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To whom it may concern,

Submission on the GST treatment of digital currency

Please find attached a submission on the May 2016 Treasury Discussion Paper on the GST treatment of digital currency.

To paraphrase Blaise Pascal, and numerous others who came after him, including the late Stephen Bladwell, from whom I regularly heard it in the course of discussing GST advice, articles, and presentations: I had hoped to write an exceptionally concise submission but it turns out that I lacked the time to make it shorter.*

Lack of time also explains the somewhat haphazard structuring of the submission. I hope there is nonetheless something useful in what I have written.

If you have any questions, please feel free to contact me at the address below.

Yours sincerely,

Rebecca Millar

* An analysis of the origins and versions of this expression can be found on Quote Investigator (http://quoteinvestigator.com/2012/04/28/shorter-letter/) but I also did not have to time to research the veracity of the views expressed there.

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GST Treatment of Digital Currency

The problem addressed by the discussion paper stems from the definition of "money" in the GST law, which is insufficiently flexible to deal with emerging innovations in financial technology (FinTech), such as the development of digital/virtual currencies. This submission proceeds from the position that digital currencies *are* money and a failure to treat them as such for GST purposes can lead not only to double taxation of final consumption but also to tax cascading and a lack of neutrality between digital currencies and other forms of money, as defined for GST purposes. That problem cannot be fully resolved by making digital currencies input taxed: they must also be recognised as money.

The critical element of any solution to the problem should be to resolve the lack of flexibility, and the best means of doing that is by amending the definition of money to include digital currencies and making a corresponding expansion to item 9 in regulation 40-5.09(1).

- Paragraph (a) of the definition of money could be changed from "currency (whether of Australia or of any other country)" to "currency, including digital currency."

- Item 9, which currently input taxes the provision, acquisition, or disposal of an interest in or under "Australian currency, the currency of a foreign country, or an agreement to buy or sell currency of either kind" could be changed to cover ""currency, including digital currency, or an agreement to buy or sell currency of either kind."

This submission also proceeds from a position that the required solution should be simple, rather than complex, and should not unnecessarily increase the already complex design and drafting of the Australian GST law.

To maximise simplicity and flexibility, the concept of digital currencies should not be defined but should be allowed to develop according to the ordinary – and developing – meaning of the concept in relevant FinTech usage.

The discussion of potential definitions in the Discussion Paper essentially amounts to an endeavour to codify the current common law understanding of the concept of currency and then adapt it to digital currencies. In my view, Courts would be capable of distinguishing vouchers, loyalty points, and in-game 'virtual' currencies from a genuine digital currency. The proposed change to paragraph (a) of the definition of money clearly treats digital currencies as part of the genus 'currencies', though not the same species as fiat currencies and by doing so incorporates the concepts that the Discussion Paper attempts to put down in words, but leaving greater flexibility to adapt to change.

There may nonetheless be some advantage to including a regulation-making or determination-making power to allow the inclusion/exclusion of particular products from the concept of a digital currency.

Finally, thought needs to be given to the treatment of activities the lead to the creation of new digital currency – not only the development of new currencies but also the discovery of new units of existing digital currencies, e.g. bitcoin mining. Her Majesty's Revenue and Customs have stated that bitcoin mining is not an economic activity for VAT purposes. It is not clear on what basis that conclusion has been reached but there are definite issues in identifying whether any supplies take place in the case of pure creation activities, such as bitcoin mining:

> When a block is discovered, the discoverer may *award themselves* a certain number of bitcoins, which is agreed-upon by everyone in the network.[1]

It is difficult to identify a relevant supply, supplier, and recipient in this context. However, other transactions taking place on the distributed peer-to-peer network that constitutes the bitcoin system do clearly involve supplies and should, if all other requirements of section 9-5 are met, be taxed:

> Additionally, the miner is awarded the fees paid by users sending transactions. The fee is an incentive for the miner to include the transaction in their block. In the future, as the number of new bitcoins miners are allowed to create in each block dwindles, the fees will make up a much more important percentage of mining income.[2]

WHY TREAT DIGITAL CURRENCIES AS MONEY?

- First, both the Senate Economics References Committee and the Productivity Commission have considered the matter in detail and concluded that digital currencies should be treated as money.

- Second, input taxation does not achieve the same effect as treating digital currencies as money. It retains the treatment of transactions as barter transactions, which requires different record-keeping and reporting that is out-of-line with the true nature of digital currencies.

- Thirdly, it would be consistent with the treatment that now applies to bitcoin – and no doubt other digital currencies – in the 28 Member States of the European Union, where the European Court of Justice (ECJ) recently decided that the service of exchanging bitcoin for Swedish currency was exempt from VAT because bitcoin is a form of currency. (This is discussed further below.)

- Fourthly, digital currencies do actually function as money and are not consumable commodities in themselves.

EVALUATING PROPOSED AMENDMENTS

Any change to the GST law should be judged against appropriate criteria. First, a proposed amendment should by informed by the fact that the Australia's GST is intended to be a tax on final private consumption in Australia,[3] which is collected as a multi-stage tax on transactions (supplies) and importations.[4]

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[1] "How bitcoin mining works" https://www.bitcoinmining.com, accessed Friday, June 3, 2016.
[2] Ibid.
[3] I use the word Australia in this submission to avoid the complex sentence structures required by the recent replacement of "Australia" with the phrase "the indirect tax zone" in the GST law. Despite the apparent belief of whoever instituted that change, I have confidence that readers of this submission, members of the public, foreigners, and even tax advisors, are capable of understanding the idea that I am using the word Australia to mean Australia minus the external territories where GST does not apply.
[4] Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998, Executive Summary.

Secondly, proposed amendments should be evaluated by reference to generally accepted tax policy criteria for evaluating a consumption tax. The OECD has worked extensively on taxation issues raised by the digital economy over the last two and half decades, and its guiding principles for evaluating consumption taxes were recently reiterated in the *International VAT/GST Guidelines*. Those criteria, which are clearly appropriate for evaluating current and proposed GST treatments of digital currencies, are:[5] neutrality (between electronic and conventional commerce and between taxpayers in similar situations); efficiency (minimise compliance and administrative costs); certainty and simplicity (clear and simple rules); effectiveness and fairness (the right amount of tax at the right time); flexibility: (capacity to adapt to technological and commercial developments).

Even the briefest evaluation of Australia's current treatment of digital currency against these criteria reveals that double taxation—the main problem noted in the discussion paper—is not the only problem. Treating digital currency as intangible property fails on all of these measures. It lacks neutrality between conventional and digital money. It results in taxable supplies paid for with digital currency being characterised as barter transactions, which is neither efficient nor simple, and significantly increases compliance costs for businesses that accept digital currencies. It lacks the flexibility to deal with emerging forms of money and, of course, the double taxation effect is neither effective nor fair, since it results in the wrong amount of tax being collected.

The OECD International VAT/GST Guidelines also spell out in detail what is meant by the concept of neutrality for the purposes of a VAT/GST: "The burden of value added taxes themselves should not lie on taxable businesses except where explicitly provided for in legislation."[6] "Businesses in similar situations carrying out similar transactions should be subject to similar levels of taxation."[7] "VAT rules should be framed in such a way that they are not the primary influence on business decisions."[8] "With respect to the level of taxation, foreign businesses should not be disadvantaged *or advantaged* compared to domestic businesses in the jurisdiction where the tax may b e due or paid."[9]

Translating the OECD's evaluation criteria into the digital currency issue at hand, the following criteria for judging proposed changes emerge:

- The proposed amendment(s) should ensure neutrality between digital and conventional forms of currency.

- They should ensure that decisions about whether to use digital currency or some other form of money are not motivated by differing tax treatments.

- They should ensure that the level of taxation on transactions involving or related to digital currency are subject to similar levels of taxation as those involving conventional currency.

- When compared both with the current law and any other proposed changes, the effect on compliance and administration costs should be low.

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[5] The list provides an abridged version of the list given in OECD, *International VAT/GST Guidelines* (2015), pp 10-11 para 1.16.
[6] Ibid, Guideline 2.1.
[7] Ibid, Guideline 2.2.
[8] Ibid, Guideline 2.3.
[9] Ibid, Guideline 2.4, *emphasis added*. Note that Guidelines 2.5 and 2.6 are not directly relevant to the topic of the discussion paper.

- The proposed amendment(s) should be clear and simple, and in particular should not result in supplies paid for with digital currency being characterised as barter transactions.
- They should resolve the double taxation problem.
- They should not generate opportunities for tax evasion and avoidance.
- They should be sufficiently flexible to enable the law to adapt to further innovations in the concept of money.

The best way to achieve all of these objectives is to treat digital currencies as money.

Furthermore, because Australia's GST follows the internationally agreed principle of taxation at destination,[10] an important aspect of neutrality is to ensure that any proposed changes do not unduly advantage or disadvantage Australian businesses, when compared with foreign businesses. This applies not only to businesses that accept digital currencies in payment for supplies but also those who deal in digital currencies or participate in the development, production, discovery, 'mining', and maintenance of such currencies. For this reason, there may be considerable advantages to adopting an approach the closely mirrors the treatment of digital currency by other countries/regions. One difficulty with this, however, is that most VAT/GST regimes have faced the same problem as Australia and are yet to resolve the problem of determining the proper treatment of digital currencies for VAT/GST purposes. One clear exception is the European Union, where it is now clear that bitcoin, at least, is treated as money for the purposes of European VAT.

THE CORRECT ANALYSIS OF THE EU VAT TREATMENT OF DIGITAL CURRENCIES

The Discussion Paper is wrong when it states that a recent ruling of European Court of Justice (ECJ) means that "Bitcoin is now effectively input taxed for EU VAT purposes."[11] Similarly, it wrongly interprets the United Kingdom position by stating that the approach of Her Majesty's Revenue and Customs (HMRC) "effectively treats most digital currencies as input taxed for United Kingdom VAT purposes."[12] This error has been made despite the fact that the Discussion Paper rightly identifies the actual position immediately before making this incorrect assertion.

The error seems to have come from some perception that differences between the Australian GST and other VAT/GST regimes justify reinterpreting what are quite clear decisions that bitcoin (ECJ) and other digital currencies (HMRC) are money. The discussion paper notes "that other consumption tax system often operate quite differently to Australia's GST". To the extent that the paper then notes the position under United States retail sales taxes, that caution is (perhaps) justified, but to the extent that it relates to the consumption taxes operated by the EU, including the United Kingdom, Japan, Singapore, and Canada, it is over-stated. Those jurisdictions all operate fully-fledge value added taxes, as does Australia, and for the purpose of those taxes, the treatment of money is consistently the same, even if there are minor variations in the way it is effected. In a value added tax, money is a measure of consumption rather than a

[10] OECD Guideline 3.1 states that "For consumption tax purposes internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption." *See* OECD International VAT/GST Guidelines (2015), p.27.

[11] Australian Treasury, GST Treatment of Digital Currency – Discussion Paper, May 2015, p. 4, para 17.

[12] Ibid, para 18.

consumable item in its own right, and it is the primary means by which 'consideration' for a supply is given.

The treatment of bitcoin and other digital currencies as money in the EU should thus be accepted for what it was, not re-characterised as 'input taxation'. In my view, the drafters of the discussion paper were led to this re-characterisation by a misunderstanding of the way in which one thing that Australia does *is* different (though not with the intention of achieving a different income). Australia defines its input taxed financial supplies by describing the capital flows rather than the underlying financial intermediation services. This achieves the input taxation of the underlying service, with the benefit of narrowing the definition of financial supplies to exclude some closely-related transactions. Most other countries more directly describe the financial intermediation services they are trying to exempt. Apart from the United States, on which I claim no expertise, all of the countries mentioned exempt financial services, in the sense that there is no GST payable on the services, either without a right to credit (the EU, UK, Japan, and Canada), with a partial right to credit (Singapore and Australia), or in some cases with a full right to credit (New Zealand, which is not mentioned in the Discussion Paper, but which exempts some financial services and zero-rates others).

The ECJ rejected arguments that the service of exchanging bitcoin for kroner was exempt under various other provisions of the EU VAT Directive dealing with financial services but held that it was exempt under Article 135(1)(e), which exempts "transactions, including negotiation, concerning currency, bank notes and coins used as legal tender". Taking advantage of differences between the various language versions of the EU VAT Directive, the Court took the view that "to interpret that provision as including only transactions involving traditional currencies would deprive it of part of its effect."[13] Bitcoin was a currency – and the service of exchanging it for kroner was a transaction concerning "currency" because bitcoin *is* money. As the Court said more than once: " 'bitcoin' virtual currency has no other purpose than to be a means of payment and … it is accepted for that purpose"[14]

Finally, the Discussion Paper makes the mistake of equating the ECJ decision with input taxation because of Australia's focus on the underlying capital flows. But the nature of the service was the exchange of currency for currency, and the decision depended upon seeing bitcoin as a currency, which is a form or money. Moreover, in regard to the capital flows themselves, the ECJ has long recognised that the intermediation service constituted by the exchange of foreign currencies is a supply for consideration, with the transaction not viewed as if each capital flow was consideration for the other, but rather as a supply of the underlying intermediation services, the consideration for which was an amount that could only be identified by taking account of the differences between buy and sell rates across multiple transactions. In both the EU and Australia, this service is exempt/input taxed because this makes the identification of the true consideration for any particular supply difficult. The different way that Australia gets to the same point should not cause us to lose sight of the fact that the ECJ treated bitcoin as equivalent to money. There is also no reason to believe that it would do otherwise when faced with a different digital currency that was "accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment."[15]

An analysis of the views of the United Kingdom HMRC clearly reveals the same thing: digital currencies are viewed as money.

[13] Case C-264/14, *Skatteverket v David Hedqvist*, 22 October 2015, para 51.
[14] Ibid, para 52.
[15] Ibid, para 49.

It seems likely that, following the EU's lead, countries will increasingly trend towards treating digital currencies as money and Australia should adopt that approach rather than opting for the less desirable alternative of input taxing such currencies.

TREATMENT OF MONEY IN AUSTRALIAN GST

Despite differences in legal design and drafting, there is little or no real difference between Australian GST and other VAT/GST regimes when it comes to the treatment of money. Money is the measure by which consumption is measured and by which the value of supplies is measured. It is thus itself essentially outside the scope of the tax. This avoids the impractical scenario in which every transaction becomes effectively two transactions – i.e. a barter arrangement in which one entity supplies something (goods, services, information, etc, for consideration in the form of money) to another, who supplies in return something else (money, for consideration in the form of goods, services, information, etc).

A SUPPLY OF MONEY IS NOT A SUPPLY….

As noted already, there is a difference between Australia and other countries in the way that it structures its rules on financial supplies, the aim of which is to ensure the input taxation of intermediation services. This does lead to one difference, which is found in the almost incomprehensible drafting of section 9-10(4):

> However, a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money.[16]

It is important to consider why the Australian law includes the idea that a supply of money *is* a supply if it is provided as consideration for a supply that is a supply of money. It is because of the decision to define financial supplies by focussing on the capital flows: the supply of money for money, rather than the intermediation service that is the target of the exemption (the exchange service). As the next section explains, other countries understand that a supply of money is not a supply, but they don't need to treat money as a supply when it is a financial supply because they drafted their rules differently.

Attachment A lists every place in the GST Act where the word "money" is mentioned. The list illustrates the function of money as something that is effectively outside the tax base: there are supplies, and then there is money.

Importantly, when money is re-included as "money for money", it is only for the purpose of input taxing those transactions. This means that everything that is money must also be listed in the table in regulation 40-5.09, otherwise the law will be taxing something that is not properly part of the tax base.

Thus, once bitcoin is treated as money, it must also be effectively included in the list of input tax financial supplies for those situations where bitcoin is exchanged for other currency, rather than merely as consideration for a supply of something else.

[16] GST Act 1999, s.9-5(4), asterisks omitted.

Treatment of Money in other VAT/GST Regimes

Australia is not alone in treating money differently for GST purposes; it is only alone in the complex legal drafting used to achieve this. For many VAT regimes, the idea that a supply of money is not a supply seems to be so obvious that it need not even be spelled out in the law. Money is not a 'subject matter' for the tax because it functions merely as consideration, by which the status of supplies as 'taxable'[17] is established, and through which the value of supplies is calculated. The reason why money is not part of the tax base and cannot be the subject matter of a supply is because it is not something that can be consumed.

The EU VAT Directive

For example, a search of the English language version of the current consolidation of the EU VAT Directive[18] reveals that the word "money" appears only twice, once in the phrase "money laundering",[19] the other in an exemption for negotiating on dealing in securities for money.[20] Neither of these achieves—nor are they intended to achieve—the treatment of money as merely being a means of payment for supplies, rather than a supply in itself. Elements that can be found in Australian definition of money also appear in the EU exemption for currency exchange transactions and the like. For example, EU Member States must exempt:

> (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;
>
> (e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;[21]

None of these references achieves the exclusion of money from being the subject matter of a supply. Nor is there any specific reference to "money" in the definitions of goods or services, which between them define the tax base on the European VAT. A supply of goods is defined as "the transfer of the right to dispose of tangible property as owner"[22] and a supply of services is defined as "any transaction which does not constitute a supply of goods".[23] The breadth of the latter concept is clear not only from its own terms but also from the later clarification that:

> A supply of services may consist, inter alia, in one of the following transactions:
>
> (a) the assignment of intangible property, whether or not the subject of a document establishing title;
>
> (b) the obligation to refrain from an act, or to tolerate an act or situation;
>
> (c) the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.[24]

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[17] It should be noted that in Australia a "taxable supply" is a *taxed* supply but in the EU the concept of a "taxable supply" refers to a supply that is within the scope of the VAT law, but which might be exempt (including both input taxed and GST-free exemptions).
[18] EU VAT Directive, Article 135(1).
[19] EU VAT Directive, Article 356(2) makes reference to a European Council directive on the prevention of money laundering.
[20] EU VAT Directive, Article 135(1)(c).
[21] EU VAT Directive, Article 135
[22] EU VAT Directive, Article 14.
[23] EU VAT Directive, Article 24(1).
[24] EU VAT Directive, Article 25.

Despite the breadth of these concepts, the exclusion of money is clearly understood. Money is not consumed; it is used to pay for consumption.

The New Zealand GST

Other countries, like New Zealand, exclude money by specifically excluding it from the concepts of goods and services:

Rather than using the generic term "supplies" to define the tax base for GST, New Zealand adopts the more traditional approach of dividing all things that can potentially be supplied, imported, or consumed into two categories:

- Goods, which is defined to mean "…all kinds of personal or real property; but does not include choses in action, money or…";[25] and

- Services, which is defined to mean "anything which is not goods or money."[26]

The New Zealand law also includes a definition of "supply": "the term supply includes all forms of supply."[27] This has two effects. First, the term supply is used to describe the means by which goods or services are supplied, rather than (as in Australia) to define both the means of supply and the thing supplied. Between them, the definitions of goods, services, and this first meaning of supply cover the same ground as Australia's section 9-10(1) and (2). The second main consequence of these definitions, is that a supply of money can never be a supply of anything. In New Zealand GST, a supply must be of something—either goods or services—and since money is excluded from both, it can never be supplied.

There is, therefore, no 'unless it is supplied as consideration for a supply that is a supply of money'. In New Zealand GST, money is always only something that is *paid*, not supplied, and usually but not always it is paid as consideration for a supply. This is probably why, in the New Zealand GST Act, the overwhelming majority of references to "money" occur in the composite expression "consideration in money", which is defined as follows: "consideration in money includes consideration expressed as an amount of money."[28]

Other significant references to money occur, as in the Australian law, in the context of calculating the tax base for insurance and gambling, and also in the rules on financial services, which are either exempt (all B2C and some B2B transactions) or zero-rated (eligible B2B transactions if the supplier has elected for zero-rating).

Despite not treating 'money for money' as a supply, New Zealand does treat "the exchange of currency (whether effected by the exchange of bank notes or coin, by crediting or debiting accounts, or otherwise)"[29] as a financial service. This recognises that the real transaction—the real service being provided—is a foreign currency exchange service.

That the foreign exchange service is the target of the special treatment of this particular financial service is lost in the wording of the Australian regulations because of the focus on the underlying

[25] Goods and Services Tax Act 1985, New Zealand, (GST Act 1985 (NZ)) (as reprinted on 24 February 2016), s 2 definition of "goods".
[26] Ibid, definition of "services".
[27] Ibid, s 5, definition of the term supply. Apart from subsection (1), most of the section is devoted to creating deemed supplies to deal with various things for which Australia would have special rules or adjustments.
[28] Ibid
[29] Ibid, s 3(1)(a).

capital flows, which describe the transaction as the provision, acquisition, or disposal of an interest in or under "Australian currency, the currency of a foreign country, or an agreement to buy or sell currency of either kind".[30] It was this construction that contributed to the High Court's decision in *Travelex Ltd v Federal Commissioner of Taxation* [2010] HCA 33 that a foreign exchange transaction was GST-free under item 4 in the table in section 38-190(1). That decision is entirely inconsistent with the destination principle because the underlying service that is the real target of the input taxation was the exchange service, and that service was provided, received, and consumed in the instant that the exchange occurred—and in Australia.

Irrespective of whether bitcoin and other digital currencies are treated as currency and included in modified versions of both the definition of "money" and the input taxed exchanges of currency for currency (item 9), the problem of the *Travelex* case will remain. Bitcoin will presumably be considered a right for the purposes of item 4 in s 38-190(1) just as Australian currency was. When bitcoin is purchased by an Australian resident, or a person in Australia, where is the bitcoin for use? How does one decide? If the person buying the bitcoin intends to use it outside Australia, should it be GST-free because the Fijian currency in *Travelex* was so treated? Ideally, the opportunity should be taken either to remove the GST-free rule in s 38-190(1), item 4 altogether (because it is unnecessary and is not consistent with the OECD *International VAT/GST Guidelines*) or at least to specify that item 4 does not cover transactions referred to in regulation 40-5.09(1), item 9.

ANSWERS TO QUESTIONS IN THE DISCUSSION PAPER

1. Should digital currencies be identified for GST purposes by defining them or listing them? If a combination or alternate approach should be used, please describe how it would work.

As noted above, I think they should be neither defined nor listed, though I see some advantages in enabling the specification of products that are/are not bitcoin by regulation or determination.

2. Assuming digital currencies are to be defined for GST purposes, what criteria should be included? Should specific types of other currencies be explicitly excluded in the definition? Would all criteria be given equal weight?

If the criteria discussed in the discussion paper are to be used for a definition, I think the requirement that they should be a 'commonly used medium of exchange' needs to be modified to prevent it acting as a barrier to entry for new and innovative financial technologies. One option, is to say that they are 'intended to be commonly used as a medium of exchange'. Similarly, the 'two-way convertibility' should not be restricted to exchanges on a centralised exchange. That limitation does not seem to clearly target the 'virtual' currencies you are wanted to exclude and it might affect yet-to-be-developed digital currencies. If you don't want virtual currencies to be covered, you could just say so in those words.

[30] GST Regulations 1999, reg 40-5.09(1), item 9.

3. **Regardless of how digital currencies are identified for GST purposes, should a decision-maker have the capacity to exclude one or more of them under certain circumstances, such as if a currency was being used predominantly for illegal purposes?**

The only reason for exclusion should be that the currency is not actually a currency. It should be irrelevant whether they are being used for illegal purposes. Fiat currencies are used for illegal purposes and they are not taxed as a consequence.

4. **Regardless of how digital currencies are identified for GST purposes, what can be done to ensure the provisions remain relevant as technology advances?**

Few definitions and more faith in plain English drafting.

5. **Should digital currencies be given input-taxed treatment or be treated equivalently to 'money' for GST purposes, noting the limited differences in outcome and the likely compliance burdens and timeframes for implementation?**

They should be treated as currency, a concept that should no longer be tied to countries. This requires the removal of the reference to Australia in the references to currency in the definition of money and in item 9 of regulation 40-5.09(1).

6. **Are there specific examples of different outcomes between the options that would result in one option being favoured? How frequently would these circumstances arise for relevant businesses?**

Failure to treat bitcoin as money would have adverse consequences because transactions involving goods or services paid for in digital currency would continue to be barter transactions. Businesses that both accepted and paid for goods and services using digital currency would have to account for the transactions on that basis and report input taxed 'supplies' of the currency. More importantly, a business that engaged in large volumes of bitcoin transactions (being transactions where the bitcoin is paid for something that is taxable) could lose input tax credits because they would be treated as making input taxed supplies rather than merely paying consideration for goods or services.

7. **What effect does each of the options have on the regulatory burdens and compliance costs of different market participants (for example, consumers, merchants and digital currency traders/intermediaries)?**

In all cases, input taxing digital currencies without treating them as money will be more complex.

8. **Are additional reduced credit acquisitions required to be specified in the GST Regulations to allow access to RITCs for the digital currency industry? If so, what types of acquisitions would they include?**

I cannot answer this question with certainty but I do think that the services provided by developers who verify, for example, bitcoin transactions should be taxable supplies.

9. Under input taxed treatment or treatment as 'money' for digital currencies, would Australia regain sufficient international competitiveness, compared to other jurisdictions?

Given that the EU is treating bitcoin as money and will no doubt do the same for other digital currencies, it will be clearly disadvantageous for Australia to adopt the less desirable approach of input taxing.

10. Does GST-free treatment have any significant advantages that haven't been considered?

Digital currencies are money and once this is recognised the question of GST-free treatment becomes irrelevant except in the situation where there is a 'money for money' transaction. There is no justification for making such transactions GST-free in the absence of a broader GST-free treatment for financial supplies.

11. Are there other options to address the current GST treatment of digital currencies that have not been considered and which would provide significant advantages?

Not that I am aware of.

ATTACHMENT: REFERENCES TO 'MONEY' IN THE GST ACT

The following list covers all of the occurrences of the word "money" in the GST Act.

(1) **Three provisions exclude money from the tax base:** Section 9-10(4) excludes money from the concept of a 'supply'. Similarly, s 13-5(3) excludes money from being an importation by stating that "an importation of money is not an importation of goods into [Australia]".[31] Since between them, the concepts of supply and importation constitute the subject matter of tax for GST purposes, these provisions effectively exclude money from the tax base.

Of course, s 9-10(4) does appear to re-include money, but that is only for the purpose of 'input taxing' financial services. The result resembles a tongue twister: "However, a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money."[32] Section 11-10(3) does the same thing from the other side of the transaction: "an acquisition does not include an acquisition of money unless the money is provided as consideration for a supply that is a supply of money."

(2) **Section 9-75, the definition of 'price':** The role of money in a consumption tax is made clear in the s 9-75 definition of the 'price' of a supply, which is the sum of:

> (a) so far as the consideration for the supply is consideration expressed as an amount of money—the amount (without any discount for the amount of GST (if any) payable on the supply); and
>
> (b) so far as the consideration is not consideration expressed as an amount of money—the GST inclusive market value of that consideration.[33]

From this we can see that the normal function of money in a GST/VAT is as the consideration for supplies, rather than as a subject matter for supplies. Consideration can be monetary (paragraph a) or non-monetary (paragraph b). Where consideration is non-monetary, each supply in the barter transaction is both a supply and consideration for a supply. But when *money* is given as consideration for goods or services, this is not the case. The money is *only* consideration and the goods are services are *only* supplies. The words 'so far as' also contemplate that the consideration for a supply could be partially monetary and partially non-monetary.

(3) **Section 11-30(4)** uses 'money' in the composite phrase 'the consideration is not expressed as an amount of money', thus referring to non-monetary consideration rather than to money itself. The provision deals with how non-monetary consideration impacts on the concept of 'extent of consideration' in the formula for calculating a recipient's entitlement to an input tax credit.[34]

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[31] GST Act 1999, s.13-5(3), asterisks omitted

[32] GST Act 1999, s.9-5(4), asterisks omitted.

[33] GST Act 1999, s.9-75(1), asterisks omitted.

[34] The exact wording is: For the purpose of working out the extent of the consideration, *so far as the consideration is not expressed as an amount of money*, take into account the GST inclusive market value of the consideration." GST Act 1999, s.111-30(4) (asterisks omitted, emphasis added).

(4) **Section 58-65** both authorises and requires a representative of an incapacitated entity "to apply any money which the representative receives in his or her capacity as that representative in order to pay [an amount the incapacitated entity is liable to pay because of Division 58]."

(5) **Divisions 78, 79, and 80 (Insurance)**. Section 78-10(1) deals with decreasing adjustments allowed insurers when they settle a claim under an insurance policy. Like s 9-75, s 78-10 envisages three possible scenarios: the claim is settled by paying money, it is settled by making a supply, or it is partly settled in money and partly in a supply. Here again, money's function as something other than a supply is evident. Section 78-20(1) repeats this categorisation in stating (in case there were any doubt) that money paid or a supply made in settlement of an insurance claim is not consideration for an acquisition by the insurer. Similarly, section 78-45(1) states that the person receiving the money or a supply in settlement of an insurance claim is not making a supply for which the money/supply is consideration.[35] The distinction between money and supplies is again evident in the definition of 'settlement amount' in section 78-15(4). This is one element of the calculation of the amount of an insurer's decreasing adjustment of settling a claim under an insurance policy.[36] The distinction between money and supplies carries into sections 78-35(1) and 78-75(1), in the context of subrogation, and 78-110(1), in the context of court judgments or orders relating to insurance claims, 78-120(1), in the context of HIH rescue payments, sections 79-65(1), 79-90(1) & (2), 79-95(3), in the context of compulsory third party (CTP) schemes, and sections 80-30(2) and 80-70(2), in the context of CTP settlement sharing agreements.

(6) **Division 126 (Gambling supplies).** The definition of "total monetary prizes" in section 126-10(1) adds to the amount deductible from a gambling supplier's net amount amounts of "money" payable to gamblers under an agreement to repay a proportion of their losses. Section 126-32(1) provides that the payment of that money is not treated as consideration for a supply (which prevents a 'double deduction' arising).

(7) **Division 134 (Adjustments for 3rd party payments).** Adjustments may arise if "money" passes from one person to a relevant third party, either by paying the money, offsetting money owed, or crediting money to an account: see ss 134-5(1)(c) and 134-10(1)(c).

(8) **Section 177-1(2).** This mentions money in the context of the Finance Minister authorising the transfer of money between federal government accounts.

(9) **Division 188 (the GST turnover rules).** Section 188-22 provides that both money and non-monetary insurance settlements are disregarded when calculating GST turnover. Section 188-35 disregards the repayment of the principal of a loan of money when working out the value of the supply constituted by the loan.

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[35] It is not clear that either of these two rules is even necessary, rather than merely 'to avoid doubt'.

[36] Step 1 in the method statement for calculating the decreasing adjustment requires the insurer to calculate the sum of "payments of money" made in settlement of the claim and "the GST inclusive market value of … supplies" made in settlement of the claim. GST Act 1999, s.78-15(4).

(10) **In various definitions in s 195-1**, including:

- "deposit account" (for an ADI);

- "monetary prizes", a concept that is relevant for the gambling provisions (see above) and which is defined to include payments "in the form of" and also, in the case of casinos, prizes "in the form of gambling chips that may be redeemed for money";

- As a defined term, "money", and within that term, in the phrase "money order".

(11) **Schedule 3 (the list of GST-free medical aids and appliances).** The composite phrase "money identification equipment" appears in item 150.