

# **Submission to the Productivity Commission inquiry on collection models for GST on low value imported goods**

**Dr Kathryn James, Senior Lecturer, Faculty of Law, Monash University**

## **Scope of submission**

This submission responds to the following questions raised by the Productivity Commission's 'Discussion Paper on Collection Models for GST on Low Value Imported Goods':

- Issues that might affect compliance costs and rates by overseas vendors and electronic distribution platforms;<sup>1</sup>
- What changes including to the legislated model might help to address this.<sup>2</sup>

The Australian reforms are an ambitious attempt to move Australia from maintaining the highest threshold in the OECD for the relief of payment of GST on the importation of low value goods to effectively being one of the first OECD jurisdictions to attempt to tax all imports of low value goods.<sup>3</sup> I am generally supportive of moves to apply the GST to all imported goods for reasons primarily relating to revenue integrity and competitive neutrality.<sup>4</sup> However, I have some concerns about the proposed execution of the legislated model.

This submission addresses three issues in relation to the legislated model:

1. The effectiveness of the legislated model is undermined by its complexity;
2. Complexity combined with weak enforcement capacity increases risks of non-compliance which are not sufficiently addressed by the legislated model;
3. There are risks of Australia being an early mover.

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<sup>1</sup> Productivity Commission, *Collection Models for GST on Low Value Imported Goods*, Discussion Paper (July 2017), 16.

<sup>2</sup> Ibid. 17-18.

<sup>3</sup> OECD, *Consumption Tax Trends 2016: VAT/GST and Excise Rates, Trends and Administration Issues* (OECD Publishing, 2016), 48, Table 1.A1.10.

<sup>4</sup> See eg OECD/G20 Base Erosion and Profit Shifting Project, *BEPS Action 1: Addressing the Tax Challenges of the Digital Economy, 2015 Final Report* (OECD, 2015), Annex C, 182, 184.

This analysis is drawn from a more detailed study of the proposed legislative scheme which will shortly be published in an academic journal (and which I would be pleased to provide to the Commission if it may assist its inquiry).

Part 4 of the submission then provides some further comments on points made by stakeholders during the public hearings.

## **1 A well-intentioned but complex scheme**

As the Productivity Commission Discussion Paper identifies, the legislated model proposes a combination of vendor and/or intermediary collection.<sup>5</sup>

The legislated model is complex. Much complexity arises from the fact that rather than tax low value goods as any other imported good, the legislated model proposes establishing a new system (of supplier or intermediary collection) for taxing imports of low value goods (which are treated as taxable supplies) alongside the existing traditional collection method for other imported goods (which are treated as taxable importations).

Specifically, the legislated model introduces a new category of taxable supply so that an offshore supply of low value goods is connected with the indirect tax zone if the recipient of the supply is a consumer of the supply.<sup>6</sup> The model is similar, but not identical to, recent reforms to tax inbound supplies of intangible goods and services – which also treats such supplies as taxable supplies.<sup>7</sup> However, discrete issues arise when applying this model to tangible goods that do not arise in relation to inbound intangible supplies. This is particularly so in relation to the interaction between the new rules for low value goods and the existing rules for all other imported goods. This dual-system potentially undermines compliance which is already problematic given the lack of enforcement power over non-resident suppliers.

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<sup>5</sup> Productivity Commission, *Collection Models for GST on Low Value Imported Goods*, Discussion Paper (July 2017), 16.

<sup>6</sup> Treasury Laws Amendment (GST Low Value Goods) Bill 2017 ('GST Low Value Goods Bill 2017'), Schedule 1, Items 1 and 38, s9-25(3A) and s84-75(1). Although this Bill has become law (primarily sub-div 84-C of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth)) references are to the Bill as this contains the entirety of the provisions legislated. Explanatory Memorandum, Treasury Laws Amendment (GST Low Value Goods) Bill 2017 (Cth) ('Low Value Goods EM'), 1.21.

<sup>7</sup> *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ('ANTS Act 1999'), sub-div 84-B.

Suppliers (which can include vendors, the operators of electronic distribution platforms and re-deliverers)<sup>8</sup> will potentially be obliged to engage with two separate regimes depending on the value of the goods. This can matter to suppliers of goods with a value close to the relevant threshold or to suppliers who make mixed supplies of low value and other goods, which can give rise to potential complications, disputes and/or avoidance risks.<sup>9</sup> This dual system can also lead to risks of double and non-taxation which the legislated model does not completely eliminate.

### **Complexities associated with calculating value of a supply**

Suppliers of goods will be obliged to engage in two separate calculations: one to determine whether the goods are below the low value goods threshold (and therefore which rules apply) and second to determine the GST payable.

For a good to qualify as a low value good to which the legislated model applies, it must have a *customs value* of less than \$1000 (excluding GST, transport and insurance costs)<sup>10</sup> at the time the consideration of supply is first agreed.<sup>11</sup> Thus, they must first establish the customs value, which is not necessarily straightforward.<sup>12</sup>

Having established that the low value good provisions apply at all, suppliers would then need to separately calculate the *consideration for the supply* (including the value of goods and any associated costs such as transport and insurance), which is the value on which GST will be payable.<sup>13</sup> These separate calculations add to compliance costs and might pose problems for goods near the threshold (ie that have a customs value below \$1000 but where the consideration for the supply is over \$1000). There is the potential in this instance for the goods to be treated as both a taxable supply and taxable importation (see more on this below).

### **The ‘mixed supply’ problem**

These complexities regarding valuation and compliance are amplified for mixed supplies (ie supplies that includes both low value goods and goods above the threshold). The legislated model stipulates that suppliers must account for each good separately (even if the total value of all goods supplied is

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<sup>8</sup> GST Low Value Goods Bill 2017, Schedule 1, Item 38, s84-77, s84-81.

<sup>9</sup> Low Value Goods EM, Examples 1.10 – 1.12.

<sup>10</sup> *Customs Act 1901* (Cth), s159; Low Value Goods EM, 1.42.

<sup>11</sup> GST Low Value Goods Bill 2017, Schedule 1, Item 38, Section 84-79(4); Low Value Goods EM, 1.43.

<sup>12</sup> Suppliers need to make a number of assumptions about how the value of the goods would be calculated by Australian Customs if it was an importation of goods from the supplier’s jurisdiction to Australia including assumptions about how the Collector of Customs might exercise a discretion (in a reasonable manner in accordance with the law) and choose from one of at least three specified ways to convert values expressed in non-Australian currency to Australian currency: GST Low Value Goods Bill 2017, s84-79(4)(d)(e)&(5).

<sup>13</sup> Low Value Goods EM, 1.47.

above the low value goods threshold).<sup>14</sup> Therefore suppliers must engage with the low value goods provisions for those goods with a customs value of \$1000 or less (ie taxable supplies) and the standard provisions for all other goods (ie taxable importations). This would presumably require separate documentation and calculation (including assessing the customs value separately from establishing the consideration for the supply for the purposes of calculating the GST liability). Further complications might arise based on the manner in which the goods are consigned because the value of an importation is determined on the value of the whole consignment at the time of importation.<sup>15</sup> As the Explanatory Memorandum explains by way of example, if many supplies of low value goods are shipped together making the total value of the consignment exceed \$1000, and this was not reasonably anticipated at the time of supply, then it would be possible for the GST to apply to both the supply (as an offshore supply of low value goods) and the importation (as a taxable importation).<sup>16</sup>

### **Rules to avoid double and non-taxation**

The maintenance of two separate regimes for taxing supplies of low value goods and other imported goods necessitates the need for rules to address double and non-taxation. The legislated model does this, but these rules also give rise to their own complications and risks and can still result in either non-taxation or double-taxation (or at least consumers incurring irrecoverable GST) which the reforms do not entirely prevent. My forthcoming article addresses the issue in greater detail, but to demonstrate the issues, this submission discusses the example quoted above from the Explanatory Memorandum.

The legislated model provides for the avoidance of double taxation in this instance by allowing for the initial supply to be treated *as if it were not a taxable supply* provided that, first, any GST passed on<sup>17</sup> (if any) by the supplier to another entity is reimbursed and, second, an entity provides a declaration or information to the supplier that indicates GST has been paid on the taxable importation.<sup>18</sup> The onus is therefore on both the supplier (to establish whether or not any GST has been passed on and if so, provide the recipient a GST reimbursement and request the relevant declaration/information from the recipient (or another entity)) as well as the consumer ((or other relevant entity) to obtain the relevant declaration/information and provide it to the supplier) to avoid

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<sup>14</sup> GST Low Value Goods Bill 2017, Schedule 1, Item 38, s84-79(2)&(3).

<sup>15</sup> Low Value Goods EM, 1.76.

<sup>16</sup> Low Value Goods EM, 1.76. This could also occur if the customs value of the goods was under the \$1000 customs value threshold at the time the consideration for supply was agreed upon but over the threshold at the time of importation due to, for example, exchange rate fluctuations: GST Low Value Goods Bill 2017, s84-85; Low Value Goods EM, Example 1.11.

<sup>17</sup> Passed on is a defined term: ANTS Act 1999, s142-25, s195-1.

<sup>18</sup> GST Low Value Goods Bill 2017, s84-85(2).

double taxation of the consumer. To address the issue that the recipient of the supply also bears a risk of incurring irrecoverable GST (if they pay GST on the *taxable importation* after having also paid GST on the *supplier-taxed offshore supply of low value goods* and do not in fact receive a reimbursement of GST already paid from the supplier), the legislated model provides that that an importation of goods is a *non-taxable importation* to the extent that a supply of goods was a *supplier-taxed offshore supply of low value goods*. However, this only occurs if the Comptroller-General of Customs is notified by or on behalf of the importer of the goods that the supply was a taxable supply ‘at or before the time by which the taxable importation would have been made’.<sup>19</sup> In this case the obligation is on the recipient of the supply (or another relevant entity) to provide timely information which might not necessarily be available to them. In the event that timely information is not provided, the recipient of the supply faces paying the GST twice over (once on the supply in the event that a refund is not forthcoming from the supplier and again on the importation).<sup>20</sup>

So far this discussion has presumed that all supplies are taxable supplies. However, in the event that the goods supplied are GST-free or input-taxed, further complications and costs arise. Obviously any model contains imperfections, however, a real issue with the legislated model is that it institutionalises separate systems for imported goods depending on their value which not only gives rise to the complications discussed above, but also undermines the ability to apply the GST to all imported goods when technological and other advances permit this at a later stage (outlined in section 3 of this submission).

## 2 The importance of deterring non-compliance

As with the application of the GST to services and intangibles, a system relying on compliance from non-resident actors faces steep risks of non-compliance. The OECD/G20 Report amongst others suggests a two-pronged approach to this risk – to incentivise compliance in the first instance (through simplified registration, reporting, and remitting (eg no input tax credits, no invoices)) and to deter non-compliance in the alternative (for example, through applying the slower and more cumbersome traditional collection method in the absence of vendor/intermediary collection).<sup>21</sup>

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<sup>19</sup> GST Low Value Goods Bill 2017, Schedule 1, Item 19, s42-15(2). The EM states that: ‘It is expected that the information required will include the ABN or vendor registration number of the supplier and that this reporting will be combined with the other existing reporting on the entry of the goods for customs purposes’ – for example the obligations on suppliers to include relevant information in customs documents: GST Low Value Goods Bill 2017, Schedule 1, Item 38, s84-93: Low Value Goods EM, 1.80.

<sup>20</sup> Low Value Goods EM 1.81.

<sup>21</sup> OECD/G20 Base Erosion and Profit Shifting Project, *BEPS Action 1: Addressing the Tax Challenges of the Digital Economy, 2015 Final Report* (OECD, 2015), Annex C, 201.

The combined vendor and/or intermediary collection adopted by the legislated model contains several measures to simplify compliance (such as a registration threshold and simplified registration and reporting requirements)<sup>22</sup> but lacks sufficient deterrence for non-compliance. For example, there is no proposal to apply the traditional collection method or some other method (such as the hybrid model canvassed by the *Low Value Parcel Processing Taskforce*) as a fall-back option for non-compliant suppliers.<sup>23</sup> Nor is there a type of favoured vendor model to fast-track processing for compliant vendors beyond the optional simplified scheme.

There might be good practical reasons to do this, but the failure to seriously address the question of deterrence might further jeopardise compliance rates given the potential complexity and costs of compliance. This submission does not specifically address the merits of these particular fall-back options, but it does urge serious consideration of such measures to deter non-compliance or to further incentivise compliance.

### 3 The risks of being an early mover

Russell Zimmerman from the Australian Retailers Association states that the ‘ARA fully supports implementation and collection as of 1 July 2018... as a first step in collection and the quickest and simplest means on initial collection’. Significantly however, he also believes that ‘a transporter liability model is the next most practical step in implementation, which needs to also be operational as soon as the 1 July 2018 commencement date.’<sup>24</sup>

This highlights a further potential risk: that, by being an early mover in the introduction of GST on low value goods, Australia could institutionalise a complex scheme which could then prevent the introduction of a more simplified approach that treats all goods as taxable importations. That is, the adoption of the legislated model which establishes two separate schemes for imported goods depending on their value, might prevent or increase the cost of moving to a single scheme for all imported goods irrespective of value (as is possible under the transporter model).

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<sup>22</sup> See eg GST Low Value Goods Bill 2017, Schedule 1, Item 42 and Item 49, Div 146.

<sup>23</sup> Commonwealth of Australia Treasury, *The Low Value Parcel Processing Taskforce Final Report* (Commonwealth of Australia Treasury, Canberra, 2012), 14.

<sup>24</sup> Productivity Commission, ‘Inquiry into collection models for GST on low value imported goods - Transcript of Proceedings’, 22 August 2017, p 3.

A review of GST laws reveals numerous instances of *path-dependence* throughout.<sup>25</sup> One can see it in failed attempts to reform the GST treatment of financial supplies. An attempt by the Australian Treasury to redraft the financial supply provisions in a principles-based manner<sup>26</sup> was comprehensively rejected by stakeholders from the financial services industry who had previously complained of the complexity of the financial supply provisions.<sup>27</sup> As a result, the Australian Government undertook far less ambitious amendments and all but abandoned any efforts towards principles-based reform.<sup>28</sup> The finance industry's support for the maintenance of the status quo (despite their dissatisfaction with it) demonstrates how the costs of complying with a complex tax regime (and the knowledge of the opportunities arising from that complexity) embodies the notion of increasing returns whereby 'the probability of further steps along the same path increases with each move down that path' because the cumulative costs of change increase.<sup>29</sup> In turn, the industry's own lobbying in support of the retention of the existing provisions creates a type of positive feedback mechanism to reinforce the maintenance of the status quo.<sup>30</sup>

Increasing returns present a direct challenge to suggestions that we can simply move to a better option when it becomes available. This is particularly the case for applying the GST to low value goods because there exists an incentive for stakeholders to shift compliance to other sectors (for example from suppliers to transporters and vice versa). Legislating a scheme that imposes collection obligations on suppliers is likely to add to the costs (such as lock-in costs, sunk costs of compliance, transaction costs) of moving to an alternative model such as the transporter model. This is especially problematic given that the technological and regulatory framework needed for the transporter model to work appears relatively close (as the evidence from Australia Post and Amazon to this Inquiry suggest).

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25 Path dependence describes the effect that earlier decisions, even seemingly inconsequential ones, have on the perception of policy issues and the range of options available at a later stage whereby notions of *increasing returns* or *positive feedback mechanisms* suggest that the costs of exit increase: Paul Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics' (2000) 94(2) *American Political Science Review* 251, 252.

26 Commonwealth of Australia Treasury, *Review of the GST Financial Supply Provisions - Consultation Paper* (Australian Government, Canberra, 2009) 10-14.

27 Commonwealth of Australia Treasury, *Submissions to Review of the GST financial supply provisions by the Commonwealth of Australia Treasury*, (21 August 2009) <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1603&NavID=>>.

28 Commonwealth of Australia Treasury, *Implementation of the recommendations of Treasury's review of the GST financial supply provisions* (Australian Government, Canberra, 2010) viii; A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No 1) (Cth); Tax Laws Amendment Act (2011 Measures No 9) Act 2012 (Cth).

29 Paul Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics' (2000) 94(2) *American Political Science Review* 251, 252. A PricewaterhouseCoopers publication to clients states that '[o]verall, the financial services industry will be relieved that there will not be substantial changes to the existing provisions, particularly given the level of investment which has been made to address fundamentally complex provisions': PricewaterhouseCoopers, *TaxTalk: GST Special Edition*, (May 2010) <[http://www.pwc.com.au/tax/assets/taxtalk/TaxTalkSE\\_May10.pdf](http://www.pwc.com.au/tax/assets/taxtalk/TaxTalkSE_May10.pdf)>.

30 Paul Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics' (2000) 94(2) *American Political Science Review* 251, 259.

## 4 Some comments on other submissions

I had the benefit of attending the public hearings in Melbourne and in this final section offer comments in response to some of the evidence provided there.

### **On the modernised transporter model proposed by Amazon**

Although the model might have much to commend it, it risks breaking the GST chain, that is, the clear identification of the GST throughout the entire product and distribution chain. This feature of the GST is considered one of its primary virtues as it facilitates the correct identification and (ideally) the forward shifting of the GST to consumers.<sup>31</sup> The avoidance of identifying the VAT in the production and distribution chain is presumably necessitated by the desire to avoid the need to change CM22 and CM23 internal postage documentation for letter and parcels respectively, which would in turn require agreement through the Universal Postal Union and World Customs Organisation. However, the rush to a system before a suitable regulatory or technological framework exists can lead to its own risks and unintended consequences (such as over-payment or underpayment of unidentified GST liability).

### **On international enforcement**

In relation to the Australian government's enforcement capacity, Mr Kamalapuram from Amazon stated that:<sup>32</sup>

The problem that we have with the current model – and you were asking some questions earlier as to why wouldn't foreign jurisdictions enforce your legislation. Because you don't have any agreement to. There was a question raised as to when entering into multilateral agreements for information sharing but that doesn't extend to sales taxes. Most of the treaties today that exist that Australia has signed on with most of the jurisdictions only cover federal income taxes. They don't even cover state income taxes in most cases. To expect that foreign jurisdictions to the point that Mr Sinclair was making that foreign jurisdictions would go out and enforce Australian GST legislation, I think, is really, in my mind, a pipedream actually.

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<sup>31</sup> Kathryn James, *The Rise of the Value-Added Tax* (Cambridge University Press, 2015), 72.

<sup>32</sup> Productivity Commission, 'Inquiry into collection models for GST on low value imported goods - Transcript of Proceedings, 24 August 2017,' p 119 [para 15].



In my view, this statement is not entirely correct. Australia could potentially utilize a number of international instruments – even if this does not yet fully happen in relation to the GST. This goes to the question of how effective ATO enforcement activities will be.<sup>33</sup>

The most important existing instrument for administrative cooperation for the GST is likely to be the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters.<sup>34</sup> The Convention applies to general consumption taxes including value-added or sales taxes (as well as income and other taxes),<sup>35</sup> and is not restricted to residents or nationals.<sup>36</sup> The administrative assistance it promotes comprises exchange of information, assistance in recovery (including measures of conservancy)<sup>37</sup> and service of documents.<sup>38</sup> However, currently many countries have made reservations to certain aspects of the Convention.

Income tax treaties are probably the next most important instrument for administrative cooperation. According to Art 26(1) of both the OECD and the UN Model Conventions:<sup>39</sup>

The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant [...] to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention.

The OECD Commentary even explicitly provides an example of a case concerning the GST that is covered by the provision.<sup>40</sup> Article 26(1) of the Model Conventions further establishes that the exchange of information is not restricted by Article 1 of the Model Conventions, with the effect that it can also cover information related to non-resident persons. It should be pointed out, however, that

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<sup>33</sup> Productivity Commission, *Collection Models for GST on Low Value Imported Goods*, Discussion Paper (July 2017), 16.

<sup>34</sup> OECD/Council of Europe, Multilateral Convention on Mutual Administrative Assistance in Tax Matters, 1988 as amended by the 2010 protocol [Mutual Assistance Convention], available at <<http://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm>>.

<sup>35</sup> See Art 2(1)(b)(iii)(C) of the Mutual Assistance Convention.

<sup>36</sup> See Art 1(3), Mutual Assistance Convention.

<sup>37</sup> A state seeking assistance from another state with the recovery of a tax debt can request the other state to take measures of conservancy (such as the seizure or freezing of assets) to preserve assets while the recovery process takes place: OECD/Council of Europe, Revised Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters as amended by 2010 protocol, para 123 et seq.

<sup>38</sup> See Art 1(2), Mutual Assistance Convention.

<sup>39</sup> United Nations Model Double Taxation Convention between Developed and Developing Countries (2011).

<sup>40</sup> See OECD Commentary, Art 26, para 8(d), that gives the following example of information relevant to the implementation of domestic law: “State A, for the purpose of verifying VAT input tax credits claimed by a company situated in its territory for services performed by a company resident in State B, requests confirmation that the cost of services was properly entered into the books and records of the company in State B”.

many states for different reasons<sup>41</sup> have not included such extensive exchange of information provision in their tax treaties.

Modern income tax treaties generally also provide for assistance in the collection of taxes. Article 27 of the OECD and UN Model Conventions for instance provides that “[c]ontracting States shall lend assistance to each other in the collection of revenue claims”. The term “revenue claim” is defined as an “amount owed in respect of taxes of every kind of description” and hence also includes GST claims. Again, in practice many income tax treaties do not contain such a provision – but this is not to suggest that they could not in the future.<sup>42</sup>

Another legal framework for information exchange in tax matters involves tax information exchange agreements (TIEAs). In 2002 the OECD developed a Model Agreement on Exchange of Information on Tax Matters (OECD Information Exchange Model), which serves as the basis for many information exchange agreements.<sup>43</sup> The Model is presented both as a bilateral and a multilateral agreement. In practice, however, TIEAs rarely cover the GST. The wording of the OECD Information Exchange Model does not *prima facie* suggest that it applies to the GST, but rather that it can apply if the parties so choose. Article 3(2) of the multilateral version of the agreement states that “[t]he Contracting Parties, in their instruments of ratification, acceptance or approval, may agree that the Agreement shall also apply to indirect taxes”.

Further legal bases for exchange of information may be agreements from other fields of law or the provisions in the domestic law of a country.<sup>44</sup> The same applies for assistance in recovery of taxes.<sup>45</sup>

This summary shows that the mechanisms exist for information exchange and cooperation, however, it is still for states to effectively use these mechanisms to assist in the identification and enforcement of GST liabilities. As states increasingly seek to enforce tax (including GST) liabilities from non-resident entities, the incentives for all states to utilize these legal instruments to greater effect might increase. The analysis above is taken from a paper I recently published with Dr Thomas Ecker (attached for the Commission’s further information).<sup>46</sup>

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<sup>41</sup> For more details see Thomas Ecker, *A VAT/GST Model Convention* (IBFD Publications, 2013) 413.

<sup>42</sup> Ibid 420.

<sup>43</sup> OECD Model Agreement on Exchange of Information on Tax Matters (2002).

<sup>44</sup> See Ecker, Thomas Ecker, *A VAT/GST Model Convention* (IBFD Publications, 2013) 416.

<sup>45</sup> Ibid 423.

<sup>46</sup> Kathryn James and Thomas Ecker, ‘Relevance of the OECD International VAT/GST guidelines for non-OECD countries’ (2017) 32 *Australian Tax Forum* 317, 370—374.