

Inquiry into the Tax Laws Amendment (2005 Measures No. 1) Bill

Report of Senator Stephens and Senator Murray

Outcome of the Committee Hearing on 26 April

Submissions made to the Committee by key representatives and advisers to the tourism export sector put forward strong arguments that the bill in its current form would create significant adverse impacts.

The testimony of witnesses at the hearing on 26 April 2005 strongly supported the arguments made in these submissions. Taken together the oral evidence and the submissions present an overwhelming case against passing the bill in its current form.

The hearings incorporated some rather unusual eventualities that are worthy of being reported to the Senate through this report.

1. Senator Watson appeared to be in receipt of some crucial information relating to the number of foreign tour operators (FTOs) affected by the proposed measure. This information was not made available to the Committee, nor was it produced in evidence or via submissions to the Committee. Still, the large number of FTO's alluded to by Senator Watson (some 400 according to the transcript), bolstered arguments made by some sector representatives that the overall impact of the measure may have been underestimated by officials from the Treasury.
2. The nature of the questioning of witnesses by Senators Brandis and Watson appeared to be favourable towards the bill being amended to deal with concerns raised by inquiry participants. Senator Brandis invited witnesses to propose amendments to the bill (especially the ICAA).
3. Senator Watson's questioning of Treasury officials secured the response that the bill was more far reaching than simply an integrity measure designed to close the loophole whereby FTOs could claim input tax credits without paying GST on elements of a foreign tour package. This directly contradicts statements made by the Minister that the bill is an integrity measure only, placing officials' statements at variance of those of the Minister.
4. Deloitte, in a supplementary submission following the hearing, called for the bill to be returned to the House and recommended that the revenue figures be clarified. While such a course is not expedient, we call on Treasury to issue a revised costing as a matter of urgency.

Deficiencies in the current bill

There seemed to be broad agreement from industry participants and professional and advisory bodies in relation to the adverse impacts of the Bill. They can be grouped into three main categories.

1. The scope of bill.

The bill appears to go beyond redressing the concern that the some FTOs are claiming input tax credits without a GST liability. Naturally, we support the policy intent of closing this loophole. Still, this must be done without the adverse unintended consequences that appear to flow from the way the bill has been drafted utilising the critical definition of 'connection with Australia' for assessing the GST liability. This appears to create the opportunity for goods/services that will not be consumed in Australia to be subject to the GST through the imposition of GST on the wholesaler's margin which appears to fall within the definition of 'having a connection with Australia' under the bill.

We find the best summary of the position is put by ICAA:

Given that GST is intended to be a tax on Australian private domestic consumption, it is not inappropriate for the charges by the Australian service providers of accommodation, meals, etc which are consumed in Australia to bear GST which is not refundable to the foreign tour operator or to the overseas tourist. However, it is most inappropriate from a policy perspective that the reach of the GST should extend to tax the margin derived by a non-resident of Australia on a transaction with other non-residents of Australia, which occurs outside Australia. Such a margin has no contractual or economic connection with Australia and should not be subject to GST.¹

2. Timing of the Bill's introduction and the lack of consultation.

We accept that there is a significant element of forward purchasing of rights in the supply of accommodation packages by foreign tour operators.

With respect to the recovery issue, the impact on the FTOs arises mainly from the operation of advance pricing arrangements associated with tourism marketing. As FTOs typically market their Australian tours, in brochures and other mediums, at least 6 months in advance of the tour actually taking place there is little or no opportunity for an FTO to increase the price of tours offered with a commencement date on or after 10 February 2005. Therefore, for the duration of the advance fixed price period, FTOs will, in all likelihood, need to absorb the impact of the GST.²

1 Submission 1, The Institute of Chartered Accountants in Australia, p. 2.

2 Submission 4, Deloitte Touche Tohmatsu Ltd, p. 10.

Given these timing issues, and the complexity of aspects of the bill, the proposed legislation should have been circulated in exposure draft form. We contend that any revenue leakage that may have occurred through the input tax credit claimed during the period when the Bill was being considered in draft form, would have been justified by producing clearer and more enforceable legislation. Fiscal pressures cannot ever be an excuse for imperfect legislation, especially when the Budget remained in very substantial surplus.

3. The lack of enforceability of the Bill

ATO officials admitted during the hearing that the ATO does not have the legal power to conduct an audit on FTO operating a foreign jurisdiction. This is a clear admission that the law is not enforceable. A law that is unenforceable a priori, is poor jurisprudence, a fortiori.

4. Possible breaches of the Trade Practices Act

Concerns have also been raised about possible breaches of the Trade Practices Act associated with advertising a price without the GST for which the GST is subsequently added. The Treasurer has in fact indicated recently that he will be legislating on component pricing to ensure that a single inclusive price is advertised. This concern needs to be dealt with and the Minister should respond to this issue in the Committee stage of the Senate's consideration of the bill.

Options to amend the Bill

Amendments to this Bill have been proposed by industry experts. We take this opportunity to thank those who have included such amendment in their submissions. The proposed changes fall broadly into two groups. The first is to apply an input taxing model which effectively removes the FTOs from the GST system leading to no GST liability and no input tax credits (ATEC, IACA, Deloitte). The further rules based model of PWC would apply a special definition of 'connected with Australia' for non-resident entities as an exception to the basic rule that applies in GST law.

Both models could achieve the desired outcome of reducing the scope the bill to the primary policy intent of closing the loophole associated the FTOs getting input tax credits. We can accept either model, and call on the Government to return to the debate on the Bill in the Senate with an amendments that gives effect to one of these two proposed models.

The proposed amendments involving the PWC model do solve the problems in the tax law in a much better manner than the original bill and should be supported.

However, Opposition and Democrats Senators note that this opting out approach to the GST system for FTOs will not apply to domestic tour operators. This is a distortionary outcome in the tax law. The Government should come forward with further amendments to address this.

Conclusions of Opposition and Democrats Senators

We are of the view that the proposed amendments are a satisfactory manner to solve the problem addressed but:

1. amendments should have been provided with greater time for review and with an supplementary explanatory memorandum; and
2. the amendments will create non-neutrality of treatment between domestic and foreign tour operators. The Government needs to address this concern.

Senator Ursula Stephens
Deputy Chair

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