



Australian Government

The Board of Taxation

REVIEW OF THE APPLICATION OF GST TO CROSS-BORDER TRANSACTIONS

A report to the Assistant Treasurer

the **board** of **taxation**
www.taxboard.gov.au

The Board of Taxation
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FOREWORD

The Board of Taxation is pleased to submit this report to the Assistant Treasurer following its review of the application of goods and services tax (GST) to cross-border transactions.

In making any recommendations the Board is required to:

- have regard to the design features of the GST as a multi-stage value added tax;
- ensure that any possible changes do not undermine the integrity of the GST in aiming to tax private consumption in Australia; and
- ensure that its recommendations have regard to the likely impact on revenue.

The terms of reference for conducting the review are reproduced in Chapter 1.

The Board established a Working Group, chaired by Mr Eric Mayne, to conduct the review. The Board conducted extensive consultation with stakeholders and received assistance from officials from the Treasury, the Australian Taxation Office and an Expert Panel comprising four GST taxation advisers chosen for their expertise. The Board would like to thank all of those who contributed so readily to assist the Board in conducting the review.

The *ex officio* members of the Board – the Secretary to the Treasury, Dr Ken Henry AC, the Commissioner of Taxation, Mr Michael D’Ascenzo AO, and the First Parliamentary Counsel, Mr Peter Quiggin PSM – reserved their final views on the issues canvassed in this report for advice to Government.

On behalf of the Board, it is with great pleasure that we submit this report to the Assistant Treasurer.

R F E Warburton AO
Chairman, Board of Taxation

E Mayne
Chairman of the Board’s Working Group

EXECUTIVE SUMMARY

On 12 May 2009, the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, asked the Board of Taxation to undertake a review of the application of the goods and services tax (GST) to cross-border transactions and to report its recommendations to the Government by the end of February 2010.

Following the announcement of the review, the Board released a discussion paper that posed a number of questions to assist taxpayers in identifying possible improvements to the application of GST to cross-border transactions.

The Board's discussion paper recognised that whilst Australia's current approach to applying GST to cross-border transactions is consistent with the key principles underpinning the GST regime, there are concerns that it draws non-residents unnecessarily into Australia's GST system. This brings with it additional compliance costs, including embedded GST to the extent non-residents are deterred from registering or fail to recover the GST included in the price of their dealings with other businesses, and costs of enforcing compliance on non-residents who are outside Australia's jurisdiction.

The submissions to the Board in response to the discussion paper confirmed that the application of GST to cross-border transactions can draw non-residents unnecessarily into Australia's GST system, imposing significant compliance costs for no net revenue gain.

This review has confirmed that the main issues that arise in the application of GST to cross-border transactions are that:

- Australia's GST system is overly inclusive of non-residents which can place unnecessary compliance costs on non-residents and can lead to embedded taxation for Australian businesses¹;
- there are significant compliance costs faced by non-residents who seek to register in Australia's GST system; and
- the collection of GST on cross-border transactions can be inefficient due to the difficulties associated with enforcing GST compliance on a non-resident outside Australia's jurisdiction.

1 Australian business refers to an entity that carries on an enterprise in Australia.

The Board is of the view that its recommendations will simplify the design of the GST cross-border rules and improve the balance between ensuring Australia's GST system does not draw in non-residents unnecessarily and ensuring the existing GST tax base is maintained.

The Board's recommendations will not change the application of GST to cross-border transactions if the non-resident is making a supply to an unregistered entity (including private consumers) and the recommendations will not significantly change the rules applying to the importation of goods.

The combined effect of the Board's recommendations will be to reduce significantly the number of non-residents that are drawn unnecessarily into Australia's GST system, through a combination of limiting the connected with Australia provisions, expanding the compulsory reverse charge provisions, extending the GST-free rules and changes to registration requirements for non-residents, while ensuring the appropriate amount of GST on private consumption is collected in an efficient and effective way.

CHAPTER 1: INTRODUCTION

CHAPTER 1.1: BACKGROUND

1.1.1 On 12 May 2009, the Government announced its response to the Board of Taxation's report on its *Review of the legal framework of the administration of the GST*.

1.1.2 Included in the response was a request that the Board undertake a review of the application of the GST to cross-border transactions and consult widely with stakeholders. This review was in response to recommendations 26 to 29 of the Board's report. In essence these recommendations were that:

- the Government should consider reviewing the application of the GST to cross-border transactions with a view to simplifying and reducing the number of non-residents in the system (recommendation 26);
- the Commissioner should consider further streamlining the proof of identity and proof of enterprise requirements for non-residents in the circumstances where the risk to revenue is low (recommendation 27);
- a resident entity which acts for a non-resident but falls short of being an agent under the current provisions should be able to apply the features of the GST non-resident agency provisions. This may include a commission agent or a sub-contractor who does things on behalf of the non-resident. The non-resident and the resident entity would both have to agree (recommendation 28); and
- non-residents that do not account for their taxable supplies or importations and their creditable acquisitions or importations because of the current or expanded agency provisions should no longer have to register for GST (recommendation 29).

CHAPTER 1.2: REVIEW'S TERMS OF REFERENCE

1.2.1 The terms of reference for the review of the application of GST to cross-border transactions are:

- The Board of Taxation should consult with relevant stakeholders and report to the Government on improvements to the design of the GST system necessary to ensure

that cross-border transactions are treated in an efficient and effective manner. A particular focus will be those design features underpinning the involvement of non-residents in the Australian GST system with a view to simplifying the design.

- The review should include, but not be limited to, consideration of:
 - the extent to which non-residents should be drawn into the operation of the GST;
 - the role of resident agents acting for non-residents and whether there is scope to broaden it; and
 - ways to simplify and reduce compliance and administrative costs associated with cross-border transactions.
- The Board should have regard to the design features of the GST as a multi-stage value added tax and should also ensure that any possible changes do not undermine the integrity of the GST in aiming to tax final consumption in Australia. In considering any changes, the Board should ensure that its recommendations have regard to the likely impact on revenue.
- The Board should consult widely and report to the Government by the end of February 2010 on the outcome of its consultations and its recommendations.

CHAPTER 1.3: THE REVIEW TEAM

1.3.1 The Board of Taxation is an independent, non-statutory body established to advise government on various aspects of the Australian taxation system (refer Appendix F for the Charter of the Board of Taxation).

1.3.2 The Board appointed a Working Group of its members to work on the review. The Working Group comprised Eric Mayne (Chair of the Working Group), Richard Warburton AO, and Curt Rendall.

1.3.3 The Board also appointed an Expert Panel which consisted of GST taxation advisors chosen for their expertise to assist with the review. They are:

- Frank Brody (Partner, Mallesons Stephen Jaques Lawyers);
- Denis McCarthy (Executive Director, PricewaterhouseCoopers);
- Rebecca Millar (Associate Professor, University of Sydney); and
- Sasha Ivanusic (BHP Billiton).

1.3.4 The Expert Panel members assisted the Board with technical and practical advice on the key issues and recommendations and the technical content of this report. The Board appreciates their valuable contribution.

1.3.5 In addition, the Board consulted extensively with the Treasury and the Australian Taxation Office (ATO). The Board in particular would like to thank Mr Robert Dalla-Costa, Specialist Advisor, Indirect Tax Division from the Treasury and Ms Josephine Drum, Centre of Expertise, Goods and Services Tax from the ATO and their respective teams for their contribution to this review and the report.

CHAPTER 1.4: REVIEW PROCESSES

1.4.1 The Board has consulted widely in developing the recommendations in this report. The Board's consultation processes involved:

- public release of a discussion paper to assist stakeholders in preparing submissions;
- meeting with representatives from the Software Developers' Consultative Group; and
- discussions with the Expert Panel.

DISCUSSION PAPER

1.4.2 The Board developed a discussion paper to facilitate public consultation. It was released on 29 July 2009.²

1.4.3 The discussion paper provided an overview as to how, and the framework under which, GST is applied to cross-border transactions.

1.4.4 The Board recognised four broad issues in the discussion paper in relation to the application of GST to cross-border transactions:

- the broad application of the connected with Australia provisions;
- registration requirements for non-residents and access to GST refunds;
- the scope of the GST-free rules; and
- consumption in Australia on which GST currently is not captured.

2 A copy of the discussion paper is available to download from http://www.taxboard.gov.au/content/gst_cross_border/issues_paper/index.asp

1.4.5 Chapter 5 of the Board's discussion paper considered some possible options for change and these are outlined in Appendix C.

SUBMISSIONS

1.4.6 The Board requested written submissions on the review of the application of GST to cross-border transactions by 4 September 2009. The Board received 19 submissions, 15 of which are available to the public and can be obtained from the Board of Taxation's website.

1.4.7 Appendix D contains a list of the parties who provided submissions and agreed to have their submissions made public.³

1.4.8 The Board thanks all parties who provided submissions and appreciates the effort and time taken by these parties in putting forward their issues and proposing recommendations.

3 Copies of public submissions made to the Board are available at http://www.taxboard.gov.au/content/GST_administration_review/submissions/index.asp.

CHAPTER 2: APPLICATION OF GST TO CROSS-BORDER TRANSACTIONS

GENERAL PRINCIPLES FOR TAXING CROSS-BORDER TRANSACTIONS IN AUSTRALIA

2.1.1 An essential feature of Australia's GST regime is to tax consumption by final consumers if this consumption takes place in Australia and to provide relief from taxation for business to business transactions. GST generally applies to goods, services and intangibles acquired outside of Australia for consumption in Australia. Goods, services and intangibles exported from Australia are treated as GST-free. This is referred to as 'the destination principle'. This ensures that the private consumption of goods and services from offshore is taxed in the same way as similar things acquired domestically. That is, GST is levied on consumption that occurs within Australia, regardless of the origin of the supply.

2.1.2 Relief from taxation for business to business transactions is achieved generally by:

- imposing tax on supplies made by entities registered for GST; but
- allowing those entities to offset the GST they are liable to pay on supplies they make against input tax credits for the GST that was included in the price they paid for their business inputs.

2.1.3 While one policy principle is to ensure that GST applies to consumption of goods or services acquired from outside Australia this needs to be balanced against the policy objective to not impose unnecessary cost on non-resident suppliers:

In addition, the Government wants to ensure it does not unnecessarily draw non-residents into the GST system⁴.

2.1.4 Non-resident businesses can be drawn into Australia's GST system because of the 'invoice-credit' mechanism which seeks to tax the valued added at each stage of the production chain on a transaction by transaction basis. To ensure that no GST is borne by businesses⁵ on their inputs, businesses are required to register for GST to claim a

4 Explanatory Memorandum to Indirect Tax Legislation Amendment Bill 2000, paragraph 3.30.

5 Other than those making input taxed supplies.

refund of the GST paid. In order for non-residents to claim a refund of the GST they have paid, they are required to register and so are drawn into Australia's GST regime.

2.1.5 This gives rise to administrative costs for non-residents and integrity concerns for the ATO, which has limited jurisdictional control over non-residents. In addition, if non-residents do not register and claim their input tax credits, there is the potential for GST to be 'embedded' in the price of the supply.

OPERATION OF THE CURRENT GST LAW IN AUSTRALIA

2.1.6 If non-resident businesses supply goods, services or other things (such as rights) for consumption in Australia, they may have an obligation to register for GST and remit GST on any taxable supplies they make, after offsetting the GST paid on their business inputs. Non-resident businesses also can register voluntarily for GST and may do so to recover GST incurred on their business acquisitions in Australia even if they do not make any taxable supplies.

2.1.7 A registration system is used for the administration of the GST to ensure that GST is remitted by those required to do so and to provide relief for GST imposed on acquisitions by businesses.

2.1.8 The GST liability normally is imposed on the entity making the taxable supply or taxable importation. In many instances, a GST liability can be imposed on a non-resident business that does not have an establishment or representative in Australia. For example, if a non-resident supplier of services either sends its employees to Australia or engages a domestic sub-contractor to perform the services, those services are done in Australia and a GST liability is imposed on the non-resident if the other requirements for making a taxable supply are met.

TAXABLE SUPPLIES

2.1.9 There are a number of elements necessary for a supply to be a taxable supply. The most relevant elements in cross-border transactions are that:

- the supply is connected with Australia;
- the supplier is registered or required to be registered for GST; and
- the supply is not GST-free or input taxed.

2.1.10 The connected with Australia rules establish the initial jurisdictional boundary of the GST.⁶ The rules for determining when a supplier, including a non-resident supplier, is making a supply that is connected with Australia differ depending upon whether the supply is one of goods, real property or something other than goods or real property.

2.1.11 The residency status of the supplier or whether the supply is between business entities is not relevant in determining if a supply is connected with Australia. However, the residency status of the recipient of the supply can be relevant in determining if the supply is GST-free.

Supply of goods

2.1.12 A supply of goods is connected with Australia if:

- goods are delivered, or made available, in Australia;
- goods are removed from Australia; or
- the supplier imports the goods into Australia or installs or assembles the imported goods in Australia.

2.1.13 In general, a supply of goods is a GST-free export if the goods are exported by the supplier before, or within 60 days after, receiving any consideration for the goods or, if on an earlier day, the supplier issues an invoice for the goods.

Supply of real property

2.1.14 A supply of real property is connected with Australia if the real property, or the land to which the real property relates, is in Australia. A supply of real property is not connected with Australia if the land to which the real property relates is outside Australia.

2.1.15 Real property is defined widely and includes the supply of a hotel room.

2.1.16 A supply of real property situated in Australia can never be a GST-free export.

Supplies of things other than goods or real property

2.1.17 A supply of anything other than goods or real property (generally services or intangibles such as rights) is connected with Australia if:

⁶ This initial jurisdictional boundary is extended by the compulsory reverse charge rule, to ensure that, to the greatest extent feasible, consumption in Australia is covered by the GST law.

- the thing is done in Australia;⁷
- the supplier makes the supply through an enterprise that the supplier carries on in Australia; or
- neither of the above applies and the thing supplied is a right or option to acquire another thing and the supply of that other thing would be a supply connected with Australia.

2.1.18 Certain supplies of services or intangibles are GST-free because of their relationship with goods or real property situated outside Australia. For example, the repair of goods from outside of Australia whose destination is outside of Australia is a GST-free supply of services.

2.1.19 A supply of a thing (other than goods or real property) that is made to a non-resident who is not in Australia when the thing supplied is done (for example, when the service is performed) generally is GST-free. However, those supplies are not GST-free if the supply is provided to another entity in Australia.

2.1.20 Supplies made to residents or non-residents who are not in Australia when the thing supplied is done also may be GST-free if the effective use or enjoyment of that supply takes place outside Australia.

2.1.21 A supply of rights is GST-free if those rights are for use outside Australia or if the recipient is a non-resident and is outside Australia when the thing supplied is done.

2.1.22 Other supplies of services that are specifically GST-free include international transport of goods and passengers, travel agency services in arranging overseas supplies and certain supplies relating to international mail.

‘IMPORTED’ SERVICES AND INTANGIBLES

2.1.23 Supplies of things other than goods or real property that are not connected with Australia are referred colloquially to as ‘imported services’ if they are acquired by an entity in Australia. Imported services for which the recipient is not entitled to a full input tax credit (for example, financial institutions) are taxable supplies and a compulsory reverse charge system applies whereby the GST payable on the supply is payable by the registered recipient of the supply, not the supplier. This extends the initial jurisdictional boundary established by the connected with Australia rules to

⁷ The phrase ‘the thing is done’ is used in the GST law to refer to the performance of the supply.

ensure that, to the greatest extent feasible, consumption in Australia is subject to the GST law.⁸

TAXABLE IMPORTATIONS

Goods

2.1.24 GST is imposed on a taxable importation except to the extent the GST Act specifies the importation is non-taxable. A taxable importation requires goods to be imported and in most situations entered for home consumption. The entry for home consumption generally is the trigger for GST liability.

2.1.25 A taxable importation also could involve a taxable supply. A taxable supply can occur when the non-resident:

- supplies goods to Australia and imports those goods into Australia on, for example, delivery duty paid (DDP) terms; or
- supplies goods to Australia and installs or assembles the goods in Australia.

2.1.26 The entity that makes the taxable importation must pay the GST payable on the taxable importation. The amount of GST is 10 per cent of the value of the taxable importation. The value of the taxable importation is the customs value of the goods plus the cost of bringing the goods to Australia, including transport, insurance, customs duty and wine equalisation tax (if any).

2.1.27 GST on a taxable importation usually is paid to the Australian Customs and Border Protection Service before goods are released from Customs control.

2.1.28 To ensure that GST effectively is borne by private consumers, an input tax credit for the GST paid on imported goods is available where the importer is registered or required to be registered and the goods are imported in relation to carrying on their enterprise, unless the importation relates to making input taxed supplies or is of a private or domestic nature.

GST COLLECTION AND REFUNDS

2.1.29 GST normally is payable by the supplier of a taxable supply.

2.1.30 A non-resident who is registered for GST, or required to be registered for GST, is required to lodge a business activity statement (BAS) with the ATO. Refunds of GST

8 This is discussed in more detail at paragraph 2.1.40

to non-resident businesses can only be made through registration and lodgement of a BAS.

Registration

2.1.31 The registration requirements for non-resident businesses are similar to those for any Australian business.

2.1.32 A non-resident that carries on an enterprise is required to be registered if its GST turnover is at or above \$75,000 (or \$150,000, for a non-profit body). Those with a turnover below these thresholds nevertheless can register voluntarily.

2.1.33 Supplies that are disregarded in working out the GST turnover for registration purposes are:

- supplies that are not connected with Australia;
- supplies of a right or option to acquire another thing, the supply of which would be connected with Australia (but not if the supply of the right or option is made through an enterprise carried on in Australia or is done in Australia); and
- supplies of a right or option to use commercial accommodation in Australia if the supply neither is made in Australia nor made through an enterprise that the supplier carries on in Australia.

2.1.34 GST-free supplies count towards the GST registration turnover. Therefore, it is possible that an entity may be required to register for GST even though the only supplies it makes are GST-free.

2.1.35 To register, non-residents must provide certain documentation as evidence that they are carrying on the enterprise for which they are seeking GST registration. They are also required to provide evidence of their identity as the non-resident entity, or of their identity as a representative, such as a director, of the non-resident entity.

2.1.36 The requirements for non-residents to establish proof of identity are broadly equivalent to those for residents. However, all documents must be certified as true copies by an Australian embassy, high commission or consulate, or by a competent authority in the relevant country (if the country has signed the Hague Apostille Convention⁹) and have these documents Apostille'd.¹⁰

2.1.37 Entities that are eligible for an Australian Business Number (ABN) apply for this at the same time as they apply for GST registration. However, non-residents who

9 The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

10 Apostille'd means a type of certification issued by a 'competent authority' designated by the state in which the document was issued.

neither carry on an enterprise in Australia nor make supplies that are connected with Australia are not entitled to an ABN even if they are registered for GST.

Reverse charge — voluntary and compulsory

2.1.38 In an attempt to reduce the burden on non-residents Australia's GST regime includes a number of mechanisms to make it easier for non-residents to meet their GST obligations. These include voluntary reverse charging of GST and making resident agents that act for a non-resident responsible for the GST consequences of what the non-residents do through their agent. 'Reverse charged' means that the GST payable on the supply is payable by the recipient rather than the supplier.

2.1.39 A voluntary reverse charge may apply if a non-resident does not have a presence in Australia and has an agreement with the recipient of the supply to apply the voluntary reverse charge. Under a voluntary reverse charge, a non-resident need not register for GST if the only supplies it makes are made under one or more reverse charge agreements.

2.1.40 A compulsory reverse charge applies if a non-resident makes a supply of services or rights that is not connected with Australia to a registered business in Australia that is not entitled to claim a full input tax credit in respect of that acquisition. The GST on the supply is reverse charged compulsorily to the business in Australia. This measure addresses the potential bias that would otherwise arise for the business in Australia to import services and rights from non-residents who would not be required to charge GST on their supplies, unlike similar services supplied domestically for which they could not fully recover the GST charged.

OECD INTERNATIONAL VAT/GST GUIDELINES

2.1.41 The Board notes that the Organisation for Economic Co-operation and Development (OECD) is developing guidelines for the application of GST/VAT to cross-border trade in services and intangibles¹¹. The OECD supports the general principle that the customer location is the main factor in determining the jurisdiction for taxation of business to business supplies. There is also support for reducing compliance costs for such business to business supplies through shifting the GST/VAT to the resident entity through a reverse charge or, where the acquisition is fully creditable, by removing that transaction from the system.

11 OECD's Committee on Fiscal Affairs 'Applying VAT/GST to Cross-Border Trade In Services and Intangibles Emerging Concepts for Defining Place of Taxation' – First Consultation Document January 2008 and 'Applying VAT/GST to Cross-Border Trade In Services and Intangibles Emerging Concepts for Defining Place of Taxation' – Second Consultation Document June 2008.

2.1.42 The Board's recommendations are broadly consistent with the direction the OECD is taking in relation to the application of VAT/GST to cross-border business to business transactions.

CHAPTER 3: BOARD'S RECOMMENDATIONS

CHAPTER 3.1: ISSUES RAISED BY AUSTRALIA'S APPROACH TO CROSS-BORDER TRANSACTIONS

3.1.1 The interaction of the features of the Australian GST system gives rise to a number of issues for taxpayers and the ATO, often for no net revenue gain. These are:

- Australia's GST system is overly inclusive of non-residents which can place unnecessary compliance costs on non-residents and can lead to embedded taxation for Australian businesses;
- there are significant compliance costs faced by non-residents who seek to register in Australia's GST system; and
- the collection of GST on cross-border transactions can be inefficient due to the difficulties associated with enforcing GST compliance on a non-resident outside Australia's jurisdiction.

3.1.2 This review is looking at ways to ensure that the approach to the GST treatment of cross-border transactions does not draw non-residents unnecessarily into the GST system and operates in an effective and efficient manner. The Board recognises that this policy objective needs to be balanced against the primary objectives of the GST of ensuring that consumption by private consumers is taxed, if that consumption takes place in Australia, and providing relief from GST for business to business transactions.

3.1.3 The Board's recommendations broadly will remove non-residents that do not have a business presence in Australia from Australia's GST system. The Board's recommendations will:

- reduce compliance costs for non-residents;
- reduce administrative costs associated with enforcing GST compliance on non-residents; and
- be revenue neutral.

CHAPTER 3.2: CONNECTED WITH AUSTRALIA PROVISIONS

3.2.1 If a supply by a non-resident is connected with Australia the non-resident supplier generally is liable for any GST payable on that supply. Exceptions occur if the non-resident supplier and the Australian recipient agree to reverse charge the GST liability and also if the non-resident supplier makes the supply through a resident agent.

3.2.2 The broad application of the connected with Australia provisions in the GST Act draws many non-resident entities into the Australian GST system and this can lead to inefficient outcomes. This includes embedded GST to the extent non-residents are deterred from registering or fail to recover the GST on their dealings with other businesses and the administrative difficulties of enforcing compliance on non-residents who are outside Australia's jurisdiction.

3.2.3 The Board has addressed the broad application of the connected with Australia rules for services and intangibles separately from goods.

CONNECTED WITH AUSTRALIA PROVISIONS – SERVICES AND INTANGIBLES

3.2.4 Supplies of services and intangibles made by a non-resident that are done in Australia are connected with Australia. It is this aspect of the connected with Australia rules that brings many non-residents into the GST system. For instance, a supply by a non-resident is connected with Australia if it engages an Australian sub-contractor to perform the service in Australia even though the non-resident does not have a business presence in Australia.

3.2.5 If a supply of a service or intangible by a non-resident is connected with Australia then the non-resident may be required to register, remit GST and may claim input tax credits. The supply will not be subject to the existing compulsory reverse charge provisions because it is connected with Australia. This generally means the non-resident's GST liability will not be transferred to the recipient business in Australia unless there is a voluntary reverse charge agreement. If it is reverse charged it would preclude the need for the non-resident to register for, and pay, GST in Australia.

Views in submissions

3.2.6 Those who made submissions in response to the discussion paper broadly were in support of the option to remove non-residents from Australia's GST system through limiting the connected with Australia rules for the supply of services and intangibles.

3.2.7 The Institute of Chartered Accountants in Australia noted in their submission that:

By international standards, the Australian GST law is in our view overly inclusive of non-residents, particularly in respect of supplies of "things other than goods or real property" (i.e. supplies of 'services'). This results in higher compliance costs for non-residents and higher GST costs for Australian firms and consumers than arise under the GST regimes of our international counterparts, such as New Zealand and Canada.

3.2.8 The Corporate Tax Association supported limiting the connected with Australia rules to exclude non-resident supplies to businesses in Australia, with businesses in Australia to be indicated by an ABN. They submitted that a reverse charge should apply where the recipient business in Australia makes the acquisition for less than a fully creditable purpose and to supplies of things other than goods and real property.

3.2.9 PricewaterhouseCoopers argued that limiting the connected with Australia rules, extended to also exclude supplies of services between non-resident entities, would allow the existing compulsory reverse charge rules under Division 84 to operate without further amendment.

The current Division 84 rules are effective and efficient, applying only where a recipient is not entitled to a full input tax credit in relation to the acquisition.

3.2.10 The Taxation Institute of Australia agreed that limiting the connected with Australia rules would, to some degree, reduce the number of non-residents in the system. The Institute recognises that limiting the connected with Australia rules will impose obligations on businesses in Australia to determine whether non-resident suppliers have a presence in Australia. However, the business in Australia is only required to account for a reverse charge liability where it results in a net amount payable.

3.2.11 Consistent with the objective of minimising the number of non-resident entities required to register for GST in Australia, the Australian Financial Markets Association believes the concept of carrying on an enterprise in Australia for GST purposes should be aligned with the income tax definition of what constitutes a permanent establishment.

Board's consideration

3.2.12 In the Board's view, the connected with Australia rules apply too broadly to the supply of services and intangibles and as a result the collection of GST is inefficient. Non-residents are relied upon to collect and remit GST that, in many instances, will

give rise to an input tax credit entitlement for the recipient business in Australia. With few exceptions¹², there is no net GST revenue arising from transactions of this nature if they are between a non-resident business and a business in Australia that is registered for GST.

3.2.13 The approach recommended by the Board is to limit the scope of the connected with Australia rules for supplies by non-residents to businesses that have a presence in Australia. The change to the rules would not include real property but would include the supply of services and intangibles and, in limited circumstances, goods. Proposed changes to the connected with Australia rules for goods are discussed separately below.

3.2.14 The Board recommends that supplies of services and intangibles by a non-resident that are done in Australia should not be connected with Australia if:

- the supply is made to a business that has a presence in Australia that is registered for GST; and
 - the non-resident supplier has no business presence in Australia; or
 - the non-resident supplier has a business presence in Australia but the supply is not made through that business presence.

3.2.15 For businesses that are entitled to full input tax credits, these transactions are currently revenue neutral, that is the GST remitted by one party is claimed as a credit by the other. This approach will not impact on the amount of GST that should be collected even though supplies by non-resident businesses may no longer be taxable. The practical effect is that a business in Australia that makes taxable supplies will remit to the ATO an amount of GST that covers their own value added and that of the non-resident.¹³

3.2.16 For recipients of the supply that are not entitled to a full input tax credit this approach will mean that supplies of services and intangibles no longer connected with Australia will automatically become subject to the existing compulsory reverse charge provisions.

3.2.17 Limiting the connected with Australia rules for services and intangibles will mean that:

- fewer non-residents are drawn into Australia's GST system reducing the costs of compliance;

12 An exception to this is if the business in Australia is not entitled to full input tax credits in relation to the supply.

13 This is no different from the position of any resident supplier whose outputs are taxable but whose inputs are GST-free, such as a restaurant purchasing GST-free food and selling taxable restaurant meals.

- the appropriate amount of GST will be collected from the business in Australia instead of the non-resident; and
- administration will be simpler for the ATO as it does not have to seek compliance from a non-resident operating outside Australia's jurisdiction.

3.2.18 Example 1 in Chapter 5 demonstrates how this recommendation will work.

Recommendation 1: The GST law should be amended to limit the application of the connected with Australia provisions for the supplies by a non-resident of services and intangibles

Supplies of services and intangibles by a non-resident that are done in Australia should not be connected with Australia if:

- the supply is made to a business that has a presence in Australia that is registered for GST; and
 - the non-resident supplier has no business presence in Australia; or
 - the non-resident supplier has a business presence in Australia but does not use that business presence in making the supply.

CONNECTED WITH AUSTRALIA PROVISIONS – GOODS

3.2.19 The supply of goods by a non-resident that involves those goods being brought to Australia is connected with Australia if the supplier imports the goods into Australia or installs or assembles them in Australia. In most cases, it is the Australian recipient of the supply who imports the goods into Australia.

3.2.20 If the goods are sold by a non-resident on free-on-board (FOB) terms the goods will be imported by the recipient and the supply of the goods is not connected with Australia. It is therefore not a taxable supply by the non-resident but will be a taxable importation for the recipient. The recipient pays the GST on the taxable importation and is responsible for managing the customs clearance procedures.

3.2.21 However, if goods are sold by a non-resident on delivery duty paid (DDP) terms the supply can be both a taxable importation and a taxable supply for a non-resident supplier. The supply is connected with Australia because the non-resident imports the goods into Australia. The GST payable on a taxable supply is payable by the supplier. If the supplier also makes a taxable importation, the supplier must pay the GST on the taxable importation. If the supplier makes a creditable importation the supplier is entitled to an input tax credit for the GST payable on the importation. This results in a situation where the same goods are subject to tax twice on the same

transaction, once as a taxable importation and then again as a taxable supply even though, often, the whole transaction is revenue neutral.

3.2.22 If the non-resident supplier of goods is not the importer of those goods into Australia, but agrees to install or assemble the goods in Australia, then the supply is connected with Australia and the non-resident will have to account for GST on the taxable supply. The supply of the goods also will be a taxable importation for the entity that enters those goods for home consumption in Australia. This means that the supply of goods is both a taxable importation for the entity that has entered the goods and a taxable supply for the non-resident supplier and ensures that the value of the installation services does not escape GST. In some instances, neither the business in Australia that enters the goods for home consumption nor the non-resident supplier is entitled to an input tax credit for the GST paid on a taxable importation. This issue is discussed further in Chapter 4.4.

3.2.23 Supplies of goods made by non-resident businesses where the goods are sourced in Australia and are made available in Australia are connected with Australia. These supplies could be made to another non-resident or to an Australian based entity. Under the current regime, the non-resident businesses can be required to register for GST, pay any GST owing, and claim input tax credits, for no net GST revenue.

Views in submissions

3.2.24 The Institute of Chartered Accountants in Australia noted in their submission that the connected with Australia provisions for the supply of goods by non-residents could be limited:

For supplies of goods with installation services in Australia, the Board should consider narrowing the rules to mirror the amendments suggested in relation to services, such that the supply by an unregistered non-resident of services to install goods in Australia does not make the supply of the goods by the non-resident connected with Australia, where the recipient of the services is registered (or possibly is another non-resident business that does not have an establishment in Australia and is not registered).

For supplies of goods brought to Australia, consideration should be given to whether "imported" goods sold under DDP terms [delivered duty paid] to fully creditable Australian business customers can be excluded without risk to the revenue. If so, a significant number of non-residents could be removed from the GST net...

Board's consideration

3.2.25 The Board recognises that many supplies of goods by non-residents into Australia are not connected with Australia and are therefore not taxable supplies. These supplies are only subject to GST as taxable importations. However, in certain

circumstances a non-resident without a business presence in Australia can make a taxable importation that also is a taxable supply of goods.

3.2.26 The approach recommended by the Board in relation to goods is to limit the scope of the connected with Australia rules for business to business transactions. This will include supplies by a non-resident to a registered business in Australia if:

- the non-resident imports the goods into Australia;
- the non-resident installs or assembles the goods in Australia; or
- the non-resident supplies goods that already are in Australia.¹⁴

3.2.27 The connected with Australia rules for supplies by non-residents of goods that already are in Australia should be limited only if the supply is to an Australian registered business. The Board is of the view that the connected with Australia rules for non-resident to non-resident supplies of goods wholly within Australia be limited only in specific circumstances involving the lease of the underlying goods (recommendation 3).

3.2.28 Limiting the connected with Australia rules for goods that are installed or assembled in Australia will result in fewer non-residents being drawn into Australia's GST system. These changes also will remove inefficiencies associated with imposing GST twice on the same transaction (as a taxable supply and a taxable importation) and will remove the administrative difficulties of enforcing compliance on non-residents who are outside Australia's jurisdiction.

3.2.29 However, to ensure that there is no loss of revenue from this approach, it will be necessary to extend the existing compulsory reverse charge rules that apply if the recipient is not entitled to a full input tax credit for the acquisition, also to cover goods. Currently the compulsory reverse charge only applies to offshore supplies of things other than goods or real property. This approach will mean that supplies of goods no longer connected with Australia still may be a taxable supply under the compulsory reverse charge provisions (recommendation 4). The compulsory reverse charge provisions will operate for goods where the recipient is not entitled to a full input tax credit for that acquisition but should not apply if the goods are imported by the recipient (as they have paid GST on the importation). This will ensure that the change to the connection rules is revenue neutral.

3.2.30 Example 4, 5 and 6 in Chapter 5 demonstrates how this recommendation will work.

14 Note that non-resident supplies of goods that already are in Australia will not involve a taxable importation.

Recommendation 2: The GST law should be amended to limit the application of the connected with Australia provisions for the supply of goods by a non-resident

Supplies of goods by a non-resident should not be connected with Australia if:

- the supply is made to a business that has a presence in Australia that is registered for GST; and
 - the non-resident supplier has no business presence in Australia; or
 - the non-resident supplier has a business presence in Australia but does not use that business presence in making the supply.

SUPPLIES BETWEEN NON-RESIDENTS

3.2.31 The Board's discussion paper also asked whether or not supplies made between non-resident enterprises, if the thing supplied is done in Australia, should be connected with Australia. While the Board did not receive any submissions addressing this issue, it was raised by, and discussed with, the expert panel.

3.2.32 Limiting the connected with Australia rules for supplies made between non-residents could result in non-taxation of consumption in Australia for supplies of goods or services that are provided to a private consumer. Limiting the connected with Australia rules in this way would allow a non-resident to claim a GST refund (via registration) without having any obligation to charge GST on its outputs. A change to this effect is more likely to draw non-residents into the GST system to claim a GST refund.

3.2.33 The Board also is concerned with how changes to the connected with Australia rules for supplies between non-residents may interact with the connected with Australia rules that allow certain non-residents effectively to be input taxed (no GST on supply but no entitlement to a credit for business inputs). Under those provisions, a non-resident, such as a foreign tour operator who supplies Australian holiday packages, is not required to register for GST despite making supplies that are connected with Australia. The non-resident's supplies instead are excluded from the registration turnover threshold. If the non-resident chose to register for GST, the taxable inputs would be offset against the taxable outputs. If these supplies were not connected with Australia the non-resident could register for GST, claim a GST refund and have no GST obligations for the outputs.

Services and intangibles

3.2.34 The Board considers that limiting the connected with Australia rules for supplies of services and intangibles between non-residents is not necessary and has the

potential to increase the risk to revenue. Recommendation 5 (GST-free rules) and recommendation 9 (GST-free only supplies made by a non-resident be excluded from registration turnover threshold) will have the effect of reducing the number of non-residents in the GST system if they make a supply of a service or intangible to another non-resident in revenue neutral arrangements.

Goods

3.2.35 Supplies of goods between non-residents, if the goods already are available in Australia and are the subject of a lease arrangement to be continued by the recipient of the goods, may bring non-residents into Australia's GST system for no net revenue gain and can lead to significant compliance costs.

3.2.36 For example, a non-resident purchases an aircraft and leases it to a business that has a presence in Australia that is registered for GST. The non-resident sells the aircraft, and the underlying lease, to another non-resident. The supply would be connected with Australia because the goods are wholly within Australia and thus the non-residents would have to register and account for GST for what may be a one-off transaction that is revenue neutral (if the underlying lease of the asset is with a GST registered business in Australia).

3.2.37 The Board is of the view that these transactions should be removed from Australia's GST system. However, any change should be restricted to lease arrangements with registered businesses in Australia to ensure that any dealings with private consumers are still connected with Australia and taxed appropriately.

3.2.38 The Board recommends that the connected with Australia rules be limited for supplies between non-residents where the goods are in Australia and leased to registered businesses in Australia. This approach is to address a particular irritant for non-resident to non-resident supplies where the goods are wholly within Australia and leased to an Australian registered business. This approach will remove these non-residents from Australia's GST system, reduce compliance costs and will be revenue neutral.

3.2.39 Example 5 in Chapter 5 demonstrates how this recommendation will work.

Recommendation 3: The GST law should be amended to limit the application of the connected with Australia provisions for certain supplies of goods within Australia between non-residents

Supplies of goods that are already in Australia between non-residents who carry on their enterprise outside Australia would not be connected with Australia if the non-resident recipient of the supply continues the underlying lease of those goods to a business that has a presence in Australia that is registered for GST.

COMPULSORY REVERSE CHARGE

3.2.40 To complement the limits to the connected with Australia rules for goods, the Board supports extending the existing compulsory reverse charge. This will ensure that the appropriate amount of GST is still collected on non-resident supplies of goods if the recipient does not acquire the supply for a creditable purpose.

3.2.41 Under the existing rules, a compulsory reverse charge may apply where a non-resident supplies something other than goods or real property that is not connected with Australia, and the recipient of the supply is registered for GST but does not acquire the supply for a fully creditable purpose. In this situation, the GST is payable by the recipient. The compulsory reverse charge is intended to overcome situations where the non-resident is not subject to GST and the supply is not fully creditable to the recipient.

3.2.42 It is not necessary for the compulsory reverse charge provision to apply to the supply of goods into Australia if the recipient makes the taxable importation as the recipient also should *not* be liable for GST under the compulsory reverse charge provision.

3.2.43 The expansion to the compulsory reverse charge rules for goods delivered or made available in Australia will apply only to supplies that are no longer connected with Australia (under recommendation 2). The expansion to the compulsory reverse charge rules is necessary to ensure that the changes to the connected with Australia rules for goods will be revenue neutral.

3.2.44 The expanded compulsory reverse charge rules for goods will apply if:

- the goods are supplied to a registered business in Australia;
- the supply is not connected with Australia;
- the taxable importation is made by the non-resident supplier or the goods were sourced in Australia by the non-resident; and
- the recipient business in Australia does not acquire the supply for a fully creditable purpose.

3.2.45 The Board is aware that this change will have implications for other aspects of the GST law, for example, in relation to the adjustment provisions in Division 129 of the GST Act. Consequential amendments will be necessary to ensure the continued smooth operation of these and other provisions.

3.2.46 Example 6 in Chapter 5 demonstrates how this recommendation will work.

Recommendation 4: The GST law should be amended to expand the existing compulsory reverse charge provisions to include goods

The existing compulsory reverse charge provision (Division 84) should be broadened to complement changes to the connected with Australia rules.

CHAPTER 3.3: THE SCOPE OF THE GST-FREE RULES

3.3.1 A supply other than goods or real property that is made to a non-resident who is not in Australia when the thing supplied is done (for example, when the service is performed) generally is GST-free. However, those supplies are not GST-free if the supply while 'made' to a non-resident is 'provided' to another entity in Australia.

3.3.2 The law does not distinguish between the provision of a supply to an Australian registered business and to a private consumer. However, where the supply that is 'made' to the non-resident is 'provided' to a registered business in Australia that can fully recover the GST, no net GST revenue is collected.

3.3.3 A supply that is 'made' to a non-resident but 'provided' to another entity in Australia is not a GST-free supply. This places a requirement on the non-resident to register for GST in order to recover the GST on the transaction. If the non-resident chooses not to register, the GST may be embedded in the price of the non-resident's transactions.

Views in submissions

3.3.4 Submissions broadly supported expanding the GST-free provisions by making supplies of services and intangibles by residents to non-resident businesses GST-free if they are 'provided' to a business that has a presence in Australia. The supply would not be GST-free where the supply is made to an unregistered entity in Australia including a private consumer.

3.3.5 While a majority of the submissions supported the proposed option to extend the GST-free treatment, a number of submissions outlined several circumstances in which it may be difficult to identify whether the supply is made to a registered business in Australia or to an unregistered entity. However, it was noted by the Australian Financial Markets Association that for most transactions in the financial services industry it should be relatively straightforward to determine whether the ultimate beneficiary of the service is a registered business in Australia or not. Similarly, PricewaterhouseCoopers noted that while it may raise some evidentiary issues for some suppliers, in many instances, it is self evident whether an entity that is provided services in Australia is registered for GST purposes.

3.3.6 In response to the Board's question in the discussion paper about expanding the GST-free rules to supplies provided to employees or office holders of a business that has a presence in Australia or non-resident business, the Taxation Institute of Australia suggests that:

The non-resident provisions (e.g. s.9-25 and s. 38-190) should be expanded generally to make it clear that where a service and or rights are provided to an employee or office holder (whilst acting as an employee or office holder), the service / rights are taken to be provided to the employer not the employee. This would remove the significant uncertainty which presently applies when identifying who the recipient of the service is.

Board's consideration

3.3.7 The Board is of the view that if supplies by businesses in Australia made to non-residents but provided to other registered entities are not made GST-free, non-residents will continue to be drawn into Australia's GST system. Also, to the extent that non-residents fail to register for GST this will result in embedded GST and flow through in higher prices making Australia a less competitive place to do business.

3.3.8 In addition to limiting the connected with Australia rules, the Board supports extending the GST-free rules to a supply of services or intangibles made by an Australian registered business to a non-resident who is not in Australia:

- if that supply is provided to another entity in Australia; and
- that other entity is registered for GST purposes.

3.3.9 The benefits of this approach include:

- fewer non-residents needing to register solely to claim a GST refund;
- combined with the Board's recommended changes to the connected with Australia rules and the broader application of the reverse charge rules, this will reduce the number of non-residents in the GST system;
- a reduction in the incidence of embedded tax for those non-residents who choose not to register for GST (as outlined in example 6 in the Board's discussion paper); and
- the change will be revenue neutral.

3.3.10 The approach in the Board's discussion paper did not cover all situations that could be GST-free, such as supplies of services made to non-residents that are provided to:

- an employee or office holder of a registered business in Australia; and

- an employee or office holder of an unregistered non-resident business.

3.3.11 The Board is of the view that the application of the GST-free rules be extended to supplies provided to an employee or office holder of a registered business in Australia or an unregistered non-resident business while acting in their capacity as an employee or office holder.

3.3.12 In implementing this recommendation, the Board considers that requiring the supplier to treat these situations as being GST-free could impose significant compliance costs on the supplier to determine whether they are an employee or office holder. Therefore, the Board suggests that, if determining the identity of the acquirer is onerous, the default should be to treat the supply as taxable rather than require the supplier to establish if the supply is GST-free or not. This approach would place the onus on the non-resident to provide the level of information required for the supply to be treated as GST-free. If the supply is taxable, the non-resident could obtain a refund of GST through the existing GST registration procedures.

3.3.13 Example 1 and 2 in Chapter 5 demonstrates how this recommendation will work.

Recommendation 5: The GST law should be amended to allow supplies made to a non-resident but provided to a registered business in Australia or employee or office holder to be GST-free

A supply of services or intangibles that is made to a non-resident should be GST-free in circumstances where the supply is provided to:

- a registered business in Australia;
- an employee or office holder of a registered business in Australia who is acting in that capacity; or
- an employee or office holder of an unregistered non-resident business who is acting in that capacity and the acquisition by that non-resident is for a fully creditable purpose.

WARRANTY SERVICES

3.3.14 The Board recognises that non-resident warrantors are drawn into Australia's GST system to recover GST on the cost of warranted repairs. It is the view of the Board that this is inappropriate if goods are sold inclusive of the warranty as the cost of the warranted repairs already has been subject to GST at the time the goods were purchased originally.

Views in submissions

3.3.15 Hawker Pacific suggested that the connected with Australia provisions be limited so that they do not include repairs carried out by businesses in Australia if the repair is being compensated by the warranty provisions of a non-resident manufacturer.

Board's consideration

3.3.16 Instead of limiting the connected with Australia provisions, the Board recommends that the supply of warranty services made to an unregistered non-resident warrantor, in relation to goods that were subject to GST on importation, or as a taxable supply, and were covered by a warranty agreement, be GST-free. The consideration paid by the warrantor (including any amount attributable to the full or partial replacement of parts) is regarded as relating to the supply of such warranty services.

3.3.17 The Board considers that warranty services provided to an unregistered non-resident warrantor in relation to GST-free supplies, such as medical equipment, also should be GST-free. To reduce complexity, the Board also considers that the proposed GST-free treatment of warranty services be extended to the importation of non-taxable goods, such as goods below the low value importation threshold.

3.3.18 The Board considers that a change to the connection rules for warranty supplies within Australia will raise the risk that supplies to private consumers are not taxed appropriately and that for this reason a more targeted expansion of the GST-free rules is appropriate.

3.3.19 This recommendation will remove some non-residents from the GST system, will reduce administrative costs and will be revenue neutral.

3.3.20 Example 3 in Chapter 5 demonstrates how this recommendation will work.

Recommendation 6: The GST law should be amended to allow supplies of warranty services made to a non-resident but provided to an Australian warranty holder to be GST-free

The Board recommends that the supply of warranty services (including replacement parts) to an unregistered non-resident warrantor be GST-free if the goods were:

- supplied under a warranty agreement; and
 - the goods were subject to GST either as a taxable supply or a taxable importation; or
 - the goods were GST-free or not subject to GST (for example, low value importations).

CHAPTER 3.4: NON-RESIDENT AGENCY PROVISIONS

3.4.1 The Board's discussion paper canvassed a range of options for permitting non-residents to shift their GST obligations to an Australian entity. These included:

- transferring a non-resident's GST liability to an Australian subsidiary;
- expanding the current non-resident agency provisions to entities that may fall short of being common law agents; and
- allowing a non-resident without a business presence in Australia to have a tax representative in Australia.

3.4.2 If a resident is an agent for a non-resident principal who is registered or required to be registered, and taxable supplies or taxable importations or creditable acquisitions are made by the principal through the agent, the GST payable on the supplies or importations is payable by the agent and not by the principal and the input tax credits are allowed to the agent and not to the principal.

3.4.3 The existing non-resident agency provisions are compulsory and only apply in quite narrow circumstances.

3.4.4 Agent is not a defined term under the GST law and accordingly, common law concepts of the agency relationship are relevant. Under the common law, an agent is a person who is authorised, either expressly or impliedly, by the principal to act for the principal, so as to create or affect legal relations between the principal and third parties.

3.4.5 The provisions apply to common law agents if a non-resident makes supplies, acquisitions or importations through a resident agent and that agent has the authority

to create relationships which legally bind the non-resident with third parties. The provisions do not apply to agents that are not common law agents such as commission agents.

3.4.6 The common law provides that the principal entity is bound by the acts of an agent as a result of the authority given to the agent. The principal will be liable for acts of the agent within the scope of the authority that the principal gives to the agent by virtue of his or her conduct and actions. When an agent uses his or her authority to act for a principal, then any act done on behalf of that principal is an act of the principal. Also, a principal is not bound by acts that are not within the expressed, implied or ostensible authority conferred on the agent. However, the principal may ratify or confirm an unauthorised dealing.¹⁵

3.4.7 If the agent has acted without actual authority, but the principal nevertheless is bound because the agent had apparent authority, the agent is liable to indemnify the principal for any resulting loss or damage.

3.4.8 If the agent has acted within the scope of the actual authority given, the principal must indemnify the agent for payments made during the course of the relationship whether the payment was authorised expressly or merely necessary in promoting the principal's business.

3.4.9 Where there is a common law agency relationship, the principal must make a full disclosure of all information relevant to the transactions that the agent is authorised to negotiate and pay the agent either a prearranged commission, or a reasonable fee established after the fact.

3.4.10 Non-residents generally do not want to have a resident agent in the context of the current non-resident agency provisions for fear of being seen as having a permanent establishment for income tax purposes. However, the structure of the agency provisions in transferring the GST obligations of a non-resident to a taxable presence in Australia is appealing to non-residents both in terms of reduced compliance costs and the fact that it can be more efficient for tax collection as there is a responsible entity within Australia that the local tax authority can deal with.

Views in submissions

3.4.11 Submissions did not support transferring GST liability to an Australian subsidiary. However, the majority supported expanding the non-resident agency provisions and allowing non-residents to appoint a tax representative. There was support for these options to be voluntary rather than compulsory.

15 GSTR 2000/37 - Goods and services tax: agency relationships and the application of the law

3.4.12 The Taxation Institute of Australia is of the view that:

In its current form Division 57 imposes too much liability on the resident agent, without providing the resident agent with any and/or sufficient safeguards against the non-resident.

The provisions, do not, of themselves, create an entitlement to seek any indemnity for any resulting GST liability from the non-resident.

Division 57 should be amended to only impose a direct liability upon a resident agent where the resident agent agrees to act as a resident agent. Further, Div 57 should be amended to give the resident a statutory right of indemnity against the non-resident for any GST amount paid on behalf of the non-resident.

3.4.13 The Corporate Tax Association noted that joint and several liability for the resident agent, as opposed to the current primary liability for the resident and relief from the liability for the non-resident, would be more appropriate.

3.4.14 KPMG support extending the definition of a resident agent to enable sub-contractors, commission agents and other representatives to be responsible voluntarily for the non-resident's GST obligations (including supplies and importations).

3.4.15 The Corporate Tax Association supports the extension of the current resident agent rules in Division 57 of the GST Act to other business relationships, provided that the resident entity has a sufficiently proximate nexus to the transaction and that it is voluntary.

3.4.16 The Taxation Institute of Australia consider that any expansion to Division 57 should be made optional.

3.4.17 The Australian Financial Markets Association believe that the concept of suing commission agents as a taxing entity generally is unworkable for most multinational corporations with businesses located all over the world.

3.4.18 The Institute of Chartered Accountants in Australia supports the expansion or shift in emphasis of the non-resident agency provisions so that non-residents who are not carrying on an enterprise in Australia can be allowed, or possibly required, to appoint a fiscal representative.

Division 57 should not apply to non-residents that have appointed a representative, nor where non-residents are carrying on an enterprise in Australia but the particular supplies are not made through that enterprise.

Board's consideration

3.4.19 Consistent with recommendation 27 of the Board's *Review of the legal framework for the administration of the GST*, the Board is of the view that the GST agency provisions could be better utilised to reduce the number of non-residents that are drawn into the GST system.

3.4.20 The Board does not support the option to allow a non-resident to appoint a tax representative or the option to transfer a non-resident's liability to a resident subsidiary. While these options may provide greater flexibility for non-residents and remove some from the GST system they also raise integrity concerns. For example, a tax representative may not be involved directly in the non-resident's transactions so may be unaware of all of the taxable supplies that it should be accounting for. The Board expects that addressing the integrity concerns would introduce some legislative complexity and this may result in a low take-up. In addition, the Board's recommendation to streamline the registration procedures for non-resident *GST only* registration¹⁶ will allow greater access to GST refunds (recommendation 10).

3.4.21 The Board is of the view that any expansion to the non-resident agency provisions should be restricted to resident commission agents who act in a similar way to common law agents. The commission agent would need to be involved in both the supplies and acquisitions of the non-resident and therefore would not raise the integrity concerns of, for example, an unrelated entity that is appointed only to claim GST refunds for the non-resident.

3.4.22 A commission agent is an entity that acts on behalf of a non-resident that does not have a business presence in Australia. A commission agent is similar to a common law agent but does not have the ability to conclude contracts for the non-resident. The Board recommends that to access the agency provision a commission agent should hold or have the control of, be in receipt of or be able to dispose of, any money belonging to that non-resident.

3.4.23 This recommendation would allow a resident commission agent that does things on behalf of the non-resident to be responsible for the non-resident's GST obligations in relation to supplies, acquisitions and importations made on the non-resident's behalf.

3.4.24 The non-resident and the resident commission agent would both have to agree for the provision to apply and the appointed agent should be given similar protection for GST purposes that a common law agent has under agency law. That is, a commission agent should be protected from exposure to a liability under Division 57 if the agent acts within its agency powers. The application of the expanded non-resident

16 GST only registration refers to situations where a non-resident registers for GST and is not entitled to an ABN.

agency provisions would continue to treat any GST liabilities or entitlements of the non-resident as those of the resident agent.

3.4.25 This recommendation will reduce the number of non-residents that need to account for GST and will allow the ATO to gain compliance from an entity that is within Australia's jurisdiction thus reducing administrative costs and will be revenue neutral.

3.4.26 In combination with the Board's recommendation to remove the registration requirements for non-residents that only make supplies through a resident agent (recommendation 8), this recommendation also will remove non-residents from Australia's GST system.

3.4.27 Example 7 in Chapter 5 demonstrates how this recommendation will work.

Recommendation 7: The GST law should be amended to expand the non-resident agency provisions so that they apply more broadly than to common law agency relationships

The non-resident agency provisions should be expanded to allow a non-resident without a business presence in Australia to appoint a resident commission agent. The non-resident and the resident commission agent would both have to agree for the agency provisions to apply.

CHAPTER 3.5: REGISTRATION REQUIREMENTS FOR NON-RESIDENTS

Registration requirement under the agency provisions

3.5.1 Under the basic rules for GST, a supplier is liable for the GST on taxable supplies it makes and an entity making a taxable importation is liable for the GST on the importation.

3.5.2 Non-residents that meet the registration threshold are required to be registered even if they are acting through a resident agent under Division 57. The resident agent also needs to register if they are acting for a non-resident that is registered or required to be registered for GST in Australia. An agent will need to make reasonable inquiries to establish whether the non-resident principal is registered or required to be registered for GST.

Views in submissions

3.5.3 Several submissions, including the Corporate Tax Association submission, supported the option expressly to confirm that a non-resident is not obliged to register for GST by virtue of the fact that it makes supplies through a resident agent.

3.5.4 The Taxation Institute of Australia's preferred option is to deem supplies made by a non-resident principal to a third party through a resident agent to be a supply made by the agent to the third party and not by the principal.

Board's consideration

3.5.5 In its *Review of the legal framework of the administration of the GST*, the Board considered that non-residents who are not accountable for their taxable supplies, acquisitions or importations because of the current agency provisions should no longer have to register for GST.

3.5.6 However, the Board acknowledged that the non-resident would still need to be regarded as being registered or required to be registered for all purposes of the GST Act, if it has an agent who is responsible for its GST obligations.

3.5.7 The Board recommends that a non-resident need not register if the only supplies and acquisitions the non-resident makes are made through a resident agent under Division 57 (including commission agents under recommendation 7). While they should not need to register, a non-resident's non-registration should not affect whether their supplies are taxable or acquisitions are creditable. For instance, creditable acquisitions can be made by resident agents acting on behalf of non-residents without the need for the non-resident to register for GST. This would remove the compliance

cost of registration, without affecting whether their supplies and acquisitions are within the GST system.

3.5.8 For non-residents making taxable supplies other than through a resident agent or appointed resident commission agent, the requirement for them to register would remain.

3.5.9 The Board is of the view that this change to the registration requirements for non-residents, together with the expansion of the GST agency provisions (recommendation 7), will reduce the number of non-residents that need to account for GST while maintaining the GST tax base. It also will allow the ATO to gain compliance from an entity that is within Australia's jurisdiction thus reducing administrative costs and will be revenue neutral.

3.5.10 Example 7 in Chapter 5 demonstrates how this recommendation will work.

Recommendation 8: The GST law should be amended to remove the requirement for non-resident registration under the agency provisions

Amend the GST law to remove the requirement for non-residents to register for GST if the only taxable supplies by the non-resident are made through one or more resident agents.

NON-RESIDENTS MAKING GST-FREE SUPPLIES

3.5.11 GST-free supplies are included when determining whether or not an entity is required to register for GST. Accordingly, if a non-resident only makes GST-free supplies they are required to register for GST when they make supplies connected with Australia greater than \$75,000 per annum (\$150,000 for a non-profit entity).

Views in submissions

3.5.12 The Corporate Tax Association argued that a non-resident making only GST-free supplies should not, as an administrative matter, be required to register for GST.

3.5.13 The Australian Financial Markets Association's submission provided further support to the exclusion from the registration requirement by suggesting that non-resident entities that make GST-free supplies will register voluntarily if they incur significant GST on inputs.

Board's consideration

3.5.14 The Board is of the view that GST-free supplies should be excluded from determining if a non-resident is required to register for GST if the non-resident does not have a GST liability because it only makes GST-free supplies.

3.5.15 If an entity makes other supplies in addition to GST-free supplies the question arises as to whether the GST-free supplies should be taken into account in determining whether those other supplies are taxable supplies.

3.5.16 The Board is of the view that such supplies should still count towards the non-resident's registration threshold if that non-resident makes other supplies that are not GST-free. To not do so potentially would give the non-resident an advantage over resident suppliers in respect of its other supplies insofar as it would not be required to account for GST because it was able to avoid GST registration. This also will ensure that the change is revenue neutral.

Recommendation 9: The GST law should be amended to remove the requirement for non-residents to register if they only make GST-free supplies

Non-residents making only GST-free supplies should not be required to register for GST. However, to the extent that the non-resident also makes other supplies that are not GST-free, then the GST-free supplies should count towards the GST registration threshold.

STREAMLINING REGISTRATION REQUIREMENTS FOR NON-RESIDENTS

3.5.17 Under the GST law, an entity may register for GST if it is carrying on an enterprise or intends to carry on an enterprise. In order to register, non-residents must provide certain documentation as evidence that they are carrying on the enterprise for which they are seeking GST registration. They also are required to provide evidence of their identity as the non-resident entity, and of the identity of the associates, such as a director, of the non-resident entity.

3.5.18 Proof of identity checks at registration are intended to confirm the authenticity of the non-resident applicant including:

- the existence of the non-resident entity;
- that the non-resident entity is carrying on an enterprise; and
- the identity of some of the associated people behind the entity (for example, the directors).

3.5.19 The proof of identity requirements include the need for one or more directors to provide identification documents and for these to be certified appropriately and

translated. One of the certified identification documents for an overseas non-Australian director must be an overseas birth certificate or passport.

3.5.20 The requirements for non-residents to establish proof of identity broadly are equivalent to those for residents. However for a non-resident that is outside Australia certified copies of documents are accepted. All documents must be certified as true copies by an Australian embassy, high commission or consulate, or by a competent authority in the relevant country (if the country has signed the Hague Apostille Convention¹⁷) and have these documents Apostille'd. 124 countries are signatories to the Hague Apostille Convention and there are thousands of notaries that are registered.

3.5.21 A non-resident is entitled to an ABN if it carries on an enterprise in Australia or makes supplies connected with Australia. Under the Board's recommendations 1, 2 and 3, many non-resident entities no longer will be entitled to an ABN because their supplies will not be connected with Australia. However, if a non-resident carries on an enterprise anywhere in the world the non-resident will be entitled to register for GST despite not being entitled to an ABN (*GST only* registration).

3.5.22 Whilst *GST only* registration still will allow non-residents to register for GST in order to claim a GST refund or to join a GST group, it is not sufficient to allow them to issue tax invoices because tax invoices cannot be issued without ABN registration. If supplies are not taxable it would not be necessary to issue a tax invoice.

3.5.23 Entities that are eligible for an ABN apply for this at the same time as they apply for GST registration. However, non-residents who neither carry on an enterprise in Australia nor make supplies that are connected with Australia are not entitled to an ABN. Under the GST legislation, an entity may register for GST if it is carrying on an enterprise or intends to carry on an enterprise anywhere, including outside of Australia. Hence, an entity that carries on an enterprise only outside Australia may be registered even if it does not make supplies connected with Australia (*GST only* registration).

3.5.24 GST registration for a non-resident that does not have a business presence in Australia is the same as that of a non-resident that intends to set up business in Australia. A non-resident company that intends to set up business in Australia will seek an Australian Registration Business Number (ARBN) through ASIC, an ABN, GST registration and a tax file number through the ATO.

3.5.25 The existing broad GST base currently requires many non-residents that do not need an ARBN or a TFN to be part of the GST system. These non-resident businesses in many cases do not intend to have a business presence in Australia.

17 The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Apostille'd means a type of certification issued by a 'competent authority' designated by the state in which the document was issued.

Therefore, going through a process that is similar to the administrative registration process of setting up business in Australia is considered onerous. Under recommendations 1, 2 and 3 most of these non-residents no longer will be required to register for GST. However, these non-resident businesses still may choose to register for GST to recover GST on their business inputs.

3.5.26 For instance, *GST only* registration would allow non-resident businesses to recover GST they may incur on acquisitions, such as taxi fares and equipment hire, when participating in a trade show in Australia.

Views in submissions

3.5.27 The Taxation Institute of Australia supported the registration process being aligned with the risk to revenue while others expressed the view that the current procedures were impracticable and essentially unworkable.

3.5.28 According to submissions in the 2008 *Review of the Legal Framework for the Administration of the Goods and Services Tax*:

It is impractical for directors to obtain certification if there is not an embassy or consulate within accessible distance. Not all countries (for example Canada) are signatories of the Hague Apostille Convention.

Some directors are unable to hand over their passport for what may be a substantial period of time for it to be certified by the nearest certifying authority.

3.5.29 The ATO raised concerns that any changes to the proof of identity requirements for ABN registration could undermine the integrity of the Australian Business Register (ABR).

3.5.30 Essential to the integrity of the ABR, the Registrar must be satisfied as to the identity of the individuals behind a business or enterprise. In doing so the Australian community is seeking to reduce the red tape burden for business and also lower government's own costs of operating (such as through standard business reporting).

Board's view

3.5.31 Recommendation 27 of the Board's report on its *Review of the legal framework of the administration of the GST* was that the Commissioner should consider further streamlining the proof of identity and proof of enterprise requirements for non-residents in the circumstances where the risk to revenue is low.

3.5.32 The Board's preferred approach is to reduce significantly the need for non-residents to register for GST through a combination of limiting the connected with Australia rules, extending the GST-free rules and removing the technical requirement

for non-residents to register for GST where they only make supplies through resident agents or GST-free supplies.

3.5.33 However, the Board maintains the view expressed in its earlier review that the requirements for a non-resident to register are onerous and discourages registration. The Board recommends that the Commissioner reduce the proof of identity burden placed on non-resident enterprises in registering for GST in Australia, particularly in relation to what has been described as onerous certification requirements of directors' passports.

3.5.34 The Board considers that non-residents seeking *GST only* registration (that is, they are not entitled to an ABN) should only have to provide the following evidence:

- documentation to show that the entity is registered with an Australian Securities and Investment Commission (ASIC) equivalent; and
- a letter issued by the revenue authority of a comparable taxing regime that the entity exists and that it carries on an enterprise.

3.5.35 This recommendation will remove the requirement for directors to provide proof of identity documents, such as a passport.

3.5.36 The Board does not consider it appropriate to make any changes to the ABN registration requirements as this may impact on the integrity of the ABN register as a unique identifier with broader application beyond GST.

3.5.37 The Board considers that this change will be revenue neutral and may increase non-resident's voluntary compliance with GST registration rules.

3.5.38 Example 8 in Chapter 5 demonstrates how this recommendation will work.

Recommendation 10: The registration process for non-residents should be streamlined

Non-residents should be able to be registered for GST only (if they are not entitled to an ABN) by providing the following evidence:

- documentation to show that the entity is registered with an ASIC equivalent; and
- a letter issued by the revenue authority of a comparable taxing regime that the entity exists in their records and that the entity carries on an enterprise.

CHAPTER 4: OTHER ISSUES RAISED AND THE BOARD'S RECOMMENDATIONS

CHAPTER 4.1: DIRECT REFUND SCHEME

4.1.1 The Board's discussion paper noted that under the current rules, a non-resident must register for GST in order to recover any GST incurred in carrying on business in Australia. It was suggested that allowing non-residents to claim directly a GST refund without registering for GST could avoid GST becoming an embedded cost to business.

Views in submissions

4.1.2 There was broad support for the introduction of a direct refund scheme, although it was recognised in some submissions that there may be integrity issues.

4.1.3 PricewaterhouseCoopers on behalf of VATit¹⁸ submitted that:

the introduction of a direct refund mechanism, pursuant to which non-resident businesses that do not make taxable supplies in Australia (and are not registered for GST in Australia) will be entitled to a refund of Australian GST incurred in the course of their business, will enhance the international competitiveness of Australian businesses, significantly reduce compliance and administration costs and further promote the integrity of the Australian GST law.

[Also] Such a system is clearly comparable to those operating in other GST or value added tax ("VAT") systems and, if introduced, should enable Australian business to recover VAT incurred in all European countries.

4.1.4 In contrast, the Institute of Chartered Accountants in Australia recognised that:

A stand-alone direct refund scheme should not be necessary... if the imposition of GST is effectively streamlined under the options proposed, we would expect the extent to which non-resident refunds need to be given will be reduced considerably.

18 VATit is a company that specialises in reclaiming VAT on international travel and services.

Board's view

4.1.5 The Board notes that the arguments for introducing a direct refund scheme are due largely to the frequency, under the current rules, of non-residents having to register for Australia's GST system solely to claim a GST refund. As noted above, this results in no net gain to revenue, and raises the potential for embedded tax to Australian businesses if the non-resident chooses not to register.

4.1.6 Granting refunds to businesses with no "legal" presence in a country inevitably brings an element of risk for tax administrations. The absence of any jurisdictional power over that business or the lack of appropriate exchange of information procedures or assistance in recovery may leave the tax administration exposed to fraudulent claims, with no legal provision for imposing or enforcing penalties, or any avenue for the recovery of undue refund payments.

4.1.7 The Board also notes that direct refund schemes that operate in some other countries require claimants to provide original invoices and tax registration certificates to support refund claims and can impose other integrity measures such as time limits and restrictions on what can be claimed. This approach would continue to impose a compliance burden on non-residents that may lead them to not seek their refund, or if they do seek a refund, it only may be partial and so still will result in embedded tax.

4.1.8 The Board notes that Australia's current GST registration requirements for non-residents are equivalent to, or more generous than, many direct refund schemes. Unlike many jurisdictions operating a direct refund scheme, Australia's GST regime does not restrict eligibility for refunds. Experience with direct refund schemes overseas has found that, while they appear to offer easy access to refunds by non-residents with no other presence in those countries, in practice¹⁹:

- claimants experience lengthy delays in obtaining refunds, many waiting six months or more;
- a high proportion of those seeking refunds find the process difficult to contend with reflecting communication difficulties, including access to forms etc which result in them outsourcing their refund claims;
- the majority of businesses seeking refunds recover less than half of the foreign GST equivalent incurred; and
- many prefer to recover refunds through local registration despite the option of using a direct refund scheme.

19 *VAT/GST relief for foreign business: The state of play - A business and Government survey*, prepared by the committee on fiscal affairs, February 2010. This report is available at www.oecd.org/ctp/ct

4.1.9 The Board is of the view that if its other recommendations are implemented they will significantly reduce the circumstances where a non-resident will need to claim a GST refund. The cost of establishing a direct refund system would be significant in comparison to the small number of non-residents that may still have to register to claim a GST refund.

4.1.10 In addition, recommendation 10 (to streamline the *GST only* registration process for non-residents) will provide greater access to refunds through registration.

4.1.11 The Board notes the arguments that the introduction of a direct refund system in Australia may give Australian businesses access to reciprocal rights in other VAT countries, most notably, Germany. However, there are very few countries where Australian businesses cannot claim a GST refund. Most countries in the European Union offer reciprocity based on the recognition that Australia has appropriate features in its GST legislation. There are some countries (including Spain and Switzerland) that will offer reciprocity only if there is a formal bilateral agreement in place.

Recommendation 11: A direct refund system is not required at this time

While a direct refund system is not required at this time the Board believes this issue should be reviewed after the Board's other recommendations have been implemented and operational for an appropriate period of time.

CHAPTER 4.2: VALUE OF TAXABLE IMPORTATIONS

4.2.1 Generally, Australian Customs and Border Protection (Customs) calculate the amount of GST and duty payable on taxable importations based on the information provided by the importer in an import declaration.

4.2.2 The information needed by Customs to calculate the value of the taxable importation includes the transaction value of the goods being imported and also the transport and insurance costs for the importer in bringing the goods to Australia.

4.2.3 At a practical level, there can be many situations that inhibit the customs broker (on behalf of the importer) determining the amount paid or payable for transport and insurance at the time of importation. In some instances, an accurate amount may never be available.

4.2.4 Seeking and establishing the actual amount paid or payable for transport and insurance in a timely fashion can be difficult for the following reasons:

- commercial-in-confidence arrangements whereby the broker needs to obtain actual amounts from a competitor (freight-forwarders also are brokers);

- the number of suppliers in the supply chain and transport figures can be intermingled with non-transport costs such as fumigation. This can cause complexities in the information chain as some parties may not have access to the necessary information; and
- complex costing models whereby large commercial importers enter into global transport and insurance contracts that cover long periods and those costs have to be allocated to each importation and then potentially to each line item on each import declaration.

4.2.5 There are instances in which estimates of the transport and insurance costs initially are made on the import declaration in preference to seeking to establish the actual amount from the various suppliers or in allocating a cost from global contracts. This approach can avoid the extra costs associated with storing goods prior to clearance by Customs and keep trade flowing smoothly through the importation processes.

4.2.6 In determining the transport and insurance amount used to calculate the GST on a taxable importation, the GST law focuses on the actual amounts paid or payable. Unlike the calculation of the value of the goods, currently there are no other ways of calculating the transport and insurance amounts. In instances where the importer does not know the actual amount paid or payable at the time the import declaration is completed, estimates need to be made that may turn out to be incorrect. For many GST registered importers, any amendments required will not result in any net gain to revenue if the taxable importation also is a creditable importation.

4.2.7 If adjustments need to be made, they must be made one-by-one in the Integrated Cargo System. For Customs brokers, adjustments for material inaccuracies mean that the broker either must make the client pay for changes (harming their reputation) or absorb the effort of making adjustments. This is a time-consuming process and for GST registered fully creditable importers these adjustments will have no net impact on GST revenue.

4.2.8 Under the GST deferral system, GST on importation is shown as a pre-populated amount on the importer's business activity statement. The amount is pre-populated by the ATO through information received from Customs via the Integrated Cargo System. In practical terms, the GST liability on imports for a deferred taxpayer is likely to be fully offset by a creditable importation by the importer on the same BAS. Therefore, the compliance costs associated with correcting the original transport and insurance amounts used to calculate the GST on import also may result in no net increase in revenue.

4.2.9 Of around 2.7 million full import declaration entries during 2007, 96 per cent were made by GST registered businesses. Those GST registered businesses accounted for 99 per cent of the GST collected on taxable importations and 86 per cent of the GST collections are covered by the GST deferral scheme. Any adjustment made to the

original GST payable resulting from new information about the cost of transport and insurance generally will be matched by a corresponding adjustment to an input tax credit entitlement with no net gain to revenue.

Views in submissions

4.2.10 Although this issue was not raised in the discussion paper, the ATO identified this issue as an existing irritant for large importers and customs brokers. It was raised also in a submission by the Customs Brokers and Forwarders Council of Australia who noted that:

Discussions have continued [with the ATO] since 2003 to this time in trying to seek resolution to this long-standing issue. While the provisions in the GST law appear to be relatively straightforward in terms of the formula for calculating VoTI [value of taxable importation] in practical terms there are many obstacles in calculating a figure that would be exact for the purpose of establishing GST liabilities on taxable importations. . . After seven years of discussion and deliberations there exists a need for a safe harbour arrangement, relating to the determination of international transport and insurance costs in the VoTI calculation.

Board's consideration

4.2.11 The Board considers that this review provides an opportunity to address an existing irritant in relation to the application of GST to cross-border transactions and the calculation of the transport and insurance amounts included in the value of taxable importations.

4.2.12 The Commissioner of Taxation has advised that under the current law there is limited flexibility to make a determination that could definitively resolve these compliance issues. The Board considers that legislative change is required. Alternative ways to calculate the transport and insurance component of the value of the taxable importation need to be considered particularly when the actual amount is not known, and in some instances may never be known with accuracy, at the time the import declaration is completed.

4.2.13 The Board notes that under the previous Sales Tax regime specific costs associated with transport and insurance were not used in calculating the taxable value. Instead the taxable value was based on the customs value of the good, plus the customs duty payable on the goods, plus an automatic uplift of 20 per cent. Also, a Sales Tax registered importer could be eligible to quote their registration number, thereby not being subject to any Sales Tax on importation.

4.2.14 The Board considered whether providing for an annual adjustment would address the issue. However, the Board is of the view that as an annual adjustment still would require importers to determine adjustments for each individual import, this

would not address industry compliance costs concerns adequately for what generally is a revenue neutral transaction.

4.2.15 Instead the Board considers that an approach that enables calculation of the transport and insurance at a single point in time without subsequent amendments is to be preferred. This could be achieved by:

- applying an uplift percentage to the value of the imported goods; or
- using predetermined standard or agreed rates; or
- using the actual value of the transport and insurance costs if known at the time of import.

4.2.16 The uplift factor or predetermined rates ideally should be set at a level that encouraged importers to use the actual value when the information is available at the time of completing the import declaration, particularly in situations where the importation is not for a fully creditable purpose.

4.2.17 For importers that are GST registered and part of the GST deferral scheme the use of a figure that is higher than one based on actual costs for the purposes of deriving an amount of GST payable generally will not have any adverse implications as the higher GST payable will be offset immediately by an equally higher input tax credit claim. However, the Board is aware that if the uplift factor or predetermined rates were set well above the average of actual costs this may give rise to a negative cash flow impact on those importers that are not part of the GST deferral scheme.

4.2.18 GST registered importers who have chosen not to, or are not able; to take advantage of the GST deferral scheme will have to wait, possibly as long as three months, before recovering GST paid on importations which results in an adverse cash flow impact compared to those who are in the GST deferral scheme.

4.2.19 The Board considered whether the application of an uplift factor or predetermined rate above the average actual cost should be restricted to GST deferred participants only but was of the view that to distinguish between different classes of GST registered importers could impose additional compliance and administrative costs on both importers and the collection agencies involved. Also the cash flow impact may not be significant given the likelihood that importations by such importers generally would be of low value and not as frequent. Also in these circumstances the importer could continue to determine the amount of transport and insurance costs on the basis of actual costs or where this is not available readily, some reasonable estimate followed by a subsequent adjustment when data became available.

4.2.20 The Board therefore considers that an uplift factor or predetermined rates for calculating the transport and insurance component of the value of a taxable importation can be applied to all GST registered businesses.

4.2.21 However, the Board considers that this approach is not appropriate for importers that are not registered for GST, there being no offsetting input tax credit entitlement. As a result these unregistered importers would bear the cost of the uplift or predetermined rate being higher than the actual cost. For the most part these importers often are one off importers who will know the actual amount paid or payable for transport and insurance at the time of completing the import declaration. In circumstances that these importers do not know the actual amounts then the current system should prevail and amendments should be made when the details are known.

4.2.22 The Board is of the view that these options will be revenue neutral. Consideration would need to be given to other similar calculations in other areas of taxation law such as value of taxable importations for luxury car tax.

Recommendation 12: Options for calculating the transport and insurance cost to include in the value of taxable importations should be introduced

The Government should allow all GST registered importers to calculate the transport and insurance costs as the actual amount paid or payable, or alternatively, use an uplifted percentage or predetermined rates.

CHAPTER 4.3: LOW VALUE IMPORTATION THRESHOLD AND COMPETITIVE NEUTRALITY

4.3.1 While the GST Act aims to tax the consumption of goods and services, including things that are imported, there are instances where these things are not subject to GST because of practical and administrative difficulties. The Board's discussion paper noted some examples of these, namely:

- goods imported through the post that are valued at less than \$1,000 (the low value threshold); and
- the supply by an offshore supplier of intangibles, such as software and music files, and services over the internet made to a private consumer.

Views in submissions

4.3.2 The general view among retailers who made submissions is that the low value threshold has the potential to distort competitive neutrality and disadvantage businesses in Australia. There is a perception that legitimate Australian importers and distributors are subject to relatively high compliance costs compared to personal shoppers importing the same product. The high volume of international e-retailing in physical goods is also a concern to the Australian retailing industry.

4.3.3 Customs Agency Services submitted that:

By reducing the threshold back [to \$250] the Australian consumer will be looking at buying from the Australian business and less likely to import direct from overseas, which creates more business, jobs etc to the local industry.

4.3.4 In contrast, other submissions from entities involved in handling and processing low value goods expressed the view that the low value importation threshold is appropriate and that any reduction would have to be considered carefully in relation to respective increases in costs due to increased processing times (leading to lengthier storage requirements and delivery delays). A submission by PricewaterhouseCoopers on behalf of the Conference of Asia Pacific Express Carriers (Australia) stated that:

The current low value threshold is set at an appropriate level that ensures postal and non-postal items are treated the same and strikes an appropriate right balance between revenue collection and administrative efficiency.

Board's consideration

4.3.5 The Board acknowledges concerns in submissions about competitive neutrality in relation to international e-retail. However, the Board also accepts that there will be an increase in administrative costs of bringing more goods into the customs system in order to account for GST the costs of which is likely to outweigh any benefit.

4.3.6 The Board also is mindful that imposing GST on low value imports of goods could result in some Australian consumers bearing a disproportional cost. For instance, if the cost of administering a lower threshold at \$250 was passed on fully to the end consumer this could see them paying disproportionately high amounts of GST and administrative charges to have their goods released from Customs compared to the value of the goods, such as if the value of the imported goods themselves was only \$251. This would be of particular concern if the goods were unsolicited such as a gift from a relative overseas.

4.3.7 It is important also to note, in comparing local and overseas goods, other factors that impact on purchasing decisions, such as the costs of shipping and handling and some risk in terms of warranties, after sales service and the potential non-supply of goods for which payment already has been made.

4.3.8 The Board notes that the threshold of \$1,000 has not been changed since 2005 and its non-indexation implies that, in real terms, the value of goods able to be imported without GST has, and will continue, to fall over time. This will reduce over time any potential bias in favour of imported goods over local goods of the same quality and value.

4.3.9 In relation to the importation of services by consumers, the Board's view is that, based on the difficulty associated with seeking non-resident compliance with Australia's GST and the extensiveness of online retail activity, it does not seem administratively feasible to try to bring non-resident supplies of services into the GST system at this time.

4.3.10 Some submissions suggested that a provision similar to that in Division 85 of the GST Act for telecommunication supplies²⁰ that could be activated when it is administratively feasible to do so. However, the Board is reluctant to recommend a change that presently cannot be enforced.

4.3.11 In light of all of these factors the Board is of the view that the current low value importation threshold is appropriate.

Recommendation 13: The low value importation threshold of \$1,000 is appropriate

The Board is of the view that it is not administratively feasible to try to bring non-resident supplies of low value goods and services into the GST system at this time.

CHAPTER 4.4: ENTITLEMENT TO GST CREDIT ON TAXABLE IMPORTATIONS

4.4.1 There are instances in relation to the cross-border supply of goods that no entity is entitled to claim back the GST on the importation. This can occur if the entity that enters the goods for home consumption is not the importer of the goods.

4.4.2 An entity makes a taxable importation if the goods are imported and that same entity enters the goods for home consumption. An entity makes a creditable importation, if amongst other things, the entity imports the goods.

4.4.3 The ATO considers²¹ that the entity that imports the goods is the entity that:

- causes the goods to be brought to Australia for application to its own purposes after importation, whether by way of supply, use, or otherwise; and

20 Telecommunication supplies are connected with Australia if the recipient will 'effectively use or enjoy' them in Australia. The Commissioner has a discretion not to apply the rule if the supply is made through an offshore enterprise and enforcement would not be administratively feasible. Collection is not administratively feasible if the recipient is not registered for GST, or if the recipient itself makes telecommunication supplies to the public for a fee.

21 GSTR 2003/15: Goods and services tax: importation of goods into Australia

- completes the customs formalities for the entry of the goods.

4.4.4 In respect of a single importation, more than one entity may cause goods to be brought to Australia for application to their purposes. One entity may send the goods to Australia to supply them, and another entity may request or arrange for the goods to be sent so that it can acquire them to use or resell. Where this is the case, the importing entity is the one that finalises the importation process by completing the customs formalities.

4.4.5 If a third party enters the goods for home consumption as 'owner', and that party was not the importer, nor acting as a resident agent for a non-resident importer, then no entity is entitled to a creditable importation.

Views in submissions

4.4.6 The Institute of Chartered Accountants in Australia provided the following example.

One problem area is the supply of goods on DDP ("Delivered Duty Paid") Incoterms. In this case, the ATO regards the non-resident supplier as the 'importer'. This is because under DDP terms, the supplier agrees to take responsibility for the Customs clearance procedures. This means that goods supplied on DDP terms will be connected with Australia, requiring registration if the value of such supplies exceeds \$75,000 per year.

The mismatch arises because if another entity in Australia enters the goods as the "owner", they are the one liable to pay the GST to Australian Customs, but the non-resident is the importer, which is the entity who would be entitled to claim the credit. However, to have a "creditable importation", you must satisfy three things – be the importer, the one liable for the GST levied on importation, and be registered at the time of importation, so what happens is that no entity is entitled to claim the credit.

4.4.7 The Institute suggests that this problem could be overcome by reviewing the definition of creditable importation and extending it to ensure that the fully creditable Australian business customer is able to claim the input tax credit if they enter the goods for home consumption.

Board's consideration

4.4.8 The Board considers that this outcome, while inappropriate, is likely to be rare. An alternative to complex legislative amendment is for the Commissioner to assist in avoiding this outcome through improved taxpayer awareness.²² Amendments to the

²² Entitlement to creditable importations is discussed, with examples, in GSTR 2003/15. However, further ATO products such as fact sheets may be of greater assistance to taxpayers.

law required to address this specific issue would be very complex and so may outweigh the benefits for the small number of taxpayers inadvertently affected.

Recommendation 14: The Commissioner should improve taxpayer awareness and education to address the circumstances that no entity is entitled to claim back the GST on the importation of goods

The Commissioner should ensure that this issue is avoided through improved taxpayer awareness and education that specifically address circumstances that no entity is entitled to claim back the GST on the importation and provide guidance as to how this can be avoided.

CHAPTER 5: EXPLANATION OF HOW THE BOARD'S RECOMMENDATIONS WILL WORK

CHAPTER 5.1: INTRODUCTION

5.1.1 The Board is of the view that its recommendations will simplify the design of the GST cross-border rules and will improve the balance between:

- ensuring Australia's GST system does not unnecessarily draw in non-residents; and
- ensuring the existing GST tax base is maintained.

5.1.2 In addition, several of the changes are expected to make the rules more efficient and effective in the collection of the GST and reduce the costs associated with the administration of the GST.

5.1.3 This Chapter provides an explanation of how the Board's recommendations will work together to achieve these outcomes.

CHAPTER 5.2: SERVICES AND INTANGIBLES

5.2.1 The Board's recommendation to limit the connected with Australia rules for services and intangibles will ensure that non-resident supplies to a registered business in Australia are no longer taxable supplies for non-resident suppliers (because they are not connected with Australia) but instead will be a taxable supply for the recipient under the compulsory reverse charge rules.

5.2.2 If the Board's recommendations are implemented a non-resident that does not have a business presence in Australia will need to determine if their supply is to a business that does have a presence in Australia and is registered for GST. If it is, the supply will not be connected with Australia.

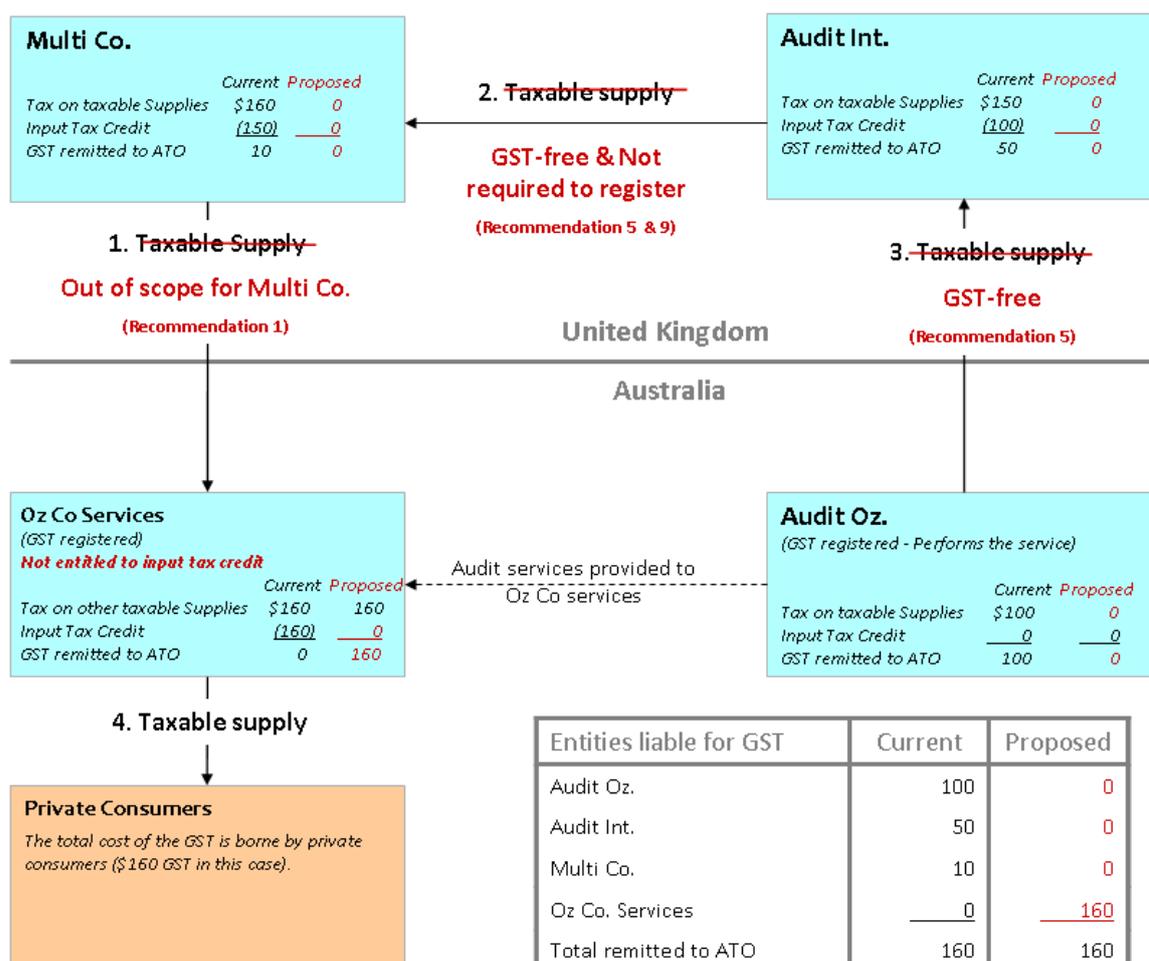
5.2.3 If the supply by the non-resident is not fully creditable to the registered business in Australia then the existing compulsory reverse charge provisions will apply and the appropriate amount of GST will be collected by the business in Australia through the reverse charge mechanism.

5.2.4 The Board also recommends that a supply of services or intangibles that is made to a non-resident should be GST-free in circumstances where the supply is provided to a registered business in Australia (example 1) or employee or office holder (example 2).

5.2.5 Example 1 demonstrates how the Board’s recommendations will affect a cross-border business to business transaction using the example of a non-resident that supplies audit services in Australia.

5.2.6 In example 1, Oz Co Services seeks audit services through a related non-resident entity, Multi Co. Multi Co engages Audit International (non-resident) to supply it with worldwide audit services. As part of that arrangement, Audit International is required to provide an audit of Oz Co Services (a business operating in Australia) and in doing so Audit International engages Audit Oz (a business operating in Australia) to perform the audit on Oz Co Services.

EXAMPLE 1: Limiting the connected with Australia rules for services and intangibles



5.2.7 In this example, under the current law, Australia's GST system relies on the non-resident entities registering for GST and collecting and recovering the appropriate amount of GST for a given transaction. The supplies by Multi Co and Audit International are connected with Australia and are taxable supplies (assuming they are registered or required to be registered).

5.2.8 If the Board's recommendations are implemented:

- Multi Co's supply to Oz Co Services no longer will be connected with Australia (recommendation 1) such that Multi Co no longer is required to register for GST;
- Audit International's supply to Multi Co will be GST-free (recommendation 5) as the audit services whilst being made to Multi Co are provided to Oz Co Services. The provision of the audit services are carried out by Audit Oz under an agreement with Audit International. Audit International will not be required to register if it only makes GST-free supplies (recommendation 9) or other supplies that are not connected with Australia;
- Audit Oz's supply to Audit International (provided to Oz Co Services) will be GST-free (recommendation 5) such that Audit International need no longer register to recover the GST previously charged by Audit Oz; and
- Oz Co Services no longer will be entitled to an input tax credit as their acquisition does not include GST (effect of recommendation 1);
 - If Oz Co Services is not fully creditable the existing compulsory reverse charge provisions will apply to the acquisition from Multi Co.

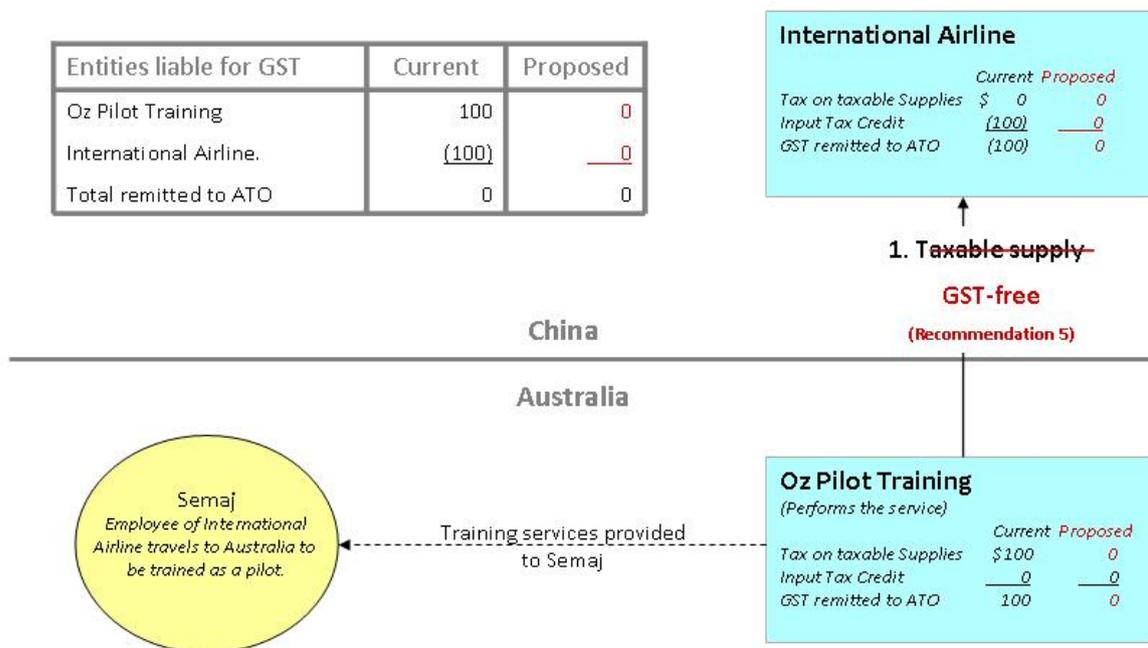
5.2.9 The combination of recommendations 1, 5 and 9 will reduce the number of non-residents required to register for GST with no net impact on GST revenue as the relevant GST instead will be collected from a business that has a presence in Australia.

SUPPLY OF TRAINING SERVICES MADE TO A NON-RESIDENT BUT PROVIDED TO AN EMPLOYEE OF THAT NON-RESIDENT ENTITY IN AUSTRALIA

5.2.10 Under the current GST law supplies of training services made to a non-resident but provided to an entity in Australia is a taxable supply as the supply is connected with Australia and is not GST-free.

5.2.11 In example 2, International Airline, a non-resident business, sends its employee, Semaj, to Australia to complete a pilot training course.

EXAMPLE 2: Supply of training made to a non-resident business but provided to its employee in Australia.



5.2.12 In this example, under the current law, the supply of the pilot training services is a taxable supply as it is provided to another entity in Australia (Semaj the employee), even though the supply is made to a non-resident. International Airline would be entitled to register for GST to recover the GST incurred in training its employee.

5.2.13 If the Board’s recommendation to make GST-free certain supplies of services to a non-resident is implemented:

- the training services provided to the employee of the non-resident company will be GST-free such that the non-resident company need no longer register to recover the GST previously charged by the training provider (recommendation 5).

5.2.14 Recommendation 5 will also reduce administrative costs without any impact on net GST revenue.

SUPPLIES OF WARRANTY SERVICES MADE TO A NON-RESIDENT

5.2.15 Under the current GST law, supplies of warranty services made to a non-resident but provided to an Australian warranty holder are taxable supplies.

EXAMPLE 3: Supplies of warranty services made to a non-resident

An Australian retailer makes a taxable supply of a sound system to an Australian resident individual. The price of the sound system is inclusive of a warranty issued by the non-resident manufacturer of the sound system. During the warranty period the owner of the sound system has repairs done by an approved Australian repairer. The Australian repairer sends an invoice to the non-resident warrantor inclusive of GST. The non-resident generally is entitled to a GST refund however they are required to register and lodge a business activity statement to claim the refund.

5.2.16 If the Board's recommendation to make GST-free certain supplies of warranty services made to a non-resident but provided to an entity in Australia is implemented:

- the supply of warranty services on the sound system will be GST-free as GST was paid, inclusive of the warranty when the sound system was purchased (recommendation 6); and
- the Australian repairer will not include GST on the supply to the non-resident.

5.2.17 Recommendation 6 will also reduce administrative costs without any impact on net GST revenue.

CHAPTER 5.3: GOODS

5.3.1 The Board's recommendation to limit the connected with Australia rules in relation to goods will ensure that fewer non-residents are drawn into Australia's GST system when they are making a supply of goods to a registered business in Australia. This will include supplies by a non-resident to an Australian registered business if:

- the non-resident installs or assembles the goods in Australia (example 4);
- the non-resident imports the goods into Australia; or
- the non-resident supplies the goods that are already in Australia.

5.3.2 The first two changes above will remove inefficiencies associated with imposing GST twice on the same transaction (as a taxable supply and a taxable importation) and all of the changes will remove the administrative difficulties of enforcing compliance on non-residents who are outside Australia's jurisdiction.

5.3.3 However, to ensure that there is no loss of revenue from this approach the existing compulsory reverse charge rules will be extended to supplies of goods. Therefore supplies of goods no longer connected with Australia may still be a taxable supply under the compulsory reverse charge provisions (recommendation 4). The

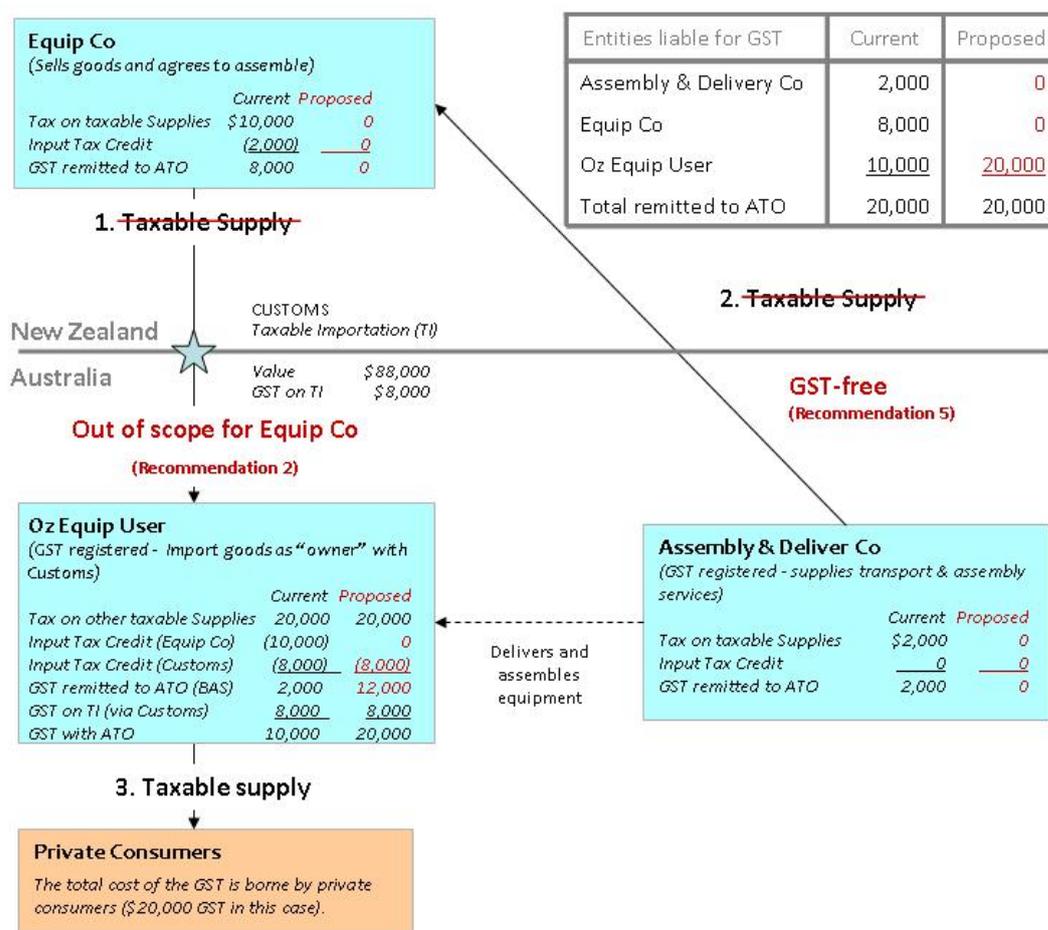
reverse charge provisions will operate for goods where the recipient is not entitled to a full input tax credit (example 6).

5.3.4 The Board also recommends that the connected with Australia rules be limited for supplies between non-residents where the goods are in Australia and leased to a registered business in Australia (example 5).

5.3.5 Example 4 illustrates how the Board’s recommendations will affect a cross-border business to business transaction using the example of a non-resident that supplies goods in Australia and the goods are assembled by a sub-contractor.

5.3.6 In example 4, Oz Equip User (an Australian resident business) acquires goods from Equip Co (a non-resident) and Oz Equip User agrees to import the goods into Australia. Equip Co agrees to install the goods in Australia. Equip Co engages an Australian sub-contractor to assemble the goods for Oz Equip User.

EXAMPLE 4: Limiting the connected with Australia rules for goods



5.3.7 In this example, under the current law, Australia's GST system relies on the non-resident entity (Equip Co) to register and to collect the appropriate amount of GST. The supply of goods by Equip Co is connected with Australia because it is assembled in Australia by the non-resident (even though the assembly is performed by the sub-contractor). The assembly is a taxable supply because it is done in Australia and provided to another entity in Australia.

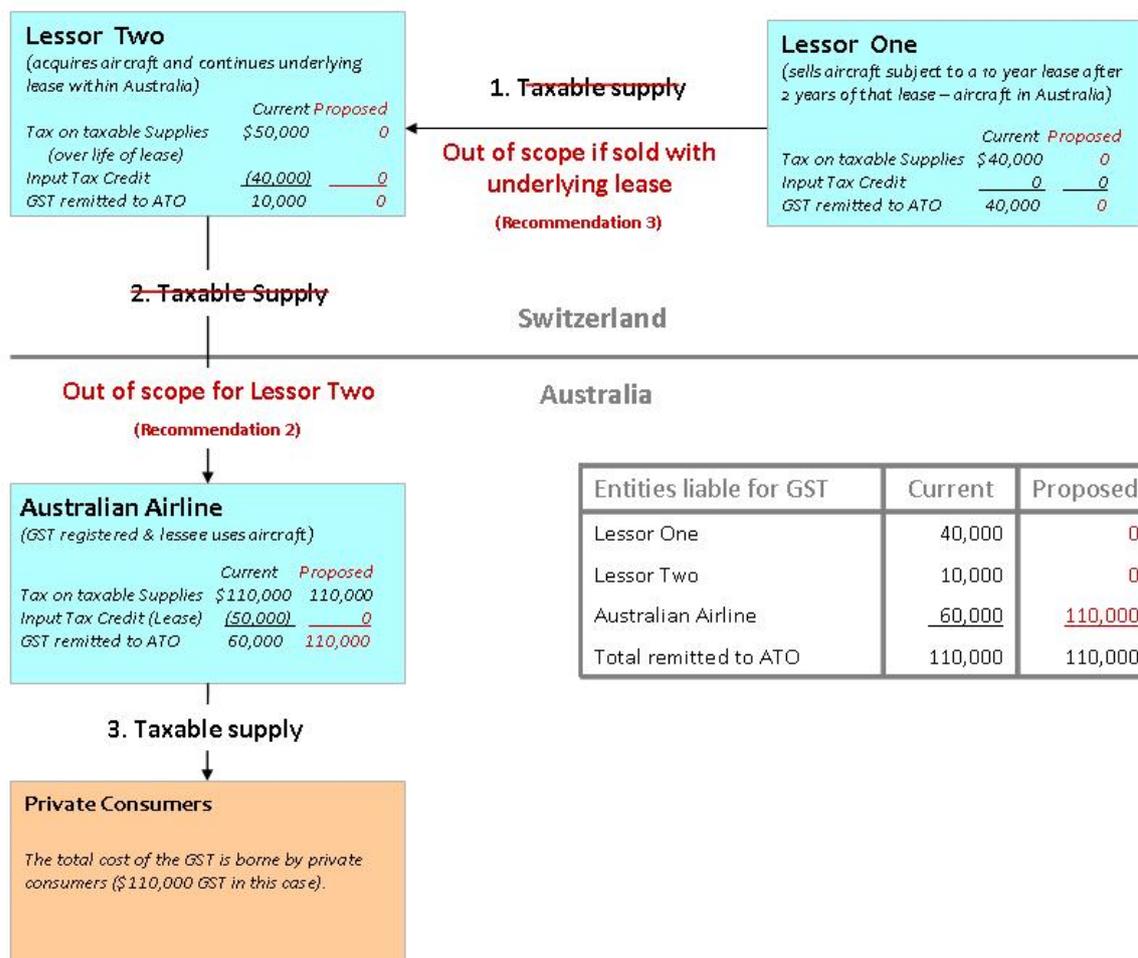
5.3.8 If the Board's recommendations are implemented:

- supplies of goods by a non-resident without a business presence in Australia no longer will be connected with Australia if the goods are assembled in Australia and the supply is to a registered business in Australia (recommendation 2); and
- supplies of assembly services that are made to a non-resident but provided to a registered business in Australia will be GST-free (recommendation 5).

5.3.9 Again the combination of recommendations 2 and 5 should remove the need for some non-residents to register for GST and will reduce administrative costs without any impact on net GST revenue.

5.3.10 Example 5 demonstrates how the Board's recommendation to limit the connected with Australia rules for certain supplies of goods will affect a business to business transaction involving the supply of goods between two non-residents (in this case from Lessor One to Lessor Two) if those goods are wholly within Australia and leased to a business that has a presence in Australia (Australian Airline).

EXAMPLE 5: Limiting the connected with Australia rules for certain supplies of goods within Australia between non-residents



5.3.11 In this example, under the current law, Australia’s GST system would draw in non-resident entities making business to business supplies even though they have no business presence in Australia and for no net gain to revenue. The supply between the Lessor One and Lessor Two are connected with Australia because the goods are in Australia.

5.3.12 If the Board’s recommendations are implemented:

- the supply between Lessor One and Lessor Two will no longer be connected to Australia if Lessor Two continues to lease the goods to an Australian registered business (recommendation 3); and
- the supply of the goods under a lease by Lessor Two would not be connected with Australia as it is a supply of goods to an Australian registered business (recommendation 2).

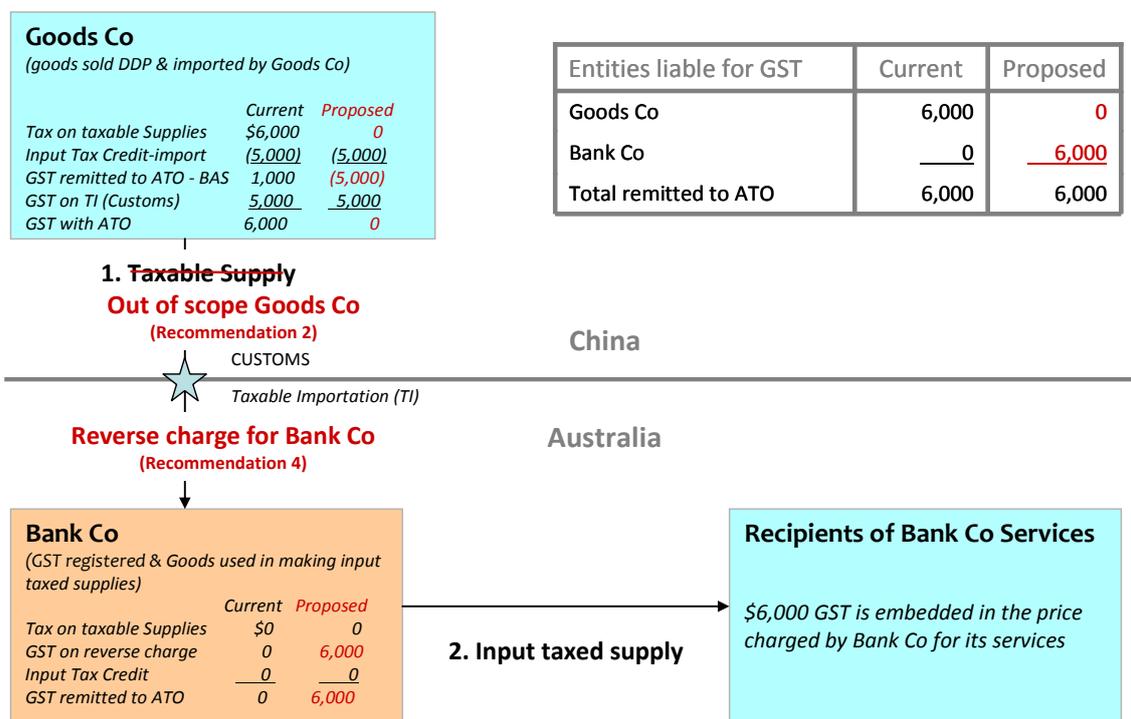
5.3.13 Recommendations 2 and 3 also will reduce the need for non-residents to register for GST without any impact on net GST revenue.

5.3.14 Example 6 demonstrates how the Board's recommendation to expand the compulsory reverse charge provisions will affect a business to business transaction involving the supply of goods by Goods Co (a non-resident) to Bank Co (a business that has a presence in Australia) if the supply is not fully creditable to the business in Australia and the goods are imported by Goods Co because the supply is made on a DDP basis.

5.3.15 The current compulsory reverse charge provision applies only to taxable supplies of services and intangibles if that supply is not fully creditable to the Australian recipient (for example, input taxed financial supplies). The current compulsory reverse charge does not apply to goods.

5.3.16 The Board's recommendation to limit the connected with Australia rules for goods potentially could lead to the non-taxation of supplies of goods if that supply is not fully creditable to the business recipient in Australia. Expansion of the compulsory reverse charge provision will ensure that the appropriate amount of GST is collected.

EXAMPLE 6: Expanding the compulsory reverse charge for goods



5.3.17 In this example, under the current law, Australia's GST system relies on the non-resident entity to collect the appropriate amount of GST. The supply by Goods Co is a taxable supply as it is connected with Australia.

5.3.18 If the Board's recommendations are implemented:

- The supply by Goods Co no longer will be connected with Australia (recommendation 2); and
- The reverse charge rules will be expanded to complement the limits to the connection rules. In this example, Bank Co will reverse charge the GST on the acquisition from Goods Co as Bank Co is not fully creditable (recommendation 4).

5.3.19 This recommendation will have no impact on net GST revenue.

CHAPTER 5.4: REGISTRATION REQUIREMENTS FOR NON-RESIDENTS

RESIDENT AGENTS ACTING FOR NON-RESIDENTS

5.4.1 Under the current GST law resident common law agents are liable for GST on supplies made by a non-resident principal. The non-resident and the resident agent are required to register for GST.

EXAMPLE 7: Supplies by a non-resident through a resident commission agent

A non-resident without a business presence in Australia makes a supply to Australia through a commission agent. The commission agent is not a common law agent. The non-resident and the commission agent cannot elect to apply the agency provisions.

A non-resident makes a supply to Australia through a common law agent. The non-resident and the Australian agent must apply the agency provisions and both are required to register for GST.

5.4.2 If the Board's recommendations are implemented:

- the commission agent and the non-resident can agree to apply the features of the agency provisions such that the commission agent will account for the GST on the transaction (recommendation 7); and
- if the agency provisions apply (either because the supply is made through a common law agent or an appointed commission agent) and all of the taxable supplies by the non-resident are made through one or more of these agents the non-resident will not be required to register for GST (recommendation 8).

5.4.3 Recommendations 7 and 8 also will reduce administrative costs without any impact on net GST revenue.

5.4.4 The Board's recommendation to exclude GST-free supplies of a non-resident from the GST registration threshold will reduce further the number of non-residents required to register for GST with no impact on net GST revenue (recommendation 9).

STREAMLINING REGISTRATION REQUIREMENTS FOR NON-RESIDENTS

5.4.5 Under the GST law, an entity may register for GST if it is carrying on an enterprise or intends to carry on an enterprise. In order to register, non-residents must provide certain documentation as evidence that they are carrying on the enterprise for which they are seeking GST registration. They are also required to provide evidence of their identity as the non-resident entity, and of the identity of the entity's associates, such as a director, of the non-resident entity.

EXAMPLE 8: GST registration

Rob is a director of ABC, a listed company based in Montreal, Canada. ABC supplies software programming services to medium size businesses and will soon be making supplies to businesses in Australia. Rob intends to send employees to Australia on a short term basis to perform the services in Australia. Rob would like to register ABC for GST in Australia to recover GST on expenses incurred by his employees in carrying out those services. ABC will not have a business presence in Australia and will only be making its supplies to GST registered businesses in Australia. ABC will not be entitled to an ABN (*GST only* registration because of recommendation 1).

To register ABC for GST in Australia under the existing ATO procedures Rob needs to provide evidence that ABC is carrying on an enterprise from Canada Revenue Agency's records for which it is seeking GST registration and evidence that ABC exists from the ASIC equivalent in Canada. As ABC is a listed company Rob also will have to provide identification documents from one director. Where original documents cannot be sighted by the ATO those documents need to be certified. Canada is not a signatory to the Hague Convention so Rob (as the director nominated by the company to provide documentation) would need to provide his original passports or birth certificate to the Australian High Commission in Ottawa, Toronto or Vancouver. Rob cannot find his birth certificate and is reluctant to send his passport. Rob is discouraged from registering ABC.

5.4.6 If the Board's recommendation to streamline the registration process for non-residents (recommendation 10) is implemented it will:

- enable Rob to register ABC for GST only by providing the following evidence:
 - documentation to show that ABC is registered with the Canadian corporate registration body (certified if originals cannot be sent to ATO); and
 - a letter issued by the Canada Revenue Agency that ABC exists in their records and that the entity carries on an enterprise.

5.4.7 This recommendation will, in this circumstance, remove the requirement for directors to provide proof of identity documents, such as a passport.

5.4.8 This recommendation also will reduce administrative costs and may encourage non-residents to comply with GST registration requirements if they are making taxable supplies or paying GST on supplies connected with Australia.

SUMMARY

5.4.9 The combined effect of the Board's recommendations will be to reduce significantly the number of non-residents that are drawn unnecessarily into Australia's GST system, through a combination of limiting the connected with Australia provisions, expanding the compulsory reverse charge provisions, extending the GST-free rules and changes to registration requirements for non-residents, while ensuring the appropriate amount of GST on private consumption is collected in an efficient and effective way.

APPENDIX A: LIST OF RECOMMENDATIONS

Recommendation 1: The GST law should be amended to limit the application of the connected with Australia provisions for the supplies by a non-resident of services and intangibles

Supplies of services and intangibles by a non-resident that are done in Australia should not be connected with Australia if:

- the supply is made to a business that has a presence in Australia that is registered for GST; and
 - the non-resident supplier has no business presence in Australia; or
 - the non-resident supplier has a business presence in Australia but does not use that business presence in making the supply.

Recommendation 2: The GST law should be amended to limit the application of the connected with Australia provisions for the supply of goods by a non-resident

Supplies of goods by a non-resident should not be connected with Australia if:

- the supply is made to a business that has a presence in Australia that is registered for GST; and
 - the non-resident supplier has no business presence in Australia; or
 - the non-resident supplier has a business presence in Australia but does not use that business presence in making the supply.

Recommendation 3: The GST law should be amended to limit the application of the connected with Australia provisions for certain supplies of goods within Australia between non-residents

Supplies of goods that are already in Australia between non-residents who carry on their enterprise outside Australia would not be connected with Australia if the non-resident recipient of the supply continues the underlying lease of those goods to a business that has a presence in Australia that is registered for GST.

Recommendation 4: The GST law should be amended to expand the existing compulsory reverse charge provisions to include goods

The existing compulsory reverse charge provision (Division 84) should be broadened to complement changes to the connected with Australia rules.

Recommendation 5: The GST law should be amended to allow supplies made to a non-resident but provided to a registered business in Australia or employee or office holder to be GST-free

A supply of services or intangibles that is made to a non-resident should be GST-free in circumstances where the supply is provided to:

- a registered business in Australia;
- an employee or office holder of a registered business in Australia who is acting in that capacity; or
- an employee or office holder of an unregistered non-resident business who is acting in that capacity and the acquisition by that non-resident is for a fully creditable purpose.

Recommendation 6: The GST law should be amended to allow supplies of warranty services made to a non-resident but provided to an Australian warranty holder to be GST-free

The Board recommends that the supply of warranty services (including replacement parts) to an unregistered non-resident warrantor be GST-free if the goods were:

- supplied under a warranty agreement; and
 - the goods were subject to GST either as a taxable supply or a taxable importation; or
 - the goods were GST-free or not subject to GST (for example, low value importations).

Recommendation 7: The GST law should be amended to expand the non-resident agency provisions so that they apply more broadly than to common law agency relationships

The non-resident agency provisions should be expanded to allow a non-resident without a business presence in Australia to appoint a resident commission agent. The non-resident and the resident commission agent would both have to agree for the agency provisions to apply.

Recommendation 8: The GST law should be amended to remove the requirement for non-resident registration under the agency provisions

Amend the GST law to remove the requirement for non-residents to register for GST if the only taxable supplies by the non-resident are made through one or more resident agents.

Recommendation 9: The GST law should be amended to remove the requirement for non-residents to register if they only make GST-free supplies

Non-residents making only GST-free supplies should not be required to register for GST. However, to the extent that the non-resident also makes other supplies that are not GST-free, then the GST-free supplies should count towards the GST registration threshold.

Recommendation 10: The registration process for non-residents should be streamlined

Non-residents should be able to be registered for GST only (if they are not entitled to an ABN) by providing the following evidence:

- documentation to show that the entity is registered with an ASIC equivalent; and
- a letter issued by the revenue authority of a comparable taxing regime that the entity exists in their records and that the entity carries on an enterprise.

Recommendation 11: A direct refund system is not required at this time

While a direct refund system is not required at this time the Board believes this issue should be reviewed after the Board's other recommendations have been implemented and operational for an appropriate period of time.

Recommendation 12: Options for calculating the transport and insurance cost to include in the value of taxable importations should be introduced

The Government should allow all GST registered importers to calculate the transport and insurance costs as the actual amount paid or payable, or alternatively, use an uplifted percentage or predetermined rates.

Recommendation 13: The low value importation threshold of \$1,000 is appropriate

The Board is of the view that it is not administratively feasible to try to bring non-resident supplies of low value goods and services into the GST system at this time.

Recommendation 14: The Commissioner should improve taxpayer awareness and education to address the circumstances that no entity is entitled to claim back the GST on the importation of goods

The Commissioner should ensure that this issue is avoided through improved taxpayer awareness and education that specifically address circumstances that no entity is entitled to claim back the GST on the importation and provide guidance as to how this can be avoided.

APPENDIX B: PRESS RELEASE — GOVERNMENT ANNOUNCEMENT OF REVIEW

THE HON CHRIS BOWEN MP

Assistant Treasurer and Minister for Competition Policy and Consumer Affairs

3 December 2007 - 8 June 2009 NO.042

GOVERNMENT RESPONSE TO BOARD OF TAXATION REVIEW OF GST ADMINISTRATION

Tonight I am pleased to announce the Government's response to the Board of Taxation's review of the legal framework for the administration of the GST. I thank the Board for undertaking this review and I release the Board's report tonight.

The Board has made 46 recommendations and I have agreed to implement 41 of these recommendations. Most of the recommendations with substantial changes to the GST law will apply from 1 July 2010, with recommendation 20 applying from 7.30pm (AEST) on 12 May 2009 (see Attachment A).

The key components of the package announced by the Government tonight include:

- harmonising the GST law and the income tax self assessment regime and rulings regime;
- adopting more principled and flexible GST grouping rules;
- simplifying the GST adjustment provisions; and
- reforming the GST treatment of sales of going concerns and farmland.

The Government is considering other compliance cost savings in relation to business activity statement reporting ('Simpler BAS': recommendations 1-3) and will consult with the small business community on ways to reduce BAS related compliance costs.

The Board received a number of submissions raising concerns about the complexity and uncertainty associated with the operation of the GST margin scheme and financial supplies provisions and the GST treatment of cross-border transactions. The Board was unable to canvass these matters in detail in the time available to complete the review and recommended that the Government examine these issues further.

The Government supports this approach and has established separate reviews into the operation of the existing GST law with respect to each of these matters.

Board of Taxation to review the application of the GST to cross-border transactions

I have asked the Board to undertake a review of the application of the GST to cross-border transactions and consult widely with stakeholders. The terms of reference are contained in Attachment B (Appendix E to this report).

APPENDIX C: OPTIONS FROM THE BOARD'S DISCUSSION PAPER

Option 1: Limit the application of the connected with Australia provisions

This option seeks to limit the scope of the 'connected with Australia rules' for supplies by non-residents to Australian businesses without impacting on the amount of GST that should be collected.

Option 2: Shifting the GST liability of non-residents to Australian businesses

The Discussion Paper suggests that greater efficiencies in collecting GST on cross-border transactions may be achieved within the current connected with Australia provisions by transferring a GST liability that currently is imposed on a non-resident without a business presence in Australia to an appropriate Australian business.

Option 2.1: Shifting the GST liability of non-residents to resident businesses through compulsory reverse charge

This option considers making the existing voluntary reverse charge provisions compulsory. Compulsory reverse charge rules could apply to taxable supplies made by a non-resident to a registered Australian business.

Option 2.2: Transfer GST liability to an Australian subsidiary

This option considers whether the GST obligations of a non-resident parent should be transferred to a registered Australian subsidiary that is not the recipient of the supply.

Option 2.3: Expanding the non-resident agency provisions

This option looks at whether the current Australian non-resident agency provisions could be broadened to allow an entity that acts for a non-resident but falls short of being an 'agent' under the current provisions, to apply the features of the provisions.

Option 2.4: Non-residents be allowed to have a tax representative

This option considers allowing a non-resident without a business presence in Australia to have a tax representative.

Option 3: Non-residents not required to be registered for GST could be allowed a direct refund of any GST

This option gives consideration as to whether an alternative mechanism is required to allow non-resident businesses to recover GST that they incur on their acquisitions in Australia without being required to register for GST.

Option 3.1: Supplies made to a non-resident but provided to a registered Australian business be GST-free

Under this option a supply of services or intangibles that is made to a non-resident but provided to a registered Australian business could be made GST-free if the GST can be captured by the Australian business for example by limiting the connection with Australia rules (option 1) and reverse charging (option 2.1).

Option 3.2: Supplies for consumption outside Australia

The supply of a service between two domestic registered businesses is GST-free when the service is provided to another entity outside of Australia. This option considers whether supplies made between two Australian GST registered entities could be made taxable supplies even though the supply is provided to another entity outside of Australia.

Option 3.3: Reverse charge for private consumers

This option considers whether the reverse charge rules should apply to private consumers. The Board recognised in the Discussion Paper that the application of a reverse charge to private consumers may impose significant compliance costs on private consumers and would be very difficult to administer.

Option 3.4: Changing the connection rules and GST liability transferred to an Australian subsidiary

This option would support option 2.2 (transfer GST liability to an Australian subsidiary) for supplies that currently are not taxable supplies. The connection with Australia rules would need to be broadened to capture these supplies and the GST liability transferred to an Australian subsidiary.

Option 3.5: Review the low value threshold limit of \$1,000

This option considers whether the existing low value import threshold should be reduced to allow more comprehensive taxation of private consumption in Australia. The Discussion Paper noted that, while a lower threshold would mean more business to consumer supplies are subject to GST this would need to be balanced against higher compliance costs for both Australian consumers and businesses and those administering the collection of GST.

Option 4: Non-residents making GST-free supplies

This option considers whether GST-free supplies should be excluded when determining if a non-resident is required to register.

Option 5: Non-residents using an agent

Removal of the technical requirement under the agency provisions for a non-resident to register if the only supplies and acquisitions the non-resident makes are made through the resident agent.

APPENDIX D: LIST OF PUBLIC SUBMISSIONS

Nineteen submissions were received. Below are the organisations and individuals that provided submissions and agreed to have their identities and submissions made available to the public.

Australian Booksellers Association

Australian Financial Markets Association

Australian Music Association

Australian Sporting Goods Association

Australian Toy Association

Conference of Asia Pacific Express Carriers / PricewaterhouseCoopers

Corporate Tax Association

Customs Agency Services Pty Ltd

Customs Brokers & Forwarders Council of Australia Inc.

Hawker Pacific Pty Ltd

Institute of Chartered Accountants of Australia

KPMG

PricewaterhouseCoopers

Taxation Institute of Australia

VATit / PricewaterhouseCoopers

APPENDIX E: TERMS OF REFERENCE

Terms of Reference for Consultation on Review of the application of GST to cross-border transactions

The Board of Taxation should consult with relevant stakeholders and report to the Government on improvements to the design of the GST system necessary to ensure that cross-border transactions are treated in an efficient and effective manner. A particular focus will be those design features underpinning the involvement of non-residents in the Australian GST system with a view to simplifying the design.

The review should include, but not be limited to, consideration of:

- the impact of the current cross-border provisions on the international competitiveness of Australian enterprises;
- the extent to which non-residents should be drawn into the operation of the GST;
- the role of resident agents acting for non-residents and whether there is scope to broaden it; and
- ways to simplify and reduce compliance and administrative costs associated with cross-border transactions.

The Board should have regard to the design features of the GST as a multi-stage value added tax and should also ensure that any possible changes do not undermine the integrity of the GST in aiming to tax final consumption in Australia. In considering any changes, the Board should ensure that its recommendations have regard to the likely impact on revenue.

APPENDIX F: MEMBERS, CHARTER OF THE BOARD OF TAXATION AND CONFLICT OF INTEREST DECLARATION

Members

The members of the Board of Taxation are:

Chairman

Mr Richard F E Warburton AO

Deputy Chairman

Mr Chris Jordan AO

Members

Ms Annabelle Chaplain

Mr John Emerson AM

Mr Keith James

Mr Eric Mayne

Mr Curt Rendall

Ex officio members

Mr Michael D'Ascenzo AO (Commissioner of Taxation)

Dr Ken Henry AC (Secretary to the Treasury)

Mr Peter Quiggin PSM (First Parliamentary Counsel)

Secretariat

Members of the Board's Secretariat who contributed to this report were Ms Christine Barron (Secretary) and Ms Megan Butcher.

Charter

Mission

Recognising the Government's responsibility for determining taxation policy and the statutory roles of the Commissioner of Taxation and the Inspector-General of Taxation, the Board's mission is to contribute a business and broader community perspective to improving the design of taxation laws and their operation.

Membership

The Board of Taxation will consist of up to ten members.

Up to seven members of the Board will be appointed by the Treasurer, for a term of up to three years, on the basis of their personal capacity. It is expected that these members will be appointed from within the business and wider community having regard to their ability to contribute at the highest level to the development of the tax system. The Chairman will be appointed by the Treasurer from among these members of the Board. If the Treasurer decides to appoint a Deputy Chairman, he or she will also be appointed from among these members of the Board. Members may be re-appointed.

The Secretary to the Department of the Treasury, the Commissioner of Taxation and the First Parliamentary Counsel will also be members of the Board. Each may be represented by a delegate.

Function

The Board will provide advice to the Treasurer on:

- the quality and effectiveness of tax legislation and the processes for its development, including the processes of community consultation and other aspects of tax design;
- improvements to the general integrity and functioning of the taxation system;
- research and other studies commissioned by the Board on topics approved or referred by the Treasurer; and
- other taxation matters referred to the Board by the Treasurer.

Relationship to Other Boards and Bodies

From time to time the Government or the Treasurer may establish other boards or bodies with set terms of reference to advice on particular aspects of the tax law. The Treasurer will advise the Board on a case-by-case basis of its responsibilities, if any, in respect of issues covered by other boards and bodies.

Report

The Chairman of the Board will report to the Treasurer, at least annually, on the operation of the Board during the year.

Secretariat

The Board will be supported by a secretariat provided by the Treasury, but may engage private sector consultants to assist it with its tasks.

Other

Members will meet regularly during the year as determined by the Board's work programme and priorities.

Non-government members will receive daily sitting fees and allowances to cover travelling and other expenses, at rates in accordance with Remuneration Tribunal determinations for part-time public offices.

The Government will determine an annual budget allocation for the Board.

Conflict of interest declaration

All members of the Board are taxpayers in various capacities. Some members of the Board derive income from director's fees, company dividends, trust distributions or as a member of a partnership.

The Board's practice is to require members who have a material personal interest in a matter before the Board to disclose the interest to the Board and to absent themselves from the Board's discussion of the matter, including the making of a decision, unless otherwise determined by the Chairman (or if the Chairman has the interest, the other members of the Board).

The Board does not regard a member as having a material personal interest in a matter of tax policy that is before the Board merely because the member's personal interest may, in common with other taxpayers or members of the public, be affected by that tax policy or by any relevant Board recommendations.