



# GST Brief

## Offshore intangible supplies and cross border transactions

February 2016

[kpmg.com.au](http://kpmg.com.au)



# Executive Summary

After consultation with taxpayers, the Government tabled legislation on 10 February 2016 which, as previously advised, will change the application of Goods and Services Tax (GST) to supplies made by and to non-residents.

The measures contained in *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016* are arguably one of the most significant changes to the GST Act since its inception and will require careful planning and consideration by entities that are affected.

## **Are you ready for these changes?**

Amendment	Application of GST to Intangibles	Cross border supplies
<b>Overview</b>	<p>This integrity measure is designed to level the playing field between overseas online retailers and ‘bricks and mortar’ Australian retailers. However it will also have wider application to other services.</p> <p>A summary of the amendments is outlined below and detailed in the following pages:</p> <ul style="list-style-type: none"> <li>• Digital products and other intangible supplies will be subject to GST if provided to Australian consumers and are not otherwise GST-free or input taxed.</li> <li>• Suppliers required to obtain information on the status of their customers.</li> <li>• Safeguards apply where the supplier has a reasonable belief that the customer is not an Australian consumer.</li> <li>• Penalties for persons misrepresenting status as an Australian consumer.</li> <li>• Registration threshold of \$75,000 per annum (\$150,000 for non-profits).</li> <li>• GST-free supplies through an overseas enterprise not included in registration threshold.</li> <li>• Operators of electronic distribution platforms may be liable on supplies made through the platform.</li> <li>• Inclusion of overseas gambling supplies.</li> <li>• Option for limited registration.</li> </ul>	<p>This measure includes a raft of amendments that largely impact non-residents who supply services to Australian GST registered businesses. As a result of this measure, non-resident suppliers will no longer be required to register and account for GST on business to business transactions which offer no net GST revenue gain to the Government.</p> <p>A summary of the amendments is outlined below and detailed in the following pages:</p> <ul style="list-style-type: none"> <li>• Definition of carrying on an enterprise is amended to capture the presence of individuals.</li> <li>• Certain supplies made by a non-resident are no longer subject to the Australian GST system where the recipient is an Australian GST registered entity.</li> <li>• Compulsory reverse charge provisions expanded.</li> <li>• Wider application of GST-free concessions for acquisitions made by non-residents. This will alleviate some non-residents from being required to register for GST to claim credits.</li> <li>• Changes to application of GST to supplies of installed or assembled goods.</li> <li>• Option to adopt different valuation method for taxable importations.</li> </ul>
<b>Commencement</b>	1 July 2017	Likely 1 July 2016
<b>Transitional</b>	No – the amendments will apply to supplies made under long term contracts to the extent it is supplied after commencement.	Yes - existing agreements are grandfathered until a review opportunity arises or supplier and recipient agree (in writing) that the amendments should apply.

# Application of GST to Intangibles

This measure is intended to modernise the Australian GST system in response to the increase in cross-border supplies of services and intangibles. It aligns with the OECD final report on 'Addressing the Tax Challenges of the Digital Economy.'

This is also consistent with measures implemented by various other countries to include these types of supplies in their consumption tax base.

## Current law

One of the requirements for a supply to be subject to GST is that the supply is 'connected with Australia'. Under the current law, a supply of services or intangibles is 'connected with Australia'<sup>1</sup> if:

- the thing is done in Australia;
- made through an enterprise carried on in Australia; or
- the thing supplied is a right or option to acquire something, the supply of which would be connected with Australia.

## New law

The new measures will expand the 'connected with Australia' provisions to include supplies of services or intangibles to Australian consumers. These supplies will be taxable unless they are otherwise GST-free or input taxed.

An Australian consumer is an Australian resident (excluding external territories) who:

- is not registered for GST; OR
- if registered for GST, does not make the acquisition to any extent for the purpose of carrying on their enterprise

## Identifying Australian consumers and safeguards

The two key questions that relate to identifying an Australian consumer relate to the residency and the GST status of the recipient. For these purposes, it is recognised that the supplier must typically rely on information

provided by the Australian customer.

As a safeguard, the amendments provide that a supplier is not liable to GST if they reasonably believe the recipient is not an Australian consumer based on:

- reasonable steps to obtain information concerning the status of the recipient; or
- business systems and process which provide a reasonable basis for identifying the status of the recipient.

In this respect, if an Australian customer is registered for GST, it will only be reasonable for the supplier to conclude the customer is not an Australian consumer if the supplier has obtained both the recipient's Australian Business Number and a declaration indicating that the recipient is registered. However, this is not required if it is reasonable to believe that the recipient is a non-resident.

The safeguards only apply to protect the supplier from under-payments of GST.

## Penalty for misrepresentation by recipients

While tax law provides for existing offences in relation to statements misrepresenting residency or improper use of an ABN, these are only imposed for more serious breaches.

The amendments provide for administrative penalties for less serious breaches. An administrative penalty will be imposed based on whether the statement resulted from failure to exercise reasonable care, recklessness or intentional disregard of the law.

A recipient that is registered for GST will be liable for a compulsory reverse charge if the misrepresent that they have acquired the supply for a business purpose. A reverse charge will also apply where the recipient later applies a supply for a private or domestic purpose (to any extent).

## GST-free – Input taxed supplies

A supply of services/intangibles may be input taxed or GST-free under the normal rules. There is also provision for the Minister to issue a determination to treat certain supplies as GST-free or input taxed in specific circumstances.

---

<sup>1</sup> Referred to as the Indirect Tax Zone

For example, a supply may be GST-free where the effective use or enjoyment of the supply is outside Australia. A supply may be input taxed where it satisfies the expanded definition of financial supplies (see below).

## Tax invoices

A tax invoice is not required to be issued for supplies made by non-residents that are not done in Australia or made through an enterprise in Australia.

## Registration

The current registration turnover threshold of \$75,000 (\$150,000 for non-profits) will also apply to supplies covered by the amendments.

However, any GST-free supplies that are made through an enterprise carried on outside of Australia will not be included in the turnover calculation.

## Limited registration entity

An entity may elect to register as a "limited registration entity" if it is a non-resident and only makes supplies that are captured by the new rules.

A limited registration entity

- will have reduced application requirements;
- is required to remit GST on its supplies;
- will lodge quarterly returns; and
- cannot claim GST on its acquisitions.

A limited registration entity will not be issued an ABN.

A limited registration entity may revoke its election and apply for full GST registration if circumstances change.

## Electronic distribution platforms

Supplies made by non-residents that are not done in Australia or made through an enterprise in Australia are referred to as 'inbound intangible consumer supplies'. The GST liability for these supplies made through an electronic distribution platform will be treated as being made by the operator rather than the supplier.

These supplies are treated as being made through the operator's enterprise and for the same consideration payable to the actual supplier.

These provisions have the effect of requiring an operator to register for GST where the value of its suppliers through the platform exceed the GST registration turnover threshold. It is important to note that the threshold includes all supplies made through the platform. That is, the operator will need to include supplies made by suppliers who may not individually exceed the turnover threshold.

## What is an electronic distribution platform?

A platform is an electronic distribution platform if:

- It is operated by means of electronic communication
- allows entities to make supplies
- the supplies are made through the platform.

It excludes services which merely create awareness of the product (e.g. advertising), or provide access to communications (e.g. internet service providers).

## When is an operator liable?

The operator will be treated as the supplier in the following circumstances (in order of application):

- the supplier and operator agree that the operator will be treated as the supplier; or
- the operator is determined in accordance with a legislative instrument; or
- they are the first operator to receive or authorise the charging of any consideration for the supplier; or
- they are the first operator to authorise the delivery of the supply.

However, despite the above, the operator will not be treated as a supplier if:

- a document issued to the recipient identifies the supply and the supplier; or
- the supplier and operator agree in writing that the supplier is the entity responsible for payment of the GST; or
- The operator does not authorise the charge, or the delivery or does not set terms and conditions under which the supply is made.

If the operator is treated as making the supply it will be responsible for taking the reasonable steps to determine whether customers are Australian resident consumers.

## What about Australian resident enterprises?

Due to the definition of inbound intangible consumer supply, supplies made by Australian resident enterprises are not subject to the platform rules. However, an operator and a supplier may agree to apply the platform rules where:

- the supply is made through a platform
- the operator is registered for GST
- the supply is not input taxed, GST-free or a supply that the operator would not be liable for if platform rules applied (e.g. where another operator would be liable)

## Specific Provisions

### Financial supplies

The definition of financial supplies are likely to be extended to cover supplies of interests in bank accounts and superannuation funds where provided by a non-resident. Without this change, the non-resident would have been making a taxable supply rather than a financial supply.

### Gambling supplies

In response to submissions made during the consultation period, it was recognised that gambling supplies provided by non-residents to GST registered taxpayers (e.g. professional gamblers) would not be included within the scope of the original measures. The new legislation now provides that gambling supplies are included regardless of the GST registration status of the Australian resident gambler.

Therefore, non-resident suppliers making gambling supplies to Australian residents will be subject to Australian GST under the 'global GST calculation' method. Enforcement of these measures and collection of the GST in this respect will remain a challenge.

## Commencement / Transitional Rules

The new rules will apply for supplies attributable on or after 1 July 2017.

Any periodic or progressive supplies made under an agreement entered into before 1 July 2017 will be subject to the new provisions to the extent: they are supplied after 1 July 2017. The relevant

supply is taken to be provided uniformly over the period. This excludes warranties (goods or services) or supplies that would be a taxable supply if the amendments had not been made.

## KPMG observations

The change widens the scope of GST to bring Australia's GST system in line with other countries and the OECD VAT/GST guidelines.

Some initial issues for affected entities to consider include:

- Establishing a system/process for suppliers to determine the status of their customers;
- Establishing a system/process to ensure GST is correctly captured and reported to the ATO
- Cost benefit analysis of a full GST registration versus a limited registration;
- Identifying supplies made under an existing or future contract that will be provided on a periodic or progressive basis that spans 1 July 2017
- Changes to existing contractual clauses to ensure suppliers are entitled to recover any GST payable on supplies from their customers
- Implications for supplies provided by foreign branches or offshore related parties of Australian entities
- Determine where the liability for GST on supplies made through electronic distribution platforms rests.
- If acquiring intangible supplies from offshore, implementing a process to notify suppliers of your GST registration status.

# Cross border transactions

The genesis of these amendments was a report prepared by the Board of Taxation on the application of GST to cross-border transactions. It was identified that non-resident suppliers incur unnecessary compliance costs under the current GST system for no revenue gain to the Government. These measures seek to limit the circumstances under which non-residents must register for GST.

## Amending the GST definition of carrying on an enterprise

Under the current law, the meaning of when an enterprise is carried on in Australia is linked to the income tax definition of permanent establishment.

The amendments update the meaning to focus on the presence of individuals located in Australia. Under the new rules, an enterprise will be carried on in Australia if the enterprise is carried on by particular individuals located in Australia and:

- the enterprise is carried on through a fixed place;
- the enterprise is carried on through one or more places for more than 183 days in a 12 month period; or
- the entity intends to carry on the enterprise for more than 183 days in a 12 month period.

## Which individuals?

This will apply to individuals who are the relevant entity, or who are an employee, officer or dependent agent of the entity. For this purpose, an agent is an entity that has authority to act on behalf of a principal and exercise that authority to conclude contracts.

## What is a 'place'?

The place is not required to be exclusively used by the entity, rather the focus is on the nature of the use of the place.

## Disconnecting supplies

The amendments introduce the concept of disconnected supplies. This provision overrides the connected with Australian provisions such that if a supply is 'disconnected' it will not be brought within the Australian GST system.

The following supplies will be disconnected where the supplier is a non-resident and does not make the supply through an enterprise in Australia:

- A supply of intangibles or services where the thing is done in Australia and the recipient is an Australian based business recipient.
- A supply of intangibles or services where the thing is done in Australia and the recipient is a non-resident that acquires the supply wholly for an overseas enterprise.
- A transfer of ownership of leased goods between non-residents where the recipient makes the acquisition solely for the purpose of an overseas enterprise, and the lessee imported the goods and continues the lease on substantially similar terms and conditions.
- A supply of leased goods by a non-resident lessor where the lessee imported the goods and the goods continue to be leased to the same lessee on substantially similar terms and conditions.

It is important to note that while a non-resident may be registered for GST and have an Australian enterprise, the supply may nonetheless be disconnected if the supply is not made through the Australian enterprise.

## What is an Australian based business recipient?

An Australian-based business recipient is an entity that is registered for GST, has an Australian enterprise and the acquisition is not solely for a private or domestic nature.

This definition is not based on residency of the particular entity, rather it is based on whether the recipient has a presence in Australia.

The requirement for an acquisition not being solely private or domestic ensures that suppliers continue to be liable for GST on supplies intended for private consumption in Australia.

## Supplies of installed or assembled goods

The current law requires that suppliers who install or assemble goods in Australia are connected notwithstanding that the recipient may have imported the goods and borne GST on the import.

The amendments will treat the supplier as having made two separate supplies (a supply of goods and a supply of installation/assembly services). The supplier will need to apportion the price to each supply.

Each supply is treated separately thus a supply of goods may not be connected while the supply of services may be connected.

A supply of installation/assembly services may be disconnected as outlined above. In this case, the recipient would need to consider if it is required to apply reverse charge.

## Compulsory reverse charge

The recipient of a disconnected supply will be subject to a compulsory reverse charge where it would not have been entitled to full GST credits if the supply was subject to GST.

## Adjustments for acquisitions which were fully creditable

Under the current law an entity is only required to consider reverse charge at the time of making an acquisition. Therefore, an entity would not be liable for reverse charge where it originally acquired services for a fully creditable purpose but later applied the services to a non-creditable purpose.

Under the revised rules, an entity will be liable for a GST adjustment where there is a change of use of this nature, as if the supply was subject to a reverse charge. Therefore the entity is required to recognise an increasing adjustment to the extent that an acquisition is later applied to a non-creditable purpose.

## Supplies for no consideration or limited consideration

The new rules seek to 'clarify' the reverse charge provisions where a supply is acquired from an 'associate' but is not connected with Australia.

A recipient will be liable for a reverse charge if:

- the supplier and recipient are associates;
- the supply is made for no consideration or consideration less than market value; and
- the recipient does not make the acquisition for a solely creditable purpose; and
- the recipient is registered or required to be registered.

Consistent with the current rules, the price of the supply is deemed as the GST-inclusive market value of the supply.

The recipient will need to recognise the GST on this supply in the tax period the supply starts to be done.

The EM states that the current GST law arguably operates the same way.

## Resident agents

The amendments also clarify the interaction between the resident agent provisions (where the resident agent is liable for GST) and the reverse charge provisions (where the recipient is liable for GST). This is achieved by exempting the resident agent from a GST liability where the non-resident would not have been liable to pay GST on the supply.

## Extension to GST-free rules

### Supplies provided to an Australia entity

Currently, a supply to a non-resident is not GST-free where the supply is provided to another entity in Australia (e.g. employee or subsidiary).

The amendments will expand the GST-free treatment where the other entity:

- Would have been an Australian based business recipient (registered for GST and not acquired for a private or domestic purpose); or
- Is an individual in their capacity as an employee or officer of an Australian based business recipient; or
- Is an individual in their capacity as an employee or officer of the recipient and the acquisition is solely for a creditable purpose and is not a non-deductible expense (e.g. entertainment).

The new provision will not apply to input taxed supplies.

Suppliers are likely to require information obtained from the other entity to support GST-free treatment under the new requirements.

## Warranty supplies

Currently, non-residents providing warranties in relation to Australian goods need to register to claim GST on costs incurred under the warranty (e.g. repairs).

The amendments provide that a supply of repair, renovation, modification or treatment of goods is GST-free if:

- The non-resident recipient (warranty supplier) is not in Australia when the supply is made and acquires the supply in the course of its enterprise;
- The non-resident is not registered or required to be registered;
- The supply is made to meet the non-resident's obligations under a warranty relating to the goods;
- The warranty must have been supplied as part of the supply of goods or been a separate taxable supply.

In addition, a supply of goods made in the course of making the above supply will be GST-free where it is the same recipient, and

- The goods are attached or form part of the goods to which the warranty relates; or
- The goods become unusable or worthless as a direct result of being used to repair, renovate, modify or treat the goods.

However, the amendments do not allow for a supply of replacement goods in Australia to be treated as GST-free.

## **GST Registration**

The GST registration turnover threshold is revised to exclude GST-free supplies made by non-residents through an overseas enterprise.

It is important to note that without this provision, an entity that makes a supply of intangibles to an Australian resident would be required to register even though the supply may be GST-free on the basis that it is consumed outside Australia.

## **Taxable Importations**

In working out the GST payable on taxable importations importers are currently required to determine an amount for international transport and insurance to their place of consignment and associated costs.

The revised rules allow for GST-registered importers to use a percentage of the customs value for these costs. The current percentage is 10% but may be changed by regulation. However, the new rules do not apply to taxable imports of wine and luxury cars.

## **Specific provisions**

### **Telecommunications supplies**

The amendments take precedence over the existing rules on telecommunication supplies.

### **Commencement/Transitional Rules**

The new rules will apply to working out net amounts for tax periods that commence from the second quarterly tax period after royal assent (i.e. likely 1 July 2016).

Agreements made prior to the date of Royal Assent will not be subject to the new laws if:

- the supplier is registered or required to be registered for GST; and
- the agreement specifically identifies the supply and the consideration for the supply.

However, the transitional rule does not apply where a review opportunity arises or the supplier and recipient agree (in writing) that the amendments should apply from a specified time.

The requirement for the supplier to be registered or required to be registered is designed to ensure that the provisions only operate where the entity already interacts with the Australian GST system.

## **KPMG observations**

These amendments fundamentally alter the application of GST to supplies made by and to non-residents. Given the likely commencement date of 1 July 2016, it is imperative that suppliers and recipients are aware of how the amendments impact on their business.

Some initial issues to consider include:

- Establishing a system / process to ensure supplies and acquisitions are treated correctly and reported to the ATO;
- Identifying supplies/transactions that will give rise to a reverse charge obligation and any adjustments, and establishing a process to monitor these;
- Review current contracts and standard terms and conditions;
- Review how supplies of installed goods will be apportioned;
- Cost/benefit analysis of calculating import GST on the value of transport and insurance costs vs using the prescribed percentage; and

- Consider whether non-residents currently registered for GST should continue being registered.

We note that despite these changes, non-residents may continue to be drawn into the net where GST is incurred on Australian costs. In this regard, The Board of Taxation rejected a direct refund system on the basis that it would require integrity checks on every application. It is curious that this does not pose an issue for other jurisdictions, in particular several countries in the European Union.

Further, it is unclear whether the new rules will require adjustments for supplies subject to a reverse charge in prior periods.

## Contact us

**Nick Kallinikios**  
**Indirect Tax**  
+61 3 9288 6714  
nkallinikios@kpmg.com.au

**Kate Law**  
**Indirect Tax**  
+61 8 9263 7303  
+61 2 9346 6080  
katelaw @kpmg.com.au

**Michael McAuliffe**  
**Indirect Tax**  
+61 3 9288 5852  
mmcauliffe1@kpmg.com.au

**Keith Polkinghorne**  
**Indirect Tax**  
+61 7 3233 3157  
kpolkinghorn@kpmg.com.au

**Anthony Versace**  
**Indirect Tax**  
+61 3 9288 5934  
aversace @kpmg.com.au

**Megan Croaker**  
**Indirect Tax**  
+61 2 9335 8647  
mcroaker@kpmg.com.au

[www.kpmg.com.au](http://www.kpmg.com.au)

The information contained in this document is of a general nature and is not intended to address the objectives, financial situation or needs of any particular individual or entity. It is provided for information purposes only and does not constitute, nor should it be regarded in any manner whatsoever, as advice and is not intended to influence a person in making a decision, including, if applicable, in relation to any financial product or an interest in a financial product. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

To the extent permissible by law, KPMG and its associated entities shall not be liable for any errors, omissions, defects or misrepresentations in the information or for any loss or damage suffered by persons who use or rely on such information (including for reasons of negligence, negligent misstatement or otherwise).

© 2016 KPMG, an Australian partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved. Liability limited by a scheme approved under Professional Standards Legislation.