challenger

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Review of Legal Framework for Administration of GST
Board of Taxation Secretariat
C/- The Treasury
Langton Crescent
PARKES ACT 2600

**By email – taxboard@treasury.gov.au**

Dear Sir / Madam

**Submissions by Challenger Financial Services Group regarding Review of Legal Framework for Administration of GST**

We refer to the document prepared by the Board of Taxation entitled "Review of the Legal Framework for the Administration of the Goods and Services Tax" (**"Paper"**) which was circulated in July 2008. Submissions were invited for the purpose of the review by 15 September 2008.

**About Challenger Financial Services Group ("Challenger")**

Challenger is an ASX-listed diversified financial services organisation that offers a broad spectrum of financial products and services.

Challenger is one of Australia's largest non-bank mortgage providers with a mortgage book of $21.8 billion, including commercial loans ($3 billion) as well as a range of residential mortgage loans ($18.8 billion). Challenger's participation in the mortgage industry has recently extended through the acquisition of interests in the distribution and aggregation market (with mortgages under administration in the order of $26.2 billion). In particular, Challenger is a participant in the securitisation industry, and is a member of the Australian Securitisation Forum.

Challenger has an asset management division with assets under management of $10.4 billion, with expertise in infrastructure, real estate and fixed income, and Challenger is also the largest provider of retail annuities in Australia. Challenger contributes as a member of the Property Council of Australia.

Challenger also has a funds management division with funds under management of $14.9 billion. Challenger is a member and regular participant in the Investment and Financial Services Association.

Challenger Financial Services Group Limited ABN 85 106 842 371 Challenger Managed Investments Limited ABN 94 002 835 592 AFSL 234668
Challenger Securities Limited ABN 28 009 568 496 AFSL 234674 Challenger Margin Lending Limited ABN 47 091 338 822
Challenger ML Nominees Pty Limited ABN 79 008 411 943 Challenger Life No.2 Limited ABN 44 072 486 938 AFSL 234670
Challenger Mortgage Management Pty Limited ABN 72 087 271 109 Challenger Superannuation Pty Limited ABN 52 006 475 501 AFSL 234681

We have had the opportunity of providing input into submissions prepared by the Investment and Financial Services Association, Property Council of Australia and Australian Securitisation Forum. We fully endorse and support the submissions put forward by those organisations.

Challenger has a deep insight and understanding on both legal and practical GST issues spanning various industry areas, including financial services and real property. In this context, and without detracting from the strength of submissions from the above-mentioned organisations, we thought it would be useful to put forward our separate submission on issues relating to the compliance, administrative and practical aspects of GST.

## Enclosed submission

We enclose our submission for the purpose of facilitating the Review of the Legal Framework for the Administration of GST. Set out at **Appendix A** is a summary of issues covered, while our detailed submission is set out at **Appendix B**.

For ease of reference, any issues and question numbers in the submission correspond with specific questions posed by the Board in the Paper.

We would be delighted to meet with representatives of the Board, particularly in relation to our submission on matters relevant to securitisation. In the meantime, we look forward to hearing from you to confirm receipt of this letter and to discuss any specific aspects of our submission.

* * *

Should you have any queries regarding this letter, please do not hesitate to contact Jeffrey Lum in the first instance on (02) 9994 7287.

Yours faithfully

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Challenger Financial Services Group

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## APPENDIX A

### Summary of submission by Challenger Financial Services Group

### Review of the Legal Framework for the Administration of the Goods and Services Tax

| Reference | Initiatives sought |
|---|---|
| **Chapter 1** | **Basic administration rules** |
| Q1.2 | Tax registrations and deregistrations - more efficient processing |
| Q1.7 | Tax invoices / recipient created tax invoices - more flexible arrangements |
| Q1.8 | Adjustment notes - should be simplified or removed |
| Q1.9 | Tax invoices - refusal by supplier to issue tax invoices - broader discretion to claim credits |
| Q1.11 | BAS forms - reducing disclosure fields |
| | Bulk BAS lodgement - more flexible and efficient arrangements |
| | Lodgement deadlines - less variation and more flexibility |
| | GST refunds - more flexible payment options |
| | BAS revisions - clarifying inefficient practices |
| | BAS revisions - clarifying mismatch of interest |
| | Voluntary disclosures - real time processing and more favourable penalty / interest rules |
| Q1.14 | Attribution rules - broader discretion for Commissioner to alter rules by determination |
| Q1.20 | Commissioner determinations - simplifying recipient created tax invoice and tax invoice rules |
| | |
| **Chapter 2** | **Other rules** |
| Q2.1 | Entities - clarifying bare trusts, custodians and nominees |
| | Entities - clarifying sales by entities that are mortgagees-in-possession (Division 105) |
| Q2.2 | Tax law partnerships - formalising more flexible arrangements for registration and accounting for GST |
| Q2.4 | GST grouping - restricting joint and several liability for grouped securitisation trusts |
| | GST grouping - restricting joint and several liability for all entities generally (similar to TSAs) |
| | GST grouping - clarifying bare trusts, custodians and nominees |
| | GST grouping - enabling grouping for stapled entities |
| | GST grouping - more efficient processing of deregistrations |
| Q2.5 | GST grouping - enabling entry and exit during a period |
| Q2.13 | Financial acquisitions threshold - broadening the threshold |
| Q2.14 | Associate rules - seeking more certainty and tighter application by arm's length rather than market value |
| | |
| **Chapter 3** | **Subsequent events** |
| Q3.1 | Change of use GST adjustments - simplifying the method for change of use adjustments & proposing safe harbour |
| Q3.3 | Change of use GST adjustments - amending thresholds and periods to limit adjustments & proposing safe harbour |
| Q3.4 | Adjustment provisions - unintended consequences from adjustments - supply of a going concern |
| Q3.5 | Adjustment provisions - clarifying technical rules for supply of a going concern |
| Q3.7 | Correcting GST mistakes - increasing correction and time limits and clarifying annual turnover requirements |
| | |
| **Chapter 4** | **GST Administrative Environment** |
| Q4.7 | GST rulings - reliance by more than 1 entity (e.g. representative member or other group member, successors, assigns) |
| Q4.13 | Penalties - revising penalty practices |
| Q4.15 | Introduction of shortfall interest charge (SIC) in GST - suggested regime for imposing interest rate lower than GIC |

# Appendix B

# Detailed submissions by Challenger Financial Services Group

## Review of the Legal Framework for the Administration of the Goods and Services Tax

## Chapter 1: Basic administrative rules

Q1.1 Are the relevant thresholds for registration easy to understand and able to be calculated easily by taxpayers? If not, how can these calculations be simplified and improved?

No specific comment.

**Q1.2 Do taxpayers find the system of registration and cancellation easy to comply with? If not, what aspects are the most difficult to comply with? In what ways can the system of registration and cancellation be simplified and improved?**

Whilst the content of ABN / GST registration forms is generally relatively straightforward, the following difficulties have arisen in practice:

- The form for cancellation of ABN and GST registration does not seem to facilitate processing by the ATO. On multiple occasions, the request for deregistering for PAYG is not processed, causing further unnecessary correspondence and discussions about completing deregistration.
- The "Application to Cancel Registration form" (NAT2955) and certain other forms are only available in original paper forms which must be ordered from the ATO. Query why only a sample form is available online, and electronic copies are not available for download and/or completion directly from the ATO website. Query further why applications cannot be made directly by online input, as distinct from accessing, printing and completing a hard copy that is mailed.

Q1.3 Are the circumstances in which taxpayers can choose or are required to cancel their registration easily understood by taxpayers? Does the GST law provide the appropriate balance between certainty and flexibility for taxpayers in determining the date of effect from which registration and cancellation of registration apply? If not, how could this be improved?

No specific comment.

Q1.4 Do foreign entities find the process of registration, cancelling registration, refunding and remission of GST easy to comply with? If not, how can the process be simplified and improved? Are there any anomalies that exist? If so, what changes are required to address them?

No specific comment.

Q1.5 Are there any factors that discourage foreign entities from registration? If so, what change should be considered?

No specific comment.

Q1.6 Do the current arrangements for resident agents acting for non-residents and the voluntary reverse charge mechanism operate effectively to enable their use by non-resident entities? If not, how could their operation be improved?

No specific comment.

**Q1.7 Do the tax invoice, recipient-created tax invoice and adjustment provisions operate effectively to minimise anomalies or compliance costs? If not, in what way should they be modified?**

Overall, the various legislative requirements and Commissioner's views as expressed in public rulings and legislative determinations provide some elements of flexibility in dealing with commercial practices (e.g. the Commissioner's views in GSTR legal / trading names of parties, addresses, details of agents etc).

There are a number of aspects that hinder the ability of taxpayers to comply with the tax invoice and/or RCTI requirements in the context of common commercial practices, such as:

- Tax invoices could be issued by a service company or related entity that is a member of the same GST group or broader corporate group as a supplier. Tax invoices could refer to the name and ABN of the service company or related entity, rather than the supplier. The relevant supply may not be made "through" an agent for the purpose of Subdivision 153-A (and 153-B). There should be scope for the tax invoice to be a complying tax invoice even if the supplier's name and ABN etc may not be on the document , particularly where the supplier and service company / related entity are members of the same GST group and consequently any GST is accounted for by the same entity (i.e. representative member of the GST group).

- Similarly, payments could be made, and RCTIs issued, by a service company or related entity that is a member of the same GST group or broader corporate group, rather than the recipient of a supply. That is, RCTIs could refer to the name and ABN of the service company or related entity. The recipient may be a member of the same GST group or broader corporate group in which case any input tax credits would be claimed by the same entity (i.e. representative member of the GST group). The relevant acquisition may not be made "through" an agent for the purpose of Subdivision 153-A (and 153-B). Again, there should be scope for the RCTI to be a complying tax invoice even if the recipient's name and address / ABN etc may not be on the document.

  It may be possible to address the first 2 points by making minor amendments to Subdivision 153-A (and 153-B) (and/or the requirements in section 29-70 of the *A New Tax System (Goods and Services Tax) Act* 1999 (**"GST Act"**) and Regulations 29-70.01 and 29.70.02 of the *A New Tax System (Goods and Services*

*Tax) Regulations* 1999 ("**GST Regulations**")) to extend beyond supplies and acquisitions made through an agent, such as to supplies and acquisitions in circumstances where payments are made or received by an entity as agent on behalf of the supplier or recipient, and the entity and supplier / recipient are members of the same GST group.

Alternatively, the issue could be addressed by the Commissioner broadening his views in GSTR 2000/17 (tax invoices) and GSTR 2000/37 (agents).

- The above points focus on content of tax invoices, but there should also be more flexibility for the entity that must account for GST and input tax credits for supplies and acquisitions involving a payment or billing agent. That is, there should be more scope for an agent to account for any GST and input tax credits to which the principal would otherwise be entitled, by agreement between the agent and principal. Again, Subdivision 153-B is not broad enough to cover such an arrangement as there may be no supply or acquisition made "through" an agent for the purpose of those provisions.

- Currently, parties may implement RCTIs if they satisfy one or more of the legislative determinations and enter into a standard written agreement as required by the legislative determination. However, the requirements of the written agreement vary depending on which determinations apply (and the priority of application). See for example the *A New Tax System (Goods and Services Tax) Act 1999 Classes of Recipient Created Tax Invoice Determination (No. 1) 2000* and the *A New Tax System (Goods and Services Tax) Act 1999 Classes of Recipient Created Tax Invoice Determination (No 49) 2000*. RCTIs should be permitted using the same written agreement irrespective of which RCTI determination applies in order to alleviate against the risk of non-complying written agreements.

- Query whether the determination relating to "defined commission and fee-based services" (*A New Tax System (Goods and Services Tax) Act 1999 Classes of Recipient Created Tax Invoice Determination (No 49) 2000*) could be broadened (or a new determination be made) to cover services for which commission and similar amounts are payable, provided that the recipient establishes the value or consideration for the supply. This would seem to be a very useful expansion of the scope of RCTIs in terms of providing greater invoicing flexibility and reducing compliance and administration costs. Furthermore, there seems to be no real reason in principle against such a change.

**Q1.8 Do the GST invoice and adjustment note requirements add additional compliance costs to the normal commercial invoice requirements? If so, how can those costs be minimised?**

It is submitted that the requirement for adjustment notes has created unnecessary further compliance obligations and costs (e.g. determining whether an item should appear in a tax invoice or an adjustment note, creating separate sections in documents in order for a document to satisfy both requirements etc). Such a concept is not considered to be beneficial to GST revenue or improving audit trail, nor is it

considered cost-effective for taxpayers to implement or even for the Commissioner to enforce.

For these reasons, any requirement for a separate document such as an adjustment note should be abolished. Rather, any adjustments arising from adjustment events should be able to be accounted for by way of an adjusted total or additional line item in a tax invoice for a subsequent tax period.

**Q1.9 Does the legal framework for the administration of the GST apply effectively where there is a dispute about the status of a supply and the supplier refuses to issue a tax invoice or adjustment note? If not, what changes should be made?**

It would seem inappropriate for a recipient of a taxable supply to be prevented from claiming input tax credits due to delay or refusal caused by a supplier to issue a complying tax invoice or other circumstances outside the control of the recipient.

The role of a tax invoice should be merely to substantiate a taxable supply and the amount of GST payable on that supply. However, the requirement to obtain and hold such a document should not itself preclude the recipient from claiming input tax credits, particularly if the recipient can establish that a formal written request has been made to the supplier for a tax invoice or otherwise holds a document issued by the supplier that otherwise evidences the supply and the GST payable (e.g. a non-complying tax invoice).

Neither the failure to obtain a tax invoice nor the issue of a document that fails to satisfy all of the legislative requirements of a tax invoice (whether inadvertently or otherwise) should delay any claim for input tax credits.

This should be addressed by:

- Further streamlining the requirements of a tax invoice (e.g. requiring only the total GST inclusive price and GST payable for any taxable supply); and/or
- Enabling a recipient (e.g. using a legislation determination under section 29-70(1) of the GST Act) to treat other documentation as a tax invoice if the recipient has obtained a document from the supplier that the recipient reasonably believed to be a tax invoice or has otherwise made a written request to the supplier with which the supplier has failed to comply.

**Q1.10 Are there inconsistencies between GST record keeping requirements and those for other legislation which add to compliance costs? If so, how can these be harmonised?**

See response to Q 3.1 dealing with Division 129 adjustments.

**Q 1.11 Are there any ways in which the present law relating to:**

- **GST returns and lodgement;**
- **the GST payment process; or**
- **tax periods and net amounts,**

**could be improved?**

Regarding the **form of GST returns** (approved form), the need to complete total sales and acquisitions (G1 and G10/G11), total GST-free sales (G2 / G3) and distinguish between capital and non-capital acquisitions (G10/G11) continue to create significant ongoing burdens on compliance and systems in circumstances that do not impact on GST revenue. Furthermore, the current form of GST return does not permit negative amounts which may flow from adjustment events. It is proposed that the approved form of GST returns be simplified by inclusion of total GST payable (1A) and total GST recoverable (1B), and that there be flexibility to enable negative numbers to be submitted.

Many larger corporate groups are required to lodge GST returns for a large number of entities, notwithstanding any GST grouping arrangements. It has been difficult in practice to implement Electronic Commerce Interface or the BAS Service Provider facility for **lodging bulk GST returns**. Further improvements need to be made in standardising and simplifying digital certificates and bulk lodgement of GST returns. This efficiency measure could significantly reduce the compliance burden.

Regarding **lodgement deadlines** for GST returns, it should be noted that most taxpayers have significant year-end and half year-end obligations after December and June of each year. In this context, entities who adopt monthly tax periods may have difficulties in meeting a 21-day deadline for December and June GST returns. Such ongoing obligations (which includes catch-up on month-end accounts) could also affect the lodgement of the January and July GST returns. It is proposed that lodgement deadlines for all GST returns (monthly or quarterly) be extended at least to the end of the month following the end of the tax period.

Regarding the receipt of **GST refunds** by taxpayers (i.e. net amounts that involve payments to a taxpayer), taxpayers should be able to instruct the Commissioner to pay refunds into any Australian bank account, whether in the name of the entity or otherwise. It is suggested that section 8AAZLH(2A) of the *Taxation Administration Act* 1953 should be deleted in its entirety.

Based on recent experience, there seems to be a practice under which an RBA credit arising from a **revision of a GST return** is applied by way of a refund notwithstanding that the RBA balance may be in debit. This is not a preferred practice as a taxpayer would simply need to organise repayment of the refund back into the RBA, which creates further compliance costs and administration. Further, the original debit balance would continue to accrue interest at the full GIC rate until the taxpayer repays the refund to the Commissioner – which gives the Commissioner an inappropriate interest windfall at the expense of the taxpayer.

Based on recent experience, there are practices that highlight the clear **mismatch of interest**, i.e. unpaid RBA debit balances accrue interest at the full GIC rate, while subsequent adjustments that bring the balance to an RBA surplus are paid without any interest at all, notwithstanding that a request is made for a refund of the RBA surplus and that the Commissioner has failed to meet their service standards for refunds. This highlights 2 issues:

1. There should be a general practice or rule for automatically processing refunds, without limiting the Commissioner's right to subsequently conduct a review; and

2. There is a broader need to aligning the interest payable by taxpayers on debts and the interest due to taxpayers on RBA surpluses. In each case the rate of GIC should be sufficient to reflect the time value of money, and the rate should not be punitive or discriminatory against taxpayers.

It is considered that **voluntary disclosures** must be encouraged as an important and efficient compliance measure, as:

- taxpayers need an quick and efficient avenue for communicating and correcting mistakes, and to have them promptly processed to running account balances;
- voluntary disclosures, particularly if they are completed and processed online and in real time, can result in significant time and cost savings for the taxpayer and also for the Commissioner;
- taxpayers can demonstrate they are pro-active in their approach to tax compliance;
- voluntary disclosures could become useful as a source of data as to the type of voluntary disclosure made (e.g. it may be possible to include a "tick-a-box" to describe the reasons for disclosure as part of an online process); and
- they do not detract from the Commissioner's power to conduct compliance activity.

In this context, there should be a more efficient practice for taxpayers to make voluntary disclosures and revise GST returns in a way that is automatically processed in real-time (with interest automatically calculated at a base rate or SIC rate - see response to Q4.15) rather than being merely flagged for review.

Real-time processing rules would save time and costs associated with manual processing, and also provide taxpayers with a better snapshot of the resulting running balance account to facilitate payment. Furthermore, if interest could be immediately calculated and also at a more appropriate rate (see response to Q4.15), this would reduce disputes and resources used (e.g. to prepare submissions for remission of interest and to challenge interest decisions) and enable taxpayers to calculate and pay the resulting balance. Such an outcome would enable taxpayers to meet and clear their tax debts quickly and efficiently, whilst also improving revenue and cash-flow for the Commissioner.

From the perspective of a large corporate, the implementation of more efficient practices for lodging and processing GST returns and revisions, in conjunction with

automatically calculating interest (at a more appropriate rate such as the SIC rate) would be powerful tools for improving tax administration and compliance.

**Q1.12 Are any changes desirable to the legal framework for the administration of the GST to ensure that refunds of GST are paid as soon as possible, consistent with maintaining the integrity of the GST system? If so, what changes should be made?**

There is significant uncertainty regarding the timing of GST refunds, particularly where refunds are flagged for review and the status is set to "lodged" rather than "processed". It is understood that a review is considered to be an integrity measure. However, such an approach is considered problematic from a business perspective in that it detracts from cash-flow planning and also precludes confirmation of the overall balance of a running balance account (e.g. for the purpose of finalising payment).

In order to provide greater certainty to taxpayers, it is proposed that any review of refunds due to pre-established rules should not preclude the processing of those refunds. Rather such refunds should be automatically processed. Should a review of the refund subsequently result in an incorrect claim for input tax credits, the taxpayer should then need to repay the Commissioner (with penalties and/or interest in accordance with prevailing practices).

Q1.13 Do the rules concerning monthly, quarterly and annual tax periods operate effectively? Do they correspond sufficiently with the reporting periods that apply for other reporting purposes? If not, how should they be modified?

No specific comment.

**Q1.14 Does the present attribution system, including the special attribution rules, provide clear and accurate rules on when liabilities and entitlements arise while also minimising compliance costs? If not, how should it be modified?**

Section 29-25 of the GST Act currently provides for the Commissioner to have discretion to alter the general attribution rules in certain circumstances listed in the subsection 29-25(2). It is submitted that the Commissioner should have a broader discretion to make determinations in appropriate circumstances not currently listed in the legislation. For example, a new paragraph 29-25(2)(i) could be added to the effect of "a supply or acquisition where the Commissioner considers it to be reasonable to do so in the circumstances".

This could potentially be exercised in circumstances where the Commissioner and a taxpayer agree to settle on a dispute by way of attributing an agreed amount of GST payable and/or input tax credits to a single tax period (rather than having to amend GST returns for multiple tax periods).

Q1.15 Are the GST accounting methods as closely aligned with commercial accounting practices as possible? If not, how can they be further aligned?

No specific comment.

Q1.16 Is the present availability and operation of the two accounting bases, including their interactions in transactions between cash and accruals taxpayers, appropriate? If not, how should it be modified?

No specific comment.

Q1.17 Is the current treatment of contra transactions for GST purposes appropriate? If not, what changes could be made to improve their treatment and minimise compliance costs?

No specific comment.

Q1.18 Do the discretions in the GST law presently available to the Commissioner balance certainty and flexibility?

No specific comment.

**Q1.19 Should any changes be made to the discretions in the GST law presently available to the Commissioner?**

See the response to Q 1.14 above in relation to attribution rules.

**Q1.20 Are the circumstances in which powers may be exercised by way of legislative determination by the Commissioner appropriate and sufficient? Should there be greater or less reliance on legislative determinations compared to general discretions?**

The process for issuing legislative determinations pursuant to section 29-70(3) in relation to recipient created tax invoices seems particularly cumbersome. It is noted that the sheer number of determinations are difficult for taxpayers to keep track of, and legislative determinations have no clear benefits over other products issued by the Commissioner such as public rulings and determinations.

It is further noted that legislative instruments by the Treasurer pursuant to Division 81 of the GST Act also seem cumbersome due to the sheer size of the instrument. Such a product creates difficulties for taxpayers in keeping track of particular fees and charges set out in such a large document, particularly where the instrument is re-issued regularly.

Q1.21 Is the current scope of the reviewable GST decisions appropriate?

No specific comment.

## Chapter 2: Other rules

**Q2.1 Does the GST law apply in relation to different entities in a way that is streamlined and reduces compliance costs? Are there ways in which it could be improved and any anomalies removed?**

It should be clarified in the GST Act that trusts do not include bare trusts, custodians and nominees (i.e. that the entity with the underlying beneficial interest in the assets

is deemed to be the entity in the context of bare trusts, custodians and nominees). This would be consistent with the Commissioner's views in GSTR 2008/3 in addition to established industry practice.

See response to Q2.2 and Q2.4 for further feedback on partnerships and grouping rules.

For some entities, the GST law specifically applies to increase uncertainty and compliance costs and risks. One such example is a lender that sells property of a debtor in its capacity as mortgagee-in-possession. Lenders may be liable for GST liability under Division 105 as a result of supplying the property of a debtor in satisfaction of a debt owed to the entity (section 105-5(1) of the GST Act).

It is considered inappropriate that Division 105 arises in circumstances where no or minimal information is made available to a mortgagee in relation to a debtor's circumstances. Such lack of information precludes a mortgagee from being able to make any reasonable assessment of the GST treatment of a sale had it been made by the debtor. This is relevant to the assessment of whether the supply would have been a taxable supply (section 105-5(1)(b)). In effect, it is submitted that there are broad categories of transactions in which a mortgagee lacks any real opportunity to comply with section 105-5(3) to treat a transaction as not attracting GST.

As a matter of commercial practice, the debtor will not (following default) provide any written notice for the purpose of section 105-5(3)(a) to confirm the GST treatment. In addition, there may not be sufficient reasonable information for the mortgagee to form the view that the supply would not have been taxable (section 105-5(3)(b)).

Furthermore, the mortgagee is unlikely to have sufficient information that would be used for the purpose of applying the margin scheme to any taxable supply. This uncertainty arises in the characterisation of a sale of any residential premises (and in particular new residential premises) by a mortgagee-in-possession. Even less information is available for the purpose of the margin scheme where a mortgagee has assisted in refinancing property that was previously acquired by a debtor.

The policy intent of Division 105 seems to require a mortgagee to account for GST otherwise payable by a debtor. To the extent that a mortgagee is in a better financial position, Division 105 protects the Commissioner's ability to recover GST liability on sales made by a lender as mortgagee-in-possession and ultimately preserves GST revenue.

However, Division 105 currently goes beyond requiring a mortgagee to account for GST otherwise payable by the debtor (i.e. putting the mortgagee in the shoes of the debtor). In addition to imposing difficult requirements on mortgagees to obtain information in relation to debtors, Division 105 operates to create additional GST liability for mortgagees, resulting in a significant unintended and inappropriate increase in GST revenue at the expense of mortgagees.

As a result of the practical and evidentiary obstacles associated with compliance with Division 105, a mortgagee could be exposed to GST liability equal to $1/11^{th}$ of the total consideration for a supply of real property, notwithstanding that:

1. the supply would not in fact have been taxable had it been made by a debtor; OR

2. the debtor would have applied the margin scheme in reducing the GST payable on the sale had it been made by the debtor (i.e. using information not available to a mortgagee-in-possession).

The requirement of any lender that is in a net "loss" position to remit GST pursuant to Division 105 would incur a further loss. This may arise as a result of a GST liability that has been created by Division 105 (i.e. would not have arisen but for the application of Division 105).

In order to ensure that any entities that are subject to obligations under Division 105 are afforded a reasonable opportunity to comply with that Division, it is proposed that:

1) a mortgagee-in-possession should be expressly permitted to:

   (a) apply the margin scheme to a sale of debtor's property for the purpose of calculating the GST payable under Division 105; and

   (b) elect to obtain and rely on the GST-inclusive market value of real property as at the date on which the debtor acquired the relevant property (as distinct from the consideration for the debtor's acquisition of the property) for the purpose of applying the margin scheme. The date of acquisition would be readily available from a title search. In the context of the margin scheme, it is submitted that such clarification would not be novel (see subsection 75-11(7)(d) of the GST Act); and/or

2) Division 105 does not apply to impose GST liability on a mortgagee in the context of residential premises.

It is submitted that the above proposal would:

- provide a mortgagee-in-possession with a reasonable opportunity to apply the margin scheme on a taxable supply in circumstances where no reasonable information is available to the mortgagee for this purpose and the debtor is likely to have applied the margin scheme had the debtor made the supply;
- reduce uncertainty and compliance risk to mortgagees and provide a real and practical opportunity to comply with Division 105, without artificially increasing GST revenue; and
- preserve and protect GST revenue so as to better achieve the policy intent of Division 105.

As a separate point on the drafting of Division 105, it is not entirely clear whether the Division adequately deals with security given by a third party in satisfaction of a debt owed by a debtor to a lender. This should also be clarified if the opportunity were to arise.

**Q2.2 Are any changes needed to the current treatment of tax law partnerships as entities to ensure that the GST law operates effectively? If so, what changes should be made?**

The definition of "entity" in section 184-1 of the GST Act, tax law partnerships are treated as entities for GST purposes in the same way as general law partnerships and trusts.

However, the sheer complexity associated with the obligation of a deemed entity such as a tax law partnership to account for GST is evident from the Commissioner's views in GSTR 2004/6, which provides for a divergence in treatment of tax law partnerships. Such divergence creates uncertainty for taxpayers as there is a requirement to rely on the Commissioner's views without any formal legislative guidance.

Should the statutory fiction continue under which tax law partnerships are treated as entities for GST purposes, it is suggested that formal guidance be given in the form of a legislative election (e.g. in writing and signed by all partners) for partners in a partnership to treat a tax law partnership as not being a separate entity, such that the activities of the partnership would be included in the GST return of each partner in their respective proportions, and each partner would be liable to remit GST payable in respect of the tax law partnership's activities based on the proportionate interest held. This would be consistent with the alternative scenario discussed in GSTR 2004/6.

In the context of an election, there is a possibility that some partners may be registered for GST while others may not. This could cause confusion for third parties dealing with the tax law partnerships. In order to address this, the co-owners could be permitted to make a written election that either:

- Sets out a nominated partner(s) to account for an agreed proportion of the GST payable and input tax credits for the tax law partnership (whether based on their proportionate partnership interest or as otherwise agreed); and
- Sets out an agreement that all partners must either agree to be registered for GST or cease to be registered for GST (i.e. ensuring consistent GST registration status across partners). The registration threshold should be applied taking into account all activities of the proposed tax law partnership.

In the absence of a valid election, the default position would apply (i.e. the tax law partnership would be treated as a separate entity that would be registered for GST in accordance with current practice).

There may also need to be deeming provisions to give effect to the proposed election – that is, the activities (supplies and acquisitions) of the tax law partnership would need to be deemed to be conducted by one or more partner as set out in the written election to the extent of their agreed proportions.

The suggested approach would provide greater certainty to taxpayers without having to rely on the Commissioner's views, and sufficient flexibility to comply with the GST law in a way that is most consistent with the circumstances and preferences of the partners.

Q2.3 Does the GST law deal appropriately in circumstances in which:

• sole traders or partners die and their assets are passed to the control of an executor or trustee of the deceased's estate; or

• entities become incapacitated?

If not, what changes should be made to ensure that the GST law operates effectively?

No specific comment.

**Q2.4 Do the rules for:**

**• forming, operating, altering and dissolving a GST group, a GST religious group, a GST joint venture and a GST branch; and**

**• reporting their GST liabilities and entitlements achieve an appropriate balance between providing flexibility, minimising compliance costs and ensuring the integrity of the GST system? If not, how should they be modified?**

*1. Joint and several liability - securitisation*

The framework dealing with the formation and consequences of GST groups is considered to be one of the more significant issues affecting the securitisation industry. Revision of these rules should be viewed as having a high priority in any consideration of amendments or clarification to the existing GST law.

The need for clarification arises from the inability of trusts to group due to commercial obstacles created by joint and several liability which results from adding trusts to a GST group. In particular, there is a lack of commercial appetite for external parties (e.g. rating agencies, investors) in accepting such liability.

Please note that this is considered to be a clear deficiency that detracts from the ability for taxpayers in the securitisation industry to effectively apply and take advantage of GST grouping rules. The inability to do so can create unnecessary and inappropriate additional GST leakage.

There has been an ongoing dispute between the Commissioner and certain participants in the securitisation industry in relation to the operation of the "associate" rules in Division 72 of the GST Act. This dispute has continued for a number of years, taking up much time and resources for participants in an industry that has been experiencing difficult market conditions. However, such disputes would not arise if securitisation trusts were to be grouped for GST purposes. As such, these issues could be addressed by minor amendments to the GST law in circumstances that are entirely consistent with the policy of GST grouping while addressing commercial limitations that are peculiar to the securitisation industry.

In summary, amendments to the GST law are therefore required to address current deficiencies in the GST grouping rules and consequently:

- overcome current commercial practices that do not permit GST grouping (e.g. due to views expressed by rating agencies and/or investors);
- align the GST rules with income tax, where joint and several liability is able to be restricted by the operation of a tax sharing agreement (i.e. a concept not available in the GST context). For example, trusts may be consolidated for income tax but are not able to group for GST purposes due to the lack of restrictions on joint and several liability;
- reduce compliance and administration costs (e.g. multiple BAS, accounting for transactions between entities that could otherwise be members of the same GST group, adopting different compliance procedures for income tax and GST etc);
- resolve a number of consequential GST issues (such as the operation of the Division 72 "associate" rules) and related disputes between the Commissioner and the securitisation industry to date; and
- curtail unnecessary additional GST leakage that could otherwise be factored into pricing decisions. This is particularly important in the context of the current lending environment.

In the income tax context, joint and several liability from grouping has been necessarily and appropriately curtailed by legislation, namely, tax sharing agreements (see sections 721-15 and 721-25 of the *Income Tax Assessment Act* 1997). In the Explanatory Memorandum to the *New Business Tax System (Consolidation) Bill (No. 1) 2002*, the concerns that prompted the amendments were described as follows:

"***Context of reform***

*11.2 The Review of Business Taxation recommended that liability for group taxation debts be based on the common law concept of joint and several liability. This would mean that all members of the group would be liable at all times for the full amount of the income tax-related liability of the group (group liability) that arose during the period of membership.*

*11.3 A number of concerns with this approach were highlighted during consultation, particularly in relation to the imposition of full joint and several liability. These included that:*

- *a subsidiary member could become technically insolvent without the knowledge of that member - this is of particular concern for company directors, who are prohibited from permitting a company to trade while insolvent;*

- *creditors of a subsidiary member could be swamped by the group liability - this could occur where a subsidiary member was insolvent and then incurred an additional debt, being a group liability; and*

- *the due diligence activities of a purchaser of a subsidiary member would become necessarily excessive - because of the possibility that a subsidiary member might be liable for a group liability, a prospective purchaser would have to scrutinise the entire group to ensure that its due diligence obligations are satisfied.*

*11.4 In foreign jurisdictions, similar concerns regarding the effect of an imposition of joint and several liability are mitigated via the application of an extensive regime of cross-guarantees and indemnities.*

*11.5 However, in response to these concerns and to maintain legislative and administrative integrity, a modified model was proposed. This model differs from the Review of Business Taxation model in 3 key respects:*

- *the head company of a consolidated group will be solely liable, in the first instance, for a group liability;*

- *where that head company fails to meet the group liability by the time the liability becomes due and payable, the Commissioner may be able to recover a part or the whole of the unpaid amount directly from those entities (other than the head company) that were members of the group at any time during the period in which the group liability accrued (the contributing members); and*

- *where a contributing member might be subject to recovery action by the Commissioner, it might nevertheless be able to exit a group free from a liability arising during a period in which it was a group member but which had not become due and payable at the time of exit, provided certain conditions are met."*

The arrangements introduced in relation to tax sharing agreements operated to restrict members from being jointly and severally liable to the extent allocated in accordance with the terms of the tax sharing agreement. This mechanism operated to alleviate commercial issues (as clearly stated in the extract) that would otherwise arise from joint and several liability. However, unfortunately, such liability does not arise in the GST context.

There is precedent for implementing measures that address concerns that are peculiar to the securitisation industry. For example, the *Taxation Laws Amendment Act (No. 5)* 2003 introduced a specific exemption for certain special purpose entities in the securitisation industry in relation to the thin capitalisation rules. The explanatory memorandum included the following extract:

***"Exemption of certain special purpose entities***

...

*1.6 The securitisation industry is complex and dynamic. Many securitisation programs are not able to avail themselves of the benefits of the zero capital treatment provided under the current thin capitalisation legislation. In particular, the current definitions do not contemplate origination, warehousing, two-tiered securitisation or synthetic securitisation. Nor do the current rules allow any residual equity holding in a securitisation vehicle. As a consequence, many bona fide securitisation vehicles will inappropriately have a proportion of their interest deductions denied under the thin capitalisation rules.*

*1.7 To address this, amendments will exclude special purpose entities from the thin capitalisation rules for all or part of the income year provided that the following conditions are met:*

- *the entity is established for the purposes of managing some or all of the economic risk associated with assets, liabilities or investments (whether the entity assumes the risk from another entity or creates the risk itself);*
- *At least 50% of the entity's assets are funded by debt interests; and*
- *the entity is an insolvency remote special purpose entity according to the criteria of an internationally recognised rating agency applicable to the entity's circumstances."*

The above extract refers to the complexity and dynamic nature of the securitisation industry, in addition to the commercial requirement for special purpose entities to be insolvency remote. However, such a commercial requirement can never be able to be satisfied in the context of an entity that is approved as a member of a GST group and subject to joint and several liability under the current rules. This problem was clearly highlighted in the above extract from paragraph 11.3 of the Explanatory Memorandum to the *New Business Tax System (Consolidation) Bill (No. 1) 2002* in the context of tax sharing agreements.

The sheer complexity of securitisation arrangements, commercial limitations imposed on special purpose vehicles in that industry, the current inability for such entities to be added as members of any GST group and the resulting GST consequences and disputes that have arisen, are all factors that highlight the need for legislative clarification.

The provisions dealing with tax sharing agreements may have design features and limitations that are outside the scope of this submission and are specific to income tax. As such, it is submitted that a similar, but not the same, concept should be adopted.

At a high-level, one proposed solution would be to expand subsection 444-90(2) in Schedule 1 to the *Taxation Administration Act* 1953 (GST groups) by way of a simple amendment to refer to securitisation trusts as follows:

(2) Subsection (1) does not apply to a *member of a *GST group if:
  (a) an *Australian law has the effect of prohibiting the member from entering into any *arrangement under which the member becomes subject to the liability referred to in that subsection; or
  (b) the member satisfies the conditions in subsection 820-39(3) of the Income Tax Assessment Act 1997.

Subsection 444-90(3) would then apply to restrict joint and several liability to acts and omissions of the relevant trust.

The existing subsection 444-90(2) demonstrates that it is both possible and appropriate to implement an effective solution to address an anomalous or inappropriate outcome of GST grouping rules in a specific financial services context (i.e. life companies). It is submitted that such a solution should be extended to address the issues raised in this submission.

We understand that the Australian Securitisation Forum will make a similar submission on this issue and we strongly support and fully endorse the ASF's submission accordingly.

We would be happy to meet with representatives of the Board of Taxation (whether as a member of an industry body such as the Australian Securitisation Forum or otherwise) to provide background information and to discuss proposed changes to the law and related issues.

*2. Joint and several liability - general*

In the income tax context, a tax sharing agreement limits the joint and several liability of members of a tax consolidated group to an amount calculated in accordance with a methodology described in the agreement.

*In addition to the above proposal relating specifically to securitisation arrangements*, an arrangement should be implemented in the GST law to limit the joint and several liability of all GST group members generally, as agreed between the representative member and that GST group member.

It is submitted that joint and several liability needs to be restricted for members of any GST group in order to properly address the fundamental issues and deficiencies raised in paragraph 11.3 of the Explanatory Memorandum to the *New Business Tax System (Consolidation) Bill (No. 1) 2002* (extracted above) for which tax sharing agreements were introduced in the income tax context.

It is proposed that the representative member can specifically elect to make a valid declaration for the purpose of the GST law to restrict the joint and several liability of each GST group member from time to time to the acts and omissions of that GST group member. Such an election would apply to limit joint and several liability for all members of the GST group to which the representative member belongs.

*3. Bare trusts etc*

It should be confirmed that bare trusts, custodians and nominees should not be treated as trusts for the purpose of the grouping rules, such that only entities with the beneficial interest in the trust assets would be considered for GST grouping purposes. This can be done through the amendments proposed for Q2.1 or otherwise, as supported by further references in Division 48 of the GST Act.

*4. Stapled entities*

The GST grouping rules applying to partnerships and trusts (and interaction with other entities such as individuals and companies) is particularly complex and should be clarified.

One particular area involves stapled entities (e.g. stapled trusts) that have multiple owners but must have the same constitution of owners (i.e. an investor in the stapled group must have 1 unit in trust A and 1 unit in trust B).

Under the current GST grouping rules, the 2 stapled entities would not be eligible for GST grouping as distributions would not be made only to another entity in the same GST group (section 48-15(1)(e) of the GST Act and Regulation 48-10.03(2) of the GST Regulations). However, at a commercial level, the stapled entities are treated as a single entity or group. In the interests of reducing compliance costs, stapled entities should be able to be grouped for GST purposes.

It should be clarified that any revision of GST grouping rules would not have any adverse impact in any other tax context (e.g. classifications as trading trusts etc).

*5. Leaving a GST group*

Where an entity leaves a GST group by cessation of enterprise or winding up, a separate "Application to register or change details of a GST group" form (NAT 2952) needs to be filled in. However, it would be easier for the request to remove the entity from a GST group to be provided for in the "Application to Cancel Registration form" (NAT2955) as a separate section (e.g. "Is the entity to be revoked as a member of a GST group?" and "What is the name of the representative member of the GST group?").

The GST group form currently requires the representative member to sign the form and apply for an entity that is to be deregistered for GST to be removed as a member of the GST group. However, query if such a form is necessary if a member ceases to have an ABN and be registered for GST. Under section 48-70(2), the Commissioner is required to revoke the approval of the deregistered entity if the Commissioner is satisfied that the member does not satisfy the membership requirements for the GST group, one of which is that the member be registered for GST (section 48-10(1)(c)).

As a result, there should be no legislative obstacle for the Commissioner to automatically remove a member from a GST group based solely on a "Application to Cancel Registration" form (NAT2955) lodged by the member in which the member seeks deregistration of its ABN or GST registration. There should be no need for the representative member to lodge a separate form, which adds unnecessarily to the compliance burden.

In any case, the relevant forms should be able to be completed and submitted online, rather than requiring original paper forms to be ordered and completed by hand, or to download an electronic form to be completed by hand. (See also the response to Q1.2 above.)

**Q2.5 Do the current arrangements for the timing of entry into and exit from GST groups, and accounting for GST liabilities upon entry into and exit from GST groups, operate effectively? If not, what changes are appropriate to improve their operation whilst minimising compliance costs?**

Entities may only be added to a GST group from the first day of a tax period (section 48-85(3)(a) of the GST Act). This is a rather frustrating requirement as it means that new entities established other than at the start of a tax period must lodge at least 1 separate GST return for the remainder of the tax period, and that activities during that period between the entity and other members of the GST group could give rise to taxable supplies and creditable acquisitions.

The inability to add members to a GST group during a tax period has resulted in additional compliance for taxpayers and also create an unnecessary and inappropriate risk that supplies between the new entity and other members of the GST group could be taxable.

For similar reasons, the GST grouping rules should also be amended to enable entities to leave a GST group from any day during a tax period.

Q2.6 Which aspect of GST reporting is the most arduous for small business:

- keeping records;
- compiling information;
- completing the BAS form; or
- other (please outline)?

How could this be improved?

N/A

Q2.7 Would a formula-based approach to estimating input tax credits be helpful to small businesses without GST free transactions (like many tradespeople and some small caterers)? Would small non-profit organisations find it helpful?

N/A

Q2.8 Would redesigning BAS reporting options on the BAS form for small business to exclude Items G1, G2, G3, G10 and G11 reduce small business confusion and errors on the BAS? Are there other design options which could achieve this?

N/A

Q2.9 If you are using one of the existing SAMs, what factors encouraged you to do so? Conversely, if you have chosen not to use a SAM, what factors influenced your choice? Would these factors apply to an expansion of the business norms and snapshot methods under the BAS Easy proposal?

N/A

Q2.10 Are the existing reporting options (that is, annual, paying GST by instalments, Option 2 and Option 3 on the BAS), well balanced between ensuring the integrity of the GST system and minimizing compliance costs and adverse cash-flow consequences for small business? If not, what changes would assist in achieving the right balance?

N/A

Q2.11 What do you see as the potential advantages or the potential problems of the BAS Easy proposal for your business?

N/A

Q2.12 Do the GST voucher provisions operate effectively? If not, what changes should be made?

N/A

**Q2.13 Does the financial acquisitions threshold operate effectively and minimise compliance costs for affected taxpayers? If not, what changes should be made to simplify it and reduce compliance costs?**

*New entities*

Certain new entities may not exceed the financial acquisitions threshold in the ordinary course of business, but in fact exceed the financial acquisitions threshold because of the initial costs associated with the start-up of the new entity's activities (e.g. costs of professional advice associated with financial supplies involving raising equity). Such entities are precluded from remaining below the financial acquisitions threshold for the first 12 months, and are therefore required to consider implementing an appropriate apportionment methodology during that period.

This outcome is considered to be inappropriate and highly onerous for taxpayers, particularly in circumstances where such obligations must be undertaken only temporarily (i.e. for a 12-month period). Such an outcome seems to detract from the policy intent of the financial acquisitions threshold, which is to enable certain entities that make predominantly taxable supplies to claim full input tax credits without having to undertake a significant apportionment exercise.

*12-month testing periods*

Furthermore, it is extremely onerous to apply the financial acquisitions threshold test over a 12-month period both retrospectively and prospectively. This creates a significant uncertainty in applying, testing and substantiating the financial acquisitions threshold and is most difficult (if not impossible) to apply.

*10% / $50,000 threshold*

The reference to 10% or $50,000 is extremely low and has not been amended to take account of the development and increasing cost structures for businesses.

The increase of thresholds from $50,000 to $75,000 is not unprecedented in the GST context, whether to take account of inflation or otherwise (e.g. the increase in the registration turnover threshold under section 23-15(1) of the GST Act). Similar reasons should apply for the purpose of revising the financial acquisitions threshold.

*Proposed revisions*

Accordingly, it is submitted that for such entities, the financial acquisitions threshold should be revised as follows:

1. To specifically exclude from the definition of "financial acquisition" in section 189-15 of the GST Act any acquisitions made in the course of the commencement or termination of an enterprise (similar to the wording contained in the definition of "carrying on an enterprise" in section 195-1 of the GST Act). Such acquisitions have a distorting effect in determining whether an entity exceeds the financial acquisitions threshold;

2. To specifically extend the exclusion to borrowing or any activity associated with raising equity capital (by way of the provision, acquisition or disposal of an interest in or under securities or otherwise);

3. To amend the period for testing to 6 months retrospectively and 6 months prospectively; ***and***

4. To increase the threshold to $100,000 or 25% (in paragraphs 189-5(1)(a) and 189-5(1)(b) accordingly and in corresponding provisions in Division 189).

**Q2.14 Do the associate provisions that apply to transactions between associates for no consideration apply appropriately and interact effectively with other areas of the GST law? If not, what changes should be made to ensure that the GST law operates effectively?**

Market value is an extremely difficult and uncertain concept to apply. It relies on complex issues associated with valuation, leads to conflict and disputes with the Commissioner, is costly (by having to engage external valuers) and is ultimately based on assumptions and conditions that need to be tested.

Division 72 is a specific anti-avoidance provision and there are many circumstances in which there is no anti-avoidance element in transactions between related entities notwithstanding that the price charged for a supply may arguably be less than the GST inclusive market value (as determined in an open market and negotiated between a willing buyer and seller).

Such a potentially broad-ranging provision can operate to automatically alter GST outcomes and create uncertainty for taxpayers, particularly in the securitisation industry. It is submitted that Division 72, at the very least, creates significant uncertainty, extremely onerous compliance / administration / valuation costs for taxpayers and inevitable disputes with the Commissioner. At most, that Division is so uncertain in its operation that taxpayers cannot reasonably comply with its requirements.

Query whether such a provision is necessary or effective in the administration of GST in circumstances where a general anti-avoidance provision already exists in the form of Division 165 and may be relied on by the Commissioner in appropriate circumstances.

It is suggested that Division 72 is too uncertain in its operation and should be deleted in its entirety for this reason. The Commissioner should rely on Division 165 in appropriate circumstances.

# Chapter 3: Subsequent events

**Q3.1 Are the adjustment provisions easy to understand and are adjustments easy to make? What impediments, if any, are there to making adjustments? Are the method statements or formulae specifying how to work out adjustments sufficiently clear? If not, how could they be modified?**

There is significant uncertainty regarding the application of Division 129 and calculation of specific adjustments. One threshold issue is whether acquisitions "relate to business finance" as defined in section 129-10(3). The definition is extremely broad and potentially covers every overhead of an organisation. In these circumstances, query if the distinction is necessary or appropriate. The distinction should be removed in the interests of simplifying the operation of Division 129.

It is proposed that a safe harbour election or formula should be considered and formalised in the GST Act (e.g. based on characterisation of independently audited financial accounts). Such a method could be used consistently for the purpose of applying an apportionment methodology for overheads etc, in addition to being used for retesting creditable purpose as part of calculating Division 129 adjustments.

Specific comments on thresholds and compliance are set out in the response to Q3.3 below.

Q3.2 Are the adjustment provisions aligned with the transactions that an entity would process for accounting and income tax purposes?

No specific comment.

**Q3.3 Are the adjustment threshold amounts, the number of thresholds and the timing of adjustments appropriate? Do they reflect an appropriate balance between accuracy and compliance costs? If not, how could they be modified?**

Division 129 thresholds (value and periods) are considered to be generally unworkable in practice.

A significant amount of work is required to identify and characterise acquisitions with a value that is above and below relevant thresholds.

Firstly, the mere identification of the first adjustment period (in accordance with section 129-20) is considered to be too complex. There is a very different outcome depending on whether a particular acquisition is made on 31 May or 1 June. The use of 1 June as a distinguishing date is neither appropriate nor logical.

Secondly, the value thresholds of $1,000 and $10,000 are considered to be simply too low, particularly for a large corporate taxpayer. This involves applying calculations and added compliance costs in determining a change in creditable purpose affecting $100 GST or $1000 GST, which seems immaterial, inappropriate and relatively insignificant from an overall revenue perspective.

Thirdly, the choice of 1, 2, 5 and 10 adjustment periods is difficult to apply in practice. This should be simplified.

Fourthly, the 10-year adjustment period is considered to be excessive - it requires monitoring for periods that may be beyond the applicable tax or accounting depreciation period. This requires an additional set of records to be kept for a significant period of time, imposing a further compliance burden.

Fifthly, there is no safe harbour test - but there should be an option for taxpayers to elect to apply a safe harbour rule (see response to Q3.1).

In the interests of more efficient administration and identifying material transactions for the purpose of applying such a complex adjustment, it is proposed that Division 129 be substantially simplified. In particular, it is proposed that:

- the concept of acquisitions that relate to business finance should be removed;
- acquisitions should be grouped by financial years, consistently with current practice for other purposes (e.g. tax and accounting);
- a new minimum threshold should be established - e.g. only acquisitions with a value of more than $100,000; and
- there should only be 2 categories of acquisitions - e.g. 2 years for acquisitions with a value of more than $100,000 but less than $1,000,000, and 5 years for acquisitions with a value of at least $1,000,000.

**Q3.4 There are many different adjustment provisions in the GST Act. Are there any unintended circumstances that arise due to the interaction of the different adjustment provisions with one another and other areas of the GST law?**

There is a technical risk that acquisitions under a supply of a going concern could give rise to a Division 135 adjustment if the acquisitions are used partly for making supplies within a GST group, which may be neither taxable nor GST-free and consequently triggering an adjustment (see section 135-5(1)(b)). This outcome seems both unintended and inappropriate and should be clarified.

It is proposed that section 135-5 should be amended to specifically refer to an intention to make supplies that are input taxed.

**Q3.5 Do the going concern provisions operate effectively? If not, what changes should be made to improve their operation and minimise the compliance costs of affected parties?**

Where all of the things that are necessary for the continued operation of an enterprise are held by various entities within a corporate group, the sale of those assets may not constitute a supply of a going concern. A similar outcome would arise if a purchasing corporate group wishes to acquire assets (e.g. land and other business assets) in different entities.

This is because section 38-325 contemplates a supply by a single supplier and a single recipient. In practice, this requirement seems to hinder the operation and policy of the section. Firstly, the GST treatment should be consistent where the underlying transaction (sale of assets) is the same. Secondly, the rules may encourage unnecessary restructuring of arrangements.

Some clarity is also required as to the precise scope of supplies that would be GST-free. There seems to be a distinction between a supply of all of the things that are necessary for the continued operation of an enterprise on the one hand, and other supplies under the broader arrangement under which the supply of all of the things that are necessary for the continued operation of an enterprise occurs. This seems confusing in practice.

Q3.6 Do the adjustment provisions cover all transactions where an adjustment should be available? Are there any other issues or anomalies with the adjustment provisions that need to be addressed? If so, what changes are needed?

No specific comment (but see responses to Q3.1, Q3.3, Q3.4 and Q3.5).

**Q3.7 Does the process for correcting GST mistakes encourage taxpayers to accurately determine their liability, whilst imposing the lowest practical compliance costs? Is there a need to change the operation of the law with regard to correcting GST mistakes to meet the above objectives? If so, what changes should be made?**

As a practical administrative matter, the publication entitled "Correcting GST Mistakes" (NAT 4700) is considered to be one of the more useful initiatives for large corporate taxpayers.

The revision of a GST return for smaller amounts and the management of subsequent penalty and interest adjustments and remission proposals are neither cost-effective nor appropriate for taxpayers or the Commissioner. In this context, the publication has reduced compliance time and costs while simplifying processes for taxpayers. However, there are considered to be 3 broad areas for improvement of the product in providing practical benefits and ease of compliance and administration.

Firstly, there can be difficulties for taxpayers in determining their **annual turnover**, particularly those in the financial services industry. In the GST Act, "annual turnover" is a concept defined in Division 188 of the GST Act. Where the fact sheet relies on the legislative concept, this creates significant uncertainty for those in the financial services industry since annual turnover seems to exclude the value of supplies that are input taxed (see paragraphs 188-15(1)(a), 188-15(2)(b), 188-20(1)(a) and 188-20(2)(b)). Alternatively, in the *A New Tax System (Goods and Services Tax) Act 1999 Classes of Recipient Created Tax Invoice Determination (No. 1) 2000*, the concept of annual turnover (for the purpose of the $20 million threshold for recipients to issue recipient created tax invoices) is altered by referring to the annual turnover that "would have been in effect if paragraphs 188-15(1)(a), 188-15(2)(b), 188-20(1)(a) or 188-20(2)(b) did not apply". It is proposed that the concept of "annual turnover" should be clarified in a similar manner for the purpose of the fact sheet.

Secondly, in light of increasing inflation and growth and size of businesses, it is noted that some thresholds in the GST Act have increased, such as the registration turnover threshold (see the *A New Tax System (Goods and Services Tax) Amendment Regulations* 2007 (No. 2) (SLI No 206 of 2007). However, the **dollar thresholds** in the fact sheet have not been amended since the time of issue (2001 or 2002). In this context, the current dollar-value thresholds are considered to be too low and should be revised.

Thirdly, the **time limits** (in particular the 3-month categories) are considered to be too short for larger organisations, where mistakes may take time to be detected, reviewed, analysed and actioned.

It is proposed that the various limits in the fact sheet could be amended to reflect the following:

| Annual turnover | Time limits (current) | **Time limits (proposed)** |
|---|---|---|
| Less than $20m | Up to 18 months (18 monthly activity statements, 6 quarterly activity statements or 1 annual GST return) | Up to 18 months (18 monthly activity statements, 6 quarterly activity statements or 1 annual GST return) |
| $20m to less than $100m | Up to 3 months (3 monthly activity statements) | Up to 6 months (6 monthly activity statements) |
| $100m to less than $500m | Up to 3 months (3 monthly activity statements) | Up to **6** months (**6** monthly activity statements) |
| $500m to less than $1b | Up to 3 months (3 monthly activity statements) | Up to **6** months (**6** monthly activity statements) |
| $1b and over | Up to 3 months (3 monthly activity statements) | Up to **6** months (**6** monthly activity statements) |

| Annual turnover | Correction limits (current) | Correction limits (proposed) |
|---|---|---|
| Less than $20m | Less than $5,000 | Less than **$10,000** |
| $20m to less than $100m | Less than $10,000 | Less than **$25,000** |
| $100m to less than $500m | Less than $25,000 | Less than **$50,000** |
| $500m to less than $1b | Less than $50,000 | Less than **$100,000** |
| $1b and over | Less than $300,000 | Less than $300,000 |

Q3.8 Are there any issues with the operation of the restriction on refund provision which need to be addressed to minimise the compliance costs of affected parties?

No specific comment.

Q3.9 Are there better ways to ensure that entities refund their customers for overpaid GST and ensure that compliance costs are minimised? If so, what alternative arrangements should apply?

No specific comment.

## Chapter 4: GST Administrative Environment

Q4.1 Is there a need for the broader rulings regime to apply to GST, or is it appropriate that it is treated separately? If there is a need for the broader rulings regime to apply to GST, would there be a need for any GST specific adaptations to take account of GST being a transaction based tax? If yes, what would be needed?

No specific comment.

Q4.2 Does the fact that the GST law does not require the Commissioner to issue notices of assessment as a matter of course pose problems for the indirect tax rulings regime? If so, what changes should be made?

No specific comment.

Q4.3 Do the current GST ruling provisions provide certainty for taxpayers concerning when rulings apply and cease? If not, what changes should be made?

No specific comment.

Q4.4 Does the existing GST ruling system provide sufficient protection for taxpayers? If not, how should it be changed?

No specific comment.

Q4.5 Should taxpayers have the right to object to a private ruling in respect of GST on a question of law?

No specific comment.

Q4.6 Should the legal framework for the administration of the GST be altered to specifically provide for the issuing of GST product or class rulings?

No specific comment.

**Q4.7 Are there any other aspects of the existing GST rulings system that should be improved to provide taxpayers with greater certainty? If so, what changes should be made?**

Currently, the concept of private indirect tax rulings in section 105-60 of Schedule 1 to the *Taxation Administration Act* 1953 permits reliance only by the entity to whom it was given (subsection 105-60(3)(a)). However, it is reasonably foreseeable that such advice would directly affect, and need to be relied on by, other parties, such as:

- other parties to a transaction for the purpose of applying the GST treatment to a particular supply and corresponding acquisition;
- successors and assigns to a contract under which a supply and corresponding acquisition is made; and
- the representative member and any other member of a GST group to which the applicant for a private indirect tax ruling belongs from time to time.

It is proposed that the concept of a private ruling be extended to enable the above entities to be able to rely on the same ruling as given to the applicant for the purpose of section 105-60 (e.g. by altering section 105-60 and the definition of "private indirect tax ruling" in section 995-1 of the *Income Tax Assessment Act* 1997.

This proposal should not have any revenue impact but would significantly reduce administration and compliance costs for taxpayers and the Commissioner by saving affected entities from otherwise having to make separate applications for similar private indirect tax rulings.

Q4.8 Does the existing fixed four-year period of review provide the best balance between providing certainty and ensuring the collection of the correct amount of tax?

No specific comment.

Q4.9 Are there any ways in which the operation of the GST periods of review would benefit from more closely resembling the income tax system?

No specific comment.

Q4.10 Is the present operation of the GST period of review appropriate for a transaction-based tax such as the GST?

No specific comment.

Q4.11 Do the rules relating to input tax credits, periods of review and attribution minimise complexity and compliance costs and provide an appropriate balance between the rights of taxpayers and protecting GST revenue? If not, what changes could be made to achieve this?

No specific comment.

Q4.12 Are the current GIC arrangements in the legal framework for the administration of the GST working effectively in the context of the GST as a transaction-based tax, including their application to receive neutral transactions, cases involving documentation issues and where GST has been paid by the wrong entity? Are any changes to the current GIC arrangements with regard to the GST desirable?

No specific comment.

**Q4.13 Should undesirable behaviour by entities be addressed by the introduction of a separate penalty?**

It is considered that the current penalty regime is already equipped to deal with undesirable behaviour, such that no separate penalty is necessary. It is submitted that the current practice and legislative rules for imposing penalties and interest (i.e. GIC) should be relaxed, whilst still enabling penalties to be imposed in appropriate circumstances.

Q4.14 Are there any specific problems with the operation of the GIC regime for particular entity types such as small business and non-profit bodies? If so, how could they be addressed?

N/A

**Q4.15 Are there circumstances in which a 'SIC-like' charge would be appropriate for GST? How could this work given that usually there is no GST assessment?**

The current regime for automatically calculating and imposing GIC is considered to be punitive in nature, and this is evident from the introduction of the SIC in the income tax context.

A SIC should also be introduced in the GST context and should apply automatically in the context of voluntary disclosures and also to any revisions made to GST returns online or otherwise, and any other revisions to GST returns that may occur (e.g. following resolution of a dispute between taxpayers and the Commissioner). Such a decision could be embedded in new rules in the legislation or, alternatively, formalised as an exercise of the general power of the Commissioner to remit penalty and interest (section 8AAG of the *Taxation Administration Act* 1953).

Given the punitive nature of the full rate of GIC, it might be appropriate in certain circumstances for the Commissioner to revert to the full rate of GIC in circumstances where there has been a failure to take reasonable case, taking positions that are not reasonably arguable or any other conduct that would give rise to a base penalty amount under section 284-90 of Schedule 1 to the *Taxation Administration Act* 1953.

As there is no GST assessment, it would be possible to implement a SIC by making reference to the rules in Division 280 of Schedule 1 to the *Taxation Administration Act* 1953 with required changes to adapt the provision to GST. Such a provision could make taxpayers "liable to pay *shortfall interest charge on an additional net amount of GST, any other amount or additional amount of indirect tax or related adjustment that arises from the Commissioner amending a GST return or *RBA (whether at the request of a taxpayer or otherwise) and results in an *RBA deficit debt on an *RBA (these concepts are used in sections 8AAZF, 8AAZH and following and defined in section 8AAZA).