BILLS DIGEST NO. 116, 2015–16

4 MAY 2016

Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016

Kali Sanyal
Economics Section

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Date introduced: 10 February 2016
House: House of Representatives
Portfolio: Treasury
Commencement: various days detailed in the body of this Bills Digest.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.

All hyperlinks in this Bills Digest are correct as at May 2016.
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## Glossary

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<tr>
<td>ABARES</td>
<td>Australian Bureau of Agricultural and Resources Economics and Sciences</td>
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<tr>
<td>ABN</td>
<td>Australian Business Number</td>
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<tr>
<td>ABN Act</td>
<td>A New Tax System (Australian Business Number) Act 1999</td>
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<td>ADI</td>
<td>Authorised Deposit-taking Institution</td>
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<td>ATO</td>
<td>Australian Taxation Office</td>
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<tr>
<td>Board</td>
<td>Board of Taxation</td>
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<td>Commissioner</td>
<td>Commissioner of Taxation</td>
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<td>EDP</td>
<td>Electronic Distribution Platform</td>
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<td>FMD</td>
<td>farm management deposit</td>
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<td>GST</td>
<td>goods and services tax</td>
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<tr>
<td>GST Act</td>
<td>A New Tax System (Goods and Services Tax) Act 1999</td>
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<tr>
<td>Intangibles</td>
<td>things other than goods or real property</td>
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<tr>
<td>ISP</td>
<td>internet service provider</td>
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<td>ITC</td>
<td>input tax credit</td>
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<td>ITZ</td>
<td>indirect tax zone</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>TAA 1953</td>
<td>Taxation Administration Act 1953</td>
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<tr>
<td>VAT</td>
<td>value added tax</td>
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<td>White Paper</td>
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**The Bills Digest at a glance**

**Schedule 1** of the Bill extends the application of the Goods and Services Tax (GST) to digital products and other imported services. The amendments are to make all supplies of things, other than goods or real property connected with the indirect tax zone (ITZ) (most broadly, Australia, excluding those geographic areas where the GST does not apply, such as the external territories), subject to the GST, when they are made to an Australian consumer. According to the proposed measures, an Australian consumer will be broadly an Australian resident—other than a business.¹

The changes result in supplies of digital products, such as streaming or downloading of movies, music, apps, games and e-books as well as other services such as consultancy and professional services, receiving similar GST treatment whether they are supplied by a local or a foreign supplier.

The measure applies in determining net amounts for tax periods starting on or after 1 July 2017.

**Schedule 2** of the Bill amends the existing GST provisions related to cross-border supplies involving non-resident entities. This will mean that certain supplies are no longer connected with the ITZ, or are GST-free. The amendments will particularly:

- revise the test for when an enterprise is carried on in the ITZ so that it is ‘better aligned’ with key GST concepts and
- allow non-resident suppliers not to account for GST on certain supplies by:
  - shifting the responsibility for identifying and paying a GST liability to the recipient, where the recipient is registered for GST and carries on an enterprise in the ITZ
  - switching off the GST liability for certain supplies between non-residents
  - extending the GST-free rules to certain supplies made to non-residents and
  - removing the GST registration requirements for non-residents that only make GST-free supplies through an enterprise carried on outside the ITZ.

The stated claim from the Government is that amendments will also reduce compliance costs for GST-registered importers in calculating the value of taxable importations.²

Measures contained in **Schedule 2** will apply to taxable supplies in determining net amounts for tax periods that commence from the second quarterly tax period starting after the Bill receives assent.

**Schedule 3** of the Bill proposed amendments regarding the income tax treatment of farm management deposits (FMDs) by:

- raising the maximum amount that can be held in FMDs by a primary producer from the current limit of $400,000 to $800,000
- providing relief to primary producers experiencing severe drought conditions by allowing them to withdraw an amount that has been held in an FMD for less than 12 months, without affecting the income tax treatment of the FMD in the earlier income year
- permitting amounts held in an FMD to offset a loan or other debt (that is as a result of the arrangement, a lower amount of interest is charged on the loan than would otherwise be the case) relating to the FMD owner’s primary production business and
- encouraging primary producers to use FMDs to improve cash flow through this loan offsetting arrangement.

These amendments will apply to income years commencing on or after 1 July 2016.³

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2. Ibid., p. 4.
Purpose of the Bill

The purpose of the Bill is to implement measures to:

• apply the GST to digital products and services imported by Australian consumers
• keep non-resident businesses out of the GST net unnecessarily and
• provide flexibility in managing farm management deposits for primary producers. 4

Structure of the Bill

The Amendment Bill contains three Schedules:

• Schedule 1 amends A New Tax System (Goods and Services Tax) Act 1999 (GST Act), 5 A New Tax System (Australian Business Number) Act 1999 (ABN Act) 6 and the Taxation Administration Act 1953 (TAA 1953), 7 containing provisions to extend GST to imported digital products and services
• Schedule 2 contains amendments to the GST Act with provisions regarding GST treatment of cross-border transactions between businesses that involve non-resident entities and
• Schedule 3 amends the Income Tax Assessment Act 1997 (ITAA 1997) 8 and the TAA 1953, to introduce a flexible mechanism for farm management deposits for primary producers.

Background to the Bill as a whole

Schedules 1 and 2 of the Bill are a package aimed at ensuring that Australia’s GST tax system is consistent with other international legal regimes in relation to the importation of digital products and services 9 and applies principles contained in the OECD Base Erosion and Profit Shifting Action Plan that deals with the tax challenges of the global trade, including difficulty in collecting value added taxes, such as the GST, on cross border sales in the digital economy. 10 The measures are also a follow up action by the Government to the Board of Taxation (BOT) Review of the Application of GST to Cross-Border Transactions in 2010. 11

The measures contained in Schedule 3 of the Bill are part of the government announcement in the Agricultural Competitiveness White Paper 12 on 4 July 2015, and follow extensive stakeholder feedback and consultation. 13

Schedule 1—background

A growing proportion of consumption and downloading of digital products is not currently caught by the GST. Tax experts contend that ‘the absence of GST on services and digital products imported by consumers represents an omission from the tax base that has been increasingly untenable’. 14

The current GST law does not include items or services that are imported by consumers and which are not goods or real property (including digital products and services). 15 This results in forgone GST revenue, which would have been otherwise passed on to the states and territories. It also places domestic businesses, which generally have to charge and remit GST on the digital products and services they provide, at a tax disadvantage compared to overseas businesses. 16

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7. Taxation Administration Act 1953 (Cth).
15. See: A New Tax System (Goods and Services Tax) Act 1999, sections 7-1, 9-10 (definition of ‘taxable supply) and 9-25 (connection to Australia).
In order to maintain the integrity of the tax regime, on 12 May 2015, the Government announced that it wished to extend GST to offshore intangible supplies to Australian consumers with effect from 1 July 2017. The key features of measures proposed by the Schedule 1 of the Bill are:

- overseas companies selling digital products and other services, such as ‘apps’ and downloads of digital content, will henceforth be required to register, collect and remit GST on their sales to Australian consumers
- the tax will be imposed on intangible supplies such as supplies of digital content, streaming or downloading of movies, music, apps, games, e-books and other digital products—but will also extend to consultancy and professional services performed offshore for customers in Australia.
- the liability for the GST will rest either with the supplier or with the operator of an electronic distribution service
- entities that make at least one inbound intangible consumer supply may opt to be a limited registration entity when they are registered for GST
- only supplies made to consumers fall into GST net: business-to-business transactions is exempt.

Soon after the announcement of the budget measures, the government released an exposure draft Bill titled ‘Tax Laws Amendment (Tax Integrity: GST and Digital Products) Bill 2015’. Following a series of consultations, revised draft legislation was re-issued in October 2015 with the provisional title ‘Tax Laws Amendment (GST treatment of Cross-Border Transactions) Bill 2015’. The measure is estimated to generate a revenue gain of $350.0 million over the forward estimates period and will be allocated to the states and territories.

**Schedule 2—background**

On 11 June 2008, the then Assistant Treasurer announced that the Government had asked the Board of Taxation to undertake a review of the legal framework for the administration of the GST. This review replaced the Board’s previous review of the application of the self-assessment principles to other taxes administered by the Taxation Commissioner. In addition, the Board was asked to consider the implications of any possible changes to GST administration provisions for other indirect taxes that share common tax administration provisions in the TAA 1953 or the GST Act. The review focused on:

- streamlining and improving the operation of the GST
- reducing compliance costs and
- removing anomalies.

In pursuing the terms of reference, the Board was asked that its consultations and recommendations focus on the legal framework for the administration of the GST as set out in the TAA 1953 and GST Act. The Board’s review did not extend to the rate of the GST or the scope and extent of what goods and services are subject to the GST.

The Board was asked to provide a final report to the government by the end of December 2008. On 18 July 2008, the Board of Taxation released its issues paper on the Review of the Legal Framework for the Administration of the Goods and Services Tax.

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17. Ibid.
24. Ibid.
Upon completion of the review of the legal framework for the administration of the GST, the Board submitted its report to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs in December 2008.²⁶

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’.²⁷ In that announcement, the Government also made a request that the Board undertake a further review of the application of the GST to cross-border transactions and consult widely with stakeholders.²⁸ On 11 May 2010, the Board submitted its final report on the Review of the Application of Australia’s GST to Cross Border Transaction.²⁹ In its review, the Board observed that:

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 businesses on their inputs, businesses are required to register for GST to claim a 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.³⁰

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.³¹

**Recommendations in the report included:**

- 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).

The then Labor Government accepted the Board’s recommendations as part of the 2010–11 Budget, and announced further changes to the Board’s recommendations as part of the 2012–13 Budget.

The Government will amend the 2010-11 Budget measure implementing the recommendations of the Board of Taxation from its Review of the application of GST to cross-border transactions. This measure is estimated to have an unquantifiable but small revenue impact and an unquantifiable but small impact on GST payments to the States and Territories over the forward estimates period.

The package, originally announced to take effect from 1 July 2012, will now have a date of effect from the first quarterly tax period following Royal Assent of the enabling legislation. In addition, following consultation on the design and implementation of the announced measure, the Government will make a number of other changes.

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²⁹ BOT, *Review of the application of GST to cross-border transactions: a report to the Assistant Treasurer*, BOT, Canberra, February 2010, pp. 5-6.
³⁰ Ibid.
³¹ Ibid.
including to those proposed for the supply of goods by non-residents and not proceeding with changes relating to the non-resident agency provisions.

To ensure the integrity of the originally announced measures, the Government will also clarify and narrow the definition of permanent establishment for GST purposes. 33

The specific recommendations accepted by the Labor Government comprised Numbers 1 to 5, 6, 9 and 12: 34

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 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 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.35

The Coalition Government announced that the measures in the 2012–13 Budget would proceed after further consultations.36

The proposed measures announced in Schedule 2 of this Bill follow the Board’s recommendations set out above. Amendments contained in Schedule 2 relieve non-resident suppliers of the obligation to account for GST on certain supplies. In such cases, where GST would have ultimately been payable on a supply affected by the changes, the GST obligations will be transferred to Australian based business recipients that are already registered for GST.

Schedule 3—background

The contribution of the farm economy to the Australian agriculture sector is estimated to be two to three per cent of Australia’s gross domestic product (GDP) and 15 per cent of export market.37 Agriculture underpins Australia’s largest manufacturing industry—food, beverage and tobacco processing—which added $25 billion to the economy in 2013–14 (25 per cent of manufacturing GDP).38

36. J Hockey (Treasurer) and A Sinodinos (Assistant Treasurer), Restoring integrity in the Australian tax system, joint media release, 6 November 2013.
37. Ibid., p. 141.
38. DOA, Agricultural competitiveness white paper, DOA, Canberra, 2015, p. 3.
It is estimated that there are about 115,000 businesses that operate as primary production activity and about 14,000 as secondary activity. Of these, about 99 per cent are fully Australian owned. Around 97 per cent of farms are classified as small businesses—having annual turnover of less than $2 million.39

Overseas buyers are the largest consumers of Australia’s agricultural production. With about 65 per cent of Australian agricultural production exported in 2014. The sector employs about 270,000 people with a further 223,000 in food, beverage and tobacco manufacturing.40

‘Advancements in technology have resulted in an overall decrease of people employed in the sector over time. Farm employment has declined from 8 per cent of total employment in 1966–67 to just over 2 per cent in 2013–14. This reflects increased automation and other productivity gains. This trend is expected to continue. At the same time changing technologies and markets mean there is a need for a more diverse and highly skilled workforce with skills across a wide range of disciplines’.41

In the White Paper, the need for a flexible taxing arrangement has been acknowledged.

Over the past four decades, the value of agricultural output has been almost two and a half times more volatile than the average for all the major sectors of the Australian economy (AFI 2012). Australian farmers also experience greater volatility in yield and price than most other farmers in the world (AFI 2012).42

Following the release of the White Paper on 4 July 2015, the government undertook a series of consultations with stakeholders. The proposed measures in the Bill are the product of those consultations and feedback.

Currently, primary producers are able to keep deposits in a reserve account, which usually helps them deal with uneven income between years. The measures contained in Schedule 3 of this Bill follow the issues that are part of the deliberation on the above government report. The identified issues were:

- the deposit limit in the scheme is restrictive
- the legislative restrictions preventing FMD accounts being used as a loan offset - if all FMD holdings are used to offset loans, the benefit to the farm sector in interest savings could amount to $150 million a year
- primary producers to opt back into income tax averaging 10 years after they have elected to exit the scheme in recognition that business circumstances change over time and
- a simplified accelerated depreciation regime for fencing to allow primary producers to deduct immediately the cost of new fencing in the year of purchase effective 12 May 2015.43

Committee consideration

**Senate Standing Committee for the Scrutiny of the Bills**

On 24 February 2016, the Senate Standing Committee for the Scrutiny of Bills considered the Bill and did not make any comment.44

**Senate Standing Committee for the Selection of Bills**

On 25 February 2016, the Senate Standing Committee for the Selection of Bills considered the Bill and identified some issues that were raised during consultation with sector stakeholders. Accordingly, the Committee made a proposition:

- c. the provisions of the Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016 be referred immediately to the Economics Legislation Committee for inquiry and report by 10 March 2016.45

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39. Ibid.
40. [Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016, op. cit., p. 142.](#)
42. Ibid.
43. Ibid.
**Senate Economics Legislation Committee**

On 10 March 2016 the Committee produced its inquiry report and stated that:

The proposed changes in the bill address one the emerging challenges raised by the growth of the digital economy. The changes proposed in the bill ensure that Australia's businesses are not at a tax disadvantage compared with their international competitors. The committee considers that it is prudent to put in place legislation to ensure the GST base does not progressively erode over time as more services become digitised.  

The Labor Senators noted the Committee Report with an acknowledgment that there is a possibility of an Australian Taxation Office review of the laws being required in the event that they do not operate as intended.

**Policy position of non-government parties/independents**

**Schedule 1**

Labor Senators on the Economics Legislation Committee broadly support the measures in Schedule 1 though they noted that submissions to Treasury on the matter have not been made public. They also noted that difficulties in enforcing the proposed legislation exist, but that international experience shows that larger entities will voluntarily comply. Labor Senators welcomed the possibility that the ATO will conduct a review of the laws if they do not operate as intended.

The Labor Party supports the intention of these measures, though they may propose amendments in the Senate.

The Australian Greens reserved their position until after the Economics Legislation Committee reported, but noted that the Greens are opposed to the GST as it is a ‘regressive tax’. Mr Bandt MP stated that ‘... this Netflix tax is a great big new tax on everything on the internet.’ Since the Committee report was released, there have been no further statements from the Australian Greens.

**Schedule 2**

At the time of writing of this Bills Digest, there appears to be no comment or suggestion available on the Schedule 2 from the opposition or minor parties.

**Schedule 3**

The Australian Labor Party is in favour of this schedule. Shadow Minister for Agriculture, Fisheries and Forestry, Joel Fitzgibbon, welcomed the additional enhancements to the FMS scheme and noted that it is good public policy.

No views were expressed by minor party or independent Members or Senators on this schedule.

**Position of major interest groups**

**Schedule 1**

Foxtel Corporate Affairs Group Director, Bruce Meagher, called the move ‘critical’ to ensure a ‘level field’, while Access Digital Entertainment Chief Executive, Craig White, said the proposed changes were a ‘long overdue’ reform that would ensure the tax kept up with new consumer trends.

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47. Ibid., (additional comments by Labor Senators), p. 21.
48. Ibid.
51. Ibid.
Chris Berg, Senior Fellow with the free market think tank the Institute of Public Affairs, said in May 2015 ‘the Abbott government’s plan to impose a ‘Netflix Tax’ on digital downloads and to lower the GST-free threshold will add to the already substantial tax burden on Australian consumers.’

The Australian Retailers Association has strongly advocated for this measure. Executive Director Russell Zimmerman said in February 2016:

Mr Morrison’s proposal to close the GST loophole that has seen international online operators given a leg up over local Australian players is the final frontier in our fight to maintain a fair an equal business environment for Australian retailers. The issue of international online retailers escaping the payment of taxes has been a huge concern for Australian retailers, and the ARA is overjoyed to see that the Government is finally taking action. If passed, this legislation will finally offer Aussie companies a level playing field on intangible items, with the Government committed to fixing the GST on physical items. This change will have the added benefit of funneling around $350 million in extra revenue into our States and Territories, which can be used to fund crucial services such as teachers, police, and doctors. We hope to see the quick passing of the laws in Parliament and the swift implementation of this sensible law.

The Tax Institute in its submission to the 2015 Treasury inquiry Tax Integrity: Extending GST to Digital Products and Other Services Imported by Consumers, indicated that it is broadly in favour of these measures. However, it noted:

It appears that the amendments are intended to bring all supplies within the scope of the GST except for real property and goods. Such a broad approach to a core provision increases the risk of unintended consequences particularly given the compliance and enforcement difficulties highlighted below. As an alternative, The Tax Institute recommends Treasury consider a more specific rule limited to supplies of digital products. For example, Division 85 already operates in this manner with respect to similar supplies of Telecommunication Services.

The Tax Institute also noted:

We also note our concern that the law as drafted may be somewhat impractical for the ATO to administer and will place significant cost burdens on business which will either increase the cost of doing business with Australia and / or affect inbound commerce. The amendments appear to rely on non-residents voluntarily complying with the law in the majority of cases. We are also concerned with the underlying policy of the proposed amendments that impose legal obligations on non-residents, but do not give the ATO the mechanisms to enforce those obligations.

**Schedule 2**

Global insurer Lloyds is broadly in favour of these measures in their submission to the Senate Committee though they did propose that an amendment be considered.

The Bill as drafted proposes to ‘turn off’ the current GST rules in relation to taxable supplies made by a non-resident supplier through a resident agent to Australian businesses. We would propose an amendment to maintain the current GST treatment where a non-resident insurer and a resident agent of the non-resident insurer agree in writing that the supplies should remain within the scope of Australian GST.

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54. C Berg (Institute of Public Affairs), *GST changes would be yet another tax increase*, media release, 7 May 2015.
55. R Zimmerman (Australian Retailers Association), ‘*Netflix tax draft laws a necessary measure, says ARA*’, media Release, 12 February 2016.
57. ibid.
Schedule 3

There is widespread support within the agricultural industry for the extension of the deposit amount from $400,000 to $800,000. Organisations such as the National Farmers Federation (NFF), the Tasmanian Farmers and Graziers Association, the Australian Honey Bee Industry Council and the WA Grains Group all presented submissions to the Senate Committee indicating their support.

The Australian Banking Association (ABA) has also indicated it is broadly in favour of the measures though it has some concerns around the implementation of the measure that will allow primary producers to use their FMD to offset any related business loans that they may have. The ABA indicated that banking products that will allow an FMD to offset loans are complex and may take some time to develop. AgForce did however have some concerns related to the new measure, which will allow primary producers to make early withdrawals in the event of severe drought. While AgForce welcome this measure it has concerns about the method used to record rainfall and the six month timeframe which will be particularly problematic in the north where seasonal variations in rainfall are so significant.

AgForce, the peak rural group representing the majority of beef, sheep and wool and grain producers in Queensland also indicated its backing of the proposed measures. AgForce did however have some concerns related to the new measure, which will allow primary producers to make early withdrawals in the event of severe drought. While AgForce welcome this measure it has concerns about the method used to record rainfall and the six month timeframe which will be particularly problematic in the north where seasonal variations in rainfall are so significant.

AgForce would also like to see the scheme made available to other entities such as companies and trusts rather than just individuals. The NFF indicated the same view in their Senate Committee submission.

There is also broad support for these measures from Chartered Accountants Australia New Zealand (CAANZ). Its submission to Treasury noted similar concerns to AgForce in that it would also like to see these measures extended to entities rather than just individuals and the six month timeframe is also seen as problematic in the north. CAANZ also recommended that the early access provision be extended beyond severe drought to other disaster events such as bushfire or flooding.

As with other industry bodies, Grain Growers—the industry body for grain farmers—welcomed the measures in this Bill. However, it shares the concerns of other bodies that the six months timeframe for determining severe drought conditions in order to get an early release of FMDs is problematic. Grain Growers also believe that primary producers are increasingly moving away from the traditional sole trader or partnership structures into company or trust structures for their businesses so would also like to see the scheme extended beyond its current form.

60. Ibid.
62. Ibid.
63. Ibid.
66. Ibid.
67. Ibid.
69. Ibid.
70. Ibid.
Financial implications

Schedule 1  
Financial impact: The measure is estimated to result in a gain to GST revenue of $350 million over the forward estimates period:

Table 2  Financial impact of extending GST to imported digital products and services, $m

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<td></td>
<td>-</td>
<td>-</td>
<td>$150</td>
<td>$200</td>
</tr>
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(-) nil


Schedule 2  
Financial impact: The measure is estimated to have an unquantifiable impact on GST revenue over the forward estimates period:

Table 3  Financial impact of extending GST to imported digital products and services, $m

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<td>-</td>
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(-) nil  
(*) unquantifiable


Schedule 3  
The impact of the measures on revenue over the forward estimates period is estimated to be negative (-) $10 million.

Table 4  The cost to revenue measures under different scenarios, $m

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<td>Revising the cap</td>
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<td>Loan offsets</td>
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<td>Early access</td>
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(-) nil, and (..) not zero, but rounded to zero


Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the compatibility of the Bill against with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.  

Key issues and provisions

Overview of the changes proposed by Schedule 1

The present Bill amends section 9-25 of the GST Act in order to make supply of goods and services connected with the ‘indirect tax zone’ ITZ (broadly, supplies made or done in Australia or made to Australia, excluding

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71. The Statement of Compatibility with Human Rights can be found at page 117 of the Explanatory Memorandum to the Bill.


73. For GST purposes, the ‘indirect tax zone’ means Australia (as defined for income tax) but excludes: (1) the external Territories, (2) an offshore area for the purposes of the Offshore Petroleum and Greenhouse Gas Storage Act 2006, (3) the Joint Petroleum Development Area and (4)
those geographic areas where the GST does not apply—principally the external territories) taxable for GST purposes, unless the supply is GST free or input taxed.\(^4\)

### Meaning of ‘Australia’ in tax codes

Currently, for income tax purposes, under the provisions of Section 960–505 of the ITAA 1997,\(^75\) the term ‘Australia’ includes the states and territories, all of Australia’s external territories, with territorial waters and Australia’s exclusive economic zone. ‘Australia’ also includes the airspace above and the seabed and subsoil beneath Australia’s waters.\(^76\)

The term ‘Australia’ in the GST Act does not include any external territory. However, it includes an installation (within the meaning of the Customs Act 1901) that is deemed by section 5C of the Customs Act 1901 to be part of Australia.\(^77\)

**Schedule 1** refers to the ITZ. The difference in the meaning of ‘Australia’ between income tax law and GST law exists, as the application of goods and services tax does not include Australia’s external territories and certain offshore areas (where, for example, income tax may operate).\(^78\) Therefore, the proposed term ‘ITZ’ makes it clear the difference in application of GST to income tax.

For GST purposes, the ‘indirect tax zone’ means ‘Australia’ (as defined for income tax) but excludes:

- the external territories
- an offshore area for the purposes of the Offshore Petroleum and Greenhouse Gas Storage Act 2006
- the Joint Petroleum Development Area and
- other than installations covered by s 5C of the Customs Act 1901 (that is such installations are included in the definition of indirect tax zone): section 195-1 of the GST Act.\(^79\)

### Registration and remittance rules

The proposed changes would permit the making of regulations to provide for a modified GST registration and remittance scheme.\(^80\) If a foreign supplier of digital services has established an Australian operator (for example, IINet/Netflix for the Netflix global company) of an electronic distribution platform (EDP), the operator will be registered for GST purposes. However, entities that make at least one inbound intangible consumer supply will have the option to elect to have limited registration for GST. They will not then be able to access input tax credits (ITC) or to receive an Australian Business Number.\(^81\)

In certain circumstances, the proposed amendments will provide that responsibility for GST liability is shifted from the supplier to an EDP operator. This would happen in certain circumstances where the EDP operator controls any of the key elements of the supply such as delivery, charging or terms and conditions.\(^82\) Shifting responsibility for GST liability to operators is aimed at minimising compliance costs. EDP operators are however, expected to be generally better placed to comply and ensure that digital goods and services sourced in a similar manner are taxed in a similar way.\(^83\) This choice will have effect for all of the financial year:

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\(^5\) Income Tax Assessment Act 1997 (Cth), sections 960-500 and 960-505.

\(^6\) Income Tax Assessment Act 1997 (Cth), subsection 960-505(2), Note 1, and Thomson Reuters, ‘Netflix’ tax to start on 1 July 2017’, Australian GST handbook, (online edition), (subscriber content).

\(^7\) Ibid., p. 9.

\(^8\) Ibid., p. 110–11.

\(^9\) Ibid., p. 107 (and Item 22 of the Schedule 2 of the Bill).


\(^12\) Ibid., p. 13.
An entity that has elected to apply limited registration cannot make creditable acquisitions in that financial year. This means that the entity will not be entitled to input tax credits for these acquisitions.\textsuperscript{84}

**Supplies subject to the new measures**

The measures proposed by the Schedule 1 of the Bill are aimed at overcoming a competitive disadvantage for domestic suppliers of certain digital products or services. For example, Netflix—the global movie streaming company—provides online entertainment material from outside Australia and does not charge GST, while local competitors all charge GST. As noted by one commentator, the changes proposed by the Bill:

...will result in supplies of digital products, such as streaming or downloading of movies, music, apps, games, e-books, as well as other services such as consultancy and professional services, receiving similar GST treatment whether they are supplied by a local or foreign supplier.\textsuperscript{85}

The Government has also noted:

The key point is that the overseas supplier is [under the existing system] generally unregistered (nor is required to be registered). The supply which is received by an Australian consumer is not connected with Australia (as the term is currently defined). Accordingly, any supply that an overseas supplier makes to an Australian customer does not qualify as a taxable supply. This means that there is no requirement for the overseas supplier to charge GST, even though the supply is received and enjoyed by an entity in Australia.\textsuperscript{86}

**Proposed changes will only apply in relation to ‘Australian consumers’**

The proposed extension of the GST to intangible supplies (such as digital downloads) will only apply on such supplies where the recipient of supply:

• is an Australian resident (but not solely because they are a resident of one of Australia’s external territories)
• is not registered for GST and
• if registered for GST, the recipient does not make the acquisition to any extent for the purpose of an enterprise they carry on (that is not for a creditable purpose).\textsuperscript{87}

In other words, the financial burden of the extension of the GST to intangible supplies will generally be borne by individuals, not businesses. The Australian Taxation Office (ATO) has proactively worked with affected suppliers to develop an agreed understanding of what the reasonable steps should be taken to determine if a person or entity is an Australian consumer, in a range of situations.\textsuperscript{88}

**International reform measures**

The measure will result in Australia being an early adopter of guidelines for business-to-consumer supplies of digital products and services currently being developed by the Organisation for Economic Co-operation and Development (OECD) as part of the OECD/G20 base erosion and profit shifting project, *Addressing the Tax Challenges of the Digital Economy*.\textsuperscript{89}

The above report from OECD/G20 noted that the evolution of:

...technology has dramatically increased the ability of private consumers to shop online and the ability of businesses to sell to consumers around the world without the need to be present physically or otherwise in the consumer’s country.\textsuperscript{90}

\textsuperscript{84}. Ibid.
\textsuperscript{85}. Thomson Reuters, ‘Netflix’ tax to start on 1 July 2017’, op. cit.
\textsuperscript{86}. Ibid.
\textsuperscript{87}. Ibid.
\textsuperscript{88}. Australian Tax Office (ATO), ‘GST cross-border transactions’, ATO website, last modified 17 February 2016.
\textsuperscript{90}. Ibid.
The OECD and G20 further noted that ‘this often results in no GST being levied at all on these flows, with adverse effects on countries’ GST revenues and on the level playing field between local and foreign vendors’.

However, many countries have already acted to tax offshore digital supplies to their consumers, including the member states of the European Union (EU).

At the start of 2015, the EU started to overhaul its consumption / value added tax (VAT) regimes to extend it to providers of broadcasting and electronic services based on the location of their customers, not where the companies set up their head offices. Digital downloads and services sold to European retail consumers are taxed at VAT rates of up to 27 per cent, making the digital retail economy a significant source of tax revenue. The amendments in Australian law are broadly modelled on similar rules currently in operation in the EU and Norway.

**Detailed analysis: Schedule 1**

Unless otherwise stated, the proposed amendments relate to the GST Act.

**Applying the GST to intangible supplies to Australian consumers**

Item 3 of Schedule 1 inserts proposed subsection 9-25(7) to the GST Act by introducing the meaning of ‘Australian consumer’ relevant to the amended rules. The entities will be treated as consumers, provided they are Australian residents and are either not registered, or if registered for GST purposes, they do not acquire the supply of digital goods and services for the purpose of carrying on an enterprise. As noted previously, this definition effectively ensures that GST on intangible products (such as digital downloads) will generally only be paid by individuals, and not businesses.

Item 1 of Schedule 1 inserts proposed subsection 9-25(5)(d) to the GST Act in order to extend the scope of the GST to supplies of services and intangibles made by any supplier to an ‘Australian consumer’. The changes will affect supplies from overseas that include the streaming or downloading of movies, music, apps, games, e-books and other digital products as well as other consultancy and professional services. This will result in a level playing field for domestic suppliers of such services against their international competitors.

**Ability of the Treasurer to determine the taxation status of certain intangible consumer supplies**

Item 4 and Item 5 introduce proposed subdivision 38-T and proposed subdivision 40-G to the GST Act respectively, outlining the context in which inbound intangible consumer supplies in Australia can be treated as ‘GST-free’ or ‘input taxed’. The situation may arise due to Australia’s international trade law obligations, under which, and on the advice of the Foreign Minister, the Treasurer can exercise power through legislative determination to treat certain supplies ‘GST-free’ or ‘input-taxed’, and make the comparable domestic supplies receive the same treatment. Such determination will however be subject to parliamentary scrutiny.

**Exemption for non-residents suppliers to issue tax invoices or adjustment notes**

Item 6 inserts proposed subdivisions 84-B, 84-C and 84-D into the GST Act, the effect of which would be to provide that non-resident suppliers are not required to issue ‘tax invoices’ for taxable supplies, or to issue ‘adjustment notes’, despite sections 29-70 and 29-75 of the GST Act that require domestic suppliers to do so.

**When are EDP operators suppliers for GST?**

Proposed subdivisions 84-B, 84-C and 84-D also outline how and when an EDP operator will be treated as a supplier, and include references to certain other supplies through an EDP as being taxable supplies. The proposed subdivisions 84-B, 84-C and 84-D also contain provisions that related to the new definition of ‘Australian consumers’ and define ‘inbound intangible consumer supplies’ and ‘electronic distribution platform’. Lastly, the provisions spell out how and when non-resident suppliers may elect to be limited

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95. Proposed sections 84-65, 84-70 and 84-100.
registration entities. According to the proposed measure, limited registration entities are not entitled to input tax credits for acquisitions, and must have quarterly tax periods.\footnote{Proposed sections 84-140, 84-145 and 84-155.}

**Item 6** also inserts **proposed section 84-55** to make an EDP operator liable to pay any GST arising from the supply of an inbound intangible consumer supply; that is software, a service such a participation in a gambling enterprise or a social media site, or supply of media, such as a downloaded movie of similar; but only where they have full control over the transaction. Where the operator of the platform does not have full control over the transaction, the GST liability rests with the supplier.\footnote{Proposed subsection 84-55(4).}

**Changes to how turnover thresholds are calculated**

Under the current provisions of GST law, entities are required to register if their annual turnover is $75,000 or more ($150,000 for non-profit entities). However, the present turnover threshold does not include the supplies of rights or options to acquire another taxable supply.\footnote{Op. cit., p. 29.}

**Items 7 and Item 8** alter that position by amending paragraphs 188-15(3)(b) and 188-20(3)(b) of the **GST Act** respectively to provide that supplies of a right or option to an Australian consumer is included in the GST turnover of an entity, provided the underlying supply is not supply of goods or real property and the supply is not GST-free. In addition, **Schedule 2** contains further related changes. These are discussed below under the heading ‘Changes to the GST registration threshold’.

**Changes to the ‘reverse charge’ rules**

Existing GST laws allow the ‘reverse charge rules’ to be applied for domestic supplies when a taxable supply and the recipient, not the supplier, is liable for GST. The situation arises when the supply is made to a recipient, which is registered for GST purposes, yet acquires the supply for wholly private purposes. To ward off such complexity in appropriately identifying such an Australian consumer, the suppliers may construe that the recipient is not an Australian consumer, and thus may consider not paying the GST.

**Items 23 and 24** insert **proposed subparagraph 84-S(1)(ba)** and **subsections 84-S(1)(A) (B) and (C)**. Those provision extend the ‘reverse charge rules’ to supplies from overseas to the extent that the supply of intangible goods and services is only connected to the ITZ because it is supplied to an Australian consumer, subject to the conditions that the law is applicable to the supplier as if the recipient is not an Australian consumer (on the basis that the consumption is of a private nature), and the supplier obtained the ABN and a declaration of other information from the recipient indicating they are registered for GST purposes.

**Gambling supplies made by non-residents**

**Item 26** inserts **proposed section 126-27** to the **GST Act** outlining when a gambling supply will be treated as connected with the ITZ. The amendment provides that the gambling supplies are connected to ITZ if they are made to an Australian resident (but not an entity that is an Australian resident solely because they are a resident of the external territories). This will ensure that gambling supplies provided to Australian consumers by non-residents are effectively brought into the GST tax system.

**Commencement**

**Item 38 and Item 39** make provisions for the application of the changes contained in **Schedule 1** of this Bill to take effect from 1 July 2017 in most cases.

**Other changes**

**Item 27 and Item 28** insert **proposed subsections 153-55(4A)** and **153-60(3A)** into the **GST Act** in order to clarify the situation when supplies between principals and intermediaries to which Subdivision 153-B could also apply. Currently there might arise a potential liability for both such suppliers to pay GST on a supply, creating a conflict. The proposed amendment will prevent such situation arising, by allowing the GST to be payable to the extent that a supply is the subject of an agreement to which these provisions apply therefore excluding the application of the subdivision to such supplies.

\footnote{Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016, op. cit., p. 29.}
Item 37 amends paragraph 284-75(4)(b) of the *TAA 1953* to allow the Commissioner to address misrepresentations about an entity’s status as an Australian consumer by broadening the existing penalty regime for making false or misleading statements by a recipient of supply.

**Overview of the changes proposed by Schedule 2**

The application of the GST rule on cross border supplies in Australia is based on the concept of destination principle. According to this rule, the GST is only applicable when the cross-border supplies are consumed in Australia’s ITZ. Additional principles of the GST regime are:

- provided consumption takes place in Australia, and irrespective of the source of supply, tax is paid by the final consumers of the supply and
- relief from taxation is provided for business to business transactions.

**GST relief for business to business transactions**

Relief from GST for business to business transactions is normally achieved 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.

In order to follow the prescribed conditions under the *GST Act*, non-resident entities providing supplies to ITZ, have to fulfil the conditions:

- getting registered for GST or required to be registered
- the supply must be connected to ITZ and
- the supply must not be GST-free or input taxed.⁹⁹

**Current test for carrying on an enterprise in the ITZ**

The existing test is based on the income tax definition of permanent establishment. A permanent establishment means ‘a place at or through which a person carries on any business’ and includes a factory office, farm, mine or market.¹⁰⁰ It also includes:

- a place where the suppliers is carrying on a business through an agent
- a place where the supplier has or is using or installing substantial equipment or machinery
- a place where the supplier is engaged in a construction project or where goods sold by the supplier are manufactured, assembled, processed, packed or disturbed to a related party.¹⁰¹

**Proposed changes to the test for carrying on an enterprise in the ITZ**

The new test in the proposed amendment through the Item 3 of Schedule 2 will be more closely aligned with Australia’s modern treaty practice in relation to permanent establishments.¹⁰² This means an enterprise will be considered to be carrying on business in the ITZ through a fixed place, or through one or more places for more than 183 days in a 12 month period.¹⁰³

**Changes to the GST registration threshold**

As noted previously under the heading ‘Changes to how turnover thresholds are calculated’, entities are required to register if their annual turnover is $75,000 or more ($150,000 for non-profit entities). However, the present turnover threshold does not include the supplies of rights or options to acquire another taxable supply.¹⁰⁴ Further, currently, if the projected or current turnover is greater than the registration turnover threshold, non-resident suppliers are required to register for GST. In order to arrive at the threshold, the value of

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100. *Income Tax Assessment Act 1936* (Cth), Section 6–1.
103. Ibid., p. 71.
104. Ibid., p. 29.
supplies (even if those supplies are GST-free) that are connected with Australia are included to arrive at the threshold. As noted by the Government, this means:

... non-resident suppliers that only make GST-free supplies but have a turnover that is greater than the turnover threshold, are required to register for GST – despite having no GST liability.\(^\text{105}\)

The measures contained in the Bill will provide that GST-free supplies made by a non-resident supplier are not counted towards these turnover tests, provided the supplies are not made through an enterprise the non-resident carries on in Australia.\(^\text{106}\)

**Scope of ‘connected with the ITZ’**

Currently, the provisions include a broader definition of ‘connected with the ITZ’. In particular, the compulsory reverse charge provisions under Division 84 of the GST Act have limited application due to this broader definition. In addition, non-resident suppliers are generally responsible for GST payable on supplies of intangibles that are done in the ITZ.\(^\text{107}\)

With the proposed amendments, ‘connection with the ITZ’ will have limited application for business to business transactions. As a result, the compulsory reverse charge provisions will be available to a greater number of supplies. Furthermore, only GST registered entities are responsible for any GST on supplies on intangibles that are done in the ITZ that are made to them by non-resident suppliers.\(^\text{108}\)

**Value of taxable importations**

In order to reduce compliance costs, importers who are registered for GST, are to be provided with an alternative option to calculate their transport, insurance and ancillary costs for importations. These changes will mean that GST-registered importers are not required to identify the exact amount paid or payable for the following costs, for the purpose of calculating the value of their taxable importations:

- international transport of the imported goods to their place of consignment in Australia
- insurance costs for that transport and
- any costs for loading or handling during the international transport or service costs for facilitating that transport.

Instead, the GST-registered importer may use a percentage of the customs value of the imported goods as a proxy for these costs when calculating the value of their taxable importation. This percentage is currently ten per cent but may be varied by regulation.\(^\text{109}\)

**Supplies of installed or assembled goods not connected with the ITZ**

Under the existing provisions of GST law, a supply of goods is connected with the ITZ if the supplier either imports the goods into the ITZ, or installs or assembles the goods there. The calculation of the amount of GST thus depends on the value of such supplies, and thus embeds the value of the goods supplied into those assembled or installed.\(^\text{110}\)

Importers of such supplies pay GST on a taxable importation, which means that goods are imported into the ITZ ‘entered for home consumption’. ‘Entry for home consumption’ is a customs-clearance certificate that says that the goods passed out of customs’ control. Accordingly, the amount of GST payable on a taxable importation is ten per cent of the value of the imported goods, a concept calculated by reference to the customs value of the goods. The value does not include any assembly or installation services.\(^\text{111}\)

The issue of liability for GST on taxable importation is separate to that of any liability imposed on the supplier because of goods connected with the ITZ. Where a supplier imports goods into the ITZ, they are obliged to

\(^{105}\) Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016, op. cit., p. 106

\(^{106}\) Ibid.

\(^{107}\) Ibid., p. 72.

\(^{108}\) Ibid.

\(^{109}\) Ibid.

\(^{110}\) Ibid. p. 93.

\(^{111}\) Ibid.
account for both GST liabilities (for importation and supply). Where the supplier is not responsible for importation, they are not liable for GST for importation, but if the supplier is responsible for installation or assemblies of goods, they are obliged to pay GST on supply only. In most cases, supplies of imported goods to business recipients involve assemble, or installation service and are fully creditable acquisitions. In such situations, the recipient is fully entitled to receive back input tax credits (ITCs) for the GST on both supply and importation.  

The amendments to subsections 9–25(3) and 9–25(6) aim to ensure that a supply of goods brought into Australia will not be connected with Australia if the supplier installs or assembles, but does not import the goods. The measures will relieve suppliers of their obligations to account for GST. Where goods brought into the ITZ are not imported by the supplier, the amount of GST is collected solely through importation rules.

Reverse charge rules for supplier for no consideration

There are certain supplies that are made for no-consideration between suppliers and their associates. Under the existing provisions (section 75–2 of the GST Act), a supply without consideration between associates is a taxable supply despite other provisions elsewhere in the GST Act. The issue obtains significance when one considers that the existing rule does not explicitly remove the need for consideration to be provided for a supply to be a taxable supply through the reverse charge rules in Division 84 of the GST Act.

The measures proposed by items 6 to 8 of Schedule 2 will ensure that a supply between associates which meets the other requirements of Division 84 will still be a taxable supply in the absence of consideration.

**Detailed analysis: Schedule 2**

**Exclusion of goods installed or assembled from being connected to the ITZ**

Under the current provisions of Section 9–25 of the GST Act, a supply of goods brought into the ITZ, continues to be connected to the ITZ if the supplier either:

- imports the goods into the ITZ or installs or
- assembles the goods in the ITZ.

Under the proposed changes, the importation limb of the existing test ‘connected to Australia’ is retained, but a supply will no longer be considered connected with ITZ if the supplier just installs or assembles goods, but does not import the goods into the ITZ. **Item 1 of Schedule 2** amends subsection 9–25(3) of the GST Act in order to reduce the scope of supplies by discarding the rule that a supply of goods that are brought into the ITZ and installed or assembled by the supplier to the installer or assembler.

**Removing costs associated with installation and assembling services from the price of supply of goods**

**Item 2 of Schedule 2** amends subsection 9–25(6) and **Item 4** inserts proposed subsection 9–75(4) to the GST Act to alter the treatment of the supply of goods by non-residents (except ‘luxury cars’) to the ITZ. ‘Where imported goods are not imported by the supplier (for example, because they are imported by the recipient), but the supplier installs or assembles the goods in the ITZ, the supplier is only required to pay GST on the supply'. Accordingly, no amount of GST is included in the price of supply of such installed or assembled goods. This is because the supplier (rather than importer) does not have to pay GST on the goods component of the supply or include it in determining if they are required to register for GST as that supply is no longer connected with the ITZ.

**Clarifying when supplies by non-residents are not connected with the ITZ**

**Item 3 of Schedule 2** inserts proposed section 9–26 to the GST Act with a purpose to clarify when and what kind of supplies by non-residents will be treated as not connected with the ITZ, and therefore potentially no longer

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112. Ibid.
113. Ibid. p. 94.
114. Ibid., p. 108.
115. Ibid.
taxable in the hands of the supplier. Inbound intangible supplies, or intangible supplies between non-residents or supplies between non-residents of leased goods, will come into the orbit of the proposed changes. The provision in this section will override the applicability of section 9-25 (which is about when supplies are connected with the ITZ) and section 85-5 (which is about telecommunications supply).

Clarifying the positions of agents

Item 3 also inserts proposed section 9-27 in order to spell out the meaning of ‘carrying on business’ by non-residents in the ITZ. Proposed section 9-27 provides that an enterprise carried on, or plans to carry on a business, by one or more individuals (either solely or through employees or officers) who are in the ITZ, doing business from one or more fixed places for more than 183 days in a 12 month period, will be treated as carrying on business in the ITZ. Commission agents or other agents of independent status, however, will not be treated as a business entity that is carrying on business in the ITZ.

The terms ‘employee’ and ‘agent’ are not defined in the GST law and take their ordinary meaning. This means that under the revised test, only agents that have, and habitually exercise, authority to conclude contracts on behalf of the entity, but are not a broker, general commission or independent agent, will be deemed to be carrying out an enterprise. The Government notes:

This approach is consistent with the type of agents that are relevant in determining whether an entity has a permanent establishment under the current law, and in the permanent establishment articles in Australia’s tax treaties ... As such, the analysis of whether an agent causes a non-resident to carry on an enterprise in the ITZ focuses on the authority of an agent, and their exercise of that authority, to conclude contracts on the non-resident’s behalf.119

Changes to resident agent provisions

The current resident agent rules are designed to make Australian agents (discussed above) liable for the GST on supplies that are made through them by non-residents, on the basis that they are better placed to deal with any GST liability than a non-resident without presence in Australia.120

Item 5 of Schedule 2 introduces proposed subsection 57-5(3) to the GST Act to amend the resident agent provisions. Under the current law, if a non-resident supplier makes a supply to an Australian consumer through a resident agent, the agent is liable to collect and remit the GST to the ATO. In case of ‘reverse charge’, however, the resident agent rule does not appropriately interact. The reason is that the GST on a supply that is reverse charged is payable by the recipient of a supply (rather than the supplier). However, in cases of supply, the resident agent rule makes the resident agent liable for GST. The proposed change will prevent this double taxation. In the new system, the resident agent would not be liable if the non-resident would not have been liable to pay GST. For supplies not connected with the ITZ, resident provisions will also no longer apply. In such circumstances, because of reverse charge rules under the provision of Division 84 of the GST Act, the supply may be a taxable supply, and the recipient, not the agent, will be liable to pay the GST.

Changes to taxation of supplies made for no consideration between associates

Item 6 of Schedule 2 amends subsection 72-5(2) of the GST Act, in order to clarify the treatment of supplies that are made between business associates for no or insufficient consideration. Under the existing provision, a supply without consideration between associates is not automatically reverse charged. At present, section 72-5 implies that a supply without consideration that is made between associates can still be a taxable supply. However, the existing rule does not automatically remove the need for consideration to be provided for a supply through the reverse charge rules in Division 84. The proposed changes provide that a supply can be treated as a taxable supply that is reverse charged to the recipient if it is acquired from a supplier that is an associate and no consideration is provided for the supply.

Changes to how price is determined in no-consideration transactions

Currently sections 72-10 and 72-70 provide that where no consideration is provided for supplies, the value of the supply is taken to the GST exclusive market value of the supply.

118. Ibid., pp. 81, 86 and 87.
120. Ibid., p. 133.
Item 7 and Item 8 of Schedule 2 insert proposed subsections 72-10(3) and 72-70(4) to the GST Act, introducing new price setting rules that are applicable to supplies for no consideration, or to supplies for insufficient consideration. These rules are relevant to supplies for which the supplier is liable to GST. Because Division 84 relies on price of a supply, the value thus decided in Division 72 is not appropriate for supplies that are reverse charged to a recipient. The amendment relates particularly to those rules in Division 72 that set the values of supplies for no consideration and insufficient consideration that do not apply to taxable supplies because of Division 84.

The effect of items 7 and 8 is to exclude the operation of sections 72-10 and 72-70 in relation to certain offshore supplies other than goods or real property (that is, intangible supplies).

**Changes to goods or services initially acquired solely for a creditable purpose**

Item 9 of Schedule 2 amends paragraph 84-5(1)(c) in order to make provisions in Division 84 also applicable to a recipient that initially acquired a goods or services solely for creditable purpose. This will split the enterprise and creditable purpose requirements into two separate provisions so they apply independently, with no impact on the overall application of Division 84. The changes will also apply to extend the GST free rules to reduce GST embedded supplies made to non-residents. This will obviate the need for non-residents to register for GST in order to claim ITCs.121

Division 84 also provides rules for determining the amount of ITCs for a creditable acquisition that relates to taxable supplies that are reverse charged to the recipient. These rules are contained in section 84-13, which sets out a formula for determining the amount of ITCs to which a recipient is entitled. This formula has three components— the amount of the ‘full ITC’, the ‘extent of creditable purpose’, and the ‘extent of consideration’.122

Item 10 amends the definition of ‘extent of consideration’ in subsection 84-13(1) of the GST Act to allow the associate of the suppliers, based in the ITZ who receives supplies without any consideration, to be acknowledged by their ‘extent of consideration’ through the operation of the ITC formula in the subsection 84-13(1)(b). The extent of consideration is intrinsically the extent to which the recipient provided, or was liable to provide, consideration (value) for an acquisition. Usually, the recipient of has an ‘extent of consideration’ nil, when the supply is for no consideration.

‘Although this does not present any issues for supplies that are not taxable supplies (because no GST is paid on those supplies and the ITC rules only apply to taxable supplies), the extent of consideration calculation does not achieve the correct outcome for supplies for no consideration between associates that are taxable supplies because of these amendments’.123

To address this, the ‘extent of consideration’ component of the ITC formula in subsection 84-13(2) is 100 per cent if the recipient of a supply is the supplier’s associate, and the supply is without consideration. This approach means that the extent of consideration determines the proportion of full ITCs to which a recipient is entitled. Treating the extent of consideration as 100 per cent is appropriate because the recipient is responsible for the entire amount of the GST liability that arises as a result of these amendments.124

**Changes to order of precedence regarding ITC calculations**

Item 11 of Schedule 2 brings a consequential amendment through subsection 84-13(2) in order to clarify that the rules contained in Division 84 will take precedence over the rules contained in Division 72 that specifies the ITC calculation. This is because the ‘extent of consideration’ is based on the premise that ‘full ITC’ component of the formula sets the maximum amount of ITCs to which a recipient is entitled. In a reverse charge situation, the amount is determined through the formula contained in section 84-13. Division 72 is limited on the applicability of such provisions, hence the proposed changes.124
Item 12 of Schedule 2 inserts proposed sections 84-20, 84-25 and 84-30, making consequential amendments respectively by treating the price of taxable supply as the GST inclusive market value of supply; acknowledging the supply without consideration received from a recipient’s associate as a taxable supply; and making adjustments for acquisitions made solely for creditable purposes when the provisions under paragraph 84-5(1) are disregarded.

The determination of tax periods for taxable supply has also been part of Division 29 and Division 72 of the GST Act. Division 29 contains general rules that use the time from which consideration for a supply is provided to determine the tax period to which GST on a supply and the ITCs on the acquisition of the supply are attributable. Where a taxable supply is for no consideration, there are issues with determining the tax period to which the GST payable on the supply is attributable (similar issues arise for the ITCs on the acquisition).  

Under Division 72 rules for determining tax periods for the GST on taxable supplies for no consideration (and the ITCs on the acquisition of such supplies) are specified, focusing on when a supply first became connected with the ITZ. Because of this focus on a supply being connected with the ITZ, there are issues with applying the Division 72 rules to supplies that are reverse charged through Division 84 that are not connected with the ITZ. The specific tax period rule introduced by these amendments addresses the current uncertainty about the tax period to which GST on a taxable supply that is reverse charged is attributable.

To avoid ambiguity about which rules apply in determining the tax period to which GST and ITCs are attributable where they arise because of Division 84, the amendments introduce rules that prioritise the application of Division 84 over Division 29 and Division 72.

**Preserving GST-free treatment of certain supplies to non-residents outside the ITZ**

Item 19 of Schedule 2 inserts proposed subsection 38-190(3)(c) in order to preserve the GST-free treatment of supplies to non-residents outside the ITZ where the non-resident recipient of such supply is not registered for GST, and the recipient’s acquisition of the goods or services is both solely for a creditable purpose and is not a non-deductible expense.

**Preserving GST-free treatment of services provided under warranties**

Item 20 adds proposed section 38-191 at the end of Subdivision 38-E of the GST Act. It will preserve the GST-free treatment of services provided to repair goods or services under warranty. It does so by providing that any supply that is other than goods or real property, to a non-resident, is GST-free if the recipient is not in the ITZ, and the supplies comprise work in the nature of repairs, or in the form of warranty. The provisions of supply of damaged goods, made in the course of a supply to the same recipient will also be treated as GST-free.

**Changes to GST threshold test**

Item 21 of Schedule 2 inserts proposed subsections 188-15(3)(d) and 188-20(3)(d) to the GST Act to ensure that GST-free supplies made by a non-resident supplier, and not made through an enterprise in the ITZ, are not counted towards GST turnover tests for registration purposes (see also the discussion under the headings ‘Changes to how turnover thresholds are calculated’ and ‘Changes to the GST registration threshold’, above).

**Alternate methods for calculating ancillary importation costs**

Item 22 of Schedule 2 adds proposed subsections 13-20(4) and (5) to the GST Act to help reduce the compliance costs for GST registered importers by providing an alternative option to calculate their transport, insurance and ancillary costs for importations. It does this by allowing them instead to use a percentage of the customs value of the imported goods as a proxy for these costs when calculating the value of their taxable importation. This percentage is currently ten per cent but may be set at a different percentage if prescribed by regulation.

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125. Ibid.
126. Ibid.
127. Proposed subsection 38-191(3).
Detailed analysis—Schedule 3

The current FMD regime

Currently the scheme allows a maximum amount of $400,000 that can be held by any individual primary producer in the scheme at any time. Income so deposited is tax deductible in the year the deposit is made, and included in assessable income in the year it is withdrawn.  

The treatment of withdrawal varies by time limits: an amount withdrawn from the scheme is generally treated as never entered into the scheme if it is withdrawn within 12 months of its deposit. As such, the taxpayer is required to amend the previous year’s income tax assessment to remove the deduction claimed for the amount of deposit.  

The current feature does not include rainfall conditions as one of the factors to be taken into account for scheme operations.  

Moreover, the deposit scheme is not allowed to be used as a loan offset arrangement for the taxpayer. If used for such a purpose, the scheme is not treated as a deposit scheme.  

The proposed changes

Deposit amount limit extended

The proposed measures in Schedule 3 of the Bill will enable primary producers to keep a maximum of $800,000 at any given time in the FMD scheme. With the inclusion rainfall deficiency as a new feature of the scheme, any amount withdrawn within 12 months of the deposit will not necessarily be treated as ceasing the facility if part of the land under primary production meets the prescribed rainfall conditions for the prescribed period.  

Early withdrawal from deposit scheme due to rainfall deficiency

The deficiency of rainfall conditions must exist for at least six consecutive months, and the taxpayer has to demonstrate that their land experienced such deficiency equivalent to or worse (or lower) than five percent of average rainfall for that six month period (default rainfall period) based on the recent data from the Bureau of Meteorology at the time of withdrawal.  

However, there may be further flexibility in determining the default rainfall period and alternative conditions under the regulations.  

Loan offset arrangements

Schedule 3 amends the conditions behind the agreement between a primary producer and a financial institution, in which, the taxpayer (an individual or a partner of a partnership carrying on primary production) can use the FMD to offset against loans or other debts. However, there is an administrative penalty that will apply if the loan or other debts do not relate wholly to a primary production business. In the latter case, if the loan is partly to a primary production business and partly to another purpose, then the administrative penalty will apply in respect of the proportion of the loan relating to the other purpose or activity. The measure is expected to provide financial institutions a level of certainty to allow them to enter into qualifying loan offset arrangements with their primary producer clients. This measure will also allow capital held in FMDs to be used more flexibly and will help primary producers to reduce costs in their business.  

This concession is however not available to loans held by companies, trusts or a person who is not an FMD owner.  

Structure of ownership of FMD scheme qualifying for early withdrawal

A number of business structures are used for the operation of primary production businesses. These include, individual entrepreneurship, partnership (with the owner being a partner), or through a trust, with the owner

130. Proposed subsection 393-40(2).
131. Proposed subsection 393(40(3AA).
being either a beneficiary, presently entitled to some or all of the net income of the trust, or a unit holder in a fixed trust under section 393-25 of ITAA 1997.132

Early access to the FMD is limited to the above groups of businesses. Moreover, only certain classes of cultivators are allowed to access this facility. They include those businesses that propagate plants, fungi, or their products or parts; maintain animals for sale or the sale of their body parts or offspring; primary produce dairy products from raw materials produced by the primary producer; and plant and trees in a plantation or forest for logging.133

By contrast, early access to FMDs is not allowed to an FMD owner that only carries on commercial fishing, felling of trees, or transporting trees that the transporter logged for milling or processing or to a place for transport to a mill or processing plant.134

Inclusion of severe drought and rainfall conditions in the FMD scheme

Item 1 of Schedule 3 amends section 393-1 of the ITAA 1997 by omitting ‘in exceptional circumstances or in the event of’ and replacing it with ‘in the event of a severe drought’. This will bring the rainfall conditions to be part of the scheme so that primary producers can withdraw their deposits in the scheme on the basis of drought conditions within a prescribed period.

Item 2 of Schedule 3 inserts proposed paragraph 393-15(2)(c)(ca) in order to reflect changes in the scheme according to new drought conditions specified elsewhere. Item 12 of Schedule 3 inserts proposed subsection 393-40(3) to the ITAA 1997 devising the mechanism for repayment of whole or part of a farm management deposit in the event of severe drought.

Inclusion of offset loan arrangements in the FMD scheme

Item 3 inserts proposed section 393-17 at the end of Subdivision 393-A which spells out the meaning of the tax consequences of liabilities reducing because of farm management deposits through loan offset arrangements. Where the owner of a FMD or a partnership of which the owner is a partner, incurs an amount of interest payable that falls short of what they otherwise would be because the owner holds FMD, then any income comprising the shortfall will be treated as being neither assessable nor exempt income. The amendments also clarify that any corresponding deduction is limited to the actual amount charged.

Raising the FMD deposit limit

Item 8 of Schedule 3 introduces the new limit of the FMD scheme to $800,000 in section 393-35 (table item 10) of the ITAA 1997, enhancing the capacity of the scheme to allow primary producers to meet the challenges of fluctuations in cash flow of their operations.

Administrative penalties

Items 4 and 9 of Schedule 3 insert proposed subsection 393-25(3) and section 393-37 respectively in order to ensure that an administrative penalty for a loan offset arrangement does not apply if the loan or other debts being offset relate wholly to the primary production business carried on by the taxpayer as an FMD owner in their capacity as an individual entrepreneur or through a partnership.

However, item 14 of Schedule 3 inserts proposed section 288-115 at the end of Division 288 in Schedule 1 of the TAA 1953 to ensure that the FMD tax concession is appropriately targeted by applying an administrative penalty for any breach of rules. The amount of the administrative penalty will be 200 per cent of the amount by which interest has been reduced on the portion of the loan used for non-qualifying purposes. The effect of the penalty was to impose an additional cost to act as a deterrent.

Commencement of amendments

Item 15 of Schedule 3 amends Schedule 1 to the TAA 1953 to apply the proposed measures to assessments for the 2016–17 income year or later income years.

133. Ibid., p. 125.
134. Ibid.
Other provisions

Schedule 1
Items 2, 6, 10 to 22, 25, 29 and 33 to 36 of Schedule 1 make consequential amendments to the GST Act that provide materials for guiding the current set of substantive changes.

Item 9 inserts proposed subsection 8(3) in the ABN Act, to provide for an exclusion from the requirement of an ABN number for ‘limited registration entities’.

Schedule 2
Items 14 and 16 to 18 make minor consequential amendments to account for the changes in definition of a couple of terms in section 195-1 of the GST Act.

Items 23 and 24 of Schedule 2 amend subparagraphs 38-185(3)(f)(ii) and 38-185(4)(f)(ii) and section 195-1 of the GST Act to remove any reference to wine and luxury car importations from the proposed importation calculations, as these products are dealt with by other provisions of respective taxation law.

Item 25 of Schedule 2 brings forth the transitional application provisions related to the tax periods and working out the net tax amounts for such period once the Schedule receives Royal Assent.

Sub-items 27(1) and 27(2) of Schedule 2 introduce the transitional rule by preventing the application of the new provisions to a supply made prior to the period when the Schedule receives Royal Assent, by an entity that is registered for GST, or required to be registered for GST and there is a written agreement between the supplier and the recipients that can identify the supply with the consideration of money, and the way of working out the consideration in money.

Schedule 3
Items 5, 6, 10, 11 and 13 adds notes at the end of subsection 393-30(2), section 393-30, note 1 at the end of subsections 393-40(1) and (2) and subsection 393-40(4) respectively of the ITAA 1997. The provisions mainly make a number of consequential amendments to the income tax law, including the materials that explain the changes to the tax treatment of FMDs.