LVIG Exposure Draft – comments for Treasury

1. **Complex drafting/structure** - An overall comment is that the drafting structure and wording is overly complicated and confusing considering what it is trying to achieve. Non-resident suppliers are unlikely to be able to understand and apply the new provisions without assistance from an advisor. The use of double negatives (and triple negatives at section 42-15) is confusing. Importantly, the proposed amendments are also inconsistent with the original legislative scheme of the GST Act. They make significant changes to the scheme and the logical order of the GST Act, which we found to have a significant adverse effect on the legibility of the Act. Our specific comments are:

**(a) *Connected with Australia rules should be contained in section 9-25*** - Sections 85-45 and 85-50 address when a supply of low value goods is "connected with the indirect tax zone". Suggest that all of the core connected with the ITZ rules be in section 9-25 to ensure all connected rules are located in the same area of the Act and not ’hidden’ within other provisions. This is especially since the revised Division 85 has the same heading name as for section 9-25 “Supplies connected with the indirect tax zone". Also this would ensure these changes are consistent with the cross border intangible supplies amendments where the operative "connected with the ITZ" rule was in section 9-25 and the detail was inserted into Subdivisions 84-B and 84-C.

(b) We suggest that subsections 85-45(1) re suppliers and 85-50(1) re goods forwarders should be, for example, new 9-25(7) and (8) respectively, OR add to subsection 9-25(3) as an (a), (b) and (c). The detailed provisions (e.g. exceptions and tax invoices etc) should be inserted in a new Subdivision 84-D, after Subdivision 84-C "Consumer supplies". In this way, similar provisions, such as the definition of “supply of low value goods” will be in the same Division as the definition of “offshore supply of low value goods”, and with the “electronic distribution platforms” and “inbound intangible consumer supply” definitions. They are all related to each other. All of those secondary cross-border rules should be together and in a consistent order in the Act.  New subsections 85-45(2) and 85-50(2)-(6), and new section 85-55 should be in Subdivision 84-D. Div 85 should remain exclusively for Telecommunication supplies.

(c) Subdivision 84-A which deals with reverse charges should be named more clearly to avoid confusion, rather than "Offshore supplies that are taxable under this Sub-division". Consider also whether it is appropriate to use a table. A table format is useful in the classification context – for GST-free treatment – however for a Division imposing liability (taxable supply by reverse charge), we believe the structure should be simple, clear, ordinary sub-sections like s 9-25. We note that a table format was used for the B2B ‘disconnect’ provisions in s9-26, however again, disconnecting provisions are not as fundamental as the primary tax imposition provisions.

We believe that Items 3 and 4 could be merged by making the reverse charge broadly applicable in any circumstances where the supply is a supply of low value goods (LVG) that is not connected, if the recipient does not acquire the goods solely for a creditable purpose.

Similarly, Items 1 and 2 re imported services can probably be merged too, because even within Item 1, that includes both (a) not connected supplies, and (b) connected supplies. The bottom line is we want to capture the GST if the registered person does not acquire the thing solely for a creditable purpose, regardless of whether the goods were acquired solely or partly for an enterprise purpose.

(d) The table at subsection 84-5(1) items 1 and 3 uses the language "the recipient of the supply satisfies the purpose test in subsection (1B)". Under (1B), satisfying the purpose test requires that you don’t acquire the thing supplied solely for a creditable purpose. This is difficult to interpret and unnecessarily complicated. Refer above, where we suggest that Div 84 be simplified so that it is triggered where a registered person does not acquire the thing or goods solely for a creditable purpose.

(e) Subsection 84-5(1) item 2 is confusing. Is this item missing something, i.e. is a reverse charge required when the recipient satisfies the purpose test (i.e. not acquired for a creditable purpose)? Also, is it necessary to have (1C) explain that item 2 only applies if it is connected solely because of 9-25(5)(d)? Can the word "solely" just be included directly in the table? (if the table format is to be kept).

(f) Subsection 84-5(1) item 4 uses the term "wrongly represents" which suggests an intentional act, but could instead say "incorrectly represents" (if Item 4 is to be kept in its current form).

1. **Insufficient time to produce a notice** - New section 84-52 requires the supplier to provide the recipient with a notice of the amount of GST (if any) payable within one business day of the request or a penalty applies. This is unrealistic and impractical, particularly considering the time difference in overseas jurisdictions. Imposing a penalty for contravention of the one-day turnaround is unduly harsh. Consider whether it would be more appropriate to require the amount of GST to be disclosed at the time of sale which would be consistent with Consumer Protection Law and enable the recipient to prove the amount of GST already paid upon importation of the goods. Otherwise, add a note to the provision that while this offers protection to the customer, they expect the notification to occur at the time of sale.
2. **When to disaggregate a transaction –** The use of the expression “supply” in section 85-55(3) is confusing because it refers both to one and many supplies in the same transaction. Perhaps use some of the more common expressions found in the examples in the EM, such as “a transaction involving multiple goods”, and so on.UnderSubsection 85-55(5) individual goods are not considered separate supplies where "it would be unreasonable to do so having regard to the nature of the goods supplied and the nature of the transaction". We note the EM cites a shipment of sand or box of nails at 1.38 and a pallet of floor tiles at Example 1.2. Offshore suppliers are likely to have difficulty (particularly large electronic distribution platforms) in distinguishing when they have made a single supply of many units or one supply of multiple low value goods, and when it would be unrealistic to disaggregate a transaction. We suggest removal of subsection 85-55(5), however, we note that this could be dealt with in a Law Companion Guide.

Subsection 85-55 (3) and (4) address disaggregating transactions involving low value goods. Some transactions will involve the taxable supply of low value goods and also good(s) over $1,000 for which GST will continue to be collected at the border. This is likely to increase the risk of errors occurring, potentially even double taxable where recipients pay import GST without realising GST was partially or fully levied by the offshore supplier (particularly where notification of the amount of GST is not required by the supplier at the time of sale).

1. **Interaction with Customs** – As discussed, section 85-55 requires a transaction involving a single purchase order to be disaggregated where individual goods would be low value goods if they were supplied separately. This is at odds with the way in which Customs processes imports under a single purchase order which would be treated as a single consignment. A supply of a $500 item and a $1,500 item is treated as one $2,000 consignment for Customs purposes but will be treated as the supply of a low value good and a taxable importation for GST purposes.

Has Treasury considered cargo reporting and import declaration requirements for common business models - <https://www.border.gov.au/Busi/Comp/cargo-reporting-import-declaration-requirements#businessmodels>)? Under Model two, one importer submits multiple orders to one supplier. Where the importer and the supplier have arranged for all orders over a specified period to be filled and paid for together (and there is evidence of this arrangement), the shipment can be considered as one consignment. In this model, there is one import declaration.

The Q&A also states that where an international air cargo company contracts with an overseas supplier of low value goods, they will need to collect additional data from the overseas supplier (e.g. the vendor registration number where the supplier is registered for GST in Australia) and include that data in relevant import declarations in relation to low value goods delivered to Australia. How will this practically work if import declarations are not required for low value goods for Customs purposes (instead they are reported in a Self-Assessed Clearance (SAC)).

1. **Requirement to notify the Commissioner of the taxable supply at the time of import before goods can be a non-taxable importation** - While the EM states that it is expected that this reporting will be combined with other reporting on entry of the goods for customs purposes, there is concern this will create an administrative burden and delay the release of the goods. There is a lack of certainty over how this will work practically.
2. **Supplier responsible for making adjustments if taxable importation doesn't eventuate -** Under Subsection 85-45(2), if it is a taxable importation and the supplier reasonably believed at the time of the supply that the goods would be imported into the ITZ as a taxable importation, the supply of low value goods are not connected with the ITZ. The EM at 1.51 states that if the supplier was incorrect in thinking it would be a taxable importation, the supplier will be liable for the GST on the supply and will be subject to the correcting GST mistakes limits (thus, could incur penalties). If the supplier gets it wrong, how will they know a taxable importation of goods (over $1,000) has not been made? They may not have recourse from the recipient for the additional amount of GST. It would be preferable to allow Division 84 to deal with a recipient who has made a false statement rather than placing this responsibility on the supplier.

What is the purpose of subsection 85-45(2)(c) "the supplier reasonably believed…that the goods would be imported into the ITZ as a taxable importation"? If it is a taxable importation, how is this relevant? Should the "and" after 85-45(2)(b) be an "or"?

We believe that this uncertainty for the supplier is an unreasonable imposition on non-resident suppliers.  It should be sufficient that GST will not apply if the total value of a transaction is over $1,000 and the supplier reasonably believes that the transaction will be delivered as a single consignment (align this rule with how Customs approach the consignment).

In any event, we also query whether the drafting of ss(2) works in the way that the drafters are contemplating, to effectively create two different taxing outcomes at two different times, on the same supply, whereby a later event undoes the tax treatment of the former, without it being an actual adjustment to an earlier supply. This is especially so as it is seeking to impose a tax liability.

The same discussion above applies similarly to sub-section 85-50(2) re goods forwarders.

1. **Supplier responsible for taxable supply even if recipient misrepresents enterprise purpose -** Currently, there is no protection in s85-45 for an offshore supplier if the recipient incorrectly represents that the goods are solely or partly enterprise expenditure (i.e. there is no s84-100 equivalent). So technically, the taxable supply by the offshore supplier is not switched off, even if the recipient is registered and misrepresents their enterprise purpose. Meanwhile, however, Item 4 will trigger a reverse charge for an incorrect representation if the recipient does not acquire the goods solely or partly for an enterprise purpose. This could result in double taxation, so it seems that a better or clearer dove-tail between the two provisions should be able to be achieved. The supplier should be able to reasonably rely on the representation of the ‘enterprise purpose’ of the recipient, regardless of whether it is correct. This is especially as the tax would be captured by Item 4 reverse charge.

For example, take the situation of a registered sole trader who acquires goods in his or her business name, but uses them solely for private or domestic purposes, in circumstances where the ATO takes the view that by their private and domestic nature, the goods were never an ‘enterprise’ expenditure, e.g. lipstick, foundation, shoes, GoPro, golf clubs, etc.

The same discussion above applies similarly to section 85-50 re goods forwarders.

1. **Goods forwarders having to determine creditable purpose of customers** - subsection 85-50(1)(c)(ii) is convoluted and is unlikely to be understood by non-residents. Instead, the ED should state: “if the recipient is registered – has not informed the goods forwarder that they are registered”.  The goods forwarder will not know the recipient’s extent of creditable purpose, nor should they be required to know.  The only matter the goods forwarder needs to satisfy themselves of is that the recipient is registered for GST and is making the acquisition in that capacity.
2. **Impact if the recipient arranges delivery to Australia (goods forwarding versus delivery of goods - where is the line?) -** Subsection 85-45(1) makes a supply of low value goods connected with the ITZ where, under (b), "the supplier delivers the goods into the ITZ, or procures, arranges or facilitates the delivery of the goods into the ITZ". What would be the impact if the supplier doesn't bring the goods to the ITZ but instead the recipient arranges for the collection of the low value goods from the supplier's warehouse and the transport and delivery of the goods to the ITZ? Can this only be done through a goods forwarder and hence will be captured by section 85-50? Paragraph 1.70 of the EM states that, "entities that merely deliver goods to the ITZ are not treated as goods forwarders". How does this interact with the Q&A which states that when an international air cargo company is engaged by a consumer, they will be liable for GST on low value goods imported by consumers in Australia? The EM should provide relevant examples to allow taxpayers to delineate between goods forwarders and freight forwarders.
3. **Revoking an election -** if a non-resident supplier revokes a limited registration election, it is effective from the start of the first tax period after revocation under subsection 146-5(3)(c). Is there provision for backdating the cancellation of an election, for example, in the event the supplier determines it has incurred GST which it would like to recover? If the supplier is permitted to claim up to 4 years of historic input tax credits in the first tax period when they are no longer registered under a limited registration, this should be clarified.
4. **Adjustments to the price of low value goods -** is this dealt with like any other adjustment? e.g. if low value goods are returned, is there provision in the quarterly simplified GST return to show negative sales? If suppliers are permitted to carry forward decreasing adjustments to net off in a subsequent return, this should be clarified as it is a departure from the current law.  
     
   How are early settlement discounts or cash back offers dealt with? For example: If there is a taxable importation but a discount is subsequently applied which means it was a sale of one or more low value goods, how does the customer recover the overpaid GST?
5. **Typographical error** - At 1.42 of the EM, remove “do not” from the following sentence:
   1. In general, consistent with the law in relation to supplies of things other than goods or real property to Australian consumers, businesses can confirm that an entity is not a consumer in relation to a supply by requesting that GST registered businesses provide their ABN and declare that they **~~do not~~** acquire the goods solely or partly for the purposes of an enterprise they carry on in the ITZ.
6. **Consolidated version of existing law and LVIG ED amendments -** As discussed at the meeting, we would appreciate if a consolidated version of the existing GST law and the LVIG Exposure Draft (ED) amendments could be provided to us at the next instance to allow a more holistic review. This will enable us to better identify any integration issues with the existing cross-border provisions, for example the interactions between this ED with the “electronic distribution platform” (EDP) rules in the recent imported intangibles ED. For this reason, we have not provided many specific comments on how these rules are likely to work in conjunction with the EDP provisions, however we do envisage that there will be both practical complexities, and potential anomalies that may exist in the drafting, given that the same rules are seeking to cover both imported intangibles and low value imported goods.