Australian Banking Association

31 May 2019

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Dear Virginia

Addendum to Goods and Services Tax Ruling GSTR 2004/4DC1

The Australian Banking Association (**ABA**) welcomes the opportunity to provide comments on proposed Addendum to Goods and Services Tax Ruling GSTR 2004/4: *assignment of payment streams including under a typical securitisation arrangement*, (**GSTR 2004/4DC1**)[1].

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

ABA members take their tax obligations very seriously. In 2018, the $13.9 billion in tax paid by banks is over 40% of the ASX200 combined tax paid and is equivalent of $550 for every person in Australia.

Recommendations

1. The GSTR 2004/4DC1 should not be finalised in its current form, as it will lead to greater uncertainty in terms of industry participants self–assessing their input tax credit (**ITCs**) entitlements;
2. Refer to our letter of 7 May 2019 where we recommend that the Commissioner of Taxation ("**Commissioner**") continue his industry consultations prior to issuing any preliminary views on the application of paragraph 11-15(2)(a) to acquisitions made by a home loan originator[2];
3. The Commissioner should reset industry consultations by more fully articulating his case for change and in particular why he considers that existing products no longer provide certainty;
4. In doing so, the Commissioner should identify his perceived areas of interpretive ambiguity, and adopt a focus on resolving outstanding legal questions by aligning his position with the policy intent of the GST law as it applies to the provision of financial intermediation services; and
5. The Commissioner should ensure that any subsequent (or revised) Addendum to GSTR 2004/4:
    - takes into account industry views (in this regard the ABA is happy to participate in lender of record / servicer apportionment workshops);
    - contain detailed guidance on transitional rules to assist taxpayers with changes of long-standing positions expressed;
    - contain a statement by the Commissioner on whether, based on his own research of other publications and conduct, the changes in position expressed represent a 'U-turn', to provide

[1] In this submission, all legislative references are to *the A New Tax System (Goods and Services) Tax Act 1999* (GST Act) and *A New Tax System (Goods and Services) Tax Regulations 1999* (GST Regulations) unless otherwise stated. Furthermore, any reference to 'acquisitions' equally apply to importations under paragraph 15-10(2)(a) and the 'indirect tax zone' is referred to as 'Australia'.
[2] In the submission, a reference to a "home loan originator", "lender of record" or "servicer" is taken also to be a reference to an ABA member.

taxpayers with certainty concerning whether the Commissioner will be taking retrospective or prospective compliance action; and

  - be reviewed again by the Rulings Panel, and that the ABA be invited to discuss in camera the Commissioner's preliminary views with Panel members.

Key Observations

- GSTR 2004/4DC1 represents a re-examination of, and departure from, a longstanding administrative view and approach that was arrived at through widespread industry consultations;
- The ABA views GSTR 2004/4DC1 as unnecessary and it is not clear as to what perceived 'mischief' it is seeking to redress;
- ABA members currently have certainty on the issues dealt with by GSTR 2004/4DC1 as evidenced by GST public and private binding ruling products which work effectively in guiding fair and reasonable determinations of entitlements to ITCs in this context[3];
- The ABA considers that the revisions encompassed by GSTR 2004/4DC1 as currently drafted feature a number of areas requiring reconsideration and redrafting:
  - an absence of sufficient facts and surrounding circumstances on which to base conclusions drawn;
  - a proper reconciliation of the views expressed against legal authorities;
  - the legal analysis, as provided, includes significant technical flaws;
  - views apparently contrary to clear legislative and policy intent, with the potential to create fresh uncertainty;
  - a lack of guidance concerning how taxpayers can practically implement or comply with the conclusions; and
  - an apparent misapplication of court decisions and a predisposition to inappropriately apply *Rio Tinto Services Ltd v FCT* [2015] FCA 94 (*Rio Tinto*)[4].

ABA's position

The preliminary views and conclusions expressed in GSTR 2004/4DC1 are deeply concerning to the ABA. In particular, we continue to have significant reservations about the ATO's interpretation and application of the relevant GST provisions. In short, the ABA considers that:

- the manner in which the Commissioner has divided acquisitions made by a home loan originator into particular cost categories, and then applied paragraph 11-15(2)(a) to those cost categories, is contrary to the Commissioner's existing views and applicable legal authorities;
- the Commissioner's views arise out of a mischaracterisation of the nature of an equitable assignment of loan receivables for GST purposes.

Additionally, the ABA believes that the approach taken in GSTR 2004/4DC1 raises broader issues concerning the Commissioner's role as the key administrator of the GST law. In particular:

- the lack of industry consultations undertaken by the Commissioner prior to the issue of GSTR 2004/4DC1;

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[3] The ABA also notes that post the issue of GSTR 2004/4 the Commissioner has conducted GST reviews / audits on ABA member securitisation arrangements which have confirmed that the GST treatments adopted are acceptable to the Commissioner.
[4] This decision was confirmed by the Full Federal Court in *Rio Tinto Services v FCT* [2015] FCAFC 117.

- the lack of sufficient context provided by the Commissioner to support the conclusions reached in the factual scenarios;
- the inadequate consideration of the practical implications of the Commissioner's preliminary views (i.e. at a fundamental level, whether the Commissioner's view is capable of being implemented and at what economic cost?);
- the lack of due consideration as to how the Commissioner's view aligns with the original policy surrounding the extent of input taxation and minimising embedded GST in financial services; and
- the capacity for GSTR 2004/4DC1 to create an un-level playing field concerning the imposition of input taxation; the potential conflict with views expressed by the Commissioner in Practical Compliance Guideline (PCG) 2017/15[5] and existing Public Rulings.

[5] *GST and Customer Owned Banking Institutions.*

Historical Context

The Australian GST system administered by the Commissioner relies on taxpayers being able to self-assess their GST obligations and entitlements. For this system to work efficiently with respect to contentious issues, it is incumbent upon the Commissioner to take into account the practical impact of the GST law on classes of taxpayers, and consult with those impacted to arrive at a position that strikes a balance between achieving compliance with the law and reducing the cost of compliance for taxpayers.

The self-assessment of GST obligations and entitlements by ABA members in respect of "securitisation arrangements" is a relevant case in point.

For ABA members, "securitisation" represents an alternative source of capital funding that is a central and integrated feature of their retail lending enterprises. In particular, securitisation is the process whereby ABA members package and convert legal or beneficial title to future receivables and kindred assets into marketable debt securities which are traded on the capital markets[6].

As identified and illustrated in GSTR 2004/4[7], the main features of a typical securitisation arrangement operated by ABA members include:

- the origination of debts (e.g. residential mortgages) by the lender of record / home loan originator;
- the creation of a special purpose vehicle (SPV) under either trust or corporations law to acquire a pool of debt assets by way of an equitable assignment from the home loan originator; and
- the issue of debt securities by the SPV backed by these debt assets which funds the asset purchase.

In addition to these features, the securitisation process depends on the services of a number of third parties to ensure both the quality of the SPV's debt securities (for ratings purposes) and the capacity for the SPV to discharge its obligations under those instruments[8]. Principal among these transactions is the servicing of the assigned debts which ensures for the SPV, amongst other things, the timely collection of principal and interest payments from borrowers.

While ABA members may delegate or subcontract the servicing of the assigned debts, this function (the provision of "servicer services") is typically performed by the originating ABA member entity (i.e. the lender of record) in accordance with terms of the assignment arrangements ("transaction documents") entered into with the SPV.

From a GST perspective, the continued servicing of originated debts post assignment by the lender of record creates uncertainty in terms of the application of the GST law. This uncertainty arises from:

- identifying the extent of the functions (if any) that continue to be owed to the borrower (as opposed to the SPV) by the lender of record / home loan originator after assigning its interest in the borrower's debt to the SPV (including to what extent the home loan originator is consuming resources in discharging its continuing obligations to borrowers or the SPV);
- characterising the nature of the servicer function when performed by the home loan originator;
- characterising the nature of a taxable supply of servicer services in the hands of the SPV;
- implementing GST policy[9] that is not naturally reflected by the way in which ABA members allocate their costs. In this regard, ABA members are required to determine the creditable purpose of their home loan origination / servicer costs without the benefit of costing systems which can be easily adapted to automate this process; and

[6] Glossary to GSTR 2002/2 Goods and services tax: *treatment of financial supplies and related supplies and acquisitions.*
[7] See paragraphs 17 -18 of GSTR 2004/4.
[8] See the diagram under paragraph 96 of GSTR 2004/4.
[9] Under the Australian GST model, arranging financial services (such as the provision of servicer services) which can be readily valued and are not capable of substitution (i.e. charged for by way of a margin) are treated as taxable supplies. This contrasts with comparable VAT / GST jurisdictions traditionally treat the provision of such services (including servicer services) as input taxed.

- grouping the home loan originator / servicer entity with SPV entities (as to whether creditable purpose associated with the issue of notes to offshore investors by the SPV can be attributed to costs incurred by the home loan originator).

Consequently, the technical and practical impact of the GST law in this context produces uncertainty and emphasises the need for continued industry engagement to address that uncertainty.

Given the lack of historical context presented in GSTR 2004/4DC1, and the apparent lack of awareness of previous engagements on this issue, we set out below a brief history of Industry / taxpayer interactions with the Commissioner, as follows:

GSTR 2003/D6[10]

- Under GSTR 2003/D6, the Commissioner expressed the preliminary view that the servicer fees paid by the SPV to the lender of record / servicer should be characterised partly as additional consideration for the assignment of the debts (input taxed financial supply) and partly for a taxable supply of managing delinquent accounts;
- In particular, these views were based on the Commissioner identifying (from transaction documents) that a number of functions to be performed by the home loan originator / servicer overlapped with functions performed in the day to day administration of obligations owed to borrowers. Given this overlap, and because the home loan originator / servicer will incur costs that would normally be recovered from the income stream now assigned, the Commissioner reasoned that part of the servicer fee represented a reimbursement for the income forgone as a consequence of the assignment[11];
- Furthermore, because the SPV becomes the beneficial owner of the income stream, any management of delinquent accounts represented a separate taxable supply qualifying as a reduce credit acquisition under item 17 of subregulation 70-5.02(2)[12]; and
- Following the issue of GSTR 2003/D6, the Commissioner embarked on an extensive round of consultations with industry participants[13].

GSTR 2004/4[14]

- GSTR 2003/D6 was finalised by the issue of GSTR 2004/4;
- Under GSTR 2004/4, the Commissioner changed his view on the GST treatment of the provision of servicer services by the home loan originator to find that the servicer fees paid by the SPV were wholly given as consideration for a taxable supply. In particular, this taxable supply consisted of the home loan originator providing the SPV with collection & remittance, debt collection and reporting services[15];
- In this regard, the Commissioner noted that the home loan originator remained obligated to perform some functions as the originator of the debts and that the performance of those functions was not a component of the taxable supply made to the SPV[16]. While not elaborating on the nature of these remaining borrower obligations, the Commissioner advised taxpayers that the creditable purpose of acquisitions made by the home loan originator directly related to the performance of borrower obligations depended on the GST character of such supplies[17];

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[10] Draft Goods and Services Tax Ruling: *Assignment of Income streams including under a securitisation arrangement,* issued 19 November 2003.
[11] See paragraphs 108 – 110 and item 3 of Schedule 1 of GSTR 2003/D6.
[12] See paragraphs 112 and item 3 of Schedule 1 of GSTR 2003/D6.
[13] Notably with members / representatives of the Australian Securitisation Forum (ASF), Australian Finance Conference (AFC) and the Australian Equipment Lessors Association (AELA). Representatives of whom were invited to participate in Rulings Panel discussions of the Draft Ruling.
[14] Goods and Services Tax Ruling: *assignment of Income streams including under a securitisation arrangement,* issued 26 May 2004.
[15] See paragraphs 106 -107 and item 4(a) of Schedule 1 of GSTR 2004/4 issued 26 May 2004.
[16] See paragraph 107 of GSTR 2004/4 issued 26 May 2004.
[17] See paragraph 50 of GSTR 2004/4 issued 26 May 2004.

- The Commissioner also confirmed that the acquisition of the servicer services was not a creditable acquisition to the SPV (as it related to the input taxed acquisition-supply of the assigned debts), and only qualified as a reduced credit acquisition to the extent that that the fees paid were consideration for the provision of debt collection services[18]; and
- After the release of GSTR 2004/4, industry participants expressed the following concerns about the Commissioner's views on the GST treatment of servicing fees:
  - that the Commissioner's views produced an anomalous outcome with regard to the GST treatment of servicing performed by a third party;
  - that the Commissioner had misconstrued the nature of an equitable assignment of debts to the SPV and accordingly the Commissioner's focus on the home loan originator continuing to do what it would normally do in relation to servicing the receivables and discharging obligations to the borrowers was misplaced;
  - that the Commissioner was incorrect in relating the acquisition of servicer services by the SPV wholly to the input taxed acquisition-supply of the assigned debts (rather the servicer services were a necessary input into the ongoing supply and maintenance of debt securities by the SPV to investors); and
  - that the Commissioner was incorrect to limit the scope of RITCs on the SPV's acquisition of servicer services to the provision of debt collection services (rather, items 14 & 15 of subregulation 70-5.02(2) also applied based on the nature of the services supplied).

ATO Consultation Paper: GST & Securitisation Arrangements[19]

- In response to a number of factors[20] the Commissioner issued a Consultation Document to members of the Australian Securitisation Forum ("**ASF**") which aimed to technically and practically address the uncertainty in the application of the GST law to arrangements for the servicing of assigned debts[21];
- In order to provide certainty in this context, the Commissioner sought to consult with ASF members on, amongst other the things, the following proposals;
  - that the Commissioner would remove commentary in GSTR 2004/4 on the treatment of "servicer services" and issue a separate GST public ruling confirming that, in a typical "Tier 1" securitisation arrangement, the servicing transaction forms part of a "single input taxed supply" of the assignment of debts to the SPV[22]. It followed on this view that the home loan originator would not need to apportion its costs post assignment of the debts to the SPV[23];
  - that the Commissioner would apply his "single input taxed supply" view of servicing transactions on a go forward basis (despite the fact that this would represent the Commissioner's view from 1 July 2000)[24]; and
  - that the Commissioner would attempt to create a level playing field for all taxpayers in terms of the past treatment of servicing transactions (in view of the variety of ways in which

[18] See paragraph 108 and item 4(a) of Schedule 1 of GSTR 2004/4 issued 26 May 2004.
[19] Issued 30 October 2006, this document explained how the Commissioner planned to interpret and implement the GST law with regard to certain transactions arising in the context of a typical "Tier 1" securitisation arrangement.
[20] Principally: the abovementioned industry concerns, the impact of recent overseas VAT / GST case law in the context of securitisation arrangements (e.g. the *Capital One Bank (Europe) plc, MBNA Europe Bank Ltd* and *Canada Trustco Mortgage Company* cases) inconsistency in the manner in which taxpayers were implementing the GST law.
[21] See page 4 of the ATO Consultation Document.
[22] See paragraph 2.1 of the ATO Consultation Document.
[23] See paragraphs 85 to 92 of the ATO Consultation Document.
[24] See paragraph 2.1 of the ATO Consultation Document.

taxpayers had accounted for servicing transactions) by implementing administrative approaches tailored to eight identified taxpayer scenarios[25].

30 May 2007 Addendum to GSTR 2004/4

- Following industry consultations, the Commissioner pulled back from his proposed "single input taxed supply" view, by leaving unaltered paragraph 107, such that the provision of servicer services resulted in the lender of record making a taxable supply (where the requirements of section 9-5 are all satisfied). However, the addendum to GSTR 2004/4 did amend paragraph 107 to describe the servicer services (by reference to the securitisation documents) as including:

  > "…activities an originator undertakes in relation to receivables it has originated after the initial settlement of the agreement. Such activities may include things done post-settlement of the receivables up to and including discharge, for example provision of payment processing and statement preparation, maintaining security interests, and collection of arrears."; and

- This addendum to GSTR 2004/4 is further notable for:
  - the inclusion of footnote [52A] to paragraph 109 (dealing with the question of the lender of record's entitlement to ITCs on acquisitions related to the making of taxable supplies of servicer services) to relevantly cross reference to paragraph 50 in order to qualify the entitlement to ITCS where the acquisition relates to the lender of record performing obligations owed to the borrower; and
  - confirming that the SPV will effectively be entitled to claim a full RITC on the acquisition of the servicer services (rather than just on that part of the service that related to the acquisition of debt collection services)[26].

ITC recovery landscape post 30 May 2007 Addendum to GSTR 2004/4

- The ABA understands that post the Addendum to GSTR 2004/4 issued 30 May 2007, there has long been an internal debate within the ATO concerning the extent to which home loan acquisitions are being consumed in discharging obligations that continue to be owed to borrowers once the debt has been securitised;
- Notwithstanding this internal ATO debate, ABA members involved in securitising their retail loan book have been taking a conservative approach to the recovery of ITCs on acquisitions allocated to their retail lending enterprises[27]. In general terms, the taking of a conservative approach in this context is demonstrated by ABA members:
  - applying direct estimation methods to determine the extent of creditable purpose in accordance with the guidance and qualifications provided by the Commissioner in GSTR 2006/3[28];
  - applying a fair and reasonable apportionment method to determine the extent of creditable purpose for all other costs (e.g. collections, loan maintenance, call centre services, issue of statements, arrears management, document and security retention and shared services costs). Typically, this involves ABA members using the net balances of the securitised and non-securitised retail loan books[29] as the proxy to determine the extent of creditable use referable to the taxable supply of servicer services[30].

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[25] See paragraphs 2.2, 2.3 and Scenarios 2.3.1 – 2.3.8 of the ATO Consultation Document.
[26] See paragraph 108 and item 4(a) of Schedule 1 of GSTR 2004/4.
[27] It is noted that ABA members typically incorporate the calculation of their securitisation recovery rate as part of the overall calculation of their retail lending / product recovery rate.
[28] see paragraphs 92-101 of GSTR 2006/3.
[29] Typically based on data reported to APRA.
[30] In some cases the apportionment method is subject to the further application of a discounting factor to recognise the origination and securitisation stages of the home loan cycle.

- We further note authorisation number 1011972183799 which effectively represents the Commissioner's acceptance as fair and reasonable of an apportionment approach that incorporates the abovementioned features; and
- The current landscape is also characterised by a number of ABA members grouping their SPVs with their home loan originating entities. In this regard, ABA members believe that the creditable use of non-origination costs extends to the issue of securities to offshore investors. However, through recent compliance activities, it is understood that the Commissioner takes issue with this approach. That is, the Commissioner views any connection to the GST-free supply of securities as existing "wholly by and through" the input taxed supply of the home loans and is therefore not a "relevant relationship" which reduces the blocking effect of paragraph 11-15(2)(a).

The above background is presented both to establish the historical context of this issue, and also to emphasise that the current technical positions taken by ABA members are not arbitrary, but in fact reflect the long-term engagement and agreement of the Commissioner. A reader of GSTR 2004/4DC1 in its current form would have no inkling of the development of the revisions in question, and in fact might be left with the impression that ABA members were taking historical positions fundamentally contrary to case-law and the Commissioner's rulings. In fact, the opposite is true.

Furthermore, the background also serves to highlight a pertinent example of the value of industry consultation. Accordingly, any revisions to GSTR 2004/4 (if indeed required) should be the product of consultations that fully canvass the technical and practical implications of the Commissioner's views.

ABA Statement

Despite the Commissioner's current position expressed in GSTR 2004/4DC1, the ABA believes that, as a consequence of the abovementioned interactions, the issue of private binding rulings and the broader guidance provided by GSTR 2006/3, the Commissioner historically had already struck the right balance between ensuring compliance with the law and reducing the cost of compliance for Taxpayers.

In particular, the extent of creditable purpose (ECP) rate determined by the application of a retail lending / securitisation ("net balances") apportionment method equates to the commercial reality of the extent of the contractual / legal relationship between the home loan originator and the SPV. Furthermore, the retail lending and securitisation enterprise activities are inextricably linked because ABA members conduct their retail lending operations with the clear intention to fund a portion their loan book through the process of securitisation.

Accordingly, rather than viewing the securitisation activities as an enterprise within the wider retail lending enterprise, both sets of activities comprise the entirety of the enterprise. Accordingly, it is a matter of objective fact that all acquisitions allocated to a retail lending / product cost centre (including origination costs) have a real and substantial relationship to all the supplies made as a consequence of the operation of the enterprise.

Costs incurred in the life-cycle of a loan pre-securitisation are therefore in no sense 'remote' from the subsequent assignment of those loans, and the ongoing servicing supply. Rather, those activities are a normal commercial concomitant of originating the loans.

On this basis, and given the limitation that ABA member costing systems can only allocate to a cost centre or product level, the use of the "net balances" method fairly and reasonably approximates the split of taxable / input taxed activity. Furthermore, the application of the ECP rate generated by a net balances method to all home loan acquisitions is consistent with the principles relevantly expressed by the Commissioner in GSTR 2008/1[31] and GSTR 2006/3[32].

However, the views as currently expressed in GSTR 2004/4DC1 suggest that the Commissioner:

- has changed his view on previously established and agreed principles;

[31] See paragraph 119.
[32] See paragraphs 90 to 101.

- is seeking to apply these new and revised principles retrospectively;
- has a differing view as to the nature of an equitable assignment (i.e. the ATO again appears to be expressing the view that the lender of record is merely assigning the “fruit”, when in actual fact it is assigning the “tree”);
- is, in the ABA’s view, wrongly focusing on the home loan originator continuing to do what it would normally do in relation to servicing the debts and discharging obligations which it retains in its capacity as lender (i.e. the activities involved in discharging these ‘statutory obligations’ are a minor part of the activities undertaken by the lender of record); and
- is, in the ABA’s view, improperly drawing parallels between the *Rio Tinto* scenario and the facts applying to a retail lending enterprise to justify views expressed in GSTR 2004/4DC1.

Detailed Submission

The format of the ABA's submission to GSTR 2004/4DC1 will initially focus on the following key concerns:

Issue 1: Commissioner's placement of revisions;

Issue 2: Commissioner's division of acquisitions made by a home loan originator record into cost categories;

Issue 3: Commissioner's application of paragraph 11-15(2(a) to acquisitions made by a home loan originator;

Issue 4: The overall impracticality of the Commissioner's preliminary views given the nature and extent of the allocation and apportionment systems developed by ABA members to self-assess their GST obligations and entitlements

Issue 5: Characterisation of the supply made by the lender of record to a borrower under a loan agreement.

Issue 6: The Commissioner would be better served in providing more context to support the positions expressed in GSTR 2004/4DC1.

Issue 7: The Commissioner has not made the case for why GSTR 2004/4DC1 is required.

Issue 8: Differentiation from "Tier 2" securitisation arrangements.

Issue 9: Date of effect submission

Issue 10: Potential conflict between GSTR 2004/4DC1 and the views expressed by the Commissioner in Practical Compliance Guideline (PCG) 2017/15

Following this, we have attached a table with specific comments in relation to each issue identified from the content of the GSTR 2004/4DC1.

Issue 1

Commissioner's placement of revisions

The ABA understands that paragraphs 107A to 107AAB of GSTR 2004/4DC1 focus on determining whether acquisitions made by a home loan originator in the context of the operation of a typical securitisation arrangement are made solely or partly for a creditable purpose. In particular, at paragraph 107A, the Commissioner considers that the issue of determining creditable purpose in this context will be based on whether the acquisitions have a relevant connection to the home loan originator making one or more of the following supplies:

- the supply of the loan;
- the servicer services to the SPV; or
- the supply of the assignment of the loan receivables.

Furthermore, the Commissioner goes on to mention at paragraph 107B that the acquisitions in question can be categorised into "pre-securitisation" and "post-securitisation" acquisitions. In relation to the treatment of post-securitisation acquisitions, the Commissioner sets out his views at paragraphs 107K to 107P which reason that the creditable purpose depends on the functions[33] the lender of record performs under the supply of the servicer services, and under the supply of the loan to the borrower.

In this regard, the ABA also notes the guidance provided by the Commissioner at paragraphs 50[34] and 109 of GSTR 2004/4 which appear to canvass the same issues.

On this basis, the ABA asks that the Commissioner note this potential duplication and further consider whether the proposed revisions (should they be finalised in their current form) are better placed under paragraph 109 rather than paragraph 107.

[33] To be determined on a case by case basis, in the context of the relevant contractual relationships and other legal obligations.
[34] By way of footnote 52A to paragraph 109.

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Issue 2

Commissioner's division of acquisitions made by a home loan originator record into cost categories

For the purposes of determining the application of paragraph 11-15(2)(a), we note that the Commissioner has elected to divide the acquisitions made by the home loan originator into the following cost categories:

- pre-securitisation origination acquisitions[35];
- pre-securitisation servicing acquisitions[36]; and
- post-securitisation servicing acquisitions[37].

Aside from our observations on the technical and practical implications discussed in our responses to Issues 3 & 4, the ABA considers that the division of home loan originator acquisitions into these cost categories has the capacity to create confusion and is potentially at odds with GST approaches endorsed by the Commissioner.

As discussed below, the terminology used in these categorisations also presupposes the outcome which the Commissioner is seeking to determine. To describe a particular class of acquisitions as 'pre-securitisation' tends to have the effect of assuming that it is entirely 'used' 'pre-securitisation'. In relation to the cost categories discussed, this treatment is not agreed and should not be pre-supposed.

For practical reasons, the Commissioner has long accepted that taxpayers can determine the application of paragraph 11-15(2)(a) to an acquisition by reference to a decision that has been made in relation to the status of all acquisitions in that class. Furthermore, the Commissioner acknowledges that this will often be the case where a taxpayer uses a direct estimation method to determine the creditable purpose of their acquisitions[38].

Consequently, the application of this sanctioned approach necessarily depends on the identification of acquisition types with common attributes such that there is a clear understanding of what things do and what things don't belong to those acquisition types.

In relation to the approach taken in GSTR 2004/4DC1, it appears that the Commissioner is aggregating a range of disparate and imprecisely described acquisitions and then suggesting that a decision on the creditable purpose of each acquisition can be based on the "status" of all of the acquisitions falling within that particular cost category, rather than on the "status" of a particular acquisition.

The ABA contends that the Commissioner's proposed approach will firstly raise differentiation issues as it will not be clear to ABA members what acquisitions will belong to each of the identified cost categories. For example, will "mortgage broking for origination" include "redraw" and "refinancing" actions, as the latter activities may fall within the scope of "post-securitisation" costs?.

Furthermore, the imprecise description of acquisitions provided in the factual examples has the capacity to cause confusion. For example, whether "referrers" be considered "brokers"; what is included within the scope of "loan establishment" (i.e. does it include the discharge of loans?).

Secondly, the ABA believes that the Commissioner's approach in GSTR 2004/4DC1 is broadly inconsistent with the general approaches to determining creditable purpose expressed by the Commissioner in GSTR 2006/3 and GSTR 2008/1.

Consequently, the ABA considers that the Commissioner has adopted a flawed and inconsistent approach by dividing lender of record acquisitions into particular cost categories and then determining the creditable purpose based on the "status" of that cost category.

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[35] Paragraphs 107C to 107G and Examples 2 to 4 (paragraphs 107R to 107AO).
[36] Paragraphs 107H to 107J and Example 5 (paragraphs 107AP to 107AT).
[37] Paragraphs 107K to 107P and Example 6 (paragraphs 107AU to 107AAB).
[38] See paragraph 8 of GSTR 2006/3.

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Issue 3

Commissioner's application of paragraph 11-15(2(a) to acquisitions made by a home loan originator

The ABA agrees with the Commissioner in GSTR 2004/4DC1[39] that GSTR 2008/1 sets out the principles for determining whether there is a 'real and substantial' or 'relevant connection' between an acquisition and supplies for the purposes of the application of paragraph 11-15(2)(a). In this regard, we note from GSTR 2008/1[40] that:

- the language of section 11-15 suggests that it was not intended that there be a tracing between an individual acquisition and supply[41];
- there is no requirement for an acquisition to precede a supply before it can be said that the acquisition is connected to be making a supply, therefore an acquisition can relate to the entity making past, current or future supplies[42];
- in establishing a relevant connection between an acquisition and an input taxed supply under paragraph 11-15(2)(a), the test is appropriately satisfied with regard to 'objective' (fact based) criteria[43]; and
- where there is a relevant connection established between an acquisition and the making of supplies that would be input taxed under paragraph 11-15(2)(a), this may not be the end of the inquiry. There is a need to consider all the circumstances surrounding the transaction concerned and to give effect to other real and substantial connections assessed in the light of the objective context. In such cases the acquisition will be made partly for a creditable purpose and therefore available to be apportioned[44].

Consequently, with regard to the last dot point, GSTR 2008/1 is not authority for viewing paragraph 11-15(2)(a) operating in an asymmetrical way. GSTR 2008/1 supports the approach that if the relationship, judged objectively, is solely to the making of a taxable supply, then there is no blockage provided by paragraph 11-15(2)(a). If the relationship, judged objectively, is to making both input taxed and taxable supplies, the acquisition is available for apportionment because it is partly creditable.

The ABA agrees with the Commissioner at paragraph 107E of GSTR 2004/DC1 that the identification of the relevant connection should not turn upon the characterisation of 'purpose' in terms of a broader commercial objective of the enterprise. The ABA also agrees with the Commissioner that the relevant enquiry is not into the relationship between the acquisition and the enterprise more broadly.

However, the ABA maintains that unlike the *Rio Tinto* scenario, the home loan originator supplies listed under paragraph 107A of GSTR 2004/4DC1 (i.e. the supply of the loan, the supply of servicer services to the SPV and supply of the assignment of the loan receivables) are inextricably linked where an ABA member uses a financing model whereby their retail lending operations are funded partly through the process of securitisation. That is, rather than serving a "broader enterprise purpose", securitisation activities (including the supply of servicer services) are an integral part of an ABA member carrying on their retail lending enterprise.

Pre-securitisation origination and servicing acquisitions

In this regard, we consider that the process of securitisation necessarily begins with the execution of the Master Trust Deed which provides for the creation of SPVs as and when a sufficient pool of qualifying home loan debts (debts) have been originated. Consequently, ABA members originate

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[39] At footnote 51B of [107A].
[40] Which in turn relies heavily on the principles established by the decision in *HP Mercantile Pty Ltd v Commissioner of Taxation* [2005] FCAFC 126 (*HP Mercantile*).
[41] GSTR 2008/1 at [118].
[42] GSTR 2008/1 at [118].
[43] GSTR 2008/1 at [119].
[44] GSTR 2008/1 at [120].

individual home loans with the clear intention that any loan arrangements meeting specified criteria could be subject to securitisation. As a result, ABA members tailor their origination and servicing processes to cater for the securitisation of home loans. The pricing of home loans also takes into account (as one criteria) the availability of securitisation-based financing.

On this basis, ABA members are firmly of the view that a "requisite intention" to securitise a loan is established at the time the home loan originator makes both pre securitisation origination acquisitions[45] and pre securitisation servicing acquisitions[46].

Accordingly, the ABA views it as incorrect for the Commissioner to assert at paragraph 107E of GSTR 2004/4DC1 that the supply of servicer services represents a mere 'broader commercial objective' of the lender of record in terms of finding a relevant connection with pre securitisation origination & servicing acquisitions ("pre securitisation acquisitions"). Rather, the link to the supply of servicer services by the lender of record to the SPV is established as a matter of objective fact out of the commercial imperative that the originated debts must be serviced to ensure that the SPV can properly discharge their obligations to investors.

The ABA also disagrees with the Commissioner's assertion at paragraph 107G that if there is a requisite intention to securitise the loan this will only be sufficient to establish a relevant connection with the financial supply of the assignment of the debt (in addition to that of the supply of the home loan). If, as suggested by the Commissioner at paragraph 107G, temporal considerations will not strike out a relevant connection with origination acquisitions and the assignment transaction, it is difficult to see how the Commissioner can justify that there is not also a relevant connection to the supply of servicer services by the lender of record to the SPV.

Furthermore, the preceding commentary establishes a basis for establishing a relevant connection between pre securitisation acquisitions and the supply of servicer services that does not rely on the hypothetical argument advanced and rejected by the Commissioner in paragraph 107G (i.e. that the supply of servicer services are made as a result of the supply of the assignment of the debts and therefore a relevant connection is found by way of this relationship).

The ABA therefore considers that the facts surrounding the operation of retail lending enterprise that securitises its loan book are clearly distinguishable from those at issue in *Rio Tinto*. Furthermore, the degree to which the two scenarios are at odds with each other reduces the reliance that the Commissioner can place on the *Rio Tinto* and *Axa Asia Pacific Holdings Ltd v Commissioner of Taxation* [2008] FCA 1834 (*Axa*) decisions in the present circumstances. In our view, while the decisions in *Rio Tinto* and *Axa* are consistent with the principles expressed in *HP Mercantile,* we do not consider that they add anything to these principles.

Moreover, the ABA does not consider that establishing a relevant connection between pre securitisation acquisitions and the supplies described in paragraph 107A is analogous to the creation of an unsupported general proposition or principle. Rather, when the facts and surrounding circumstances of a retail lending enterprise are fully and properly described[47], it is evidently clear that pre securitisation acquisitions have a relevant connection (i.e. a connection that is not 'trivial' or 'remote') to the supply of servicer services.

Post securitisation servicing acquisitions

We note from paragraph 107L that the determination of the creditable purpose of post securitisation servicing acquisitions[48] depends on the functions[49] that the lender of record performs under the supply of servicer services and the supply of the loan to the borrower. Elaborating on this premise, the Commissioner goes on to make the following points:

[45] As described at [107D] of GSTR 2004/4DC1.
[46] As described at [107H] of GSTR 2004/4DC1.
[47] Refer to Issue 6 of this Submission.
[48] See footnote 51G and paragraph 107J of GSTR 2004/4DC1.
[49] Determined on a case by case basis, in the context of the relevant contractual relationships and other legal obligations.

- acquisitions relating to the lender of record performing functions that only arise as a consequence of the assignment of the debts are made wholly for a creditable purpose because they have a relevant connection exclusively to the supply of servicer services[50];
- acquisitions relating to the lender of record servicing the debts (where that function is within the scope of the servicing arrangement with the SPV) are made partly for a creditable purpose because they have a relevant connection to both the financial supply of the loan and the taxable supply of the servicer service[51]; and
- acquisitions relating to the lender of record performing their usual functions and responsibilities as the supplier of the loan are not made for a creditable purpose because they relate wholly to the supply of the loan[52].

From this commentary[53], it is clear that the Commissioner views the effect of an equitable assignment transaction as merely creating in the SPV a beneficial interest in payment streams owed by the borrower (i.e. principal and interest payments). This is effectively confirmed by the Commissioner's statement in paragraph 107O that:

> "The supply of the loan to the borrower continues after the securitisation, and the originator will continue to make acquisitions to perform functions to manage its ongoing debtor creditor relationship with the borrower."

On this basis, it follows that the Commissioner believes that the activities involved in discharging these obligations will remain a significant part of the activity undertaken by the home loan originator. In other words, the Commissioner considers that the creditable purpose of post-securitisation servicing costs will potentially be overestimated unless taxpayers give proper recognition to these input taxed activities.

The ABA suggests that this viewpoint lies at the heart of the Commissioner's longstanding concerns with the application of ABA member retail lending apportionment methods, and is the prime motivation for the Addendum to GSTR 2004/4. While ABA members agree that debtor / creditor obligations cannot be assigned under an equitable assignment, this fact should not readily lead to the conclusions being drawn by the Commissioner in GSTR 2004/4DC1.

For the following reasons, the ABA disagrees with the Commissioner's views on post-securitisation servicing acquisitions:

- the assignment in equity of a debt is a legal chose in action (being the debt owed by the borrower to the home loan originator) which satisfies all of the legal requirements to be enforceable except for the requirement to give notice of the assignment to the borrower[54]. Consequently, the effect of the assignment is that the SPV becomes the beneficial owner of the "debt", rather than merely the beneficial owner of "payment streams" (i.e. it is an assignment of the "tree" and not merely of the "fruit" of the tree);
- the extent of the obligations that continue to be owed by the home loan originator to the borrower are minimal and primarily relate to the lender of record fulfilling statutory obligations under the National Credit Code[55]. Furthermore, these obligations are largely met through highly automated systems which require little time and effort on the part of the lender of record;
- one of the essential requirements of securitisation is to isolate the debts assigned to the SPV from the assets that are held by the lender of record in the event of the latter entity's bankruptcy. Consequently, the extent to which the Commissioner considers that the home loan originator continues to owe obligations to the borrower challenges the capacity for the SPV to remain "bankruptcy remote";

[50] Paragraph 107M of GSTR 2004/4DC1.
[51] Paragraph 107N of GSTR 2004/4DC1.
[52] Paragraph 107O of GSTR 2004/4DC1.
[53] And most of GSTR 2004/4 for that matter.
[54] It is only because notice is not given to the borrower that the assignment takes effect in equity rather than law.
[55] Schedule 1 of the *National Consumer Credit Protection Act 2009*.

- under section 11AF of the *Banking Act 1959*, the Australian Prudential Regulatory Authority (APRA) has issued prudential standards and guidance notes to ensure that authorised deposit-taking institutions (ADIs) adopt prudent practices to manage risks arising out of their involvement in, amongst other things, securitisation arrangements, and to ensure that appropriate capital is held against the risks involved. Relevantly, an ADI is only authorised to act as a "servicer" as part of a securitisation scheme where certain conditions are met including that there is a formal, arm's length, written agreement in place with the SPV and that the ADI's operational systems are adequate to meet its obligations as a servicer. Where a servicing agreement does not meet the conditions specified, the ADI will be required to hold capital on its balance sheet against the assets it is servicing[56]. This is a further indication that the functions performed by the home loan originator post assignment are primarily directed at fulfilling obligations owed to the SPV as the consequence of not doing so results in a significant financial penalty; and
- as a result of the assignment in equity, the cost of servicing assigned debts is met entirely from the fees paid by the SPV.

Taking these points into account, the ABA considers that the correct characterisation of the servicing function performed by the home loan originator is that the SPV, as the beneficial owner of the assigned debts, engages the home loan originator to perform duties in managing those debts on their behalf. As a result, the vast bulk of the lender of record's time in discharging these duties as servicer, is spent on the collection of principal and interest payments from the borrowers. In our view, this is clearly not an obligation which remains with the home loan originator as supplier of the loan, but rather is a duty which it has been specifically contracted to perform as the servicer for the benefit of the SPV as the beneficial owner of the assigned debts.

We therefore consider that post-securitisation servicing acquisitions made by the home loan originator are made for a creditable purpose as they substantially relate to the making of taxable supplies of servicer services. Consequently, aside from their impracticality, the ABA disagree completely with the Commissioner's technical positions expressed and illustrated in paragraphs 107K to 107P and paragraphs 107AU to 107AAB ("Example 6") of the GSTR 2004/4DC1.

Furthermore, given the minimal activity associated with the discharge of the statutory obligations owed to borrowers, and the practical difficulty that existing costing systems will have in measuring this use, we consider that the historically conservative apportionment methods adopted by ABA members more than adequately caters for this limited amount of input taxed activity.

Conclusion

In our opinion, the Commissioner has adopted the approach in the Addendum to GSTR 2004/4DC1 of narrowly viewing the operation of a retail banking enterprise incorporating securitisation through the single prism of the loan agreement component. This, in our view, has affected the Commissioner's assessment of the application of 11-15(2)(a) to home loan acquisitions such that the guidance provided is not in line with the objective facts of the situation.

[56] Sections 7-10 of APRA Guidance Note AGN 120.5.

Australian Banking Association

Issue 4

The overall impracticality of the Commissioner's preliminary views given the nature and extent of the allocation and apportionment systems developed by ABA members to self-assess their GST obligations and entitlements

Aside from the belief expressed in this submission that all direct costs allocated to a retail lending enterprise are made partly for a creditable purpose, ABA members consider that self-assessing their ITC entitlements on the basis of GSTR2004/4DC1 would be highly impractical and connotes an inappropriate and unreasonable expectation of tracing[57].

We also consider that GSTR 2004/4DC1 in its current formulation requires the allocation and apportionment of classes of acquisitions in an entirely different manner to that expressed by the Commissioner in GSTR 2006/3[58] and GSTR 2008/1.

In our view, this is made clear from the conclusions reached in relation to Examples 1-6 of GSTR 2004/4DC1 and the implication that these conclusions are drawn from the Commissioner's repeated predisposition and reliance on applying *Rio Tinto Services Ltd v FCT* [2015] FCA 94 (*Rio Tinto*)[59].

In particular, we note that the Commissioner often supports his justification for imposing stricter cost "tracing" requirements on taxpayers by quoting the following passage from *Rio Tinto* on appeal that the application of paragraph 11-15(2)(a) requires "… *the precise identification of the relevant acquisition and a factual enquiry into the connection between the acquisition and the making of supplies that would be input taxed*"[60].

In this respect, the ABA submits that the Full Federal Court was expressing a broad observation concerning the application of paragraph 11-15(2)(a) in the context of the facts in *Rio*, rather than a hard and fast rule that must be applied in all circumstances. Furthermore, we consider that this approach is at odds with the Commissioner's views on 'tracing'[61], and the guidance provided by GSTR 2006/3 concerning the use of direct estimation methods.

The ABA notes that at paragraph 35 of GSTR 2006/3 the Commissioner endorses the use of direct methods of allocating or apportioning the intended or actual use of acquisitions to the activities of an enterprise as they best accord with the basic principles explained in paragraph 33 of GSTR 2006/3[62].

Practically, it is through a cost allocation approach (by way of a management costing or financial accounting system), which the Commissioner accepts is a 'direct estimation method', that retail lending enterprise costs are identified as relating to the various supplies made by the lender of record. Furthermore, such systems may not be able differentiate 'fully creditable' acquisitions from others.

That said, ABA members contend that their (externally audited) accounting systems have the attributes of being accurate and objective and preclude the capacity for manipulation for GST purposes. Indeed GSTR 2006/3 is clear that a direct estimation method being a cost allocation approach provides an accurate reflection of 'intended use', and it is expected that an ABA member would use such a method if available to them.

Consequently, any switch to self-assessing according to the guidance provided by GSTR 2004/4DC1 would impose a significant cost and compliance burden on ABA members.

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[57] While this is the impression gained through-out paragraphs 107A to 107AAB of GSTR 2004/4DC1, it is particularly acute with reference to paragraph 107P wherein the Commissioner states that: "…*In principle, the approach to post-securitisation acquisitions could be applicable for some pre-securitisation acquisitions that are used over time.* ***Where a decision has been made to securitise a particular loan, and an acquisition relating to that loan is used over a period of time,*** *some of which will be after securitisation, then the acquisition may also relate to both the supply of the loan and the intended future supply of servicer services.".*

[58] In particular we note the Commissioner's views expressed in paragraph 38 of GSTR 2006/3.

[59] This decision was confirmed by the Full Federal Court in *Rio Tinto Services v FCT* [2015] FCAFC 117.

[60] See for example GSTD 2018/D1 at paragraph 26.

[61] See paragraph 106 of GSTR 2008.

[62] See paragraphs 90 to 101 of GSTR 2006/3.

Issue 5

Characterisation of the supply made by the lender of record to a borrower under a loan agreement

In the context of providing general guidance to “assignors” on their entitlement to input tax credits (“ITCs”) the Commissioner states at paragraphs 48 to 50 of GSTR 2004/4 that:

> 48. So long as the assignor continues to make the underlying supply, it will be entitled to claim input tax credits or reduced input tax credits, as the case may be, on its acquisitions to make that supply in much the same manner as before the assignment occurred.
>
> 49. Where the assignor has previously made predominately taxable supplies the assignment of the payment stream, being a financial supply, may cause it to exceed the financial acquisitions threshold[26]. The assignor will then need to consider its entitlement to input tax credits including the apportionment of certain acquisitions not directly related to the underlying supply.[27]
>
> 50. Because the assignor is still obligated to perform some functions as the supplier it will make acquisitions that relate to performing those obligations. **Whether or not there is an entitlement to input tax credits for these acquisitions will depend on the GST character of that underlying supply.**

It follows on this basis, and from case law, that the application of paragraph 11-15(2)(a) is necessarily predicated on determining:

- the GST characterisation of the supply being made; and
- the precise identification of the relevant acquisition[63].

In this regard, we note that the Commissioner provides the following analysis of a “loan agreement” at paragraphs 71 & 72 of GSTR 2004/4:

> 71. A loan is a financial supply under item 2 of subsection 40-5.09(3) provided the requirements of subsection 40-5.09(1) of the Regulations are satisfied, **as it is the provision of an interest in or under a credit arrangement or right to credit.** The loan agreement also gives rise to a presently existing right to receive payments of principal and interest from the debtor. (emphasis added).
>
> 72. The presently existing right to the payment stream is property and an interest in debt for the purposes of the definition of ‘interest; in section 196-1.01 of the Regulations. Assignment of this property is the disposal[43] of an interest in a debt for GST purposes. The disposal of the interest, by way of assignment, is a financial supply if the requirements of subsection 40-5.09(1) of the Regulations are satisfied.

In relation to GSTR 2004/4DC1, while the Commissioner mostly refers to the “supply of the loan” throughout, we do note the following references from the revisions:

- “The supply of the loan to the borrower continues after the securitisation, and the originator will continue to make acquisitions to perform functions to manage its ongoing debtor/creditor relationship with the borrower”[64];
- “…the acquisitions Fiordland Bank makes are intended for use in maintaining the ongoing debtor/creditor relationship with the borrower under the supply of the loan”[65]

Consequently, it is not clear whether the Commissioner regards the supply of the loan as being made:

- singularly at the time of the execution of the loan agreement, or

[63] *Rio Tinto* on appeal at [7].
[64] See paragraph 107O of GSTR 2004/4DC1.
[65] See paragraph 107AX of GSTR 2004/4DC1.

- on an ongoing basis for the duration of the loan agreement.

The ABA considers that the GST characterisation of the supply of the loan is essential in order to properly determine the application of paragraph 11-15(2)(a) in this context.

Accordingly, the ABA believes it is incumbent on the Commissioner to preface the GSTR 2004/4DC1 revisions with a description of the GST character of the underlying supply that the home loan originator makes to the borrower.

Australian Banking Association

Issue 6

The Commissioner would be better served in providing more context to support the positions expressed in GSTR 2004/4DC1

To support the preliminary views expressed in GSTR 2004/4DC1, the Commissioner has essentially relied upon the existing description of a typical securitisation arrangement, which primarily focuses on the supplies made by the lender of record[66]. Given the significance of these proposed revisions, it is deeply concerning to the ABA that the Commissioner has based his views on a limited set of facts that do not properly establish the context in which the home loan originator makes its acquisitions.

As previously discussed, the Commissioner is preferring to view the securitisation process in isolation to the retail lending enterprise (i.e. as an enterprise within an enterprise), rather than as an integrated part of a single enterprise. Consequently, by not fully canvassing the context in which the process of securitisation takes places, the Commissioner is electing to ignore facts and circumstances relevant to the proper determination of the application of paragraph 11-15(2)(a) to the factual scenarios presented.

While the ABA accepts that the focus of the test imposed by Paragraph 11-15(2)(a) is on the relationship that acquisitions have to “transactions” performed by an enterprise rather than to the “enterprise” itself (which is the test imposed by subsection 11-15(1)), we consider that the unique circumstances of a securitising retail lending operation is an example where the satisfaction of the positive limb test necessarily informs the application of the negative limb test.

Furthermore, we believe the proposed revisions will have limited utility unless the Commissioner also considers the circumstances of the home loan originating entity and SPV entities being grouped for GST purposes. While the grouping of these entities is not universal amongst ABA members, it is a common enough practice to represent the typical way in which retail lending enterprises account for their acquisitions for GST purposes.

Finally, notwithstanding our views expressed in relation to **Issue 7** that the case of the revisions to GSTR 2004/4 has not been made, we consider the foregoing comments all demonstrate that if further guidance is to be provided in this context, the Commissioner should:

- develop a separate ruling product to express those views (ABA members do not support the inclusion of the factual examples into GSTR 2004/4);
- base his views on a fuller presentation of the facts and circumstances surrounding the operation of a lending enterprise that securitises;
- include the circumstances where the lender of record and SPV entities are grouped for GST purposes, so that the question of the relationship between acquisitions and the supply of GST-free securities by the SPV is considered; and
- provide for an “alternative view” section where it becomes evident through further industry consultations that the Commissioner and industry representatives continue to have competing (but arguable) views on the application of paragraph 11-15(2)(a) to lender of record acquisitions.

[66] See paragraphs 15-18 and 96.

Issue 7

The Commissioner has not made the case for why GSTR 2004/4DC1 is required

As previously discussed in the background section of this submission, the current version of GSTR 2004/4 was subject to a review and widespread consultation and is commonly considered to have delivered certainty to the industry. Furthermore, through-out this period ABA members have typically adopted conservative approaches to the recovery of ITCs on acquisitions allocated to their retail lending enterprises[67].

In general terms, the taking of a conservative approach in this context is demonstrated by ABA members:

- applying direct estimation methods to determine the extent of creditable purpose in accordance with the guidance and qualifications provided by the Commissioner in GSTR 2006/3[68]; and
- applying a fair and reasonable apportionment method to determine the extent of creditable purpose for all costs (e.g. collections, loan maintenance, call centre services, issue of statements, arrears management, document and security retention and shared services costs). Typically, this involves ABA members using the net balances of the securitised and non-securitised retail loan books[69] as the proxy to determine the extent of creditable use referable to the taxable supply of servicer services[70];

Against this backdrop, ABA members are understandably surprised to be presented with revised views that have capacity to cause major confusion without the Commissioner clearly articulating the case for change and why existing products (e.g. GSTR 2006/3 & GSTR 2008/1) no longer provide certainty. We are also disappointed that the Commissioner has elected to express his preliminary views in a ruling product, rather than seeking to build the argument for change through industry consultations.

Consequently, the ABA strongly urges the Commissioner to delay the issue of GSTR 2004/4DC1 and embark on industry consultations to discuss the case for change.

[67] It is noted that ABA members typically incorporate the calculation of their securitisation recovery rate as part of the overall calculation of their retail lending / product recovery rate.

[68] see paragraphs 92-101 of GSTR 2006/3.

[69] Typically based on data reported to APRA.

[70] In some cases the apportionment method is subject to the further application of a discounting factor to recognise the origination and securitisation stages of the home loan cycle. In these circumstances, the apportionment method is regarded to be extremely conservative.

Australian Banking Association

Issue 8

Differentiation from “Tier 2” securitisation arrangements

The ABA notes that by reference to footnote 51C at paragraph 107B, the Commissioner attempts to exclude the application of the proposed revisions to GSTR 2004/4 to “Tier 2” securitisation arrangements. We agree with this decision but consider that it should be explained with more commentary in order to avoid confusion.

For example, through-out the revisions the Commissioner makes reference to the “originator”, which has a different connotation in the context of Tier 2 securitisation arrangements (i.e. it refers to the entity which facilitates the creation of the loan for the benefit of the SPV which is the lender of record in the Tier 2 context). Consequently, further footnoting is required (or a more expansive commentary on the nature of Tier 2 arrangements) to remove the capacity for confusion to be created.

The ABA also notes that the “Division 72” Settlement Deeds (“Deeds”) entered into between the Commissioner and the operators of Tier 2 securitisation arrangements contains a clause indicating that the terms of these Deeds may be terminated where the Commissioner issues a later GST public ruling on matters dealing with securitisation arrangements.

While the ABA is not suggesting that the revisions to GSTR 2004/4 will have the effect of terminating the application of the Deeds in question, we consider that it would be prudent for the Commissioner to address this question as part of any expanded commentary on the delineation between Tier 1 & Tier 2 securitisation arrangements to avoid any doubt.

Issue 9

Date of effect submission

In relation to the Commissioner's request for a submission on the applicable date of effect for the changes to 107A to 107AAB, the ABA considers that the changes will require a significant alteration to current practices in order to implement. We therefore submit it is incumbent on the Commissioner to negotiate with the ABA a suitable transition period to allow ABA members sufficient time to effect the system / accounting changes required to comply with the views expressed in GSTR 2004/4DC1.

We also believe that it is incumbent on the Commissioner (consistent with PS LA 2011/27) to undertake his own research to determine whether previous publications or conduct on his part could have conveyed a different view in relation to the application of paragraph 11-15(2)(a) in this context. In doing so, we would then expect the Commissioner to table this research with the Rulings Panel to obtain their views on whether it is appropriate for the Commissioner to take retrospective or prospective compliance action in this context. Furthermore, the finalised version of GSTR 2004/4DC1 should contain a statement from the Commissioner whether compliance action would be on a go forward basis or not and provide reasons for such a position.

In this regard we note the recommendations made by the Inspector General of Taxation (IGT) in his ***Follow-Up Review into Delayed or Changed Australian Taxation Office Views on Significant Issues*** which was reported to the Assistant Treasurer in July 2014. In particular, we draw the Commissioner's attention to the IGT's 'process step' Recommendations: 2(a)(i), (ii) & (iii) in support of the abovementioned, which the Commissioner is reported as being in agreement with.

Issue 10

Potential conflict between GSTR 2004/4DC1 and the views expressed by the Commissioner in Practical Compliance Guideline (PCG) 2017/15[71]

Given that securitisation is a significant funding mechanism for small banks in Australia, the ABA would also encourage the ATO to engage with the Customer Owned Banking Association (**COBA**). COBA is the industry advocate for Australia's customer owned banking sector and represents 66 member institutions

In this regard, the ABA also notes that PCG 2017/15 provides a concession to Customer Owned Banking Institutions (**COBIs**) which enables such entities to claim up to 18% in input tax credits on their partly creditable acquisitions. In some circumstances, where the COBI does not have the accounting / system resources to determine whether their costs are fully creditable or not fully creditable, the PCG allows for the COBI to apply a rate up to 18% to all their acquisitions.

Given the prevalence of securitisation in this sector, it is unclear to the ABA how the guidance provided in GSTR 2004/4DC1 interacts with the practical guidance provided by way of PCG 2017/15.

We also submit that irrespective of their size and access to resources, in the context of determining the application of paragraph 11-15(2)(a) in relation to its home loan acquisitions, ABA members are in similar situation to COBIs who are unable to determine the application of 11-15(2)(a) in their particular circumstances.

The ABA asks the Commissioner to clarify his position on the application of PCG 2017/D1 in light of the issue of GSTR 2004/4DC1.

[71] *GST and Customer Owned Banking Institutions.*

ABA comments on GSTR 2004/4DC1

GSTR 2004/4DC1 Paragraph	ABA Comments	Cross-reference to ABA Submission
Date of effect Section		
8	In relation to the Commissioner's request for a submission on the applicable date of effect for the changes to 107A to 107AAB, the ABA considers that the changes will require a significant alteration to current practices in order to implement. We therefore submit it is incumbent on the Commissioner to negotiate with the ABA a suitable transition period to allow ABA members sufficient time to effect the system / accounting changes required to comply with the views expressed in GSTR 2004/4DC1. We also believe that it is incumbent on the Commissioner (consistent with PS LA 2011/27) to undertake his own research to determine whether previous publications or conduct on his part could have conveyed a different view in relation to the application of paragraph 11-15(2)(a) in this context. In doing so, we would then expect the Commissioner to table this research with the Rulings Panel to obtain their views on whether it is appropriate for the Commissioner to take retrospective or prospective compliance action in this context. Furthermore, the finalised version of GSTR 2004/4DC1 should contain a statement from the Commissioner whether any compliance action associated with the changes would be applied on a go-forward basis or not, and provide reasons for such a position. In this regard we note the recommendations made by the Inspector General of Taxation (IGT) in his ***Follow-Up Review into Delayed or Changed Australian Taxation Office Views on Significant Issues*** which was reported to the Assistant Treasurer in July 2014. In particular, we draw the Commissioner's attention to the IGT's 'process step' Recommendations: 2(a)(i), (ii) & (iii) in support of the abovementioned, which the Commissioner is reported as being in agreement with.	Please refer to Issue 9 of the ABA Submission to GSTR 2004/4DC1.
Entitlement to input tax credits section		
50	In view of the ABA's comments on the nature / effect of an equitable assignment, we ask that the Commissioner review his comments in paragraph 50 to confirm that the extent of obligations performed by the home loan originator post securitisation are limited to the	Please refer to Issue 3 of the ABA Submission to GSTR 2004/4DC1.

Australian Banking Association

	discharge of statutory obligations that are predominantly fulfilled by means of automated systems.	
Assignment of various types of payment streams section: Loan agreements		
71	In view of the ABA's comments on the need for the Commissioner to provide his view on the GST characterisation of the supply of the loan being made by the home loan originator, we consider that the Commissioner should amend this paragraph to confirm the detailed basis for his view.	Please refer to Issue 5 of the ABA Submission to GSTR 2004/4DC1.
Typical transactions section: Step 1: Creation of the special purpose vehicle (SPV)		
99	In view of the ABA's comments on the application of paragraph 11-15(2)(a) with regards to establishing a relevant connection between home loan acquisitions and the supply of servicer services, we consider that the Commissioner should review his comments that acquisitions relating to the establishment of the securitisation program wholly relate to the home loan originator making input taxed supplies. We also consider that the Commissioner should confirm here that the "requisite intent" to securitise is found by reference to the establishment of the overall securitisation program, not at the point at which specific tranches of debts are assigned to the SPV.	Refer to Issue 3 of the ABA Submission to GSTR 2004/4DC1.
Typical transactions section: Step 2: Assignment of receivables to the SPV Creation of the special purpose vehicle		
103	In view of the ABA's comments on the effect of an equitable assignment, we consider that the Commissioner should amend his comments in these paragraphs to confirm that an assignment done in equity involves the assignment of the "tree" and not merely the assignment of the "fruit" of the tree.	Refer to Issue 3 of the ABA Submission to GSTR 2004/4DC1.
Typical transactions section: Step 4: Provision of servicer services: application of paragraph 11-15(2)(a) to pre-securitisation origination and servicing acquisitions		
107A & Footnote 51A	In light of the ABA view that the operation of a retail lending business that securitises is an integrated enterprise involving the performance of a number of interrelated activities, we consider that the Commissioner should include commentary on the application of paragraph 11-15(2)(a) with respect to all supplies being made in the carrying on of this	

	enterprise (including those being made by the SPV where it is grouped with the home loan originating entity).	
107B & Footnote 51C	The ABA believes that the Commissioner is inconsistently applying his own principles by simply relying on the description of a "typical securitisation arrangement" given by paragraphs 96 to 125 to support his positions on the application of paragraph 11-15(2)(a) to home loan acquisitions. That is, we note from paragraph 119 of GSTR 2008/1, that the Commissioner views the satisfaction of the test imposed by paragraph 11-15(2)(a) as requiring an objective assessment of the **surrounding facts and circumstances** in order to establish whether there is the requisite connection between an acquisition and the making of supplies that would be input taxed (or the making of a taxable or GST-free supply as identified by Davies J in ***Rio Tinto***). Accordingly, by simply relying on the description provided in paragraphs 96 to 125, the Commissioner is choosing to view the scope of a retail lending enterprise solely through the narrow prism of its constituent securitisation aspect. Consequently, the Commissioner is not taking into account the full (objective) facts and circumstances in which a home loan originator makes its acquisitions to assess the application of the test imposed by paragraph 11-15(2)(a). We also consider that the Commissioner should be more expansive in delineating between "Tier 1" and "Tier 2" securitisation arrangements to avoid the capacity for confusion to be created. Furthermore, with regard to the latter, the Commissioner should also include a statement to the effect that the changes made by this Addendum have no impact on the Division 72 Settlement Deeds entered into with the operators of Tier 2 securitisation arrangements.	Refer to Issues 6 & 8 of the ABA Submission to GSTR 2004/4DC1.
107C	The ABA disagrees with the Commissioner's view, and considers that origination acquisitions also have a relevant connection to the making of taxable supplies of servicer services (and potentially the GST-free supply of securities by the SPV, in circumstances where the home loan originator and SPV entities are members of the same GST group).	Refer to Issue 3 of the ABA Submission to GSTR 2004/4DC1.
107D	The ABA notes here the Commissioner's imprecise descriptions of origination acquisitions, which has the capacity to cause taxpayer confusion. The Commissioner should be adopting terminology that is consistent with corresponding reduced credit acquisition descriptions.	Refer to Issue 2 of the ABA Submission to GSTR 2004/4DC1.

107E and Footnote 51D	As a general statement, the ABA considers that the Addendum to GSTR 2004/4 would benefit from a more detailed explanation of the surrounding legislative scheme in order to place the application of paragraph 11-15(2)(a) in its proper context. That said, we agree that GSTR 2008/1 sets out the principles for establishing a relevant connection (between supplies and acquisitions) to engage or otherwise the application of paragraph 11-15(2)(a). Furthermore, the ABA suggests that these principles are mainly drawn from the observations of Hill J in *HP Mercantile* and that the decisions in *Axa* & *Rio Tinto*, while consistent with *HP Mercantile*, do not add to these principles. However, for the reasons/reference advanced in our response to paragraph 107C we disagree with the Commissioner's view that origination acquisitions are solely intended to be used in making input taxed supplies of loans to borrowers.	Refer to Issue 3 of the ABA Submission to GSTR 2004/4DC1.
107F & 107G	We understand that the intent of these paragraphs is to suggest that the up-front establishment of a requisite intent to securitise will not be sufficient to evidence a relevant connection to the supply of servicer services, because this link only exists wholly 'by and through' the making of an input taxed supply of the assignment of the debts to the SPV. In response, the ABA firstly considers that superimposing the Full Federal Court's comments in relation to the *Rio Tinto* facts on to the circumstances of a retail lending enterprise that securitises its loan book is misguided. In *Rio Tinto*, it is clear that their honours were suggesting that a connection will be "remote" where an acquisition directly serves the requirements of one distinct enterprise activity (provision of residential accommodation) for the broader purposes of another enterprise (the mining of iron ore). However, this is not the case with the facts and circumstances of a retail lending business at issue here, as the process of securitisation forms a constituent component of the enterprise being carried on. As previously stated, by the Commissioner narrowly focusing on the securitisation activities, he is not taking into account the full facts and circumstances of the retail lending enterprise to assess the application of paragraph 11-15(2)(a) to origination acquisitions. Secondly, the Commissioner's comments also suggest that temporal issues will not be a factor that prevents the establishment of a relevant connection in this context (i.e. origination acquisitions are considered to also have a relevant connection to the home loan originator making a future input taxed supply of the assignment of the debts originated). Consequently, where it is established on the facts that the home loan originator intends (at the time of writing a loan) to make a separate and distinct future supply to the SPV of	As above.

	servicing the related debts, this will clearly also be a relevant connection for the purposes of determining the application of paragraph 11-15(2)(a) to origination acquisitions. If the Commissioner is seeking to elevate one type of connection over another, he is falling back into the arguments ventilated post the original issue of GSTR 2004/4 which were resolved once and for all by the addendum to GSTR 2004/4 in May 2007. On this basis, we disagree with the Commissioner's views expressed in these paragraphs.	
107F to 107J	For the same reasons discussed above, the ABA disagrees with the Commissioner's view that pre-securitisation services acquisitions have no relevant connection to the making of taxable supplies of servicer services. Furthermore, the Commissioner's comments indicate a requirement to "trace" acquisitions to actual supplies made. Aside from being practically unrealistic, this is inconsistent with the Commissioner's principles as expressed in GSTR 2008/1 (see dot point 1 of paragraph 118).	As above.
Typical transactions section: Step 4: Provision of servicer services: application of paragraph 11-15(2)(a) to post-securitisation servicing acquisitions		
107M to 107P	We agree with the Commissioner that the creditable purpose of post-securitisation servicing acquisitions depends on the functions performed by the home loan originator in both its origination and servicing capacities. However, we consider that the conclusions reached are based on a misunderstanding of the nature and effect of an assignment of in equity. In this respect, we consider that the functions relating to maintaining the debtor/creditor relationship are limited to the discharge of statutory obligations owed as a credit provider. While accepting that the performance of these obligations represents input taxed activity, we believe that little in the way of resources (in the form of ongoing acquisitions) are consumed in performing these obligations. Additionally, the Commissioner's comments indicate a tracing requirement, which, aside from being practically unrealistic, is inconsistent with the Commissioner's principles expressed in GSTR 2008/1 (see dot point 1 of paragraph 118). We also note the potential overlap with paragraph 109 and footnote 52A which already deals with the servicer's entitlement to ITCs on acquisitions that relate to taxable supply of	Refer to Issues 1, 3 & 4 of the ABA Submission to GSTR 2004/4DC1.

	servicer services. This poses the question whether the proposed revisions are better placed by being inserted under paragraph 109 instead of paragraph 107. Finally, ABA members are of the view that current approaches to the apportionment of home loan acquisitions more than reasonably factor in the extent of the input taxed activity that remains once a debt has been securitised.	
Examples section		
Example 2 107R to 107AA **Mortgage Brokerage Services**	We disagree with the factual premise stated by the Commissioner in paragraph 107Y (that ELF Mutual Bank *may* assign debts and supply taxable servicer services to the SPV) and his conclusion reached in paragraph 107AA (that the acquisitions from Barnacle only have a relevant connection to the supply of the loan). The factual premise expressed in paragraph 107Z incorrectly suggests that the intent to securitise a loan is determined after the event of origination as a separate consideration. Rather, the intent to securitise is determined well in advance of the origination of a loan by reference to the ABA member setting up a securitisation program (under a Master Trust Deed framework) and incorporating the capacity to securitise into the loan establishment process. The design of the loan product (i.e. prior to any loan being written) is affected by the criteria (eg ratings agency criteria qualifying for rating as 'investment grade' debt issues) required to maximise the value of the debt and underlying receivables stream for securitisation purposes. Accordingly, the example should be amended to recognise the upfront existence of an intent to securitise. Consequently, where the home loan originator writes a loan that is brokered on the basis of processes that identify candidates for securitisation (because of a predetermined intent to securitise such loans established by way of the existence of a Master Trust Deed), we consider that the acquisition of brokerage services will also have a relevant connection to the making of taxable supplies of servicer services (such that the acquisition will be made partly for a creditable purpose).	Refer to Issue 3 of the ABA Submission to GSTR 2004/4DC1.
Example 3 107AB to 107AJ	Similar to our response to Example 2, the ABA disagrees with the factual premise stated by the Commissioner in paragraph 107AE (that Adelie Bank *may* assign debts and supply taxable servicer services to the SPV) and his conclusion reached in paragraph 107AJ (that the acquisitions of lender's mortgage insurance only has a relevant connection to the	As above.

Lender's Mortgage Insurance	supply of the loan). Rather, we consider that the acquisition of lender's mortgage insurance also has a real and substantial connection to the taxable supply of servicer services and are therefore made partly for a creditable purpose. Some securitisation arrangements require that the underlying loan has existing lender's mortgage insurance (others may not). Furthermore, we disagree with the Commissioner's views expressed in paragraphs 107AH and 107AI that the application of paragraph 11-15(2)(a) (in relation to establishing a relevant connection to future supplies) turns on an assessment of whether the "benefit" of an acquisition forms part of a supply that is being made. The ABA considers that by doing so, the Commissioner is introducing a new concept which is both undefined and not supported by case law.	
Example 4 107AC to 107AO **Other loan establishment acquisitions**	Similar to our response to Example 2, the ABA disagrees with the factual premise stated by the Commissioner in paragraph 107AM (that Fiordland Bank *may* assign debts and supply taxable servicer services to the SPV) and his conclusion reached in paragraph 107AO (that the acquisitions of other loan establishment acquisitions only has a relevant connection to the supply of the loan). Rather, we consider that the acquisitions also have a real and substantial connection to the taxable supply of servicer services and are therefore made partly for a creditable purpose.	As above.
Example 5 107AP to 107AT **Pre-securitisation servicing acquisitions**	Similar to our response to Example 2, the ABA disagrees with the Commissioner's conclusion reached in paragraph 107AT (that pre-securitisation servicing acquisitions only have a real and substantial connection to the supply of the loan). Rather, we consider that the acquisitions also have a real and substantial connection to the taxable supply of servicer services and are therefore made partly for a creditable purpose.	As above.
Example 6 107AU to 107AAB **Post-securitisation servicing acquisitions**	With reference to our response to paragraphs 107K to 107P, we consider that the functions performed by Fiordland Bank as supplier of the loan are limited to the performance of its statutory obligations as a credit provider. Consequently, we believe that paragraph 107AW should be amended to reflect this understanding. Additionally, the Commissioner's comments indicate a "tracing requirement", which, aside from being unrealistic to implement, is inconsistent with the Commissioner's principles expressed in GSTR 2008/1 (see dot point 1 of paragraph 118).	Refer to Issues 1, 3 & 4 of the ABA Submission to GSTR 2004/4DC1.

	We also note the potential overlap with paragraph 109 and footnote 52A which already deals with the servicer's entitlement to ITCs on acquisitions that relate to taxable supply of servicer services. Finally, we agree with the Commissioner's conclusion in paragraph 107AAB that the pre-securitisation servicing acquisitions are made partly for a creditable purpose, but maintain that current approaches to the apportionment of home loan acquisitions more than reasonably factor in the extent of the input taxed activity that remains once a debt has been securitised.	

Conclusion

For the reasons outlined above, the ABA has significant concerns with the ATO's proposed approach to GSTR 2004/4DC1. We would be happy to meet with the ATO again to discuss the matters raised in this submission and we look forward to reaching an appropriate resolution on this issue.

Yours sincerely,

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