

RECONSIDERING THE CASE FOR TAX REFORM DURING A CRISIS

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The impact of COVID-19 on fiscal systems worldwide is exactly the type of crisis thought necessary to precipitate major tax reform. This article contends that if Australia is about to embark on significant tax reform, then this must be accompanied by a full and frank account of the respective benefits and risks of reform. It uses the debate on Goods and Services Tax ('GST') reform to reveal the flaws inherent in existing reform discussions that fail to progress beyond the economic merits of a policy idea without sufficient regard to how those ideas are implemented (or not) in practice. The GST reform debate generally proceeds with supporters of GST reform arguing for the expansion of the tax on the grounds of economic efficiency and opponents of reform arguing against the expansion of the tax on the basis of unfairness. However, when the discussion moves beyond economic theory and takes account of how the GST operates in practice, and specifically the laws and legal institutions that implement the GST, many of the purported benefits of the GST do not hold up. This has important consequences for the types of reform proposals put forward as well as how those proposals are assessed.

I INTRODUCTION

2021 marked the 21st anniversary of the introduction of a GST in Australia.¹ Any preparations to mark the occasion were waylaid by the enormous social and economic impact of the Coronavirus pandemic.² With the massive government

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1 The *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ('*ANTS Act 1999*') commenced on 1 July 2000.

2 An early exception was the UNSW Sydney and Sydney Law School's 20th Anniversary of the GST in Australia: Where Policy Meets Reality conference, Sydney, 25–6 March 2019. See also

spending in response to COVID-19 and the subsequent fiscal pressure this will entail, it is likely that there will be an urgent need for fundamental tax reform. That is, the impact of COVID-19 on fiscal systems worldwide is exactly the type of crisis often thought necessary to precipitate major tax reform.³

Reform of the GST has already been proposed as one of a number of tax reform options in response to COVID-19, but notably not by the Commonwealth government. The most high-profile example so far is a Draft Report by the New South Wales ('NSW') Treasury's Federal Financial Relations Review Panel which recommends that the Commonwealth and state governments 'should assess and agree options for lifting the GST rate and/or expanding the base'.⁴

Elysse Morgan, 'The GST Turns 20 Today: Is It Time to Increase the Tax Rate or Broaden the Base?', *ABC News* (online, 1 July 2020) <<https://www.abc.net.au/news/2020-07-01/gst-20-years-old-is-it-time-to-increase-the-tax-rate/12407258>>; 'Secret Papers: For the Last 20 Years, Every Single Australian Has Paid 10% Extra for Almost Every Product and Service We Use, But the Release of Top-Secret Cabinet Documents Shows Just How Hard It Was for the Howard-Costello Government to Make the GST a Reality as They Faced a New Millennium', *Nine News* (Nine Network, 1 January 2020). A number of media articles in *The Australian Financial Review* also marked the occasion and called for further reform: see below n 4.

- 3 Kathryn James, *The Rise of the Value-Added Tax* (Cambridge University Press, 2015) 219 and the references cited therein; W Elliot Brownlee, *Federal Taxation in America: A Short History* (Cambridge University Press, 2nd ed, 2004) 1–9. For a discussion of the role of exogenous and endogenous processes in policy change, see Richard Eccleston, *Taxing Reforms: The Politics of the Consumption Tax in Japan, the United States, Canada and Australia* (Edward Elgar, 2007) 19; Andrew C Gould and Peter J Baker, 'Democracy and Taxation' (2002) 5 *Annual Review of Political Science* 87, 89.
- 4 Treasury (NSW), *NSW Review of Federal Financial Relations: Supporting the Road to Recovery* (Draft Report, July 2020) 37 <<https://www.treasury.nsw.gov.au/sites/default/files/2020-06/FFR%20Review%20Draft%20Report%20.pdf>> ('*NSW Review of Federal Financial Relations*'). See also the recent call for an increase in the GST in response to the COVID-19 crisis by Tax and Transfer Policy Institute Director Professor Robert Breunig, discussed in Paul Karp, 'Australia Will Need to Raise GST to Pay Coronavirus Debt, Tax Expert Says', *The Guardian* (online, 14 April 2020) <<https://www.theguardian.com/business/2020/apr/14/australia-will-need-to-raise-gst-to-pay-coronavirus-debt-tax-expert-says>>; PricewaterhouseCoopers, *Where Next for Australia's Tax System? How GST Reform Can Help Reboot Prosperity for Australia* (Report, July 2020) <<https://www.pwc.com.au/tax/assets/tax-reform/2020/how-gst-reform-can-help-reboot-prosperity-for-australia-july2020.pdf>> ('*How GST Reform Can Help Reboot Prosperity for Australia*'). See the calls for reform following on from the 20th anniversary of the GST in *The Australian Financial Review*: Editorial, 'GST Birthday Sad Reminder of Reform Complacency', *The Australian Financial Review* (Sydney, 29 June 2020) 38; Alexander Downer, 'Why the Last Great Tax Change Remains Unfinished Business', *The Australian Financial Review* (Sydney, 29 June 2020) 39; Editorial, 'The GST Success Shows Up the Carbon Tax Failure', *The Australian Financial Review* (Sydney, 30 June 2020) 38; Matthew Cridland, 'GST Reform is Held Hostage by the Veto Power of the States', *The Australian Financial Review* (Sydney, 30 June 2020) 39; Rosalind Dixon and Richard Holden, 'Here's How the GST Can Be Both Bigger and Progressive', *The Australian Financial Review* (Sydney, 8 July 2020) 39; John Kehoe and Aaron Patrick, 'Expanding GST Would "Boost Economy", Says Liberal MP', *The Australian Financial Review* (online, 28 October 2019) <<https://www.afr.com/policy/tax-and-super/expanding-gst-would-boost-economy-says-liberal-mp-20191027-p534lt>>; John Kehoe, Bo Seo and Matthew Cranston, 'Henry Says Tax System Much Worse', *The Australian Financial Review* (Sydney, 18 February 2020) 1. Prior to the crisis, a GST increase had already been proposed by a number of reform advocates: see, eg, John Daley and Danielle Wood, Grattan Institute, *A GST Reform Package* (Report No 2015-12, December 2015); Eryk Bagshaw, 'Push to Increase and Expand GST', *The Sydney Morning Herald* (online, 16 October 2018) <<https://www.smh.com.au/politics/federal/push-to-increase>>

In some respects, this latest call for reform continues a pattern that has emerged since the introduction of the GST in 2000 of experts or interest groups proposing GST reform on the basis of a number of predictable claims around enhanced efficiency and revenue generation and the Commonwealth government ruling out reform because of its perceived political risk.⁵ Indeed, one enduring feature of the GST since its introduction is the paralysis of reform that has succeeded it. Such remains the political potency of the GST that two major tax reviews conducted since its introduction have had the GST excluded from their terms of reference.⁶ Instead, reforms have responded to specific gaps or areas of weakness — most recently in response to GST fraud⁷ and in the adoption of measures to tax some previously untaxed consumer purchases in the rapidly expanding digital economy.⁸ However, the NSW intervention signals the potential for a state government to lead the call for GST reform, which is novel and a potential game changer.

This article contends that this reform paralysis is in part due to the quality of the reform debate. Many calls for reform focus on the theoretical economic benefits of expanding the GST base or increasing the rate, which merely restate the benefits of broad-based consumption taxes generally.⁹ As well as denying the inherent

and-expand-gst-20181015-p509p7.html>; Bruce Quigley, 'Has the Opportunity for Tax Reform Gone?' (2019) 53(11) *Taxation in Australia* 586; Michael Janda, 'Ken Henry's Tax Review Is Gathering Dust, but Its Ideas Could Kick-Start Australia's Economy', *ABC News* (online, 23 December 2019) <<https://www.abc.net.au/news/2019-12-23/henry-tax-review-ten-years-on/11817328>>. Business organisations have previously pushed GST reform as an element of their key objective of a lowering of the corporate income tax rate: see Business Council of Australia, *Realising Our Full Potential: Tax Directions for a Transitioning Economy* (Report, March 2016) 21 ('*Realising Our Full Potential*'); KPMG, *The Economic Impact of a GST-Funded Company Tax Cut* (Report, 14 January 2016) 8–10 <<https://fsc.org.au/resources/research-reports-projects>>; Naomi Woodley, 'Increasing GST, Slashing Company Tax Could Raise Extra \$36b for Government: FSC', *ABC News* (online, 18 January 2016) <<https://www.abc.net.au/news/2016-01-18/financial-services-council-weighs-in-on-gst-debate/7094688>>. But, on the abandonment of a GST increase by the Turnbull government in 2016, see Michelle Grattan, 'Treasury Modelling Shows No Growth Lift from GST Tax Mix Switch', *The Conversation* (online, 12 February 2016) <<https://theconversation.com/treasury-modelling-shows-no-growth-lift-from-gst-tax-mix-switch-54574>>, discussing modelling reported at Treasury (Cth), 'Treasury Analysis of Tax Mix Switch' (Media Release, 12 February 2016).

- 5 'Govt Has "No Plans to Increase the GST": Frydenberg', *Sky News* (online, 2 July 2020) <https://www.skynews.com.au/details/_6168659489001>. Cf John Kehoe, 'PM Leaves GST on the Table', *The Australian Financial Review* (Sydney, 30 June 2020) 8. This was also a pattern prior to the introduction of the GST: James, *The Rise of the Value-Added Tax* (n 3) 242–9; Kathryn James, 'We of the "Never Ever": The History of the Introduction of a Goods and Services Tax in Australia' [2007] (3) *British Tax Review* 320.
- 6 Review Panel, *Australia's Future Tax System: Report to the Treasurer* (Report, December 2009) pt 1, viii [5] ('*Henry Review*'); Treasury (Cth), 'Re:think: Tax Discussion Paper' (Discussion Paper, March 2015) 131 ('Re:think').
- 7 See below Part III.
- 8 See below Part IV.
- 9 See above n 4. See also KPMG, *Tax Reform in Australia: The Facts* (Report, February 2015) <<https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/professional-resources/taxation/tax-reform-in->

contestability of the desirability of taxing a consumption base, such claims ignore how the GST specifically operates to tax consumption and the reality of the GST in practice.

In many respects, the current reform debate repeats the pattern of the debate preceding the introduction of the GST. Many of the GST's virtues were presented by comparison to what it was not — namely the wholesales sales tax ('WST') and, to a lesser extent, the income tax. The WST was labelled inefficient, complex, a cost to business and subject to multiple rates and exemptions.¹⁰ In an at-times superficial political debate, a number of promised claims made of the GST went largely unchecked.¹¹ For example, the then Treasurer Peter Costello and the *Tax Reform: Not a New Tax, a New Tax System* document ('ANTS Statement') announcing the reforms introducing the GST, predicted that the GST would: '[r]educ[e] tax avoidance and the cash economy',¹² simplify the tax system,¹³ reform 'antiquated Commonwealth-State financial relations'¹⁴ by giving all revenues collected from the GST to the states;¹⁵ help encourage savings, investment and work effort;¹⁶ deliver higher economic growth and more jobs;¹⁷ reduce compliance costs; secure more revenue; remove the need for ad hoc tax redesign;¹⁸ 'lift the tax burden on our exports';¹⁹ improve living standards;²⁰ make

australia.pdf?la=en&rev=982851a839e048898f894f55620ec3d7>; John Daley, 'Tax Reform: Where to Focus?' (Presentation, 10 July 2018) 40–1 <<https://grattan.edu.au/news/tax-reform-where-to-focus/>>; Bruce Quigley, 'Tax Reform Can't Wait' (2020) 54(7) *Taxation in Australia* 348; 'Big Issues 2017', CEDA (Web Page, 6 December 2017) <<https://www.ceda.com.au/Research-and-policy/All-CEDA-research/Research-catalogue/Big-Issues-2017>> (survey of business community finding GST reform to broaden base and raise rate still a major priority); John Freebairn, 'GST Reform: John Freebairn Overview', *The Economic Society of Australia* (Web Page, September 2015) <https://esacentral.org.au/nep-poll-overviews-item/33768/gst-reform-john-freebairn-overview/?type_fr=908> (discussion and analysis of results of poll of National Economic Panel).

- 10 Treasury (Cth), *Tax Reform: Not a New Tax, a New Tax System* (1998) 71–2 ('ANTS Statement').
- 11 Cf John Quiggin, 'Forget the GST and Focus on Real Issues', *The Australian Financial Review* (Sydney, 20 May 1999) 19; Neil Brooks, 'Lessons for Australia from the Canadian Experience with the GST: Don't Do It!' in Binh Tran-Nam (ed), *Tax Reform and the GST: An International Perspective* (Prospect Media, 1998) 109, 124–38; Graeme S Cooper and Richard J Vann, 'Implementing the Goods and Services Tax' (1999) 21(3) *Sydney Law Review* 337.
- 12 *ANTS Statement* (n 10) 150.
- 13 *Ibid* 8–9, 15.
- 14 *Ibid* 9.
- 15 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1089 (Peter Costello, Treasurer).
- 16 *ANTS Statement* (n 10) 6–8.
- 17 *Ibid* 3, 9, 155–6.
- 18 *Ibid* 10, 156.
- 19 *Ibid* 9.
- 20 *Parliamentary Debates* (n 15) 1091 (Peter Costello, Treasurer).

the tax system fairer and promote ‘a more prosperous, more egalitarian and fairer Australian society’.²¹

The hyperbolic nature of a number of these claims means that a number of them could never be effectively measured or identified. However, it is worth reflecting on those claims that can. On a number of measures the GST can be considered a success.²² It has survived constitutional challenge²³ and implementation problems to become effectively institutionalised as the second most important contributor (behind the income tax) to Commonwealth taxation revenues — generating \$65.147 billion in revenue for 2018–19 or 14% of Commonwealth taxation revenue.²⁴ The package introducing the GST remains the last large-scale reform of Australia’s tax system. However, the GST was no salve for federal fiscal relations and indeed has become a regular feature of disputes between the Commonwealth and state governments.²⁵ While Australia did enjoy a period of economic growth following the introduction of the GST, this growth was well underway before the introduction of the GST and cannot be causally attributed to the tax alone, but is likely to have been driven by a number of factors such as the resources boom.²⁶ This increased growth was accompanied by an increase (not decrease) in economic inequality.²⁷

21 ANTS Statement (n 10) 9.

22 Binh Tran-Nam, ‘The Goods and Services Tax (GST): The Public Value of a Contested Reform’ in Joannah Luetjens, Michael Mintrom and Paul ‘t Hart (eds), *Successful Public Policy: Lessons from Australia and New Zealand* (Australian National University Press, 2019) 235, 237–40.

23 See, eg, *O’Meara v Federal Commissioner of Taxation* (2003) 128 FCR 376; *Halliday v Commonwealth* (2000) 45 ATR 458; *McKinnon v Commonwealth* [2000] FCA 936, [10] (Hill J). See also Gordon Brysland, ‘GST and Government in 2010’ in Christine Peacock (ed), *GST in Australia: Looking Forward from the First Decade* (Lawbook, 2011) 3, 6–11.

24 This compares to the income tax which provided 74% or \$338.667 billion of Commonwealth tax revenues — with \$229.749 billion levied from individuals and \$106.819 billion from enterprises: Australian Bureau of Statistics, *Taxation Revenue, Australia, 2018–19* (Catalogue No 5506.0, 28 April 2020).

25 Richard Eccleston and Richard Krever, ‘The Future of the Australian Federation: Intergovernmental Financial Relations amid Growing Fiscal Pressures’ in Richard Eccleston and Richard Krever (eds), *The Future of Federalism: Intergovernmental Financial Relations in an Age of Austerity* (Edward Elgar, 2017) 95, 115–16.

26 For growth data, see Australian Bureau of Statistics, *Australian National Accounts: National Income, Expenditure and Product* (Catalogue No 5206.0). This historical data shows gross domestic product (‘GDP’) growth over the post-2000 quarters, as well as those since March 1973. While one study found significant growth effects from the introduction of the GST in 2000, doubt has been cast on the likelihood of a similar effect from an increase in the GST rate now: see Tom Bolton and Brian Dollery, ‘An Empirical Note on the Comparative Macroeconomic Effects of the GST in Australia, Canada and New Zealand’ (Working Paper No 2004-17, School of Economics, University of New England, 2004) 11–13; Michelle Grattan (n 4).

27 The Productivity Commission notes that economic inequality increased over the near three-decade-long period of economic growth up to 2018: Productivity Commission, ‘Rising Inequality? A Stocktake of the Evidence’ (Research Paper, August 2018) 1–3. See also Australian Council of Social Service and UNSW Sydney, *Inequality in Australia 2020: Part 1* (Report, 2020) 29, 41, 42, 44. Note that income inequality increased in Australia from 1999 to 2007 and then plateaued. Wealth inequality increased from 2003–09 then fell back during the

A more reliable basis for assessing the success or otherwise of the GST is to examine the performance of the tax itself (rather than the secondary promises that accompanied its introduction). A useful way of doing this is to assess the GST against the three design norms that GST experts generally agree that a well-designed or ‘good’ GST should comply with. These require: (1) that the GST is levied on a broad base of final consumption at a single rate (that is, that it taxes as many of the goods and services purchased by final consumers as possible); (2) that this taxation take place through a staged collection and refund process — usually the invoice-credit method (whereby everyone pays GST on eligible purchases but registered entities such as business are entitled to a refund or ‘credit’ for the GST, with appropriate proof of payment — usually an invoice); and (3) that the tax be levied on a destination basis — meaning that the jurisdiction with power to tax is the jurisdiction where the goods and services are consumed by a final consumer (which in practice results in the taxation of imports and non-taxation of exports).²⁸ At first glance, the Australian GST complies with all three norms of good GST design — it is levied on a consumption base through the invoice-credit method on a destination basis. However, like almost every other GST or Value-Added Tax (‘VAT’) in practice, the Australian GST is a ‘real’ one, meaning that, once implemented, it fails in various ways to realise the three design norms of the good GST.²⁹

On the first norm, the GST reaches around half of the available consumption base³⁰ due to deliberate exclusions to the base (such as food, education and health and medical services)³¹ as well as the challenges posed through non-compliance and the rapid expansion of the digital economy.³² On the second norm, the invoice-credit method has proven expensive to administer (costing \$0.92 to collect every

global financial crisis (‘GFC’) before returning to pre-GFC levels: Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2017–18* (Catalogue No 6523.0, 12 July 2019); Australian Bureau of Statistics, *Household Income and Income Distribution, Australia, 2009–10* (Catalogue No 6523.0, 30 August 2011).

28 For more on these design norms and the existence of the expert consensus, see James, *The Rise of the Value-Added Tax* (n 3) chs 2–3. See, eg, Organisation for Economic Co-operation and Development, *Consumption Tax Trends 2020: VAT/GST and Excise Rates, Trends and Policy Issues* (2020) 20–2, 25–33 (‘*Consumption Tax Trends 2020*’).

29 For more on the distinction between the ‘good’ and ‘real’ GST, see James, *The Rise of the Value-Added Tax* (n 3) chs 2–3.

30 *Consumption Tax Trends 2020* (n 28) 50–2, 97–8. The VAT revenue ratio (‘VRR’) = (VAT or GST revenue)/([consumption (including government consumption) – VAT or GST revenue] x standard VAT or GST rate): at 51, 98. Although there are problems with the VRR as a measure, in particular because it includes government expenditure as private consumption and therefore over-inflates the consumption measure, it is generally accepted as one of the main methods to measure the extent of the GST base and can still indicate revenue gaps due to policy and compliance gaps: at 50–5. For reference to the VRR in Australia, see, eg, *Henry Review* (n 6) pt 2 vol 1, 285–6; ‘Re:think’ (n 6) 131–4.

31 Treasury (Cth), *Tax Benchmarks and Variations Statement 2019* (Report, January 2020) 135–46.

32 See below Part IV.

\$100 of net GST revenue³³ compared to \$0.64 for all other Commonwealth taxes in 2018–19)³⁴ and susceptible to non-compliance — with an estimated \$5 billion lost to non-compliance and unpaid debt in 2018–19.³⁵ Far from simplifying the tax system, the legal implementation of the GST has added its own complexities, with one prominent Federal Court judge stating that it had “failed to meet the generally accepted hallmarks of tax reform” and had in many ways made things worse’.³⁶ On the third design norm, like all real VATs, the Australian GST has been challenged by the explosion in the volume of trade in intangible goods and services which do not cross traditional border controls, where the timing and place of consumption might differ from the time of purchase and which are difficult to trace.

However, as this article demonstrates, the debate on GST reform generally goes no further than a discussion of the first design norm — on the desirability or otherwise of expanding the GST base or rate. The arguments for reform are often a restatement of the arguments made prior to the introduction of the GST, but without sufficient regard for 20-plus years of evidence on the performance of the tax. Occasional attention is paid to the third design norm of taxing domestic final consumption due to the challenges posed by the growth in online consumer purchasing. However, attention is rarely paid to the second design norm concerning the implementation of the invoice-credit method and how the GST works in practice. The result is a reform discussion that fails to properly account for the benefits and risks of reform.

This article addresses this imbalance by structuring its discussion of the merits or otherwise of the GST around each GST design norm. Parts II–IV examine the design norms, including the contestability of the claims made in support of each one, and assesses how the Australian GST measures against each norm with a specific focus on how laws, legal institutions and administrative constraints account for any departures from the norms. The primary contribution of this article is to demonstrate that when a real GST is the subject of analysis, the case for reform is not nearly as clear-cut as its proponents suggest and its opponents concede. This contribution is significant because of the strong consensus on the merits of GST reform expressed by reform proponents. In showing the flaws in the assumptions or arguments that underlie this consensus, the article intends to pave the way for a more rigorous account of the benefits and risks of GST reform. The article concludes with some reflections on the consequences that might flow from this contribution, including on how the GST reform debate should be reframed so as to address the types of issues that will need to be dealt with to effectively reform the GST and to properly debate the merits of broader tax reform in response to a crisis.

33 Australian Taxation Office, *GST Administration Annual Performance Report 2018–19* (Report, November 2019) 39.

34 Australian Taxation Office, *Commissioner of Taxation: Annual Report 2018–19* (Report, 2019) 28.

35 *GST Administration Annual Performance Report 2018–19* (n 33) 8–9.

36 Peter Martin, ‘Judge Hits Out at Leaky, Expensive GST’, *The Age* (Melbourne, 15 September 2011) 7. See also *ATS Pacific Pty Ltd v Federal Commissioner of Taxation* (2014) 219 FCR 302, 311–12 [33] (Edmonds J).

II DESIGN NORM 1: A BROAD CONSUMPTION BASE AT A SINGLE RATE

The Australian GST reform debate generally proceeds with supporters of GST reform arguing for the expansion of the tax on the grounds of economic efficiency and opponents of reform arguing against the expansion of the tax on the basis of regressivity.

Former Treasury head Ken Henry recently remarked that broadening the GST base ‘will have to happen’, stating that ‘[w]e cannot continue to put increasing reliance on the personal income tax system — not if we want to pursue a *productivity-enhancing* agenda and also an agenda which enhances workforce participation’.³⁷ The NSW Federal Financial Reform Review Panel, labelling the GST as ‘one of the nation’s most efficient taxes’,³⁸ recommended expanding the GST base and rate to ‘address the erosion of revenues, support the medium- to long-term economic and fiscal recovery’ and provide ‘an avenue to reduce Commonwealth income taxes, [and] abolish more harmful state taxes’.³⁹

In 2015, there was a short-lived attempt by business groups, accounting firms and some think tanks to return GST reform to the agenda. In assessing the arguments for reform, finance journalist, Jessica Irvine, encapsulated the general nature of the claims made in support of GST reform when she remarked:

Economists like efficient taxes: ones that do not distort behaviour. Income taxes discourage work and encourage tax avoidance. Company taxes also encourage tax evasion and ultimately lead to lower wages for workers. But everyone buys bread. Taxes on consumption are efficient for the very reason they are reviled: it’s hard to avoid paying them.⁴⁰

Many proposals for GST reform present assumptions (sometimes supported by modelling) around the economic costs of certain taxes as sufficient in and of themselves to warrant reform. For example, the NSW Federal Financial Reform Review Panel referred to modelling showing the relatively low ‘marginal excess burden’ of the GST as evidence for the need for its expansion.⁴¹ Furthermore, in

37 Janda (n 4) (emphasis added).

38 *NSW Review of Federal Financial Relations* (n 4) 30.

39 *Ibid* 32.

40 Jessica Irvine, ‘Everyone Buys Bread, and Here’s a Way to Keep Butter on It’, *The Sydney Morning Herald* (Sydney, 20 July 2015) 6. For a more circumspect view this time around, see Jessica Irvine, ‘Post-Pandemic Tax Reform Is on the Agenda: How Could It Affect You?’, *The Sydney Morning Herald* (online, 13 May 2020) <<https://www.smh.com.au/national/post-pandemic-tax-reform-is-on-the-agenda-how-could-it-affect-you-20200511-p54rse.html>>: ‘Economists like land taxes because they are hard to avoid. Most — although not all — also like the GST because it is also somewhat hard to avoid: everyone needs to buy stuff’.

41 Marginal excess burden was defined as ‘the economic value destroyed for every additional dollar raised, resulting from individuals and businesses making less than ideal choices’. Interestingly, the same modelling also showed that the company tax had the lowest marginal excess burden despite it repeatedly being singled out for reform/reduction on efficiency grounds: *NSW Review*

the course of recommending an expansion of the GST base (and rate) in 2015, the Grattan Institute stated:

Broad-based consumption taxes such as the GST are relatively *efficient* taxes. They *drag less on economic efficiency* than many state government taxes including payroll taxes and stamp duties.

Consumption taxes are efficient for many reasons. They are *relatively difficult to avoid and create fewer distortions* in decisions to work, save and invest [than an income tax].⁴²

As these quotes demonstrate, much of the support for, and opposition to, the GST stems from the fact that it taxes consumption (the goods and services purchased by final consumers) as opposed to income (such as earnings generated from labour or investment), as well as some other familiar targets — state-based levies (such as payroll taxes and stamp duty).⁴³

A Contextualising the Reform Debate

The debate on the relative merits of income and consumption taxes is centuries-old and fiercely contested, and it is not the intention of this article to revisit it here.⁴⁴ However, it is important to highlight that, contrary to many of the claims

of Federal Financial Relations (n 4) 31. For an example, and summary, of the economic modelling, see Jason Nassios et al, 'The Economic Impact and Efficiency of State and Federal Taxes in Australia' (Working Paper No G-289, Centre of Policy Studies, Victoria University, April 2019).

42 Daley and Wood (n 4) 6 (emphasis added) (citations omitted).

43 The difference between the two bases is best captured in the classic Schanz-Haig-Simons formulation where $\text{income} = \text{consumption} + \Delta \text{ savings}$ (measured over a period of time). An ideal income tax focuses on taxing any economic gains over a period of time irrespective of how these gains are then spent or saved. Conversely, economic losses should reduce taxable income. By contrast, a consumption tax is best illustrated by re-arranging the formulation so that $\text{consumption} = \text{income} - \Delta \text{ savings}$ (time). This reveals that the key difference between the two bases is that an income tax includes gains made from savings as they occur over a period of time whereas a consumption tax excludes those gains unless and until those gains are spent so that income earned but not spent in a particular period is not taxed until the later period (if any) in which it is spent: Henry C Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (University of Chicago Press, 1938) 49–50.

44 For those on the consumption side, see, eg, William D Andrews, 'A Consumption-Type or Cash Flow Personal Income Tax' (1974) 87(6) *Harvard Law Review* 1113; Edward J McCaffery, 'A New Understanding of Tax' (2005) 103(5) *Michigan Law Review* 807; Joseph Bankman and David A Weisbach, 'The Superiority of an Ideal Consumption Tax over an Ideal Income Tax' (2006) 58(5) *Stanford Law Review* 1413. Mill and Hobbes are generally cited in support of consumption taxes: John Stuart Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (Longmans, Green, and Co, rev ed, 1909) 810–17; Thomas Hobbes, *Leviathan*, ed Richard Tuck (Cambridge University Press, rev ed, 1991) 238–9. Many acknowledge the role for both an income tax and a consumption tax such as a VAT: see, eg, Ian Crawford, Michael Keen and Stephen Smith, 'Value Added Tax and Excises' in Stuart Adam et al (eds), *Dimensions of Tax Design: The Mirrlees Review* (Oxford University Press, 2010) 275, 280–3. For those who also defend the income tax, see Neil Brooks, 'An Overview of the Role of the VAT, Fundamental Tax Reform, and a Defence of the Income Tax' in Richard Krever and David White (eds), *GST in Retrospect and Prospect* (Brookers, 2007) 597; Barbara H Fried,

made in support of the GST outlined above, there *is* a debate over the respective merits or otherwise of taxing income and consumption including through a GST. As the GST debate suggests, the *strongest* (but not the only) arguments of consumption tax advocates tend to be grounded in economic efficiency (familiar and contested claims that consumption offers a less distortive and less mobile tax base than income).⁴⁵ By contrast, the *strongest* (but not the only) claims of income tax advocates tend to be grounded in fairness (that an income tax captures more of the resources of those with a greater ability to pay).⁴⁶

The most common critique of the GST is that, as an indirect consumption tax, the GST places a higher *relative* burden on the poor (who must spend most of their income to survive) than the rich (who can save more as their income rises), making the GST a regressive tax.⁴⁷ Supporters of the GST have a number of technical replies to this charge of regressivity, including that when the GST is measured as a proportion of annual expenditure (rather than income) or over a lifetime (rather than a year), it is less regressive (meaning the poor still pay relatively more but less so than when measured against annual income) or proportionate (meaning the relative tax burden is constant across all income categories).⁴⁸ These claims are all contested.⁴⁹ However, for the purposes of this article, it is sufficient to note that, even when conceding the point, supporters of GST reform prefer for any unfairness in the GST to be dealt with through compensatory spending or adjustments in other taxes, such as the income tax, rather than in muddying the design of the GST through introducing equity-based exclusions to the base or variations to the rate.⁵⁰

'Fairness and the Consumption Tax' (1992) 44(5) *Stanford Law Review* 961, 962, 1016; Alvin C Warren Jr, 'Fairness and a Consumption-Type or Cash Flow Personal Income Tax' (1975) 88(5) *Harvard Law Review* 931; Thomas Piketty and Emmanuel Saez, 'Income Inequality in the United States: 1913–1998' (2003) 118(1) *Quarterly Journal of Economics* 1, 37; Peter Diamond and Emmanuel Saez, 'The Case for a Progressive Tax: From Basic Research to Policy Recommendations' (2011) 25(4) *Journal of Economic Perspectives* 165. For a summary of the broader debate, see James, *The Rise of the Value-Added Tax* (n 3) 21–5.

45 See, eg, *Henry Review* (n 6) pt 2 vol 1, 273; 'Re:think' (n 6) 138.

46 See Patrick Emerton and Kathryn James, 'The Justice of the Tax Base and the Case for Income Tax' in Monica Bhandari (ed), *Philosophical Foundations of Tax Law* (Oxford University Press, 2017) 125, 143. This is not to suggest that there are not those who argue for the superior efficiency of the income tax over a VAT or for the superior fairness of a VAT over the income tax, but rather describes the general moves in the debate: see above n 44.

47 *NSW Review of Federal Financial Relations* (n 4) 33; 'Re:think' (n 6) 133–5; *Henry Review* (n 6) pt 2 vol 1, 275–6; Richard Krever, 'Designing and Drafting VAT Laws for Africa' in Richard Krever (ed), *VAT in Africa* (Pretoria University Law Press, 2008) 9, 18.

48 See, eg, *Henry Review* (n 6) pt 2 vol 1, 275–6; 'Re:think' (n 6) 135; Liam Ebrill et al, *The Modern VAT* (International Monetary Fund, 2001) 106–7.

49 See, eg, Daniel Shaviro, 'Beyond the Pro-Consumption Tax Consensus' (2007) 60(3) *Stanford Law Review* 745; Emerton and James (n 46) 144–52.

50 *NSW Review of Federal Financial Relations* (n 4) 34–6; *Henry Review* (n 6) pt 2 vol 1, 14; International Tax Dialogue, 'The Value Added Tax: Experiences and Issues' (Background Paper, International Tax Dialogue Conference on the VAT, 15–16 March 2005) 14–15; Richard M Bird and Pierre-Pascal Gendron, *The VAT in Developing and Transitional Countries* (Cambridge University Press, 2007) 108; Ebrill et al (n 48) ch 8; Sijbren Cnossen, 'Global Trends and Issues in Value Added Taxation' (1998) 5(3) *International Tax and Public Finance*

This is because many of the GST's putative merits — such as its revenue generation, simplicity and neutrality⁵¹ — stem from its ability to reach a *broad* consumption base.⁵²

However, even if the claim that consumption taxes are more efficient in theory is accepted,⁵³ the point alone fails to capture the reality of the GST in practice. As most proponents of GST reform acknowledge, the Australian GST, like nearly every other GST in practice, does not reach a broad consumption base.⁵⁴ In 2018, the GST reached 47% of domestic consumption.⁵⁵ In so doing, it is one of the almost one-third (11 of 36, excluding the US) of the Organisation for Economic Co-operation and Development ('OECD') member states' GSTs which manage to tax half or less of domestic consumption and like most the GSTs of most OECD economies which reach less than 65% of the potential consumption base (30 of 36).⁵⁶ However, while Australia once roughly tracked the OECD average (currently at 56%),⁵⁷ it is now consistently below it.⁵⁸

The failure of most GSTs to reach a broad consumption base suggests that the merits assumed of the GST are not necessarily forthcoming (or at least not to the extent that might be suggested).⁵⁹ It can, for example, be reflected in Australia by the relatively low share of GST revenues as a proportion of total tax revenues across all levels of government (down from a peak of 13.9% in 2009–10 to 12.1% in 2017–18).⁶⁰ It is also partly reflected in the decline of GST revenue relative to gross domestic product ('GDP'). There can be a number of reasons for this decline (not all of which reflect on the poor performance of the GST) such as the relative strength of (mining) investment relative to final consumption and the relative strength of corporate tax collections that flow from this. However, other reasons

399, 399–400; *Consumption Tax Trends 2020* (n 28) 42–4. For examples contesting these claims, see above n 44.

51 Michael Keen and Ben Lockwood, 'Is the VAT a Money Machine?' (2006) 59(4) *National Tax Journal* 905, 905.

52 *Henry Review* (n 6) pt 2 vol 1, 275; James, *The Rise of the Value-Added Tax* (n 3) 46.

53 For a denial of the claim, see Emerton and James (n 46) 149–50 and the citations therein.

54 *Henry Review* (n 6) pt 2 vol 1, 285; Daley and Wood (n 4) 8.

55 *Consumption Tax Trends 2020* (n 28) 51–2, 97–8. Although, see above n 30 on the concerns with the VRR as a measure of VAT performance because it includes government consumption as private consumption.

56 *Consumption Tax Trends 2020* (n 28) 51–2, 97–8.

57 *Ibid* 51, 98.

58 The percentage of domestic consumption reached by the GST compared to the OECD average has steadily declined (from 56% in 2005): 'Re:think' (n 6) 132; *ibid* 97–8; Janda (n 4). However, see above n 30 as to why this trend might not be as concerning as it first appears.

59 James, *The Rise of the Value-Added Tax* (n 3) 83–97.

60 Australian Bureau of Statistics, *Taxation Revenue, Australia, 2014–15* (Catalogue No 5506.0, 26 April 2016); Australian Bureau of Statistics, *Taxation Revenue, Australia, 2017–18* (Catalogue No 5506.0, 29 April 2019). GST revenue as a proportion of GDP and of household consumption has also been in decline: *NSW Review of Federal Financial Relations* (n 4) 30.

do go to the performance of the GST, such as the growing proportion of consumption expenditure on GST-free and input-taxed supplies such as health, residential rent and education.⁶¹

It is clear that on the measure of coverage, exclusions to the GST base are an important issue. However, contrary to the reform discussion to date, this issue and the setting of the GST rate are not the *only* issues in GST reform; nevertheless, it is important to address them.

B The Issue of Base-Broadening and Rate Increases

In 2015 the Grattan Institute proposed:

Increasing the GST or applying it to more things is preferable to most other means of raising revenue. A broad-based tax on consumption drags on growth less than most other taxes. Broadening the GST base to include fresh food, health and education would be more efficient, and would reduce compliance costs compared to narrower coverage. But increasing the rate of the GST would be a satisfactory second best.⁶²

Here we have the usual statement of the superiority of consumption taxes; then, having assumed the superiority of consumption as a tax base, the argument for expanding the base or increasing the rate is presented as straightforward. Better to tax broadly and raise more revenue in a simple and efficient manner than try to deal with the equity and other concerns in the actual design of the GST itself. This runs the risk of exclusions that overcompensate the rich, increase complexity and exacerbate the administrative and compliance costs that arise from having to draw lines between taxable and non-taxable supplies.⁶³ However, the fact that nearly every GST in existence fails to follow this advice suggests a certain vulnerability on this measure.⁶⁴ The following discussion explains why the simple removal of exclusions is not so straightforward by: firstly, detailing the rationale for the exclusions from the GST (which extend beyond mere equity alone); secondly, examining the relatively costly method through which exclusions are effected in Australia; and thirdly, exploring the flaws in the assumption that adjustments to the income tax and transfer payments can sufficiently address all the distributive concerns that attend an expansion of the GST.

61 'Re:think' (n 6) 140–1; Parliamentary Budget Office (Cth), *National Fiscal Outlook: As at 2019–20 Budgets* (Report No 04/2019, 2019) 14.

62 Daley and Wood (n 4) 1.

63 *Ibid* 10–11; see above nn 50–52.

64 James, *The Rise of the Value-Added Tax* (n 3) 83–97. The New Zealand GST is the oft-touted outlier: at 105, citing Paul van den Noord and Christopher Heady, 'Surveillance of Tax Policies: A Synthesis of Findings in Economic Surveys' (Working Paper No 303, Organisation of Economic Co-operation and Development, 27 July 2001) 31; *Consumption Tax Trends 2020* (n 28) 51–3.

First, the main exclusions to the GST base as measured by estimated revenue forgone in 2019–20 were: food (\$7.6 billion per year),⁶⁵ education (\$4.85 billion),⁶⁶ health (\$4.55 billion),⁶⁷ financial services (\$4.55 billion),⁶⁸ housing,⁶⁹ and water, sewerage and drainage services (\$1.12 billion).⁷⁰ In addition to being a cost in terms of revenue forgone, these exclusions generate a significant amount of administrative activity (because they require delineation over what constitutes a taxable or non-taxable supply), increase compliance costs and increase the scope for fraud. This can be seen in the number of legislative determinations, interpretive decisions and rulings related to food,⁷¹ health,⁷² education,⁷³ financial supplies⁷⁴ and real property.⁷⁵

Of these, only the exclusion of basic food can be justified *solely* on the basis of equity.⁷⁶ Relevant to this point is the fact that expanding the base of the GST to include food would be less equitable than simply increasing the rate because fresh

65 *Tax Benchmarks and Variations Statement 2019* (n 31) 146.

66 *Ibid* 140.

67 This figure is just for health and medical services (eg services rendered by a medical practitioner): *ibid* 142. Further exclusions include residential care, community care and other care services (\$1.28 billion); drugs and other medicinal preparations (at a cost of \$590 million): at 141; medical specified aids and appliances (eg hearing and disability aids) (\$245 million). The total cost of the exclusion is therefore more in the order of \$6.67 billion.

68 *Ibid* 135–6.

69 Supplies of commercial property including commercial residential premises: *ANTS Act 1999* (n 1) s 40–65(2)(a); short-term accommodation: at s 40–35(1)(b); and the first supply of residential premises are taxed: at ss 40–65(2)(b), 40–75. Subsequent supplies of residential premises are input-taxed: at s 40–65(1). Residential leases (of less than 50 years) are input-taxed to preserve the position of home-owners and renters: at ss 40–70(1)(b), 195–1 (definition of ‘long-term lease’). Because the decision to input-tax residential housing is a policy decision around measuring the consumptive value of the supply rather than a specific exclusion, it is not treated as a tax expenditure and is not measured by Treasury as such: *Tax Benchmarks and Variations Statement 2019* (n 32) 161–2.

70 *Tax Benchmarks and Variations Statement 2019* (n 31) 137.

71 A search of the Australian Taxation Office (‘ATO’) database reveals over 200 documents related to food, comprising ATO IDs (82), Legislative Instruments (6), and Rulings, Determinations and Bulletins (134): ‘Legal Database’, *Australian Taxation Office* (Web Page, 31 May 2020) <<https://www.ato.gov.au/Law/#Law>>. Also 375 edited private advice.

72 A search of the ATO database reveals over 260 documents related to health, comprising ATO IDs (114), Legislative Determinations (5), and Rulings and Determinations (154): *ibid*.

73 A search of the ATO database reveals around 90 documents related to education, comprising ATO IDs (31), Legislative Determinations (1), and Rulings and Determinations (58): *ibid*.

74 A search of the ATO database reveals over 450 documents related to the financial supply provisions, comprising ATO IDs (101), Legislative Determinations (9), and Rulings and Determinations (351): *ibid*.

75 A search of the ATO database reveals over 270 documents related to real property, comprising ATO IDs (52), Legislative Determinations (5), and Rulings, Determinations and Bulletins (222): *ibid*.

76 ‘Re:think’ (n 6) 133; Daley and Wood (n 4) 10–11. Water, sewerage and drainage services were excluded on the basis that such services are akin to a government charge (although the exclusion also has clear distributive impacts): *ANTS Statement* (n 10) 22.

food constitutes a greater proportion of spending for low income households than it does for higher income ones.⁷⁷ The partial exclusion of housing reflects a policy choice to only tax the first supply of new residential premises on the assumption that the market asset price equals the present value of the future stream of consumption services over the lifetime of the asset.⁷⁸ Financial services are input-taxed (meaning that no GST is charged on the supply and no refunds can be claimed on the GST paid on inputs used in making those supplies).⁷⁹ Financial services are excluded under most VATs in this manner due to the difficulty of attributing the value of such supplies on a transactional basis when the real price for the service is part of a margin calculated across a number of transactions. The distributional consequences of the exclusion are unclear but, if anything, the exclusion under-taxes final consumers (who do not pay GST on eligible financial services) and over-taxes business (because the suppliers of those services cannot obtain a credit for inputs on those supplies).⁸⁰ Both exclusions are unlikely to be amenable to reform and, even if this were not the case for financial services, the revenue benefits of inclusion are unclear.⁸¹

Health and education services were excluded primarily for reasons of market neutrality — because these services are provided by the public sector (and no price is paid and no GST is therefore charged), GST is not charged on equivalent supplies made by private sector providers so that public providers are not unfairly advantaged.⁸² Despite this, excluding some educational and medical supplies, such as drugs and other medicinal preparations, has clear distributive implications.⁸³

77 *NSW Review of Federal Financial Relations* (n 4) 35.

78 *Tax Benchmarks and Variations Statement 2019* (n 31) 162; Andrews, ‘A Consumption-Type or Cash Flow Personal Income Tax’ (n 44) 1150. The decision to tax upfront is a policy choice common to many broad-based consumption taxes and can extend to other long-life goods and capital assets such as cars, household appliances etc. However, there is a debate on whether taxing upfront on a one-off basis adequately captures the future value of all consumption services for long-held assets that increase in value over time such as housing in Australia: at 1150, 1155–60. Purchases of repairs, maintenance and other services such as utilities are generally subject to GST (unless excluded on other bases, eg sewerage and water): see *ANTS Statement* (n 10) 97.

79 *ANTS Act 1999* (n 1) s 40-5(1).

80 Alan Schenk, ‘Taxation of Financial Services (Including Insurance) under a US Value-Added Tax’ (2010) 63(2) *Tax Law Review* 409, 419–30; Howell H Zee, ‘VAT Treatment of Financial Services: A Primer on Conceptual Issues and Country Practices’ (2006) 34(10) *Intertax* 458, 462–6. In Australia, the over-taxation of financial supply providers is partly offset by the reduced input tax credit which allows certain financial institutions to claim a portion of the GST paid on their inputs (at a cost of approximately \$900 million): *Tax Benchmarks and Variations Statement 2019* (n 31) 135–6.

81 See above nn 69, 80.

82 *ANTS Statement* (n 10) 93–4, cited in ‘Re:think’ (n 6) 133.

83 See William D Andrews, ‘Personal Deductions in an Ideal Income Tax’ (1972) 86(2) *Harvard Law Review* 309, 335–7. Andrews argued that health and medical services are intermediate goods (ie one akin to business inputs) that enables one to obtain a reasonable state of health to engage in final consumption (among other things). The deductibility of such expenses from an income tax was justified at 314:

As between two people with otherwise similar patterns of personal consumption and accumulation, a greater utilization of medical services by one is likely not to reflect any greater material well-being or taxable capacity, but rather only greater medical need.

Therefore including *some* education and health services in the GST base would likely have both a progressive effect *and* expand the GST base — public provision would remain untaxed and private supplies (which are likely to form a greater percentage of consumption of higher income earners over lower income earners) would be taxed.⁸⁴ Yet there has been little enthusiasm from the Coalition government for expanding the base in this way⁸⁵ — encouraging private provision through preserving market neutrality between public and private providers has trumped a desire to expand the base in a progressive manner in this instance.

Second, Australia has a particularly costly method of introducing exclusions into the base with most exclusions taking the form of GST-free supplies — meaning that registered entities obtain credits for GST on their inputs but consumers pay no GST on the supply.⁸⁶ Australia has one of the highest number of GST-free domestic supplies in the OECD.⁸⁷ Most other OECD jurisdictions use reduced rate categories or rely on input-taxation to achieve equity goals.⁸⁸ No OECD country (except Chile) has a single-rate VAT and most have multi-rate VATs or, as is the case in Australia and New Zealand, a zero rate (labelled GST-free in Australia) on certain domestic supplies (as well as on exports) and a standard rate.⁸⁹ The extensive use of domestic zero-rating in the Australian GST was motivated by a desire by Australian policy-makers to give the appearance of a single-rate GST — so that the tax appeared simpler (especially when compared to the WST it replaced)

- 84 Ben Phillips and Matt Taylor, *The Distributional Impact of the GST* (Report, October 2015) 15; *Tax Benchmarks and Variations Statement 2019* (n 31) 8–10. Revenue and distributional effects do not factor in the behavioural consequences of any changes such as students or patients moving from the private to the public sector as a result of any change: Phillips and Taylor (n 84) 29. Treasury modelling also suggests that, on certain measures, the relative value of the GST-free treatment of certain childcare services benefits the rich more than the poor (constituting 0.09% of annual expenditure by the lowest income quintile and 0.20% of annual expenditure by the highest income quintile): *Tax Benchmarks and Variations Statement 2019* (n 31) 10; *NSW Review of Federal Financial Relations* (n 4) 35. However, although the rich spend more in absolute terms on education, some evidence suggests that the poor spend more as a proportion of their income and there is a need to disaggregate the expenditure data to fully understand the distributive implications: *How GST Reform Can Help Reboot Prosperity for Australia* (n 4) 11–14.
- 85 James Massola, ‘Tax Reform: Morrison Pours Cold Water on Adding GST to Health and Education’, *The Sydney Morning Herald* (online, 24 January 2016) <<http://www.smh.com.au/federal-politics/political-news/tax-reform-morrison-pours-cold-water-on-adding-gst-to-health-and-education-20160123-gmcqjh.html>>.
- 86 *ANTS Act 1999* (n 1) s 38-1, div 38.
- 87 *Consumption Tax Trends 2020* (n 28) 71–6; James, *The Rise of the Value-Added Tax* (n 3) 286. Note that the ‘wide range of zero-rated supplies’ within the Australian GST mean that ‘in many respects it is more concessional than the dual-rate, multiple exemption European VAT laws’: Richard Krever and Peter Mellor, ‘Legal Interpretation of Tax Law: Australia’ in Robert F van Brederode and Richard Krever (eds), *Legal Interpretation of Tax Law* (Kluwer Law International, 2014) 15, 34.
- 88 *Consumption Tax Trends 2020* (n 28) 42–6, 71–6, 80–5. Input-taxed supplies (or exempt supplies) occur when no GST is charged on the final sale but the supplier is not entitled to input credits for any good or service used to make that supply: at 45.
- 89 *Ibid* 42–4, 71–6. Japan previously had a single-rated consumption tax levied at 8% but increased the tax rate to 10% in October 2019 while maintaining the 8% rate on certain supplies such as basic food: at 44, 73.

and to prevent pressure to extend categories of rate variation.⁹⁰ These might be worthy goals, but the cost to revenue of delivering concessions through GST-free domestic supplies over reduced rates is higher in absolute terms (even though both approaches suffer from the same criticisms that they are distortionary, costly and complex).⁹¹

Third, the move to deflect the distributive goals in the GST by deferring to the income tax and transfer payments is both superficially appealing and wholly inadequate. Part II(C) below outlines three problems with this move. First, as the next section shows, no proposal has overcome the issue that the effective compensation from spending can be, and has in fact been, readily eroded while the changes to (increase) the GST base (or rate) are likely to be permanent. Second, spending on transfer payments only addresses the losses of the poor but not the gains of the rich if expanding the GST facilitates a shift in the tax mix from income to consumption. Third, the move fails to address the trends towards reducing the progressivity of the income tax to address these distributive issues.

C The Problem with Relying on the Income Tax and Transfer System to Address Distributive Concerns

Various reforms propose modelling to compensate for the expansion of the GST in the immediate term, but few address the issue of how meaningful compensation can be achieved on a permanent basis.⁹² In its 2015 proposal to expand the GST (or increase the rate), the Grattan Institute made the familiar move to address distributional concerns by proposing an increase in the unemployment benefit and adjusting income tax rate/thresholds for low- to middle-income earners.⁹³ When acknowledging the vulnerability of such compensation to subsequent erosion, the reply of the Institute was:

Inevitably some poorer households will not be fully compensated. This is an unfortunate reality of any revenue-positive tax reform. ... But reform should not require that no one goes backwards. ... it is reasonable to ask that some on lower incomes — just like others in the population — contribute to paying for the

90 James, *The Rise of the Value-Added Tax* (n 3) 284–9.

91 *Consumption Tax Trends 2020* (n 28) ch 2. This point motivates PricewaterhouseCoopers ('PwC') to recommend considering rate variations as a reform option: *How GST Reform Can Help Reboot Prosperity for Australia* (n 4) 6. However, input-taxing supplies can give rise to additional complexities that result from providers being unable to claim GST refunds for the inputs on their supplies. This might include avoidance schemes (see Part III(B) below) and, in the federal context, difficulty if the Commonwealth imposes irrecoverable tax burdens on state providers.

92 See, eg, *NSW Review of Federal Financial Relations* (n 4) 36–7; *How GST Reform Can Help Reboot Prosperity for Australia* (n 4) 8, 19–20 (PwC acknowledge the need to lock in compensation but offer no concrete proposals to do so); Daley and Wood (n 4) 17, 21, 24; *The Economic Impact of a GST-Funded Company Tax Cut* (n 4) 8–10, 12, 14. Cf Dixon and Holden (n 4). Dixon and Holden propose a personalised GST exemption threshold of \$7,500 be applied to remove GST from purchases at the checkout when consumers pay with a registered debit or credit card. Such technology is untried and faces a number of legal and technological barriers to implementation.

93 Daley and Wood (n 4) 17, 24.

improvements in government healthcare which ... benefit them, but come at a growing cost to budget bottom line.⁹⁴

This is an inelegant and insensitive defence and hardly one sufficient to counter the path-dependent pull to retain the exclusion of basic food from the GST base. It is particularly so when alternative compensation options are available that might prove more permanent, such as an approach used elsewhere of providing low income/asset taxpayers a refundable GST credit to compensate them for the GST they pay on an annual basis.⁹⁵

Such proposals fail to properly account for the rationale that underpinned the exclusion of basic food in the first place, which was a concern that the GST would become permanent whereas compensation would not.⁹⁶ Statutorily mandated welfare payments do not have the status of property rights and come with no constitutional guarantee, so they can be withdrawn (through subsequent legislation passed by a sovereign parliament) or easily eroded (for example, by failing to appropriately index such payments).⁹⁷ This is evident in the compensation that accompanied the introduction of the GST, which was steadily and effectively eroded by cuts to the real value of allowances until changes were made in response to the COVID-19 pandemic.⁹⁸ For example, at the time of the introduction of the GST, the main unemployment benefit — the Newstart Allowance — was increased to just above the poverty line for couples but later dropped below it in November 2003 and fell even further until it was around 70% of the poverty line by February 2018; the rate for singles was just below the poverty line (87%) in 2000 and progressively decreased until it was just 61% of the poverty line by the beginning of February 2018.⁹⁹

94 Ibid 21 (emphasis omitted) (citations omitted).

95 Canada offers a refundable GST/Harmonised Sales Tax ("HST") credit based on annual net income, but the GST/HST also contains a number of exclusions to the base: 'GST/HST Credit: Overview', *Canada Revenue Agency* (Web Page, 12 March 2021) <<https://www.canada.ca/en/revenue-agency/services/child-family-benefits/goods-services-tax-harmonized-sales-tax-gst-hst-credit.html>>; *Consumption Tax Trends 2020* (n 28) 80. Singapore has a broad-based GST and offers an annual cash credit based on annual income and the annual value of the taxpayer's home: Government of Singapore, 'Overview', *GST Voucher* (online, 21 October 2022) <<https://www.gstvoucher.gov.sg/overview-of-gstv>>; 'Goods and Services Tax (GST): What It Is and How It Works', *Inland Revenue Authority of Singapore* (Web Page, 23 October 2021) <[https://www.iras.gov.sg/taxes/goods-services-tax-\(gst\)/basics-of-gst/goods-and-services-tax-\(gst\)-what-it-is-and-how-it-works](https://www.iras.gov.sg/taxes/goods-services-tax-(gst)/basics-of-gst/goods-and-services-tax-(gst)-what-it-is-and-how-it-works)>.

96 See Senator Brian Harradine's famous 'I cannot' speech declaring his decision not to support the introduction of a GST: Commonwealth, *Parliamentary Debates*, Senate, 14 May 1999, 5115–17 (Brian Harradine). See also Sean Aylmer, 'Compensation Too Low', *The Australian Financial Review* (Late Edition, Sydney, 20 April 1999) 9; Thomson Reuters, 'GST: Democrats Favour "Irish" Model' [1999] (17) *Weekly Tax Bulletin* 9.

97 For recent High Court confirmation of these points, see *Cunningham v Commonwealth* (2016) 259 CLR 536, 555–6 [43]–[44], 556 [46], 557 [48] (French CJ, Kiefel and Bell JJ).

98 Daley and Wood (n 4) 19.

99 Note that figures exclude housing (the poverty line is calculated before housing expenses and excludes rent assistance). The same data shows pensioners fared better (due in part to the more generous indexation of pensions): 'Comparison of Poverty Lines with Pension and Newstart

By contrast, no government has dared attempt to expand the GST base.¹⁰⁰ This is true of nearly every other GST in existence — with very few countries succeeding in significantly expanding the GST base once introduced.¹⁰¹ Not only are exclusions to the base longer lasting; they are also effective. Research from the OECD suggests that, despite being a blunt and inefficient instrument, the exclusion of food (and certain essential services such as utilities) *is* effective at achieving the desired progressive effect of compensating poor households.¹⁰²

One marked difference between recent GST reform discussion and the debate preceding the introduction of the GST is the absence of discussion around the full distributional implications of shifting the tax mix. If expanding the GST involves

(Now JobSeeker) Payments for Singles and Couples without Children (in \$2017–18 Per Annum)', *Research and Insights into Poverty and Inequality in Australia* (Web Page) <<http://povertyandinequality.acoss.org.au/poverty/comparison-of-poverty-lines-with-pension-and-newstart-payments-for-singles-and-couples-without-children-in-2017-18-per-annum/>>. On the temporary changes relating to the increase in JobSeeker, see *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) ('*Omnibus Act*'). This Act provides for amendments to the *Social Security Act 1991* (Cth) introducing a \$550 supplement per fortnight for JobSeeker and Youth Allowance, as well as other stimulus payments to households: *Omnibus Act* (n 99) sch 4 cl 26, sch 11 cls 21, 30. See also *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) (various further payment arrangements); *Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020* (Cth) (provides for amendments to *Fair Work Act 2009* (Cth) and framework for JobKeeper payment). From April 2021, the JobSeeker supplement ends and will be replaced by a permanent \$50 per fortnight increase in the JobSeeker payment: *Social Services Legislation Amendment (Strengthening Income Support) Act 2021* (Cth) sch 1 pt 1; 'Enhanced Social Security Safety Net: JobSeeker Payment and Other Working Age Payments', *Department of Social Services* (Web Page, 24 February 2021) <https://www.dss.gov.au/sites/default/files/documents/02_2021/atd_enhanced-social-security-safety-net_24022021.pdf>.

- 100 This inertia is likely amplified by the legislative requirement that any change to the GST base or rate must be with the unanimous agreement of the Commonwealth and states. Although the legal impediment is easily overcome by the passage of new legislation by a sovereign Commonwealth parliament, the requirement operates as an effective political constraint with all Commonwealth governments treating it as a substantive constraint in discussing possible GST reform: *A New Tax System (Managing the GST Rate and Base) Act 1999* (Cth) s 11; James, *The Rise of the Value-Added Tax* (n 3) 251.
- 101 Rebecca Millar, 'What Can Other Countries Teach Us about GST Reform?', *The Conversation* (online, 27 January 2015) <<https://theconversation.com/what-can-other-countries-teach-us-about-gst-reform-36545>>; Organisation for Economic Co-operation and Development, *Tax Policy Reforms 2019: OECD and Selected Partner Economies* (Report, 2019) 79. Cf Bernardin Akitoby et al, 'Tax Revenue Mobilization Episodes in Developing Countries' (2020) 3(1) *Policy Design and Practice* 1, 13–15, 18, 26–7. Saudi Arabia tripled the rate of the VAT from 5% to 15% from 1 July 2020 after having only introduced the VAT in 2018: 'Saudi Arabia Triples VAT to Support Coronavirus-Hit Economy', *BBC News* (Web Page, 11 May 2020) <<https://www.bbc.com/news/business-52612785#:~:text=Saudi%20Arabia%20is%20tripling%20its,support%20its%20coronavirus%20hit%20economy.&text=Saudi%20Arabia's%20state%20news%20agency,be%20suspended%20from%201%20June.>>.
- 102 Although the rich are compensated more in absolute terms because they spend more on food, the relative benefit of the exemption is greater given that the poor spend a greater proportion of their total expenditure: Organisation for Economic Co-operation and Development and Korea Institute of Public Finance, *The Distributional Effects of Consumption Taxes in OECD Countries* (OECD Tax Policy Studies No 22, 2014) 14, 69. See also *Tax Benchmarks and Variations Statement 2019* (n 31) 8–10.

a shift in the tax mix through reducing reliance on income taxes and increasing reliance on consumption taxes, then equity considerations require more than just compensating the poor. If it is accepted that a consumption tax imposes a lower relative burden on the returns from wealth than does an income tax,¹⁰³ and if the distributional consequences of reform from top to bottom are a genuine concern, then there is an important question to ask about the role of the income tax and of wealth taxes.

However, not a single proposal for GST reform includes any significant reform of wealth taxation despite the fact that Australia has no dedicated form of wealth taxation.¹⁰⁴ Despite the proven capacity of the income tax to be designed in a manner to facilitate progressivity from top to bottom, very few reform proposals suggest reforms to bolster or expand the capacity of the income tax to do so. In fact, many recommend the exact opposite — often calling for reductions in the

103 Even the most ardent supporters of lifetime equivalence arguments (ie those that claim that saving is simply deferred consumption to smooth over fluctuating earning capacity over a lifetime: see, eg, *Henry Review* (n 6) pt 2 vol 1, 12) must acknowledge that while many might consume what they earn in a lifetime, not everyone will. For some high wealth and high-income individuals, it is almost impossible to spend what they earn or inherit in a lifetime: Emerton and James (n 46) 144–52; Thomas Piketty, *Capital in the Twenty-First Century*, tr Arthur Goldhammer (Belknap Press, 2014) 525.

104 Australian states and the Commonwealth government abolished estate taxes from the late 1970s: Willard H Pedrick, ‘Oh, to Die Down Under! Abolition of Death and Gift Duties in Australia’ (1982) 14(4) *University of Western Australia Law Review* 438, 441–2. At best, Australia has an ad hoc approach to taxing wealth through the capital gains tax regime (subject to various discounts and exemptions), superannuation (taxed concessional) and a patchwork of state and local property taxes: *Henry Review* (n 6) pt 2 vol 1, 143–4. The reply of reform proponents is to claim that by increasing the price consumers pay for goods and services, the GST reduces the real value of the stock of existing household savings and acts as a de facto tax on wealth: ‘Re:think’ (n 6) 135; Daley and Wood (n 4) 6–7. Even if this is so, the burden is less than a graduated income tax: see Emerton and James (n 46) 144–52. A PwC document in support of GST reform discusses, without necessarily supporting, reforms to capital gains taxation, negative gearing and superannuation: PricewaterhouseCoopers, *GST and Personal Income Tax Reform: The Yin and Yang of Tax Policy* (Report, November 2015) 2–3; see below n 105. The NSW Treasury Federal Financial Relations Panel recommends land tax reform but in the context of replacing stamp duties. The review also notes that potential state tax reforms have been discouraged by the availability of Commonwealth grant assistance and the methodology of the horizontal fiscal equalisation (‘HFE’) system that can mean that a part of any additional revenue from the reforms would be subject to an offsetting loss of Commonwealth grant funding through the reallocation of part of the grants to other states: *NSW Review of Federal Financial Relations* (n 4) 44. On the complex tax policy incentive effects of HFE, see generally Neil Warren, ‘Intergovernmental Fiscal Arrangements as a Constraint on State Tax Reform under Henry’ in Chris Evans, Richard Krever and Peter Mellor (eds), *Australia’s Future Tax System: The Prospects after Henry* (Thomson Reuters, 2010) 305.

company tax or personal income tax.¹⁰⁵ These recommendations occur despite the monetary value of tax concessions for income from savings (for example in the form of capital gains and superannuation tax concessions) dwarfing the value of concessions within the GST.¹⁰⁶ Instead the redistributive capacity of the income tax continues to be progressively undermined by the flattening, or hollowing out, of the income tax.¹⁰⁷ This has primarily occurred either by legislative design (as is the case with the legislated rate reductions and compression of personal income tax rates, which has been accelerated in response to the COVID-19 crisis)¹⁰⁸ or by a regulatory structure that facilitates tax gaming (whereby high wealth and income

- 105 See above n 4; below nn 115, 118. Arguments in opposition to increased taxation of wealth (in the form of a broader-based income tax or through specific wealth taxation) often rely on claims around the unfairness of double or triple taxation. For example, if savings are a product of already taxed income (ie if generated by taxed labour income), then further returns are subject to the income tax (albeit most likely in the form of concessionary taxed capital gains if at all) and then if tax is again imposed when that wealth is spent (under a GST) or transferred (under a wealth transfer tax). However, as the *Henry Review* noted:

‘Double taxation’ is not good or bad in itself. Any system that taxes economic flows at more than one point will involve an element of double taxation. ... A system that raised all its revenue from a single household income tax would impose very large costs on taxpayers despite the absence of double taxation. The important thing is to design and implement a system that raises enough revenue while limiting the costs of doing so.

- Henry Review (n 6) pt 2 vol 1, 139. A PwC report acknowledges the equity issues that arise from the concessional tax treatment of retirement and savings income which mean that older households pay on average half the income tax of younger households on the same income. However, elsewhere they call for a reduced reliance on income taxes: PricewaterhouseCoopers, *Where Next for Australia’s Tax System? How Our Tax System Can Help Reboot Prosperity for Australia* (Report, June 2020) 28 (*‘How Our Tax System Can Help Reboot Prosperity for Australia’*), quoting Owain Emslie, ‘Enjoy Life, You’re Only Old Once!’, *Grattan Institute* (online, 3 October 2019) <<https://grattan.edu.au/news/enjoy-life-youre-only-old-once/>>; *How GST Reform Can Help Reboot Prosperity for Australia* (n 4) 4–5, 10.
- 106 *Tax Benchmarks and Variations Statement 2019* (n 31) 17; *How Our Tax System Can Help Reboot Prosperity for Australia* (n 105) 28, quoting Emslie (n 105).
- 107 Cf Graeme Davis et al, ‘Recent Personal Income Tax Progressivity Trends in Australia’ (Working Paper No 2019-05, Treasury (Cth), September 2019). Davis et al finds an increase in progressivity over the years 1994–95 to 2015–16 but also greater concentration on a narrower proportion of higher income earners: at 14–15. However, the combination of income tax changes and changes to transfer system entitlements has been found to have created very high overall effective marginal income tax rates at much lower income levels for certain categories of income earners: Miranda Stewart and Peter Whiteford, ‘Balancing Efficiency and Equity in the Tax and Transfer System’ in Mark Fabian and Robert Breunig (eds), *Hybrid Public Policy Innovations: Contemporary Policy beyond Ideology* (Routledge, 2018) 195, 204–18.
- 108 The government (with bipartisan support) brought forward the second and third stages of its partly implemented Personal Income Tax Plan which ultimately seeks to significantly flatten and reduce personal income tax rates: see, eg, *Treasury Laws Amendment (Personal Income Tax Plan) Act 2018* (Cth); *Treasury Laws Amendment (Tax Relief so Working Australians Keep More of Their Money) Act 2019* (Cth); *Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020* (Cth) sch 1. On the effect of recent personal tax cuts, see Sonali Walpolu and Yuan Ping, ‘Progressivity and the Personal Income Tax Plan’, *Austaxpolicy* (Blog Post, 22 October 2020) <<https://www.austaxpolicy.com/budget-forum-2020-progressivity-and-the-personal-income-tax-plan/>>.

taxpayers can defer or shelter income through various means such as the use of trusts and corporate entities).¹⁰⁹

This pattern of prioritising ‘efficiency’ in tax proposals and deferring ‘equity’ concerns to the income tax and spending was recently identified by Richard Vann:

This argument allows proponents of particular tax policies to focus solely on efficiency arguments when it is well known that the necessary adjustments in transfers are unlikely to be forthcoming or that if they occur they are likely to be diluted over time or cut back when the next ‘budget crisis’ emerges. This has been a constant approach in Australia for over 20 years.¹¹⁰

...

A variant of the argument is to note that the income tax is the main tax for redistribution and to promote other changes to the system on efficiency grounds based on the unreal assumption that the income tax will be increased appropriately to solve fairness problems arising from other changes ...¹¹¹

At best this trend might be neglectful, at worst disingenuous, because the same motive underpins the desire to expand the GST and weaken the income tax and/or reduce public spending. This is a desire to prioritise market-based outcomes through either not ‘interfering’ with market decisions (which, for example, underpin the move away from the taxation of income from capital) or discourage government involvement in the market (by limiting government spending).¹¹²

For example, the *Henry Review* deflected calls to address distributive concerns within the design of the GST itself because to do otherwise would undermine the efficiency and neutrality of the GST. Instead it preferred for these concerns to be addressed by the income tax and transfer system:

Income redistribution to make Australia fairer is primarily the job of the personal income tax and transfer system ... This means that other taxes and charges can be used in the most efficient way, reducing the overall complexity of the system. It is very difficult to target GST exemptions on some products to certain groups.¹¹³

109 Vann provides an account of how these reform trends to both the personal income tax and corporate income tax undermine its progressivity (and efficiency): Richard Vann, ‘In Defence of the Income Tax’ (2019) 34(4) *Australian Tax Forum* 831, 837–50.

110 Ibid 836.

111 Ibid 836 n 11, citing Louis Kaplow, *The Theory of Taxation and Public Economics* (Princeton University Press, 2008).

112 See, eg, the self-imposed cap on government spending as a percentage of GDP (of 23.9%): Josh Frydenberg, ‘Budget Speech 2019–20’ (Speech, Parliament of Australia, 2 April 2019) <<https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/speeches/budget-speech-2019-20>>. Although COVID-19 has sidelined the cap, the rationale for it will inevitably return post-crisis. For a critique of the flawed reasoning that underlies these neutrality approaches, see Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2002) 72.

113 *Henry Review* (n 6) pt 2 vol 1, 286.

On the other hand, the same preference for efficiency and neutrality was used to argue against the taxation of capital income and wealth — thus reducing the very capacity of the income tax to redistribute. This can be observed in the *Henry Review* endorsing the same double-distortion arguments that underpin support for a consumption tax and undermine support for the income tax:

The essential reason for treating lifetime, long-term savings more favourably is that income taxation creates a bias against savings, particularly long-term savings. Taxes on savings income, including the taxation of inflationary gains, can discriminate against taxpayers who choose to defer consumption and save. The longer the person saves and reinvests, the greater the implicit tax on future consumption ... These individuals pay a higher lifetime tax bill than people with similar earnings who choose to save less.¹¹⁴

This manifested in reform recommendations that sought to extend the preferential treatment of income from capital.¹¹⁵ And despite acknowledging the efficiency benefits of taxing wealth in the form of a bequest tax, the *Henry Review* demurred for reasons of political sensitivity.¹¹⁶ Similarly, the NSW Federal Financial Review Panel calls for GST reform because otherwise this ‘leaves more damaging taxes on income, capital and property transactions to do the heavy lifting’¹¹⁷ and recommends addressing the distributional issues through ‘higher social security payments or lower income tax rates so that those on low incomes do not unfairly bear the burden of [GST] reform’.¹¹⁸ The result is that the income tax is cited as a tool to address distributional concerns at the bottom end (which it cannot do for those taxpayers below the personal income tax threshold), but there is little appetite for strengthening its capacity to do so at the top end.

This failure to adequately engage with the most controversial aspect of GST reform — its distributional consequence — is likely one reason why reform proposals fail to garner sufficient support.¹¹⁹ It is not clear why, in the call to reform the GST,

114 Ibid pt 1, 32. For a criticism of these lifetime equivalence arguments, see Emerton and James (n 46) 144–52.

115 See, eg, the *Henry Review*’s recommendation to apply a 40% discount to most interest income, net residential rental property income, capital gains and certain interest expenses, thus modestly reducing the current 50% concessional rate but extending the scope of the current concessional treatment of capital gains for certain individuals, trusts, small businesses and eligible superannuation funds to a broader range of income from savings: *Henry Review* (n 6) pt 2 vol 1, 62–85; see especially at 70. See also ‘Re:think’ (n 6) 58–60. For a critique of this measure as overly compensatory, see Vann (n 109) 841–2.

116 *Henry Review* (n 6) pt 2 vol 1, 137–46; see especially at 144. See also ‘Re:think’ (n 6) 72 — offering very little enthusiasm for wealth tax reform.

117 *NSW Review of Federal Financial Relations* (n 4) 33.

118 Ibid 36 (emphasis added).

119 See, eg, Phillip Coorey, ‘They Want to Increase the GST? Tell ‘Em They’re Dreaming’, *The Australian Financial Review* (online, 31 October 2019) <<https://www.afr.com/politics/federal/they-want-to-increase-the-gst-tell-em-they-re-dreaming-20191030-p535w6>>; Ross Gittins, ‘Tax Reform Push Doesn’t Add Up’, *The Sydney Morning Herald* (online, 19 July 2015) <<https://www.smh.com.au/business/tax-reform-push-doesnt-add-up-20150719-gifzgz.html>>.

the poor are called upon to go backward (by facing a higher tax burden without appropriate and guaranteed compensation) while the rich can move forward (by facing a lower relative tax burden) when both poor and rich share in the gains of a functioning and stable state. These gains include not just public health care and education (which are key to levelling access to opportunity) but functioning capital markets and the protection of property rights (which are key to the accumulation and preservation of wealth).¹²⁰ This is especially so when COVID-19 has exposed the consequences of economic stratification — with the poor and marginalised disproportionately bearing the economic impact of the response to the pandemic (in the form of job losses and reduced wages/entitlements) as well as the burden of disease (being more vulnerable to contracting the virus due to poor living conditions and work obligations that make it difficult to self-isolate as well as being more likely to be seriously ill from the virus given a greater likelihood of comorbidities).¹²¹

Nevertheless, even if everyone agreed on what should be included in the base of the GST, because economic concepts such as consumption require legal translation, there is no guarantee that the desired goal of taxing this base of final consumption would be achieved and certainly not necessarily in a simple or efficient way, as Part III explains. And yet this important point is almost *never* acknowledged in the GST reform debate.

III DESIGN NORM 2: THE INVOICE-CREDIT METHOD

In making the case for reform, Robert Breunig and Kristen Sobeck of the Tax and Transfer Policy Institute state that, in addition to the low current rate and application to a shrinking share of spending, ‘the fact that GST is difficult to evade and less costly to administer, suggest[s] that broadening the base is low hanging fruit on the tax reform tree, ripe for picking’.¹²² In opposing GST reform in 2015,

120 Murphy and Nagel (n 112) 8, 74; Emerton and James (n 46) 125–6, 139.

121 See, eg, Ben Schneiders and Royce Millar, ‘A City Divided: COVID-19 Finds a Weakness in Melbourne’s Social Fault Lines’, *The Age* (online, 8 August 2020) <<https://www.theage.com.au/national/victoria/a-city-divided-covid-19-finds-a-weakness-in-melbourne-s-social-fault-lines-20200807-p55ji2.html>>; Steve Schifferes, ‘The Coronavirus Pandemic Is Already Increasing Inequality’, *The Conversation* (online, 10 April 2020) <<https://theconversation.com/the-coronavirus-pandemic-is-already-increasing-inequality-135992>>; Max Fisher and Emma Bubola, ‘As Coronavirus Deepens Inequality, Inequality Worsens Its Spread’, *The New York Times* (online, 15 March 2020) <<https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html>>; Davide Furceri, Prakash Loungani and Jonathan D Ostry, ‘How Pandemics Leave the Poor Even Farther Behind’, *IMF Blog* (Blog Post, 11 May 2020) <<https://blogs.imf.org/2020/05/11/how-pandemics-leave-the-poor-even-farther-behind/>>; David Kelly, Kate Shaw and Libby Porter, ‘Melbourne Tower Lockdowns Unfairly Target Already Vulnerable Public Housing Residents’, *The Conversation* (online, 6 July 2020) <<https://theconversation.com/melbourne-tower-lockdowns-unfairly-target-already-vulnerable-public-housing-residents-142041>>; Andrew Leigh, ‘We Can’t Let Coronavirus Worsen Inequality’ (2020) 85 *Journal of Australian Political Economy* 57.

122 Robert Breunig and Kristen Sobeck, ‘What Will the Coalition Be Remembered for on Tax? Tinkering, Blunders and Lost Opportunities’, *The Conversation* (online, 9 April 2019)

Victorian Premier Daniel Andrews remarked that ‘[i]t’s a brutally efficient tax, but it has no regard for a person’s capacity to pay. It is not a particularly fair tax at all’.¹²³ The quote captures the typical response of opponents to GST reform — to concede the economic efficiency argument but pursue the equity critique. However, this is a surprising concession from an opponent of reform. When one moves beyond the status of the GST as a consumption tax to look at how the GST performs once implemented, that is, how much revenue it raises at what cost to revenue authorities (administrative costs) and taxpayers (compliance costs), the GST is neither ‘less costly to administer’ nor ‘difficult to evade’.¹²⁴ Given the persistent claims made to the contrary, this Part explores the evidence and the reasons why the GST does not necessarily satisfy these merits claimed of it. It does so by firstly examining the administrative costs and vulnerabilities of the GST, and secondly by detailing the GST’s compliance risks, and finally by outlining the ways in which the legal implementation of the GST constrains outcomes in a way that is entirely unaccounted for in the current reform debate.

A *Administrative Costs of the Real GST*

The most recent Australian Taxation Office (‘ATO’) estimates show that it costs \$0.92 to collect every \$100 of net GST revenue (after refunds),¹²⁵ compared to a cost of \$0.64 for a comparable amount of revenue in the case of all other Commonwealth taxes.¹²⁶ These figures suggest that the GST is the single most expensive tax to administer at the Commonwealth level. However, the data should not be overinterpreted, as the high cost relative to revenue is in part attributable to the low rate and small base of the GST. However, given that this data appears to directly contradict the claim made that the GST is the least costly tax to administer, it is worth exploring what contributes to the administration costs of the GST. To do so requires revisiting how the GST operates.

The unique feature of the GST that distinguishes it from alternative sales taxes, namely the retail sales tax (‘RST’), is its staged collection and refund mechanism

<<https://theconversation.com/what-will-the-coalition-be-remembered-for-on-tax-tinkering-blunders-and-lost-opportunities-114632>>. See also *How GST Reform Can Help Reboot Prosperity for Australia* (n 4) 1.

123 ‘Business Groups Despair at Lack of Calm Tax Policy Debate’, 7.30 (Australian Broadcasting Corporation, 16 July 2015) 0:04:33–0:04:41 <<http://www.abc.net.au/7.30/content/2015/s4274704.htm>>. See also PricewaterhouseCoopers, *GST and Personal Income Tax Reform: The Yin and Yang of Tax Policy* (Report, November 2015) 2–3.

124 For work detailing compliance costs, see, eg, *Henry Review* (n 6) pt 2 vol 1, 288–9; MYOB, *The Hidden Costs of GST Hitting Small Business Hardest* (Special Report, February 2015). Cf Richard Highfield, Chris Evans and Michael Walpole, ‘The Development and Testing of a Diagnostic Tool for Assessing VAT Compliance Costs: Pilot Study Findings’ (2019) 16(3) *eJournal of Tax Research* 620. Note that Australia’s GST compliance costs are low relative to other jurisdictions with a VAT: at 640. See also James, *The Rise of the Value-Added Tax* (n 3) 280–2.

125 *GST Administration Annual Performance Report 2018–19* (n 33) 39. This cost has steadily declined — down from \$1.47 in 2012–13: Australian Taxation Office, *GST Administration Annual Performance Report 2014–15* (Report, 14 December 2015) 16.

126 *Commissioner of Taxation: Annual Report 2018–19* (n 34) 28.

— the invoice-credit method. The GST taxes everyone at all stages of the production and distribution chain — businesses and consumers alike — but allows registered entities, such as businesses, to receive a credit (ie refund) for any GST paid on their inputs through presenting an invoice (hence the name invoice-credit method). By contrast, the RST suspends the collection of tax until the final stage of a retail sale made to an end consumer.¹²⁷ Both the GST and the RST share a risk that individuals will avoid the tax by not registering or not documenting the final sale (eg through engaging in the cash economy).¹²⁸ However, the GST is said to be more resistant to this risk because the staged collection method facilitates the forward-shifting of the tax to final consumers and provides a better documentary trail for enforcement purposes. In addition, the refund mechanism (which links the purchaser's tax credit to the tax remitted by the seller through the production of an invoice) is said to be self-enforcing and more resistant to fraud and particularly the cash economy.¹²⁹

However, as the *Henry Review* observed, 'the widespread use of tax invoices as a basis of systematic crosschecking between tax paid and tax claimed, while simple in concept, is costly in practice'.¹³⁰ It is also clear that the theoretical benefit of the self-enforcement of the GST has been overstated. First, the claim is undermined by the fact that a business purchaser's interest lies not in ensuring that the seller has appropriately remitted the GST to the revenue authorities but in simply obtaining an invoice acceptable for processing their own GST refund.¹³¹ Second, although the GST might offer a superior documentary audit trail to the RST, the claim that a loss of revenue from fraud occurring at the final stage from the retailer to final consumer can be offset by GST paid at earlier stages holds most strongly if those earlier entities were themselves not able to claim a refund for the GST paid on their inputs in the event that the GST is avoided at the final stage. Given there is no link between a supplier's entitlement to an input tax credit and the later payment of GST by a final consumer, this is not necessarily the case. The claim holds less strongly if the entity supplying to the evader paid GST and claimed a refund of GST paid on its inputs; then there would be partial evasion (of the tax on the value added at the final stage).

The GST has additional risks that attach to its method of collection. First, with an invoice essentially operating as a cheque written on the government, there is an incentive to falsely claim refunds (a risk shared by the income tax but not the RST).¹³² Second, GST collection is vulnerable to unpaid debt and to phoenix activity (as is the income tax) by offering an incentive to collect input tax credits and then avoid payment of GST liabilities through winding up a company (as

127 George R Zodrow, 'The Sales Tax, the VAT, and Taxes in Between: Or, Is the Only Good NRST a "VAT in Drag"?' (1999) 52(3) *National Tax Journal* 429, 431.

128 *Henry Review* (n 6) pt 2 vol 1, 287.

129 See, eg, Zodrow (n 127) 432; Brooks, 'An Overview of the Role of the VAT, Fundamental Tax Reform, and a Defence of the Income Tax' (n 44) 633; Ebrill et al (n 48) 23–4.

130 *Henry Review* (n 6) pt 2 vol 1, 287.

131 Ebrill et al (n 48) 23.

132 Bird and Gendron (n 50) 20, 133.

opposed to simply not remitting revenue under an RST).¹³³ These theoretical vulnerabilities have been borne out in practice.¹³⁴

B Non-Compliance

The vulnerability of the GST to non-compliance, be it fraud, evasion or unpaid debt, is reflected in the GST gap, which was estimated at 7.3% of theoretical revenue for 2017–18 (or \$5 billion).¹³⁵ While this is good by international standards,¹³⁶ it is still a significant amount of money.

Despite claims that the GST would ‘[r]educ[e] tax avoidance and the cash economy’,¹³⁷ the cash economy has thrived since the introduction of the GST. Recent government estimates suggest that the cash economy constituted 3% of GDP or \$50 billion in 2017.¹³⁸ The GST has not *caused* this problem but neither has it *solved* it. The Australian government’s Black Economy Taskforce details the ways in which the GST has *contributed* to the cash economy by final consumers making cash payments to avoid GST (with a corresponding reduction in GST and income tax liability for the supplier); registration fraud — with businesses either registering to obtain input tax credits but not remitting GST or not registering to avoid GST obligations; business-to-business (‘B2B’) schemes that seek to claim (or double-claim) input credits and not remit GST; and the use of phoenix activity (eg claiming input tax credits and winding up a business before remitting GST)¹³⁹ to avoid the payment of GST (and other) obligations.¹⁴⁰

The use of B2B schemes to manufacture input-credit claims has been demonstrated within the precious metals sector, whereby various schemes have sought to exploit

133 The ATO estimates unpaid debt at \$5.7 billion as of 30 June 2019 — with \$4.3 billion of this as collectable debt: *GST Administration Annual Performance Report 2018–19* (n 33) 26.

134 On how different accounting methods exacerbate these issues, see Yige Zu and Richard Krever, ‘GST Cash and Accrual Mismatches: Avoiding the Avoidance’ (2017) 46(4) *Australian Tax Review* 271.

135 *GST Administration Annual Performance Report 2018–19* (n 33) 8.

136 Estimates place the VAT gap in the European Union (‘EU’) at EUR137.5 billion in 2017: Center for Social and Economic Research and Institute for Advanced Studies, *Study and Reports on the VAT Gap in the EU-28 Member States* (Final Report, 4 September 2019) 19.

137 *ANTS Statement* (n 10) 150.

138 Black Economy Taskforce, Parliament of Australia, *Black Economy Taskforce* (Final Report, October 2017) 1, 11. Martin contends that ‘[o]ur love affair with cash moved into high gear with the introduction of the goods and services tax a decade ago — defying predictions at the time that it would crack down on the cash economy’: Peter Martin, ‘Australia Awash in Cold, Hard Cash’, *The Age* (online, 26 September 2011) <<https://www.theage.com.au/business/australia-awash-in-cold-hard-cash-20110925-1krty.html>>.

139 ‘Phoenix Taskforce’, *Australian Taxation Office* (Web Page, 28 October 2020) <<https://www.ato.gov.au/general/the-fight-against-tax-crime/our-focus/illegal-phoenix-activity/phoenix-taskforce/>>. On recent amendments to the law, see *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth). See generally Helen Anderson, ‘Illegal Phoenix Activity: Practical Ways to Improve the Recovery of Tax’ (2018) 40(2) *Sydney Law Review* 255.

140 *Black Economy Taskforce* (n 138) 12–13, 33.

the preferential treatment within the GST legislation, which provides that the first supply of precious metal (gold, silver or platinum) after refinement to a dealer is GST-free while subsequent supplies are input-taxed.¹⁴¹ Most schemes incorporate one or more elements of missing trader or carousel fraud, whereby transactions are structured to manufacture input credits but traders go missing before any GST owing is paid.¹⁴²

The use of phoenix activity to avoid payment of GST obligations has been prominent in the construction sector where, for example, residential property developers have collected GST on the sale of new residential property, claimed significant input tax credits on construction costs and then dissolved their business before remitting the GST.¹⁴³

The cost to revenue of these two instances of fraud alone is in excess of \$1 billion¹⁴⁴ and \$3 billion respectively.¹⁴⁵ The legislative response to fraud in the precious metals sector has been to introduce a mandatory reverse-charge mechanism on B2B supplies which requires purchasers, rather than suppliers, to remit the GST on all taxable supplies (thus addressing the missing-trader fraud risks when a supplier claims input credits and absconds before remitting any GST).¹⁴⁶ The legislative response to phoenix activity in the real property sector has been to introduce a GST withholding regime whereby the final consumer must

141 *ANTS Act 1999* (n 1) ss 38-385, 40-100, 195-1 (definition of ‘precious metal’), (definition of ‘refiner of precious metal’), (definition of ‘dealer in precious metal’).

142 For an overview of the various schemes, see Inspector-General of Taxation, *Review into the Australian Taxation Office’s Fraud Control Management* (Report, June 2018) 232–3 [A4.20]–[A4.25]. See also *ACN 154 520 199 Pty Ltd (in liq) and Federal Commissioner of Taxation* [2019] AATA 5981 (‘ACN 154 520 199 [2019]’); *Re Very Important Business Pty Ltd and Federal Commissioner of Taxation* (2019) 110 ATR 77 (‘*Re Very Important Business*’); *Re Mango Reef Pty Ltd and Federal Commissioner of Taxation* (2018) 108 ATR 714; *BXCD and Federal Commissioner of Taxation* [2017] AATA 2826; *Re Cash World Gold Buyers Pty Ltd and Federal Commissioner of Taxation* (2020) 111 ATR 659; *Eastwin Trade Pty Ltd and Federal Commissioner of Taxation* [2017] AATA 140. Cf *ACN 154 520 199 Pty Ltd (in liq) v Federal Commissioner of Taxation* (2020) 282 FCR 455 (‘ACN 154 520 199 [2020]’).

143 *Black Economy Taskforce* (n 138) 13, 126; Explanatory Memorandum, Treasury Laws Amendment (2018 Measures No 1) Bill 2018 (Cth) 47 [5.2]–[5.4] (‘Explanatory Memorandum, Treasury Laws Amendment (2018 Measures No 1) Bill’).

144 Australian Taxation Office, *GST Administration Annual Performance Report 2017–18* (Report, 18 March 2019) 15; Inspector-General of Taxation, *GST Refunds* (Report, March 2018) 74 [6.15]; *Review into the Australian Taxation Office’s Fraud Control Management* (n 142) 244 [A4.71], 249 [A4.98], 250 [A4.100].

145 As of November 2017, 3,731 individuals had actively engaged in phoenix activity from 2013–17, with these individuals controlling over 12,000 insolvent entities and responsible for \$1.8 billion in debt that has been written off and having claimed \$1.2 billion in input tax credits over the period: Explanatory Memorandum, Treasury Laws Amendment (2018 Measures No 1) Bill (n 143) 47 [5.6].

146 Treasury Laws Amendment (GST Integrity) Bill 2017 (Cth); *ANTS Act 1999* (n 1) div 86; *Review into the Australian Taxation Office’s Fraud Control Management* (n 142) 234, 250; *GST Administration Annual Performance Report 2017–18* (n 144) 15.

remit the GST component to the ATO prior to settlement (rather than the developer).¹⁴⁷

Both these examples of fraud in the GST system demonstrate that claims about the GST's superior self-enforcement and resistance to fraud should not go unchallenged. This is particularly so when the policy solutions adopted in Australia have also been used to address fraud and non-compliance with increasing frequency in VATs worldwide.¹⁴⁸ As the OECD notes — both the withholding mechanism and reverse-charge scheme have the same effect of requiring the customer to collect and pay the GST (albeit with differences in their function).¹⁴⁹ That is, they both attempt to resolve the vulnerability of the GST to fraud by circumventing the very collection mechanism that is said to be the GST's great strength. The use of a reverse-charge mechanism in the context of fraud in the precious metals industry effectively means the GST operates like an RST. Indeed, the vulnerability of the GST to fraud led GST practitioner Kevin O'Rourke in 2017 to call for an RST to replace the GST:

The integrity benefits of a B2B model with its 'self-policing' mechanism are clearly overstated. A system in which an input tax credit entitlement is divorced from whether GST is ever paid is tailor-made for fraud.¹⁵⁰

The fact that these issues do not feature in the debate on the merits of GST reform suggests a degree of superficiality that requires redress. It might be, for example, that simply raising the GST rate would exacerbate some of the flaws with the real GST because the higher GST rate might further incentivise fraudulent refund claims such as those in the precious metals sector by increasing the value of input credits. Likewise, none of the calls to increase the GST base include precious metals in the list because the rationale for special treatment is to preserve market competitiveness for a trade-exposed industry (rather than to compensate the poor).¹⁵¹ Similarly, the use of phoenixing to avoid remitting GST remains a risk

147 Explanatory Memorandum, Treasury Laws Amendment (2018 Measures No 1) Bill (n 143) ch 5. See also *Treasury Laws Amendment (2018 Measures No 1) Act 2018* (Cth) sch 5, inserting *Taxation Administration Act 1953* (Cth) sch 1 sub-div 14-E and amending *ANTS Act 1999* (n 1) ss 33-1, 40-65(2).

148 See *Consumption Tax Trends 2020* (n 28) 56–60.

149 Organisation for Economic Co-operation and Development, *Mechanisms for the Effective Collection of VAT/GST: Where the Supplier Is Not Located in the Jurisdiction of Taxation* (Report, 2017) 24 [54] <<https://www.oecd.org/tax/tax-policy/mechanisms-for-the-effective-collection-of-VAT-GST.pdf>>.

150 Kevin O'Rourke, 'GST Integrity and Compliance Issues: Do We Really Need to Tax B2B Transactions?' [2017] (29) *Weekly Tax Bulletin* 975, 977–8. Bob Deutsch makes a similar claim: Bob Deutsch, 'GST Anniversary: A Time to Celebrate?', *The Tax Institute* (Blog Post, 13 February 2020) <<https://www.taxinstitute.com.au/news/this-week-in-tax4>>. A similar sentiment underpinned the *Henry Review*'s support for a cash flow tax over a GST: *Henry Review* (n 6) pt 2 vol 1, 279–84. See also James, *The Rise of the Value-Added Tax* (n 3) 334–7.

151 *Sales Tax (Exemptions and Classifications) Act 1992* (Cth) sch 1 ch 1; Explanatory Memorandum, A New Tax System (Goods and Services Tax) Bill 1998 (Cth) 82–3 [5.125]–[5.126] ('Explanatory Memorandum, ANTS Bill 1998'); *Review into the Australian Taxation Office's Fraud Control Management* (n 142) 231–2 [A4.16]–[A4.18]; Michael Jeffery and

beyond the real property sector, especially in relation to high-value supplies for which the high price (and corresponding GST liability) might further incentivise such activity.

C Administrative Responses and Legal Constraints

There are procedures that tax administrators can put in place to minimise administrative costs and address compliance issues — such as encouraging self-assessment supported by targeted monitoring, risk-management and audit activity¹⁵² and withholding and verifying at-risk refund claims.¹⁵³ In 2015, the ATO estimated that the GST gap would have been more than 10.6% (up from 6.5%) for 2014–15 without the compliance work of administrators.¹⁵⁴

Naturally this compliance work comes at a cost. Administrative costs reflect the theoretical and actual vulnerabilities of the GST. The ATO's preliminary estimate of actual GST administration expenditure for 2018–19 was \$659.0 million¹⁵⁵ for net GST cash collections of \$65.2 billion.¹⁵⁶ The top four components of its administrative costs were (1) active compliance (ATO and Home Affairs (Customs/Border Force)) at \$315.0 million or 48% of total administrative costs; (2) debt collection at \$75.1 million or 11%; (3) design-and-build administrative solutions (ie investments in technology and digital solutions) at \$37.9 million or 6%; and (4) processing and accounts (encompassing GST refunds) at \$37.8 million or 6%.¹⁵⁷ It is no surprise that a significant component of the cost of GST administration relates to the processing of refunds because this is the unique feature of the GST — tax everyone but let eligible entities claim refunds.¹⁵⁸ In 2018–19, the cost of collecting \$100 of gross revenue (prior to refunds) from all taxes amounted to \$0.71 with the GST and \$0.64 without it.¹⁵⁹

However, even when administrators can detect risks, their ability to respond in a timely and effective way is affected by the legal framework within which they operate. For example, the ATO has instigated litigation in relation to the various

Russell Maynard, 'Australia's GST: What It Means for the Mining Industry' (1999) 18(1) *Australian Mining and Petroleum Law Journal* 54; ACN 154 520 199 [2019] (n 142) [125] (McCabe DP and Senior Member Lazanas); *Re Very Important Business* (n 142) 83–4 [29] (McCabe DP and Senior Member Lazanas).

152 *GST Administration Annual Performance Report 2018–19* (n 33) 8–34; *Review into the Australian Taxation Office's Fraud Control Management* (n 142) 233–50 [A4.26]–[A4.102].

153 *GST Refunds* (n 144) 7–12 [2.17]–[2.35].

154 Australian Taxation Office, *GST Administration Annual Performance Report 2014–15* (Report, 14 December 2015) 41.

155 *GST Administration Annual Performance Report 2018–19* (n 33) 6.

156 *Ibid* 5.

157 *Ibid* 42.

158 Refunds also constitute a significant component of the ATO's active compliance program: *ibid* 22.

159 *Commissioner of Taxation: Annual Report 2018–19* (n 34) 28.

refund fraud schemes within the precious metals sector with varying degrees of success.¹⁶⁰ Authorities have also at times struggled to balance the need to provide timely refunds (so the GST is not a cost to business) against the need to guard against fraud (to preserve the integrity of the revenue base).¹⁶¹

A reform debate which occurs purely at the policy level fails to appreciate these constraints that are inherent in a system that adheres to the rule of law, whereby the implementation of any major policy idea requires parliament to pass legislation detailing those laws, administrators to administer them and judges to determine their limits. This brings to bear a number of institutionalised influences that impact on realisation of that idea. This is evident in how the economic goal of taxing final consumption is sought to be realised through the GST legislation.

The legislation introducing the GST makes minimal reference to the economic concept of consumption — not as a purpose of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (*'ANTS Act 1999'*),¹⁶² not in the basic rules for determining GST liability¹⁶³ and not as a defined term.¹⁶⁴ Instead, the goal of

160 *GST Administration Annual Performance Report 2018–19* (n 33) 30, 32. In the context of schemes in the precious metals sector, such schemes have variously been found by the Administrative Appeals Tribunal ('AAT') to either not satisfy the general requirements necessary to obtain an input credit or to constitute a scheme under the general anti-avoidance provisions: see above n 142. This is in addition to the issue that the activities in question could also constitute criminal tax evasion and be prosecuted as such. However, a recent Federal Court decision in favour of the taxpayer rejected the relevant reasoning resulting in the denial of input credits in that case and has remitted the issue of the application of the general anti-avoidance rule back to the AAT: see *ACN 154 520 199* [2020] (n 142) 461 [15] (Perram, Moshinsky and Thawley JJ); *ANTS Act 1999* (n 1) ss 11-5, 11-15, 11-25, 38-385(a), div 165. Cf *ACN 154 520 199* [2019] (n 142) [96]–[97], [99]–[131], [134], [260]–[284] (McCabe DP and Senior Member Lazanas). On 8 April 2021, the High Court denied special leave to appeal the decision of the full Federal Court: *Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in liq)* [2021] HCASL 64.

161 See, eg, *Federal Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 (*'Multiflex'*); *ACN 154 520 199* [2020] (n 142); *Taxation Administration Act 1953* (Cth) s 8AAZLGA; *GST Refunds* (n 144) 7–12 [2.17]–[2.35].

162 The *ANTS Act 1999* (n 1) has no express purpose clause. But see the broader statements of purpose of the GST: Explanatory Memorandum, *ANTS Bill 1998* (n 151) 6 (including that the GST is 'effectively a tax on final private consumption in Australia').

163 The basic rules (determining liability to pay and entitlement to GST input credits in ch 2 of the *ANTS Act 1999*) only mention 'consumption' when borrowing the technical term 'home consumption' from the *Customs Act 1901* (Cth) to determine when something is a 'taxable importation': *ANTS Act 1999* (n 1) s 13-5(1)(b). The reforms to tax offshore inbound digital supplies and supplies of low-value goods from offshore providers (discussed at Part IV below and contained in the special rules) refer to an *Australian consumer* for the former and a *consumer* for the latter. However, the terms primarily have a technical (eg based on registration status) rather than substantive meaning: *ANTS Act 1999* (n 1) ss 9-25(5)(d), 9-25(7), 84-65(1), 84-75(1)–(2), 84-100, 84-105.

164 The dictionary section has no definition of 'consumption': *ANTS Act 1999* (n 1) s 195-1. The only reference to consumption is in the definition of 'retailer', defined as 'an entity that, in the course or furtherance of carrying on its enterprise, sells goods to people who buy them for private or domestic use or consumption': at s 195-1 (definition of 'retailer'). While meeting the definition of retailer enables some registered entities to apply simplified accounting methods (at div 123), the definition has no influence on the basic rules establishing liability for GST and

taxing final consumption is sought to be realised by giving legal effect to the underlying transactions that give rise to expenditure on consumption.¹⁶⁵ For domestic transactions, these are the twin notions of ‘taxable supply’,¹⁶⁶ to ensure eligible supplies of goods and services that trigger expenditure on final consumption also generate a liability to pay GST on those goods and services, and ‘creditable acquisition’,¹⁶⁷ which permits registered entities such as business to claim an input tax credit for the GST incurred on inputs used in the production of goods and/or services. The intended effect of these two requirements is that, as far as possible, the final consumer (rather than business) bears the economic burden of the GST, but this is not stated as an express purpose of the Act.¹⁶⁸

Adjudication of the GST is therefore concerned with interpreting these and other legislative concepts which, although mediating the broader economic goals of taxing final consumption, are themselves the proper subject of adjudication rather than the economic goal itself.¹⁶⁹ The High Court has made this clear in the handful

access to input tax credits. See also at s 195-1 (definition of ‘Australian resident’), (definition of ‘Australian consumer’), (definition of ‘consumer’).

- 165 Sijbren Cnossen, ‘VAT Treatment of Immovable Property’ in Victor Thuronyi (ed), *Tax Law Design and Drafting* (International Monetary Fund, 1996) vol 1, 231, 234.
- 166 To constitute a taxable supply the supply must satisfy four positive elements (*ANTS Act 1999* (n 1) s 9-5): (1) the supply is made for consideration: at ss 9-10, 9-15; (2) in the course or furtherance of an ‘enterprise’ that the entity carries on: at s 9-20; (3) is ‘connected with the indirect tax zone’ ie Australia: at s 9-25; (4) the entity is registered or required to be registered: at s 23-5; *A New Tax System (Goods and Services Tax) Regulations 1999* (Cth) regs 23-15.01, 23-15.02. A supply is not a taxable supply to the extent that it is ‘GST-free’ (*ANTS Act 1999* (n 1) div 38) or ‘input taxed’ (at div 40). See at div 13 for ‘taxable importations’, discussed further in Part IV below.
- 167 A ‘creditable acquisition’ requires an entity to satisfy four elements (*ANTS Act 1999* (n 1) s 11-5, div 11): (1) an entity acquires anything solely or partly for a creditable purpose: at ss 11-10, 11-15; (2) the supply of the acquisition was a taxable supply: at s 9-5; (3) the entity provided or was liable to provide consideration for the acquisition: at s 9-15; (4) the entity is registered or required to be registered under the Act: at ss 23-5, 25-5.
- 168 It might be possible to infer the goal of taxing final consumption to the *ANTS Act 1999* as a whole if one examines the principles behind the rules surrounding registration, enterprise, taxable supplies and creditable acquisitions but, as this Part details, neither the *ANTS Act 1999* nor the courts adopt this approach: cf above n 162. See also Rebecca Millar, ‘Grappling with Basic VAT Concepts in the Australian GST: The Meaning of “Supply for Consideration”’ (2014) 3(1) *World Journal of VAT/GST Law* 1, 2 (‘Grappling with Basic VAT Concepts’); Rebecca Millar, ‘The Destination Principle: Past Developments and Future Challenges’ (Legal Studies Research Paper No 12/33, Sydney Law School, April 2012) 1–6; below n 170.
- 169 The High Court has not endorsed a sui generis interpretive approach to the GST legislation, such as an approach which interprets the GST with reference to it being a ‘practical business tax’: *Travellex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510, 519 [24] (French CJ and Hayne J) (‘*Travellex*’); *Saga Holidays Ltd v Federal Commissioner of Taxation* (2006) 156 FCR 256, 264 [29]–[30] (Stone J); *Brady King Pty Ltd v Federal Commissioner of Taxation* (2008) 69 ATR 271, 279 [49] (Middleton J); *Multiflex* (n 161) 592 [37]–[38] (Stone, Edmonds and Logan JJ); Robert Olding, ‘Interpretation of the GST Act: Towards a Principled Basis?’ in Christine Peacock (ed), *GST in Australia: Looking Forward from the First Decade* (Lawbook Co, 2011) 77, 84; Michael Wigney, ‘Text, Context and the Interpretation of a “Practical Business Tax”’ (2011) 40(2) *Australian Tax Review* 94, 99–102; Krever and Mellor (n 87) 36–8.

of cases it has considered on the GST.¹⁷⁰ In its first judicial consideration of the *ANTS* legislation in the case of *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (*'Reliance Carpet'*), the High Court quickly dispensed with any notion of the relevance of the GST as a consumption tax to the task of interpreting the *ANTS Act 1999*. The Court quoted with approval remarks from the Full Federal Court in the case of *Sterling Guardian v Federal Commissioner of Taxation*:

In economic terms it may be correct to call the GST a consumption tax, because the effective burden falls on the ultimate consumer. But as a matter of legal analysis what is taxed, that is to say what generates the tax liability (and the obligations of recording and reporting), is not consumption but a particular form of transaction, namely supply ...¹⁷¹

Subsequent appellate courts have expressed fidelity to an interpretive approach that seeks to give effect to legislative intention as ascertained through the language, context and purpose of the *ANTS Act 1999* with the process very much driven from the Act itself.¹⁷²

The result does not necessarily mean that judicially determined outcomes will not accord with the desired economic outcome of taxing final consumption — some decisions will,¹⁷³ some will not. If parliamentary drafts-people have drafted rules with sufficient clarity and the courts interpret those rules consistently and with

170 For discussion of the interpretive approach of appellate courts, see, eg, Olding (n 169); Wigney (n 169) 99–102.

171 *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342, 346 [3] (Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ) (*'Reliance Carpet'*), quoting *Sterling Guardian Pty Ltd v Federal Commissioner of Taxation* (2006) 149 FCR 255, 258 [15] (Heerey, Dowsett and Conti JJ) (*'Sterling Guardian'*).

172 *Federal Commissioner of Taxation v Qantas Airways Ltd* (2012) 247 CLR 286, 292–295 [14]–[22] (Gummow, Hayne, Kiefel and Bell JJ) (*'Qantas Airways'*) (applies rather than restates the interpretive approach in *Reliance Carpet*); *Travellex* (n 169) 513 [2], 519 [24], 522 [36] (French CJ and Hayne J), 526 [54] (Heydon J), 527 [64] (Crennan and Bell JJ) (quoting *Sterling Guardian* (n 171) 258 [15] (Heerey, Dowsett and Conti JJ) with approval), 531 [82] (Crennan and Bell JJ); *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523, 539–40 [47] (French CJ, Crennan, Kiefel, Gageler and Keane JJ), quoting *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [24] (French CJ and Hayne J) (*'Certain Lloyd's Underwriters'*) (contains an explicit statement of the interpretive approach); *Federal Commissioner of Taxation v MBI Properties Pty Ltd* (2014) 254 CLR 376, 382–5 [3]–[14], 390–2 [34]–[41] (French CJ, Hayne, Kiefel, Gageler and Keane JJ) (*'MBI Properties'*) (applies rather than restates the interpretive approach in *Reliance Carpet*); *Rio Tinto Services Ltd v Federal Commissioner of Taxation* (2015) 98 ATR 390, 400 [30] (Davies J), quoting *Certain Lloyd's Underwriters* (n 172) 390 [26] (French CJ and Hayne J). Cf *Rio Tinto Services Ltd v Federal Commissioner of Taxation* (2015) 235 FCR 159, 160 [3], 162–3 [7]–[8] (Middleton, Logan and Pagone JJ). For statements of the modern approach to statutory interpretation in Australia, see, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69], 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

173 See, eg, *Reliance Carpet* (n 171) 352 [28] (Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ). By paying a deposit the purchaser consumes a service from the vendor; the vendor agrees not to sell the property to anyone else other than the purchaser on the agreed terms and the purchaser has the ability to walk away (at a price).

reference to established interpretive approaches then, in theory, the outcome should reach that desired result. However, these outcomes are affected by institutionalised processes of drafting statutory rules (including the lobbying that attends these processes), strategies of litigation as well as the interpretive rules and approaches of the courts. The result can be that problems which should have straightforward answers if answered entirely by reference to economic criteria can become dizzyingly complex.¹⁷⁴ One cannot safely predict the outcome by simply applying the underlying economic policy or logic of the GST as a consumption tax.

A reform debate which fails to take account of the influence of law also fails to provide an accurate reflection of the efficacy of the GST in practice. Claims that merely assert that the GST is more efficient, or more cost-effective or more resistant to fraud fail to adequately address the evidence to the contrary. Consequently, the reasons why the GST might not live up to the claims made of it, such as the impact of laws and legal institutions, are left underexplored, as are possible solutions that might arise from a more fulsome appraisal.

IV DESIGN NORM 3: LEVYING THE GST ON A DESTINATION BASIS

As a tax on domestic consumption, the GST is levied on a destination basis, meaning that the tax is charged where goods and services are consumed by the final consumer irrespective of where the good or service was produced. If consumption occurs outside a given jurisdiction, GST is not charged. In practical terms, this means that GST is charged on imports and refunded on exports.¹⁷⁵

One claim made of the GST is that the tax is more efficient than the income tax because consumption is a less mobile base than income.¹⁷⁶ In simple terms, an end consumer is less able and less likely to cross a border to avoid a consumption tax. The following statement from KPMG demonstrates the nature of the claim:

In contrast [to company tax], the GST has been estimated to have a relatively low economic cost as it applies to a broader and *less mobile base* ... Thus, a switch from a less efficient tax (company tax) to a more efficient tax (GST) should benefit the economy by raising revenue in a less-distorting manner.¹⁷⁷

174 See, eg, *Travellex* (n 169).

175 Crawford, Keen and Smith (n 44) 331; Cnossen, 'Global Trends and Issues in Value Added Taxation' (n 50) 399; Ebrill et al (n 48) 176–7. An RST can achieve the same result by suspending the tax on exports: Krever (n 47) 9, 12.

176 See, eg, *Realising Our Full Potential* (n 4) 12; *Henry Review* (n 6) pt 2 vol 1, 273; Daley and Wood (n 4) 6.

177 *The Economic Impact of a GST-Funded Company Tax Cut* (n 4) 8 (emphasis added).

This article has already demonstrated the problems with the first-claimed advantage of a broad base, and likewise the claim of immobility is overstated because it begins and ends at the point of economic theory.

Although in theory consumption is a relatively immobile base, the taxation of domestic consumption through a GST traditionally required two things: first, place-of-taxation rules to determine where consumption occurs and therefore where tax is payable; and second, the effective administration of border controls to apply those rules and impose GST on imports and refund GST on exports.

Place-of-taxation rules do not rely on defining consumption per se but on articulating a series of proxy rules that roughly attempt to predict where consumption might be most likely to occur.¹⁷⁸ Most VAT rules were designed at a time when these predictions were fairly straightforward because most trade was in tangible goods that crossed customs borders and most services were consumed where they were supplied.¹⁷⁹ All GST/VATs have been challenged by the explosion in the volume of trade in intangible goods and services which do not cross traditional border controls, where the timing and place of consumption might differ from the time of purchase and which are difficult to trace.¹⁸⁰ For example, a place-of-taxation rule that provides for services to be taxed where they are performed is quite adequate for a haircut but completely insufficient for an app that helps a person design a hairstyle — is the service performed at the point of purchase? At the point of use? At the point where the app was developed?

Recent reforms to Australia's place-of-taxation rules — to include inbound supplies of digital products and remotely consumed services¹⁸¹ and imports of low-value tangible goods (ie goods with a value of \$1,000 or less) from offshore providers¹⁸² — demonstrate the nature of these issues.

The primary motive for both sets of reforms was to address the revenue lost from not taxing inbound digital supplies and imports of low-value goods from offshore providers — estimated to be \$350 million for the financial years 2017–19 and \$300

178 Organisation for Economic Co-operation and Development, *International VAT/GST Guidelines* (Report, 2017) 40–1 [3.6]; Rebecca Millar, 'Echoes of Source and Residence in VAT Jurisdictional Rules' in Michael Lang, Peter Melz and Eleonor Kristoffersson (eds), *Value Added Tax and Direct Taxation: Similarities and Differences* (IBFD, 2009) 275, 297–314; Rebecca Millar, 'Grappling with Basic VAT Concepts' (n 168) 4–10.

179 Although this statement is most relevant for early VATs, such as those introduced in the EU in the mid-20th century, it is also true to some degree of late adopters such as Australia which, at the time the GST was introduced in 1999, had only 1.1 million Australians with internet subscriptions, compared to 14.7 million in June 2018: Australian Bureau of Statistics, *Internet Activity, Australia, June 2018* (Catalogue No 8153.0, 2 October 2018); Annabel Hepworth, 'Games Lose, PC Buyers Win, and the Net Will Be Widened', *The Australian Financial Review* (Late Edition, Sydney, 28 June 1999) 4 (of the special GST Guide for Business liftout).

180 *International VAT/GST Guidelines* (n 178) 54 [3.61].

181 *Tax and Superannuation Laws Amendment (2016 Measures No 1) Act 2016* (Cth) sch 1.

182 *Treasury Laws Amendment (GST Low Value Goods) Act 2017* (Cth) sch 1.

million for 2017–20 respectively.¹⁸³ Although small relative to GST revenue (collectively constituting under 0.5% of GST revenues)¹⁸⁴ and a fraction of overall retail spending,¹⁸⁵ the cost of the exclusions is likely to grow with the expansion of online retail sales into the future.¹⁸⁶ The exclusion of inbound supplies of digital products and remotely consumed services from offshore suppliers (‘offshore inbound digital supplies’) was more one of omission, with policy-makers at the time of the introduction of the GST simply not countenancing the existence of, or at least the prominence of, this form of supply within the legislative framework.¹⁸⁷ By contrast, the non-taxation of imports of low-value goods was a deliberate policy choice motivated by an assessment that the administrative costs of collecting GST at the border on such goods would outweigh the revenue benefits.¹⁸⁸ However, the cost–benefit calculation shifted with the rapid rise of online shopping which, over the life of the Australian GST, has transformed the act of a consumer purchasing and having goods delivered from an offshore supplier from a rare to a commonplace event.¹⁸⁹

The reforms address a gap in the previous law whereby an offshore inbound digital supply or supply of low-value goods from an offshore supplier neither constituted a ‘taxable importation’ (with the rules only including supplies of tangible goods

- 183 Revenue estimates were difficult due to the absence of effective reporting requirements or border controls. Estimates for the offshore inbound digital supplies were based on consultation with potential registrants and included \$150 million in 2017–18 and \$200 million in 2018–19: Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill 2016 (Cth) 4, 50 (‘Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill’). Estimates for the low-value goods reforms were contested and varied. Budget estimates consisted of \$70 million in 2017–18, \$100 million in 2018–19, and \$130 million in 2019–20: Explanatory Memorandum, Treasury Laws Amendment (GST Low Value Goods) Bill 2017 (Cth) 3 (‘Explanatory Memorandum, Treasury Laws Amendment (GST Low Value Goods) Bill’); Treasury (Cth), *Budget 2016–17* (Budget Paper No 2, 3 May 2016) 4 <https://archive.budget.gov.au/2016-17/bp2/BP2_consolidated.pdf>.
- 184 For 2017–19, revenue loss is estimated at 0.273% for offshore inbound digital supplies and 0.13% for low-value goods out of total GST revenue of \$128.3 billion: author calculations from above n 183; *GST Administration Annual Performance Report 2018–19* (n 33) 5.
- 185 For 2017–19, revenue loss estimated at 0.055% for offshore inbound digital supplies and 0.027% for low-value goods out of total retail spending of \$635 billion: author calculations based on above n 183; Australian Bureau of Statistics, *Retail Trade, Australia* (Category No 8501.0, 3 July 2020). See also Senate Economics Legislation Committee, Parliament of Australia, *Treasury Laws Amendment (GST Low Value Goods) Bill 2017 [Provisions]* (Report, May 2017) 2–3 [1.14]–[1.15] (‘*Low Value Goods Report*’); Productivity Commission (Cth), *Collection Models for GST on Low Value Imported Goods* (Inquiry Report No 86, 31 October 2017) 20–1.
- 186 *Low Value Goods Report* (n 185) 3 [1.15]; Explanatory Memorandum, Treasury Laws Amendment (GST Low Value Goods) Bill 2017 (n 183) 6–7 [1.14]–[1.15]; Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill (n 183) 3.
- 187 Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill (n 183) 11 [1.14].
- 188 *Consumption Tax Trends 2020* (n 28) 26; Katharine Murphy and Ben Preiss, ‘Retailers Told the Enemy Is Within’, *The Age* (Melbourne, 5 August 2011) 1.
- 189 Explanatory Memorandum, Treasury Laws Amendment (GST Low Value Goods) Bill (n 183) 6–7 [1.13]–[1.14]; Organisation for Economic Co-operation and Development, *OECD Digital Economy Outlook 2015* (Report, 2015) 182, 184.

but specifically excluding low-value goods)¹⁹⁰ or a ‘taxable supply’ (falling outside the requisite place-of-taxation rules stipulating when a supply was sufficiently ‘connected with’ Australia either by simply not including imports of low-value goods or not doing so in a reliable enough way for offshore inbound digital supplies).¹⁹¹

The legislative response was to extend the place-of-taxation rules for these two categories of *taxable supply* and detail the criteria by which each type of supply would be sufficiently ‘connected to Australia’ to satisfy the place-of-taxation rules.¹⁹²

Provided that the statutory criteria are met, such as establishing that a relevant taxable supply has occurred and meeting the relevant registration thresholds,¹⁹³ both sets of reforms adopt a combined vendor- and intermediary-collection model, but generally prioritise the collection of GST by intermediaries in the form of the

190 *ANTS Act 1999* (n 1) ss 9-25(3), 13-5(1), 13-10(a), 42-15, 195-1 (definition of ‘goods’), divs 13, 42; Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill (n 183) 10 [1.10]; Explanatory Memorandum, Treasury Laws Amendment (GST Low Value Goods) Bill (n 183) 6 [1.12]. Section 42-5(1) of the *ANTS Act 1999* (n 1) specifies that the relevant non-taxable importations are listed in the *Customs Tariff Act 1995* (Cth) sch 4, which lists ‘goods of low value’ as being goods ‘prescribed by by-law, whose value is less than the amount prescribed by by-law’: at sch 4 item 26. This has been prescribed as goods with a customs value of less than \$1,000.01 (indexed for inflation): *Low Value Goods Report* (n 185) 2 [1.10], citing Australian Border Force, *Customs By-Law* (No 1305011, 1 March 2013).

191 Australia is specifically defined as the ‘indirect tax zone’ which means Australia excluding the external territories and some offshore petroleum and gas developments: *ANTS Act 1999* (n 1) s 195-1 (definition of ‘indirect tax zone’). For ease of reading, the indirect tax zone will be referred to as Australia. Only the ‘catch-all’ rule that includes ‘[s]upplies of anything else’, defined in negative terms as ‘a supply of anything other than goods or real property’ and then referred to as ‘the thing’, could provide the basis for the taxation of offshore inbound digital supplies as a taxable supply: at s 9-25(5); but could not do so on a sufficiently reliable basis to constitute a workable regime. The rules focus on a supply of a service being connected with Australia (either as a service done in Australia, supplied through an enterprise in Australia or a right or option to acquire a service connected with Australia) which is problematic for digital supplies because the time and place of such supplies might be highly mobile and difficult to detect: *ANTS Act 1999* (n 1) ss 9-5(c), 9-25, 9-40; Explanatory Memorandum, Tax and Superannuation Amendment (2016 Measures No 1) Bill (n 183) 10 [1.9]; Explanatory Memorandum, Treasury Laws Amendment (GST Low Value Goods) Bill (n 183) 6 [1.10], [1.12]; *International VAT/GST Guidelines* (n 178) 65–6 [3.112]. Cf the GST legislation always contained a specific place-of-taxation rule (based on effective use and enjoyment) for telecommunications supplies regardless of the physical presence of the supplier: *ANTS Act 1999* (n 1) div 85.

192 *ANTS Act 1999* (n 1) div 84; see especially at sub-divs 84-B, 84-C. See also at ss 9-25(3A), 9-25(5)(d), 9-25(7).

193 Suppliers are obliged to register, collect and remit GST if the annual value of their supplies (which includes the value of offshore supplies of low-value goods as well as other supplies connected to Australia) exceeds the relevant GST registration threshold (\$75,000 for business entities or \$150,000 for non-profit entities): *ANTS Act 1999* (n 1) ss 9-5(d), 23-5, 23-15, 84-45, 84-85(3), div 188; Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill (n 183) 28–9 [1.89]; Explanatory Memorandum, Treasury Laws Amendment (GST Low Value Goods) Bill (n 183) 12–13 [1.24]–[1.25]; Australian Taxation Office, *GST on Low Value Imported Goods* (LCR 2018/1, 7 March 2018) 6 [25]–[26]. Once a platform reaches this threshold, then it must collect GST on all taxable supplies — even those made by small, non-domestic suppliers who would otherwise fall under the registration threshold: *Collection Models for GST on Low Value Imported Goods* (n 185) 55–6.

‘electronic distribution platforms’, that is, the operator of an electronic service such as a website that enables suppliers to supply their goods or services to multiple end users such as eBay or Google.¹⁹⁴ To encourage compliance by non-resident suppliers, both sets of reforms adopt a simplified registration procedure¹⁹⁵ and simplified collection and reporting requirements.¹⁹⁶

The intention of the reforms is to secure voluntary compliance through simplified registration, reporting and remittance requirements and the encouraging early registration figures are a sign of the success of this approach.¹⁹⁷ However, this intention might be undermined by the complexity of the legislative schemes. Some of this complexity arises from deliberate policy choices and legislative design, such as the decision to apply a dual system for imported goods of differing values — with supplier- or intermediary-collection for imports of low-value goods (which are treated as taxable supplies) introduced alongside the existing traditional collection method for other imported goods (which are treated as taxable importations).¹⁹⁸ Other sources of complexity result from the nature of the GST itself, as the staged collection method struggles to apply across jurisdictions and borders.¹⁹⁹

These complexities increase compliance costs for offshore suppliers and therefore increase the risk of non-compliance.²⁰⁰ As the compliance costs literature indicates, large entities are more able to absorb compliance costs than smaller

194 *ANTS Act 1999* (n 1) ss 84-55(1), 84-70, 84-77(2), 84-81(3); Australian Taxation Office, *GST on Supplies Made through Electronic Distribution Platforms* (LCR 2018/2, 7 March 2018) 6 [24], 7–8 [32]–[39], 9 [46]–[47]. Such platforms can contract out of the obligation but the threshold is a high one: *ANTS Act 1999* (n 1) ss 84-55(4), 84-81(3). In the case of low-value goods, a redeliverer — that is, an entity that takes delivery of goods from offshore vendors and then assists purchasers to bring those goods into Australia — might be liable to collect and remit GST (only in the absence of a vendor or platform doing so): at ss 84-77(3)–(4), 84-81(4); Explanatory Memorandum, Treasury Laws Amendment (GST Low Value Goods) Bill (n 183) 28–31 [1.85]–[1.97]; Australian Taxation Office, *When Is a Redeliverer Responsible for GST on a Supply of Low Value Imported Goods?* (LCR 2018/3, 7 March 2018) 3–6 [14]–[31].

195 *ANTS Act 1999* (n 1) ss 146-5, 146-20.

196 *Ibid* ss 84-50, 84-87, 146-10, 146-15, 146-25.

197 See below n 205.

198 For a detailed analysis of the risks inherent in this dual system, see Kathryn James, ‘Applying the GST to Imports of Low-Value Goods in Australia’ (2018) 47(2) *Australian Tax Review* 83, 97–104.

199 For an overview of the issues and the OECD response, see *International VAT/GST Guidelines* (n 178) 41, 69, 71 [3.129].

200 Compliance cost estimates were contested. Official estimates for the offshore inbound digital supplies reforms were an initial cost of \$1.82 million and an annual cost of \$420,000 across approximately 100 non-resident businesses: Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill (n 183) 56–7 [1.253]–[1.254]. This equates to an average cost of \$18,200 upfront and \$4,200 ongoing. Stakeholder estimates were generally higher: *Collection Models for GST on Low Value Imported Goods* (n 185) 59–60.

ones,²⁰¹ which underscores the importance of key players, and in particular the platforms, continuing to cooperate.

The reliance on the cooperation of big market players in collecting GST is therefore sensible on the one hand because it targets large suppliers who have greater capacity and incentive to comply and leverages the concentration of market power in the online marketplace.²⁰² The prioritisation of platforms as the primary collector of tax is an important strategic move as it incorporates them into the GST system and facilitates any future enhancement in their obligations to collect GST and potentially other relevant taxes. On the other hand, an approach that relies on large multinational enterprises to voluntarily pay tax is risky given the proven reluctance of such enterprises to do so²⁰³ and the possible future prospect of government regulation to break up the dominance of these key players in the future.²⁰⁴ Although early figures on the revenue performance of the reforms are promising,²⁰⁵ the revenue generated is modest.²⁰⁶

201 *Henry Review* (n 6) pt 2 vol 1, 288–9; United States Government Accountability Office, *Value-Added Taxes: Lessons Learned from Other Countries on Compliance Risks, Administrative Costs, Compliance Burden, and Transition* (Report No GAO-08-566, April 2008) 16.

202 One estimate suggests that the top 10% of suppliers generate roughly 90% of low-value imported goods and services: *Collection Models for GST on Low Value Imported Goods* (n 185) 50, quoting Michael B Evans, *GST Distribution Review: Options for GST Taxation of Imported Goods and Services* (Report, January 2012) 54.

203 See, eg, White House and Department of the Treasury, *The President's Framework for Business Tax Reform* (Report, February 2012) 7–8. The response of Facebook to recent reforms to introduce a digital media bargaining code by shutting down Australian news pages on the platform show the tensions that inhere: *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Cth); Jack Snape, 'The Media Bargaining Code Has Passed Parliament, but Don't Rule Out Another Facebook News Ban Yet', *ABC News* (online, 24 February 2021) <<https://www.abc.net.au/news/2021-02-24/news-media-bargaining-code-passes-parliament-facebook-ban/13186354>>. Early evidence on the performance of the reforms indicates that such companies might be more inclined to cooperate when the intended economic burden does not fall on them directly: see below n 205.

204 See, eg, Kari Paul, "'This Is Big": US Lawmakers Take Aim at Once-Untouchable Big Tech', *The Guardian* (online, 19 December 2020) <<https://www.theguardian.com/technology/2020/dec/18/google-facebook-antitrust-lawsuits-big-tech>>.

205 The imports of low-value goods reforms yielded \$348 million from July 2018 to June 2019 — exceeding estimates by almost \$250 million: *GST Administration Annual Performance Report 2018–19* (n 33) 13; see above n 183. For the first three months of the reforms, almost half (49%) of all revenue was generated by the top five platforms — with more than 1,000 suppliers (including platforms) registered after nine months: Australian Taxation Office, 'GST on Low Value Goods Measure Continues to Exceed Expectations: ATO Considers It a Very Successful Initiative' (Media Release QC 59499, 4 July 2019); Ian Ayrton, 'Break-Out Session B: The Role of Platforms' (Presentation, OECD Global Forum on VAT, 20–22 March 2019) 7. The offshore inbound digital supplies reforms yielded \$728 million from July 2017 to June 2019 (comprising \$345 million from 2017–18 and \$383 million from 2018–19) — with 36% of all revenue generated by the top ten platform groups (of more than 500 registrants) between July 2017 and September 2018. This again has exceeded expectations: *GST Administration Annual Performance Report 2018–19* (n 33) 13; Ayrton (n 205) 6; see above n 183. Ayrton notes that some large platforms are not included in these figures as they restructured and now account for their sales as part of their Australian operations (which is another measure of success): Ayrton (n 205) 6.

206 See above n 184.

Even if Australia gets the rules right, in a globalised world, the success of those rules depends on the rules of others — in the absence of a globally coordinated or harmonised approach, the different place-of-taxation rules between jurisdictions can sometimes result in either double taxation (where more than one jurisdiction's place-of-taxation rules tax the same supply) or non-taxation (where the place-of-taxation rules of more than one jurisdiction fail to tax the supply at all).²⁰⁷ There has therefore been much effort, particularly by the OECD, to coordinate global efforts for consistent place-of-taxation rules including through the release of the *International VAT/GST Guidelines*.²⁰⁸ However, there is far from a uniform approach among jurisdictions.

States generally rely on their ability to enforce their VAT/GST laws to ensure compliance. While these requirements might be present for domestic supplies or imports of high-value tangible goods that can be processed at the border — their existence is challenged by the proliferation of new supplies in a globalised market economy. Given the 'Australian Government has little jurisdiction to enforce its tax laws in other countries',²⁰⁹ administrators will have to rely on a patchwork of enforcement options in the event of non-compliance.²¹⁰ The most viable options rely on the cooperation of nation states that have jurisdiction over non-compliant non-resident suppliers.²¹¹ However, the legal and administrative framework supporting these options is relatively nascent.²¹² For example, two of Australia's biggest trading partners, the United States and China, are unlikely to cooperate.²¹³

207 *Consumption Tax Trends 2020* (n 28) 30.

208 See the ongoing work of the OECD in this area, beginning with the Organisation for Economic Co-operation and Development, *Electronic Commerce: Taxation Framework Conditions* (Report, 8 October 1998), and the most recent output, being the latest version of the *International VAT/GST Guidelines* (n 178).

209 Productivity Commission (Cth), 'Collection Models for GST on Low Value Imported Goods' (Discussion Paper, July 2017) 9.

210 See, eg, *Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, opened for signature 25 January 1988, 1966 UNTS 215 (entered into force 1 April 1995) arts 1.2–1.3, 2.1.b.iii.C, as amended by *Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters*, opened for signature 27 May 2010, CETS No 208 (entered into force 1 June 2011) ('*Mutual Assistance Convention*'). For a full analysis of the options and their limitations in relation to low-value goods, see James, 'Applying the GST to Imports of Low-Value Goods in Australia' (n 198) 109–11. See also Kathryn James and Thomas Ecker, 'Relevance of the OECD International VAT/GST Guidelines for Non-OECD Countries' (2017) 32(2) *Australian Tax Forum* 317, 370–5; *Collection Models for GST on Low Value Imported Goods* (n 185) 72–6.

211 For an account of administrative cooperation measures, see James and Ecker (n 210) 370–4.

212 Many countries have made reservations to certain aspects of the *Mutual Assistance Convention*. However, the ATO reported that, as of 2017, it had successfully made six exchange-of-information requests in relation to the imports of intangible goods and services reforms: *Collection Models for GST on Low Value Imported Goods* (n 185) 49–50.

213 The United States has not yet ratified the *Mutual Assistance Convention* and, even so, has declared a reservation from the assistance in recovery provisions in keeping with its position of not enforcing the tax laws of other jurisdictions: *ibid* 49. The ATO provided evidence to a Senate Committee in 2017 that jurisdictions such as the United States and China will not enforce

It is therefore likely that authorities would only pursue enforcement in cases of serious non-compliance involving sums large enough to warrant the cost of pursuing this path.²¹⁴

It is not necessary to progress the analysis much further to see how far the debate has strayed from the claimed economic merit that the VAT applies to a less mobile base of consumption. The GST faces real challenges in taxing 21st century modes of commerce through rules and administrative systems premised on 20th century modes of commerce and statehood. The response to the challenge of taxing new categories of supply such as imports of low-value goods and offshore inbound intangible supplies show that solutions are possible, but that at this stage their success depends on the voluntary compliance of a handful of multinational conglomerates until states can appropriately coordinate their responses. Claims that consumption is a less mobile base than income still might hold, but they should take into account the real challenges of taxing consumption in the modern world. In doing so, there is scope not just to improve the reform debate but to improve the reform responses — for example, in better coordinating the administration of the GST and income tax to address revenue risks common to both bases or in better targeting the GST to the consumption of the rich, including those supplies which facilitate the minimisation of the income tax, as a backstop to the revenue lost from avoidance of the income tax.²¹⁵ These opportunities are lost in the current debate.

V REFOCUSING THE GST REFORM DEBATE

The worldwide impact of COVID-19 on fiscal systems is exactly the type of crisis often thought necessary to precipitate major tax reform. This article has demonstrated that if Australia is about to embark on major tax reform, then this must be accompanied by a full account of the respective benefits and risks of those reform options.

This article has shown that the discussion on the merits of GST reform does not reflect the fact that the Australian GST is a real rather than a good GST. Prior to the introduction of the GST, favourable comparisons were able to be made of the GST against its clearly flawed predecessor, the WST, as well as the income tax. The benefits of the GST over these other taxes could be more readily claimed because Australia lacked an actual real GST in practice. However, a number of the

measures to tax low-value goods on behalf of the ATO: *Low Value Goods Report* (n 185) 29 [1.6].

214 For an overview of the current enforcement capacity of these authorities and possible reforms, see Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 1) Bill (n 183) 54–5 [1.236]–[1.238]; *International VAT/GST Guidelines* (n 178) 77–8.

215 See, eg, Value Added Tax Committee, ‘Question concerning the Application of EU VAT Provisions: Possible VAT Implications of Transfer Pricing’ (Working Paper No 923, European Commission, 28 February 2017).

same superficial claims continue even though Australia now has a real GST with a more than 20-year pedigree.²¹⁶

This article demonstrated that the real GST fails in various ways to fully realise the three norms of good GST design. However, the debate on GST reform generally selectively examines the first design norm by focusing only on the economic arguments as to why the GST base and rate should be expanded or increased, which merely restate the benefits of taxing consumption over income. This article demonstrated the flaws in assuming these merits, especially when proper account is taken of how the real GST operates in practice and of how the legal and administrative framework shapes the real GST.

As the introduction to this article made clear, the primary purpose of this paper is to draw attention to flaws in the claims made in support of GST reform. In showing how the benefits of GST reform are inflated and the risks downplayed, it is hoped that the path can be cleared for a more open and honest account of the merits of tax reform more broadly. For example, Part II highlighted the ways in which the discussion of the significant distributional impacts of reforms which shift the tax mix from income to consumption focus almost exclusively on compensating the poor (albeit in mostly inadequate ways) without properly addressing the gains of the rich that arise from such a shift in the tax mix. When the inevitable push to expand the GST in these ways arrives, it is important that reforms not just examine how to appropriately compensate the poor (through techniques such as a refundable GST credit) but also examine what the rich should pay, especially in relation to those economic gains which consist of income from, or increases in, wealth which are concessionally taxed or not taxed at all. Part III highlighted how a number of the claimed merits of the GST relating to its superior enforceability and administrability seem to ignore the relative expense of administering the GST and the real risks posed by fraud and non-compliance. The Part further demonstrated how reform responses are constrained by the legal and administrative framework of the GST, which should be factored in to any reform debate. Part IV showed how the claims around the superior immobility of the consumption base fail to take sufficient account of the challenges of applying and enforcing the GST to new modes of consumption. There are real questions over the sustainability of current responses to applying the GST to imports of low-value goods and inbound offshore digital supplies which rely on the voluntary cooperation of a handful of multinational enterprises to collect revenue on a growing number of consumer supplies. That is, ultimately both the GST and income tax will require much greater international cooperation and coordination to be fit for purpose in the 21st century.

It might be that the income tax is even more flawed on a number of these measures — it is well established that the personal and corporate income taxes have been significantly undermined by legislative intent, neglect, tax lobbying and

216 Given the lateness with which Australia introduced a GST, there were plenty of real-world VATs to draw comparisons with. However, this rarely occurred. For exceptions, see Cooper and Vann, 'Implementing the Goods and Services Tax' (n 11); Graeme S Cooper and Richard J Vann, 'A Few Myths about the GST' (2000) 23(2) *University of New South Wales Law Journal* 252.

gaming.²¹⁷ However, given that the income tax offers the only tax proven to be capable of mass revenue-raising on a progressive basis,²¹⁸ then a frank debate that appropriately considers the full distributive implications of reform should proceed with an honest appraisal of the real strengths and flaws of both tax bases and express a desire to improve upon *both*.²¹⁹ COVID-19 has laid bare the flaws in a system where the benefits of economic reform are concentrated too heavily in the hands of the few. It is time to even up the debate and ensure that the debate is comparing real with real rather than real and ideal. Given the significant distributional consequences that will likely flow from major tax reform, it is important that Australia gets this debate right.

217 See Vann (n 109) 837–50.

218 Emerton and James (n 46) 144.

219 See, eg, Patricia Apps and Ray Rees, ‘Raise Top Tax Rates, Not the GST’ (2013) 28(3) *Australian Tax Forum* 679.