

# The Australian GST cross-border rules in a global context

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## *Abstract*

This article builds on previous research by the author examining the goods and services tax (GST) rules applying to cross-border supplies in a number of countries and highlights the immensely changed technological environment in which the GST operates in this context in Australia since the GST was introduced in 2000. The recent rules introduced in Australia are evaluated in light of global practice and it is concluded in particular that Australia was at the forefront of efforts to apply the tax to internet platform suppliers. The point is also noted that the breakthrough with platforms lends itself to allow taxing of the 'sharing economy' in a similar manner should the decision be made to do so.

**Key words:** Goods and services tax, digital economy, cross-border supplies, Australia, New Zealand, Canada, South Africa

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## 1. INTRODUCTION

This article on the 20th anniversary of the Australian goods and services tax is in one sense an update on a previous publication that undertook a comparative analysis of the cross-border supply rules for the supply of intangibles. That research examined the approach to this practically difficult challenge to the administration of the goods and services tax/value added tax (GST/VAT) in four jurisdictions – but with a significant focus on Australia. The other countries examined were New Zealand; Canada; and South Africa.<sup>1</sup> The article is also a recognition of the immensely different global economy that has developed since the introduction of the GST which economy has seen an increase in global connections through changes to the digital face of business and a shift to what many now call ‘the digital economy’.

This article, as well as updating, endeavours to understand to what extent the approach in Australia may have been influential in the development of approaches to dealing with the phenomenon of cross-border supplies around the globe, or may itself have been influenced by other approaches. It also constitutes a record of how far the Australian GST has had to come, having been introduced when the internet was still a fledgling compared to the capacity to make cross-border orders and deliveries now in the digital age.

## 2. THE EARLY EMERGING THEMES

In the earlier work referred to above, the author and a researcher at University of Pretoria identified some themes in the manner in which revenue authorities have responded to the challenge of taxing cross-border supplies of intangibles. It appeared that the two principal methods of applying the destination principle to inbound digital supplies are either a reverse charging method or an extra-jurisdictional compulsion to register, imposed on the foreign supplier.

That study found that the VAT/GST rules governing inbound digital supplies varied across the sample jurisdictions (see Table 1 for a summary). Canada relied on the long-established rules applicable to traditional supplies. New Zealand has established detailed and tightly focused rules that seem to ensure that foreign suppliers do not incur irrecoverable GST although they require registration of foreign suppliers of inbound digital supplies.

The four sample countries all have a reverse charge mechanism. In Canada’s case and also in the case of South Africa the reverse charge was required for inbound digital supplies to final consumers, whether they are businesses or not. The South African rules limited this reverse charge to circumstances where the foreign digital service provider is not required to register for VAT in South Africa (and that is determined by means of a number of tests related to the residence, address, bank account location and place of payment of the recipient of the supply; and to the turnover of the supplier). Whereas the South African approach seemed to be blind to whether the recipient is consuming for private consumption or for business purposes, the Australian and New Zealand approach applies the reverse charge mechanism to the receipt of partially creditable

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<sup>1</sup> See Michael Walpole and Madeleine Stiglingh, ‘Untangling the Worldwide VAT Web on Digital Supplies’ (2017) 32(2) *Australian Tax Forum* 429.

supplies by GST-registered businesses. In those two jurisdictions domestic consumers do not reverse charge, and this seems very sensible.

In the group of countries whose rules the study examined South Africa was the first to require foreign suppliers to register if making foreign inbound digital supplies. The requirement was imposed in 2014. The requirement came in, in New Zealand, in October 2016 and in Australia in 2017. The idea, it appears, came from Norway which reported success in foreign supplier registration in around 2013.<sup>2</sup> The European Union had already begun to show signs of adopting this method for suppliers to consumers within EU Member States. The sample countries in the study differed in how broad the definitions were of supplies that trigger a requirement to register. The Australian definition seems the broadest including supplies (through the definition of ‘inbound intangible consumer supplies’<sup>3</sup>) of everything other than goods or real property although recognising a limitation of the tax to supplies to final consumers, ie, wholly non-business supplies. The New Zealand definition is wide too using, as it does, a ‘remote service’ supply concept.<sup>4</sup>

The previous study contrasted these with the South African approach which the study noted had a finite list of supplies falling under the five headings of: (1) educational services; (2) games and games of chance; (3) internet-based auction services; (4) miscellaneous services (including e-books, audio-visual content, still images and music), and (5) subscription services. The study queried whether this list therefore included advertising services or the supply of software although the study also noted that there was some debate on this point. The study concluded that the exclusions from the list were probably made so as to exclude business supplies that would simply lead to the circularity of a reverse charge arising and then being credited under normal VAT principles. There is always a problem with lists as they can go out of date – and in the digital economy can do so very rapidly. They thus need constant attention and leave the revenue authorities open to the risk of suppliers and consumers finding a work-around that deprives the treasury of its consumption tax.

The study noted that, quite sensibly, the jurisdictions requiring the registration of foreign suppliers of inbound digital supplies limited this to the context of supplies to residents of the jurisdiction of consumption. (See, for example, the carve-out from the Australian rules of supplies of ‘things’ not being goods or real property to non-resident recipients who acquired them for the purposes of their conduct of an enterprise outside the (Australian) indirect tax zone.)

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<sup>2</sup> See, eg, Naoki Oka, ‘Inland Revenue Authority of Singapore (IRAS)-OECD Regional GST/VAT Conference (May 2013), Taxing Cross-Border Supply of Services and Intangibles, Case Studies, Technical Summary of Discussions’, 7, <http://www.oecd.org/ctp/consumption/iras-oecd-vat-conference-technical-summary-of-examples.pdf> (noting that ‘[a]ccording to the presentation made by the Norwegian participant, the revenue [from the 2011 reform to apply VAT to purchases of electronic services from abroad] was above initial projections and the number of simplified regulations was satisfactory’).

<sup>3</sup> *A New Tax System (Goods and Services Tax Act) 1999* (Cth) s 84-65 (GST Act).

<sup>4</sup> ‘A “remote” service is defined as a service where, at the time of the performance of the service, there is no necessary connection between the physical location of the recipient and the place of physical performance. The definition includes digital services, such as e-books, music, videos and software downloads, as well as non-digital services, such as general insurance, consulting, accounting and legal services’: Inland Revenue Department (New Zealand), ‘GST on Cross-Border Supplies of Remote Services: A Special Report from Policy and Strategy, Inland Revenue’ (May 2016) 1, <https://taxpolicy.ird.govt.nz/sites/default/files/2016-sr-gst-cross-border-supplies.pdf>.

Thus, the long-established income tax concept of residence of the supplier (in income tax the party deriving the income) gives way in this aspect of VAT law to the primacy of the residence of the consumer. The study saw that New Zealand and South Africa used an objective test. South Africa had what the study called a ‘two out of three’ test. This was based on the fact that digital service supplies fell within the definition of an ‘enterprise’ for purposes of South African VAT if supplied from outside South Africa and two of three criteria were met, namely:

- (a) the recipient of the supply is a resident<sup>5</sup> of South Africa;
- (b) the payment for the service is made from a South African bank account;
- (c) the recipient has a business address, residential address or postal address in South Africa.<sup>6</sup>

In New Zealand the test is a ‘two out of six’ test. The non-resident supplier is to regard the recipient of their supplies as a New Zealand resident where they have ‘non-contradictory information’ regarding any two of six items, namely:<sup>7</sup>

- (a) the recipient’s billing address;
- (b) the internet protocol (IP) address of the device used by the recipient, or ‘...another geolocation method’;
- (c) the bank details of the recipient ‘including the account the person uses for payment or the billing address held by the bank’;
- (d) the country code of the mobile device’s subscriber identity module card (SIM card) that was used by the recipient;
- (e) the location of the recipient’s fixed land line used to supply the service to them; or
- (f) ‘other commercially relevant information’.

The study approved of the fact that the New Zealand law includes rules to assist in determining the place of residence where, for example, there are two non-contradictory indications of residence somewhere other than New Zealand. In such cases the more reliable information must be used. There is also a ‘fail safe’ rule such that the Inland Revenue can prescribe the use of another way to determine the residence of the recipient, in certain circumstances, and can also agree on another method, with the supplier, where the list approach has failed.

The Australian rule on determination of residence of the consumer of affected supplies is based on a ‘reasonable belief’ based on the supplier’s ‘usual business systems and

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<sup>5</sup> A ‘resident of the Republic’ means ‘a resident as defined in section 1 of the Income Tax Act: Provided that any other person or any other company shall be deemed to be a resident of the Republic to the extent that such person or company carries on in the Republic any enterprise or other activity and has a fixed or permanent place in the Republic relating to such enterprise or other activity’: *Value-Added Tax Act 89 of 1991* (SA) s 1(1).

<sup>6</sup> Paragraph (b)(vi) of the definition of an ‘enterprise’ in section 1 of the *Value-Added Tax Act 89 of 1991* (SA).

<sup>7</sup> *Goods and Services Tax Act 1985* (NZ) s 8B(2).

processes’.<sup>8</sup> In the Australian rules it is only non-businesses (or businesses not registered) that are ‘consumers’ so the reasonableness of the supplier’s belief that the recipient is not a resident consumer is restricted by the legislation to the extent that if it is based on the consumer being registered for GST it must have disclosed to the supplier its Australian Business Number (ABN) and a declaration that it is registered, or other information to the effect that it is registered. As the mere registration of a business for tax by means of an ABN is not evidence of GST registration it seems to this author that this aspect of the Australian rules is more than a little complex and prone to misunderstanding by foreign suppliers.

At least the Australian and New Zealand rules narrow the application of the GST to supplies from business to consumers (B2C); South Africa did not appear to do that and the study noted at the time of the survey of countries that the South African rules did not distinguish between business to business (B2B) supplies and B2C supplies requiring both types of supplier to register for VAT.

The registration threshold is another interesting feature to compare between jurisdictions. Australia and New Zealand have matched their registration thresholds for non-resident suppliers to that of domestic suppliers, so they are the same for both. The GST threshold in New Zealand is based on a 12-month actual or projected turnover of NZD 60,000,<sup>9</sup> and that in Australia is AUD 75,000. At the time of the survey the South African registration threshold for foreign suppliers was a 12-month actual or projected turnover of ZAR 50,000. It has since been increased so as to match the domestic registration threshold of ZAR 1 million.<sup>10</sup> Given that the former threshold was the equivalent of about USD 3,500 the net was very widely cast with such a low threshold and the adjusted threshold would no doubt be welcome to some small suppliers.

Table 1 below summarises the findings at the time.

**Table 1: Summary of (2017) VAT Rules Governing Inbound Digital Supplies**

<b>Inbound digital supply rules</b>	<b>Canada</b>	<b>South Africa</b>	<b>Australia</b>	<b>New Zealand</b>
Specific rules	No	Yes	Yes	Yes
Effective date	N/A	2014	1 July 2017	1 October 2016
Specific definitions	Yes	Yes	Yes	Yes
Type of definition	‘intangible personal property’	‘Electronic service’ Finite list not including all intangibles.	‘Australian consumer’ and ‘Inbound intangible consumer supplies’	‘Remote service’ that distinguishes between digital and non-digital services.

<sup>8</sup> GST Act, s 84-100.

<sup>9</sup> *Goods and Services Tax Act 1985* (NZ) s 51.

<sup>10</sup> *Value-Added Tax Act 89 of 1991* (SA) s 23(1A) effective 1 April 2019, as announced in 2018 National Budget Speech released on 21 February 2018. The change was to take effect from 1 October 2018 but was deferred to 1 April 2019.

Place of taxation proxy	Place it may be used (not actual use)	Residence Objective 'two of three item' test	Australian consumer Reasonable-belief test	Residence. Objective 'two of six item' test, or as prescribed.
Non-resident registration*	Not required for non-resident not carrying on business in Canada.	Yes Also provides for 'Intermediary'	Yes But only in relation to B2C supplies to non-registered recipients. Also 'electronic distribution service'	Yes Also provides for 'electronic marketplace'
Threshold? c/f domestic	Yes - same	Yes – same, ZAR 1 million (prev. ZAR 50,000)	Yes – same	Yes - same
Types of taxable inbound supplies	Registration of foreign supplier without Canadian presence not required.	B2B and B2C	Only B2C	Only B2C B2B are zero-rated
Reverse charging	Yes – B2C	Yes – B2C (unless non-resident is registered)	Yes – only GST registered business	Yes – only GST registered business

\* Without permanent establishment and complying with carrying on of business requirement in the country.

### 3. THE CURRENT AUSTRALIAN STATUS QUO

The Australian rules on digital supplies across its borders into Australia have not been long in place and it is thus not all that simple to assess how they are going. Those interested in GST will know that the Australian model was adventurous in that it relied on registration by offshore suppliers and it was one of the first – but this approach has now become common.

Recent announcements have revealed that the Australian approach has generated more revenue than expected. In his speech to the *OECD Global Forum on VAT 2019* in Melbourne in March 2019 the Assistant Treasurer revealed that:

Recent registration numbers reveal that over 1500 offshore businesses have registered under both [digital supplies and low value goods off shore supplier registration] measures, covering all major platforms and businesses from all jurisdictions.

I can also report that both measures are collecting more revenue than estimated.

In terms of revenue, the GST on digital products and services measure raised around \$269 million Australian dollars in 2017-18 compared with an estimate of \$150 million.<sup>11</sup>

This is an impressive achievement in light of the difficulties the GST system faced. The challenge that the Australian law faced was that cross-border supplies of intangibles were beyond the reach of the GST net because the section of the GST Act that created the legal connection (for GST purposes) between the supply and the indirect tax zone (ie, Australia) was too narrow. Section 9-25 was a textbook example (should anyone ever want to write a textbook on such subject matter) of pre-internet GST law. The relevant part said for intangibles:

(5) A supply of anything other than goods or \*real property is *connected with the indirect tax zone* if:

(a) the thing is done in the indirect tax zone; or

(b) the supplier makes the supply through an \*enterprise that the supplier \*carries on in the indirect tax zone; or

(c) all of the following apply:

(i) neither paragraph (a) nor (b) applies in respect of the thing;

(ii) the thing is a right or option to acquire another thing;

(iii) the supply of the other thing would be connected with the indirect tax zone.

Example: A holiday package for a trip to Queensland that is supplied by a travel operator in Japan will be connected with the indirect tax zone under paragraph (5)(c).

The question of when it could be said that enterprises were carried on in the indirect tax zone was covered by the following provision that has now been replaced (with a new s9-27):<sup>12</sup>

(6) An \*enterprise is *carried on in the indirect tax zone* if the enterprise is carried on through:

(a) a permanent establishment (as defined in subsection 6(1) of the *Income Tax Assessment Act 1936*) in the indirect tax zone; or

(b) a place that would be such a permanent establishment if paragraph (e), (f) or (g) of that definition did not apply.

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<sup>11</sup> See Hon Stuart Robert (Assistant Treasurer), 'Address to the 5th OECD Global Forum on Value Added Tax, Melbourne Convention Centre' (20 March 2019), <https://ministers.treasury.gov.au/ministers/stuart-robert-2018/speeches/address-5th-oecd-global-forum-value-added-tax-melbourne> (accessed 21 March 2019).

<sup>12</sup> These changes resulting in the insertion of section 9-27 were part of those made to cure the problems with the operation of the B2B provisions, essentially the problem that under the old rules a non-resident may have a GST liability in Australia despite having no real presence. Note that the asterisk beside a term indicates that the term has a statutory definition in the GST Act.

It will be evident from this that the supply of intangibles to Australian residents made by a non-resident without a permanent establishment thus lacked the necessary connection with Australia. Downloaded intangibles from overseas like software, music videos and games were thus not within the GST net.

This was addressed by changing the place of supply rules so as to include supplies to 'an Australian consumer'. Section 9-25 was amended, and a relevant extract is shown below.

Meaning of Australian consumer

(7) An entity is an Australian consumer of a supply made to the entity if:

(a) the entity is an \*Australian resident ...; and

(b) the entity:

(i) is not \*registered; or

(ii) if the entity is registered – the entity does not acquire the thing supplied solely or partly for the purpose of an \*enterprise that the entity \*carries on.

Note: Suppliers must take reasonable steps to ascertain whether recipients are Australian consumers: see s 84-100.

The definition both cured the problem of lack of connection and narrows the impact of the change by ensuring that it applies to the private consumption of the supplies in question.

One observes in this approach the operation of a principle in Australian GST law of defining broadly so as to cast the net wide and then narrowing the application of certain rules to moderate them and thus target the rule. Australia has a (perhaps notoriously) broad definition of 'supply' for GST purposes and this is an example of confining such breadth to 'business to consumer' (B2C) supplies of intangibles across Australia's border. There is further narrowing of application evident in a new section 9-26 which introduced a further concept in the form of 'an inbound intangible consumer supply'. In summary, these supplies cover:

- 'inbound intangible supplies' (being supplies of things other than goods or real property) which are deemed not to be connected with the indirect tax zone when the recipient is an 'Australian-based business recipient' (another defined term);
- intangible supplies between non-residents where the recipient is a non-resident which acquires the supply solely for the purpose of carrying on its business enterprise outside Australia;
- a supply between non-residents of leased goods; and
- continued lease of goods covered by the previous item.

The exclusion of these items is revenue neutral because taxing the supply would lead to a credit being claimed by the recipient and consequential circularity and wasted compliance costs; they also preserve the GST-free status of exports. The provisions



seem to be fine-tuned to impose GST on supply of intangibles across the border to local domestic consumers.

There are other intricate elements of fine-tuning that ensure that the widened category of taxable supplies continues to be covered by the usual rules associated with ‘GST-free’ (zero-rated in European parlance) and ‘input taxed’ status.

Section 38-610<sup>13</sup> deals with the GST-free category and section 40-180 deals with input taxed supplies. Section 38-610 demonstrates the principle:

38-610 Inbound intangible consumer supplies

(1) An \*inbound intangible consumer supply is *GST-free* if:

(a) it is made by a \*non-resident; and

(b) it is covered by a determination under subsection (2).

(2) The Minister may, by legislative instrument, determine that a specified class of \*inbound intangible consumer supplies are GST-free.

(3) However, the Minister must not make the determination unless:

(a) the \*Foreign Minister has advised the Minister in writing that the treatment of the class of supplies under the \*GST law would, apart from the determination, be inconsistent with Australia’s international obligations; and

(b) the Minister is satisfied that similar supplies made by \*Australian residents would be GST-free.

Section 40-180 applies similar machinery to supplies that are determined by the Minister to be input taxed.<sup>14</sup> Thus certain supplies might be treated under this new cross-border regime in the same manner that they were treated before the new rules. Supplies might be regarded as GST-free health or education supplies; and others as input taxed financial supplies, but these determinations themselves require a further written determination by the Foreign Minister as to Australia’s international trade obligations. It is interesting that the opinion of two Ministers on different matters is required in order to give effect to the GST-free or input taxed status. One might ask (flippantly and cynically), ‘what could possibly go wrong?’.

The need for sundry additions and refinements in the statute that have been inserted in order to deal with the new special category of inbound intangible supply has been extensive.<sup>15</sup>

The remaining step is to tax supplies of inbound intangibles that are made to Australian businesses registered for GST, acquired as part of their enterprise but not solely for GST-creditable purposes. The relevant portion of the consideration for these supplies is

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<sup>13</sup> GST Act, s 38-610.

<sup>14</sup> GST Act, s 40-180.

<sup>15</sup> A schedule of these new sections can be found in *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* (Cth), Sch 1.

subject to reverse charging obligations requiring the recipient to pay GST on that portion.

*The Australian rules as they apply to non-resident businesses*

Having, as explained above, excluded from the application of the rules as many supplies as possible and appropriate, the obligation remains on non-resident suppliers to collect GST on the supplies they make in the form of ‘inbound intangible consumer suppl[ies]’. The rules operate by way of default and an expectation is imposed on the supplier to collect GST (and remit it) *unless* they have taken reasonable steps to identify the recipient as one other than an Australian (domestic) consumer, and unless they have by this means formed a reasonable belief that the recipient is not such a consumer. As has been mentioned above, the supplier may rely on their ‘usual business systems and processes’ in order to form the reasonable belief as to the status of the recipient. The Australian GST registration of the recipient may be used to form an opinion, if the recipient has an Australian Business Number (ABN) and the recipient has made a declaration to the effect that they are registered for GST.

Other rules unique to this situation apply such as that the foreign supplier may either become fully registered for GST in Australia or may limit their exposure to Australian GST administration rules and become a limited registration entity. These rules are set out in Sub-division 84-D of the GST Act and a summary of their obligations can be seen in the Appendix to this article.

Such entities have been statutorily drawn into the Australian GST system by reason of the fact that intangible supplies by such non-residents have become connected with the indirect tax zone. So if their taxable supplies to Australia (of such intangibles) meet or exceed the normal annual turnover registration threshold of AUD 75,000 they are required to register for GST in Australia.<sup>16</sup> Anticipating, no doubt, that this might be deeply unattractive to foreign businesses, aside from the probably limited enforcement options, it is possible for such suppliers to opt for a ‘GST-lite’ registration under which they might register only as ‘limited registration’ entities.<sup>17</sup> The threshold is the same but the compliance obligations are fewer.

Some key aspects of the rules applicable are that limited registration entities are not entitled to input tax credits in Australia (– presumably they would be unlikely to have many credits given that they may have customers here, but no other presence). They are required to submit returns quarterly and cannot opt for less frequent returns, nor be subject to more frequent returns.<sup>18</sup>

*Platforms*

One of the more advanced aspects of these Australian rules is the manner of treatment of the internet phenomenon of businesses making supplies to consumers through multiple supplier websites. The concept is illustrated most easily by referring the reader to enterprises such as *Amazon*, *eBay* etc. Such enterprises may take many forms and

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<sup>16</sup> GST Act, s 23-5.

<sup>17</sup> GST Act, s 84-135.

<sup>18</sup> GST Act, ss 84-140 and 84-155.

they may not be a supplier but may be an agent or facilitator between the actual supplier and the consumer. These types of platform are often described as intermediaries.

The Australian approach is to treat these types of supplier as ‘electronic distribution platforms’. The approach is very much one of substance over form as it ignores the different legal forms and relationships that might underlie internet sites, suppliers and such intermediaries. Section 84-70 has inserted into our law a unique GST meaning of electronic distribution platform (EDP).

A service is an EDP if:

- (a) it allows entities to make supplies available to end users; and
- (b) is delivered by means of \*electronic communication; and
- (c) any of the supplies that are \*inbound intangible consumer supplies are to be made by means of electronic communication.

The definition also excludes carriage services, payment, and payment processing systems.

The EDP definition was confined to electronically delivered sound and picture files, software applications, games, videos and the like. The extension of the GST to low value goods<sup>19</sup> meant a change to the definition of EDP.

There are other important exclusions from this definition of forms of supply dealt with elsewhere in the Act. Thus, a service is not an EDP solely because it is:<sup>20</sup>

- (a) a carriage service (within the meaning of the *Telecommunications Act 1997*); or
- (b) a service consisting of one or more of:
  - (i) providing access to a payment system;
  - (ii) processing payments;
  - (iii) providing \*vouchers the supply of which are not \*taxable supplies because of section 100-5.

Each of these is subject to their own rules under other provisions. Payment systems and processing of payments are dealt with under the financial supply rules. Likewise, vouchers, as a voucher for supplies up to a stated monetary value is not subject to GST. GST may arise on the supply for which the voucher is redeemed but not the voucher itself.

As has been indicated, the problem of such platforms and how to tax them is theoretically large and significant because the variety of platforms and the permutations of ways in which they might operate are many. Australia was not the first but was nevertheless at the forefront in this attempt to cut through the legal and practical

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<sup>19</sup> *Treasury Laws Amendment (GST Low Value Goods) Act 2017* (Cth), enacted on 26 June 2017.

<sup>20</sup> GST Act, s 84-70(2).

difficulties so as to establish a workable statutory framework for dealing with the phenomenon of internet platforms.

#### **4. GLOBAL PRACTICES**

The changes that are being made to taxation of the supply of intangibles around the world reveal certain trends. No doubt several of these have arisen through different jurisdictions simply reaching the same conclusion on ways to deal with a common problem. Others are a recognition in one jurisdiction that a practice developed in another can be adopted and adapted for use. It is unclear which.

One of the trends that is readily apparent is the use of residence of the consumer as a proxy for place of supply in B2C situations.

##### **4.1 Residence of the recipient**

As has been mentioned in section 2, in New Zealand the place of taxation of ‘remote services’ is determined by the residence of the recipient and this is a proxy for place of consumption. The New Zealand rule is to use non-contradictory information as to two of six items of information.<sup>21</sup>

In Australia the supplier the foreign supplier has to form a ‘reasonable belief’ as to the residence (and nature) of the Australian recipient of their supply. At least ‘business processes’ can be used to form an opinion about the recipient.

The South African solution of using the residence of the consumer seems to override the facts and through the legislation could lead to a supply to a South African resident being subject to VAT even when made (and consumed) in another country. (The South Africa rules stipulated that the recipient should be South African resident – as defined for Income Tax<sup>22</sup> – something a supplier might find hard to determine; that the payment of the service be made from a South African bank account; and that the recipient have a business address, residential address or postal address in South Africa.<sup>23</sup>) This is at least an objective two out of three test but not all that manageable for suppliers. Perhaps this is not something to be concerned about as it affects ‘outliers’.

The Canadian rules seem to tax the supply based on the place it may be used – not its place of actual use. This is probably not all that different to the South African rules.

##### **4.2 Registration threshold**

An area where there is, and always has been, some diversity in approach to VAT/GST liability is that of the registration threshold.

In the group covered by the earlier study on which this article draws, there was less diversity at least in relation to differences between foreign and domestic businesses. That study found that Australia, Canada and New Zealand all applied the same threshold to foreign suppliers that applied to domestic suppliers. South Africa applied a different threshold in that foreign suppliers faced a threshold of ZAR 50,000 whereas domestic suppliers have a registration threshold of ZAR 1 million. This has now changed to a

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<sup>21</sup> *Goods and Services Tax Act 1985* (NZ) s 8B(2).

<sup>22</sup> On the definition of ‘resident of the Republic’, see n 5, above.

<sup>23</sup> See n 6, above.

common ZAR 1 million threshold for both domestic suppliers and foreign suppliers of electronic services.

The question of what threshold to set for VAT/GST registration is not insignificant. The fact that a supplier is not registered means that it bears the tax on its inputs and it cannot get a credit for that tax. This can cause a cascading of taxes with adverse economic consequences. On the other hand, a threshold that is too low can result in the requirement that suppliers register when they are too small and too poorly equipped in terms of scale to manage their compliance obligations. As compliance costs are highly regressive this is harmful to the smaller players in a market.

It would seem that the suppliers across border of intangibles-like services would probably be better organised through their systems than many small businesses and so the compliance burden can be addressed to some extent by good systems built into their operating model. The risk of compliance costs being damaging is lower in this case than in the case of other small businesses, provided the registration threshold is not too low. But some countries, like Australia, do have rather low thresholds and this is a risk. The levelling of competition achieved by matching domestic resident and non-resident suppliers seems sensible. It certainly should address the complaints of unfair competition often made by domestic suppliers that have to compete with foreign suppliers. This equality of treatment is, of course, reliant on adequate enforcement of registration and collection.

#### 4.3 Dealing with platforms

The development of international practices associated with dealing with electronic platforms that aggregate supplies by multiple suppliers in whatever legal manner and through whatever commercial arrangements is another strong theme that has emerged in the collection of VAT/GST on cross-border supplies of services and other intangibles.

It is probably correct that Australia, once again, took a bold step in attempting to get these suppliers under control. The definition of ‘electronic distribution platform’<sup>24</sup> is novel and effective. In New Zealand the ‘electronic marketplace’ is similar. These solutions may seem complex because of their definitions but they are more useful and targeted than broader, looser, concepts like the term ‘intermediary’. What suppliers require is certainty.

The platform approach is also in itself a platform for expansion of VAT/GST collection generally. This is because once platforms have been incorporated into the tax system and are understood conceptually, they provide an opportunity to tax such activities as the supplies inherent in ‘the sharing economy’ or ‘gig economy’. These two terms attempt to describe the modern phenomenon of small suppliers aggregating their product (whether it be short term accommodation (AirBnB), or spare capacity in their motor car (Uber and other ‘ride sharing’ arrangements)). The individual suppliers participating in such activities would often be very small businesses not usually reached by or readily able to comply with the consumption tax system. Many such suppliers would ordinarily fall well below the registration threshold in their jurisdiction. If the platform can be required to register this may provide an opportunity for a concept developed for cross-border supplies to be adapted and applied in all situations including

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<sup>24</sup> GST Act, s 84-60.

domestic and cross-border supplies. The decision to do so should be taken after some reflection. What the approach to platforms has done is to provide a tool developed for cross-border supplies of low value goods and some intangibles that can now be applied to ‘the sharing economy’ and to subject to consumption tax supplies by small and even micro businesses that would otherwise not have been within the reach of the VAT/GST.

Policy considerations, it is submitted, in deciding whether to apply platform rules to the ‘sharing economy’ should include: the size of this economy and the desirability of taxing it; the fact that the platform will have some input tax credits but would probably not be able to claim those in respect of its suppliers/members; the fact that the suppliers/members would remain input taxed and a consideration of whether this is a distortion; and whether the extension of the VAT/GST to this modern phenomenon will create transparency as to the income tax implications of these activities and result in revenue related to that.

#### 4.4 The International Guidelines

Recognising the quiet revolution that has been taking place in relation to VAT/GST and the so-called ‘digital economy’ the OECD has been proactive in aligning the policies and activities of its members and others. It has recently adopted a set of *International Guidelines on VAT* (2017). It has also now issued a *Report on the Role of Digital Platforms in the Collection of VAT/GST on Online Sales* (March 2019). It is likely to be an interesting exercise to review these and identify the extent to which Australia has influenced and follows these. That will be an exercise for an updated version of this article. And it will be necessary to update it long before another 20 years has passed.

## APPENDIX

### Summary of Schedule 1 of *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* Australia<sup>25</sup>

Provision	Intended effect of measure
Sub-division 84-B	Inserts new rules specifically for Inbound intangible consumer supplies as follow
Section 84-45	<p>Tax invoices and adjustment notes not required for offshore supplies to Australian consumers. Operators of electronic distribution platforms are regarded as having <u>themselves</u> made electronic supplies that are made through the platform:</p> <ul style="list-style-type: none"> <li>(a) from offshore to Australian consumers; or</li> <li>(b) in some cases, under an agreement with the supplier.</li> </ul> <p>The operator of the platform counts the supplies towards <u>its</u> GST turnover, and <u>it</u> pays GST on the supplies.</p>

<sup>25</sup> This is a summary of Schedule 1 of the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* (Cth) with the author’s gloss on those measures. Some description is drawn from the Act verbatim. Emphasis is added. An asterisk beside a term indicates (as used in the legislation itself) that the term has a statutory definition in the GST Act. The summary does not include any subsequent amendment to the provisions since enactment under the 2016 Measures No. 1 Act.

Section 84-50	There is to be no requirement for tax invoices or adjustment notes in respect of inbound intangible consumer supplies. Existing sections 29-70 and 29-75 (which deal with tax invoices and adjustment notes in the normal course) are to be ignored.
Section 84-55	<p>As intimated in s 84-45 – the operator of an electronic distribution platform is to be treated as supplier who made the supply (84-55(1)(a)) for the *consideration that was made for the supply (84-55(1)(b)) as part of the *enterprise carried on by that operator. Thus, GST on the supply is payable by the operator of the electronic distribution platform.</p> <p>S 84-55(2) clarifies that where the *inbound intangible consumer supply is made through more than one *electronic distribution platform then 84-55(1) applies only to the operator of any of those platforms identified by a hierarchy of alternative rules which restricts the application to:</p> <ul style="list-style-type: none"> <li>(a) a party to a written agreement, between the operator and at least one of the other operators of the platforms, under which the operator is to be treated as the supplier; or</li> <li>(b) if no such agreement has been made—the operator determined in accordance with an instrument made by the Commissioner under subsection (3); or</li> <li>(c) failing such agreement or instrument made under subsection (3): <ul style="list-style-type: none"> <li>(i) the first of the operators of those platforms to receive, or to authorise the charging of, any *consideration for the supply; or failing this</li> <li>(ii) the first of the operators of those platforms to authorise the delivery of the supply.</li> </ul> </li> </ul> <p>S84-55(3) authorises the Commissioner of Taxation, by legislative instrument, to specify how an operator is to be determined for the purposes of paragraph (2)(b).</p> <p>S84-55(4) despite subsections (1) and (2), removes from the operation of the section operators of an *electronic distribution platform in relation to an *inbound intangible consumer supply made through the platform if:</p> <ul style="list-style-type: none"> <li>(a) a document, relating to the supply, issued to the *recipient of the supply identifies: <ul style="list-style-type: none"> <li>(i) the supply; and</li> <li>(ii) the supplier as the supplier of the supply; and</li> </ul> </li> <li>(b) the supplier and the operator of the electronic distribution platform (EDP) have agreed in writing that the supplier is the entity responsible for paying GST for the supply or a class of supplies that includes the supply; and the operator the EDP does not authorise the charge to the recipient for the supply nor authorise the delivery of the supply; and does not set the terms and conditions under which the supply is made.</li> </ul> <p>This specific set of circumstances seems to have been inserted after consultation in response to industry concerns on behalf of parties with specific arrangements in place between EDP operators and suppliers using their platform.</p>
Section 84-60	Extends s 84-55 to certain other supplies through an EDP. Section 84-55 (above) applies to a supply as if it were an *inbound intangible consumer supply if (a) the supply is made through an EDP; and (b) that supply is covered by a written agreement between the supplier and the operator of the platform entered into before the supply is made; and (c) the EDP the operator is registered; and (d) the agreement treats the supply as if it were an inbound

	<p>intangible consumer supply made through the EDP. In these circumstances s 84-60(3) treats the supply as having been made in the course/furtherance of the enterprise through which the EDP operates the platform.</p> <p>S 84-60(2) removes from this extension supplies in circumstances where (a) the supply is GST-free or input taxed; or (b) the operator would not be treated under section 84-55 as being the supplier of, and as making, the supply if it were an *inbound intangible consumer supply.</p>
Section 84-65	<p>Inserts a definition of <i>inbound intangible consumer supply</i> as discussed above. In summary supplies of things other than goods or real property qualify if the *recipient is an *Australian consumer. But they fall outside the definition if:</p> <p>(a) the thing that is the supply is done wholly in the indirect tax zone [which notionally removes it from the scope of “inbound”?]; or</p> <p>(b) (Ignoring s 84-55 about EDPs) the supplier makes the supply wholly through an *enterprise that the supplier *carries on in the indirect tax zone [which establishes a connection to the indirect tax zone (ITZ – ie, Australia) through other provisions?].</p> <p>The specific explanations of why some supplies fall outside the definition seem to be out of an abundance of caution and for clarity and to ensure that B2B type supplies are dealt with under the normal but amended rules and the supplies to Australian (final) consumers are dealt with under the so-called ‘Netflix’ rules.</p>
Section 84-70	<p>Inserts a meaning of <i>electronic distribution platform</i>.</p> <p>A service is an EDP if:</p> <p>(a) it allows entities to make supplies available to end-users; and</p> <p>(b) is delivered by means of *electronic communication; and</p> <p>(c) the supplies are to be made by means of electronic communication.</p> <p>This would seem to exclude websites that facilitate online shopping for goods like clothing etc. It is more focussed on electronically delivered sound and picture files, games, videos and the like.</p> <p>There are important exclusions from this definition of certain supplies dealt with elsewhere in the Act. Thus, a service is <u>not</u> an EDP solely because it is: (s84-70(2))</p> <p>(a) a carriage service (within the meaning of the <i>Telecommunications Act 1997</i>); or</p> <p>(b) a service consisting of one or more of:</p> <ol style="list-style-type: none"> <li>(i) providing access to a payment system;</li> <li>(ii) processing payments;</li> <li>(iii) providing *vouchers the supply of which are not *taxable supplies because of section 100-5.</li> </ol> <p>[Each of these is subject to their own rules under other provisions. Payment systems and processing of payments are dealt with under the financial supply rules. Likewise, vouchers - a voucher for supplies up to a stated monetary value is not subject to GST. GST may arise on the supply for which the voucher is redeemed but not the voucher itself].</p>
Sub-division 84-C	<p>Inserts rules applicable to the identification of and the categorisation of supplies to <i>Australian consumers</i> and excludes certain supplies from these. These rules seem intended to reduce the compliance burden.</p>
Section 84-95	<p>Explains that one of the tests in s 9-25(5) as to whether a supply is connected with the ITZ is whether the recipient of a supply of an intangible is an Australian consumer. There are grounds for restricting this and treating a</p>



	supplier in some situations as making a supply to an entity that is <u>not</u> an Australian consumer.
Section 84-100	<p>Establishes when entities are treated as not being Australian consumers and states that the GST rules apply to you as if another entity was <u>not</u> an *Australian consumer of a supply if:</p> <p>(a) you take reasonable steps to obtain information about whether or not the other entity is an Australian consumer of the supply; and</p> <p>(b) after taking those steps, you reasonably believe that the other entity is not an Australian consumer of the supply.</p> <p>S 84-100(2) goes on to the effect that the *GST law applies in relation to you as if another entity was not an *Australian consumer of a supply if:</p> <p>(a) your usual business systems and processes provide you with a reasonable basis for forming a reasonable belief about whether the other entity is an Australian consumer of the supply; and</p> <p>(b) you reasonably believe that the other entity is not an Australian consumer of the supply.</p> <p>The argument that you have a reasonable belief that the recipient is not an Australian consumer because it is registered for GST does not provide a full escape from the compliance burden associated with making an Australian consumer supply. This is because s 84-100(3) specifies that any belief on your part that the other recipient is not an *Australian consumer of the supply on the relevant grounds 'is reasonable only if:</p> <p>(a) the other entity's *ABN, or the other identifying information prescribed under subsection (4) relating to the other entity, has been disclosed to you; and</p> <p>(b) the other entity has provided to you a declaration or information that indicates that the other entity is registered'.</p> <p>S 84-100(4) adds that the Commissioner may prescribe identifying information for the purposes of paragraph (3)(a) under a legislative instrument.</p>
Sub-division 84-D	Inserts rules for 'limited registration entities' that have to comply with a subset of the GST rules. [Because intangible supplies by non-residents have been included in the definition of supply by means of the expanded meaning of 'connected with the ITZ' non-residents whose taxable supplies in the ITZ meet or exceed the AUD 75,000 annual turnover threshold are required to register for GST under the normal operation of s 23-5.]
Section 84-135	<p>Explains that non-residents may elect to be limited registration entities. Limited registration entities are not entitled to input tax credits for acquisitions and must have quarterly tax periods.</p> <p>[These limited registration rules are seemingly intended to minimise the contact that non-resident suppliers must have with the Australian tax authorities and reduce their compliance burden. The cost of this is that they are not entitled to any input tax credits, but this cost may be illusory as if they are non-resident and their supplies are not otherwise connected with Australia, they are unlikely to have creditable costs in the jurisdiction.]</p>
Section 84-140	<p>Allows non-residents to elect to be limited registration entities. Such entities are not entitled to input tax credits for acquisitions and must have quarterly tax periods.</p> <p>The section notes that 'The Commissioner may approve simpler approved forms for limited registration entities: see subsection 388-50(3) in Schedule 1 to the <i>Taxation Administration Act 1953</i>.' [It is submitted that the section may</p>

	be unnecessary as these separate registration arrangements can be established administratively.]
Section 84-145	<p>Limited registration entities cannot make creditable acquisitions and an acquisition made by a *limited registration entity is not a *creditable acquisition if an election under s 84-140(2) is in effect.</p> <p>But elections are revocable and subsection (1) does not apply, and is taken never to have applied, to the acquisition if the election is revoked under subsection 84-140(5) during:</p> <ul style="list-style-type: none"> <li>(a) the *financial year in which the acquisition is made; or</li> <li>(b) the next financial year.</li> </ul> <p>[The section includes an explicit override of s 11-5 (which is about what is a creditable acquisitions).]</p>
Section 84-150	<p>Entries in the Australian Business Register</p> <p>The section provides key aspects of the administrative and compliance mechanics associated with the operation of the Australian Business Register and limited registration entities.</p> <p>Essentially limited registration entities do not have to have to be entered on the Australian Business Register. The section deals with the implications of changes in limited registration status.</p>
Section 84-155	<p>Establishes the rule that limited registration entities have only quarterly tax periods and have no other option (which would otherwise be available under s 27-10 (an election) or ss 27-15 or 27-37 (a determination by the Commissioner) and relate to one-month tax periods).</p>