FIRST DO NO HARM: GST AND HEALTH CARE SERVICES

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This article considers the impact of A New Tax System (Goods and Services) Tax Act 1999 (Cth) on health services, health practitioners and their patients. It discusses the basis for the concessionary treatment of healthcare in Australia and other jurisdictions. The difficulty of determining the tax status of a service not covered by Medicare is highlighted; so too the conflict between the medical and allied health provisions.

Healthcare will be GST-free: this statement was the Howard Government's clarion call in its attempts to win electoral support for the tax. Its promise has been realised; A New Tax System (Goods and Services Tax) Act 1999 (Cth) ("GST Act") makes many health-related goods and services GST-free.[1] However, blanket concessional treatment has not been applied to all health supplies. Certain goods and services will be subject to GST.

This article will examine briefly the impact of GST on the services provided by those working in medical and paramedical professions. It aims to identify the rationales for excluding healthcare from GST and the factors determining the tax status of a service. Finally, it will consider difficulties resulting from the application of the legislation to services.

Where appropriate, comparison will be made with the approach taken to the taxation of healthcare services in the United Kingdom and Canada. Both countries have health systems similar to that in Australia. Each applies consumption tax to goods and services. Their situations differ from Australia. Both in Canada and in the United Kingdom health services are input-taxed. Both countries' taxing statutes describe them as "tax exempt".[2] British and Canadian health care workers do not charge tax on their services. Because of

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1 Subdivision 38B Health, A New Tax System (Goods and Services Tax) Act 1999 (Cth) ("GST Act").

2 In Canada, health services are exempt from GST under Excise Act, s 123(1) (Exempt Supplies) and schedule V, pt II. In the UK, the Value Added Tax Act 1994 s 31 and schedule 9, group 7, are the relevant provisions.

this, they are not entitled to a refund of the tax they have paid on acquisitions of materials (ie, an input tax credit). Although in the Australian GST Act, healthcare is referred to as "exempt", this is a misnomer. Health goods and services are GST-free (zero-rated).[3] Throughout this article, the term "exempt" will be used as a synonym for "input-taxed", as is usual in the other jurisdictions.

POLICY BASES FOR HEALTHCARE'S GST-FREE STATUS

From the outset of its GST proposal, the Howard Government intended that commonly used medical and paramedical services be GST-free. In *Not a New Tax: A New Tax System* Report ("ANTS"), it envisaged services attracting a Medicare benefit as GST-free. Dental, optical, physiotherapy, chiropractic, speech pathology, occupational therapy, counselling, dietetic and podiatry services would not be subject to tax.[4] However, it qualified its view, noting that the precise scope of the exclusion would be determined on advice from the Tax Consultative Committee.[5]

It could reasonably be assumed that health supplies were to be excluded from the tax base by virtue of their inherent merit. Traditionally, the concept of health as a public good has afforded it special treatment in terms of taxation. Certainly, this is the basis for exempting medical services from Value Added Tax ("VAT") in the European Union.[6] However, the ANTS proposal did not rely on this argument. Instead, the rationale for the GST-free status of healthcare was competitive neutrality of the public and private sectors.[7] The proposal stated, "applying taxes to healthcare would place the private health sector with its heavier reliance on direct fees at a competitive disadvantage with the public health system".[8]

This argument is not new to the Australian GST debate. In its 1991 Fightback proposal, the Liberal-National coalition noted that the health sector required concessional treatment as it received substantial government funding.[9] It was not possible to apply GST to the public system as no direct charge was made for its services. Quoting the Hawke Government's 1985 draft white paper on tax reform, it stated that although private services could be included in the tax base, "to do so would be highly arbitrary and discriminatory".[10]

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3 Above n 1.

4 *Not a New Tax: A New Tax System* (1998 AGPS) at 93.

5 Ibid.

6 Sixth Council Directive (77/388/EEC) of 17 May 1977, Art 13A.

7 Above n 4.

8 Ibid.

9 Australian Liberal Party. *Fightback!* (1991 Australian Liberal Party) at 75.

10 Ibid.

Two additional considerations support zero-rating healthcare. If GST were imposed on the private health system, charges for its services would increase. Higher costs would discourage reliance on this sector, resulting in increased demand for public health resources. This would defeat the Federal Government's objective in sustaining the ailing public system by encouraging participation in private healthcare. Also, both health and taxation issues have assumed increased priority in the 1990s. During the lead-up to the 1998 federal election, maintenance of health services and GST were the most important issues in the minds of voters.[11] Proposing to tax healthcare would have been unnecessarily controversial.

As anticipated, the Tax Consultative Committee ("Vos Committee") clarified the scope of the health exclusion. The policy underpinning its recommendations was again maintenance of competitive neutrality. The Committee's terms of reference required it to limit discrimination in the taxation treatment of public and private sectors.[12] In determining which medical and health services were to be zero-rated, the committee noted that the services already envisaged as tax-free were "mainstream".[13] They had been "available as specific services with specific qualifications for some time".[14] The committee used these criteria to limit the scope of the exclusion. It recommended those services with "strikingly similar characteristics" to those in the ANTS proposal be afforded tax-free status.[15]

In recommending the types of health services that should qualify as GST-free, the committee was concerned to protect consumers from "unsafe" services, not subject to regulation. It clearly regarded placement on the GST-free list as limited to those health services considered appropriately regulated and health promoting.[16] The importance of this factor prompted the committee's rejection of counselling services for GST-free status.[17] It noted that those practising as counsellors were not required to have a minimum level of competency and were not subject to either state or self-regulation. The Committee's recommendations for the scope of the health supplies exclusion were adopted and incorporated in A New Tax System (GST) Bill 1998. The Senate Select Committee then commented on its contents.

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11 Bean and McAllister. "The GST and All That" (1999) AQ (May-June) 46.

12 Tax Consultative Committee (Vos Committee) *Report of the Tax Consultative Committee* (1998) ch 1, s 4 "Terms of Reference" available at: <http://www.treasury.gov.au/publications/TaxationPublications/TaxReform/vos s/vos1.htm> (at 23 June 2000).

13 Ibid at ch 4.

14 Ibid.

15 Ibid.

16 Ibid.

17 Ibid.

The scope of the exclusion for medical and health services was severely criticised in the Senate Select Committee's Main Report into GST.[18] It noted that the list of zero-rated services contained in the bill was "not just inconsistent but arguably discriminatory and anti-competitive".[19] Its major recommendation, in terms of services, was that complementary healthcare services receive concessionary treatment. It argued that alternative and natural therapies were as commonly used as conventional medical services, and should be afforded GST-free status.[20]

The primary concern underpinning its recommendation was that the health exclusion should reflect the healthcare choices of Australians.[21] The tax should be imposed consistently; all commonly used services should receive the same treatment. The committee stated that the bill, based on the earlier ANTS statement and subsequent recommendations of the Vos Committee, discriminated against Australians using complementary therapies, practitioners of those therapies and also the public health system.[22] Of particular concern was the fact that low-income earners, the disadvantaged and chronically ill were frequent users of alternative medical services.[23]

The committee noted that despite the fact Medicare covered mainstream medicine, a high proportion of Australians were choosing to pay for alternative therapies, reducing demand on the public health system. If GST were imposed on complementary healthcare services, this economic disincentive would increase demand on the public sector.[24] The intended aim that the exclusion should operate so as to reduce anomalies in treatment of public and private systems would similarly fail were alternative medicine taxed.[25] An increasing number of conventional medical practitioners rely on alternative therapies (acupuncture, primarily) for treatment of certain ailments. The committee considered that the tax status of these procedures ought not to depend on the profession of their practitioners.[26]

Unlike the Vos Committee, the Senate Committee did not regard the qualifications of service providers as a determinant for GST-free status. Despite the Senate Committee recommendations, this criterion is nevertheless incorporated in the GST Act. Service providers in the listed

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18 Senate Select Committee on A New Tax System *Main Report* (1999) available at: <http://www.aph.gov.au/senate/committee/gst/main/chaptr10.htm> (at 21 July 2000).

19 Ibid at 10.79.

20 Ibid at 10.72-10.79, 10.99.

21 Ibid at 10.72.

22 Ibid at 10.72-10.79.

23 Ibid at 10.73.

24 Ibid at 10.97.

25 Ibid at 10.75.

26 Ibid at 10.76.

fields must have a minimum level of skill and be subject to regulation.[27] However, the Act does incorporate the Senate's recommendations that the services of acupuncturists, herbalists and naturopaths be GST-free.[28]

As a whole, the health care provisions clearly reflect the competing concerns that the imposition of GST should harm neither the public nor private health sectors. Protection of consumers and practitioners must also be paramount. The policy of competitive neutrality is supplemented by the desire that Australians have self-determination in respect of their health. Consumers should not be constrained in their choice of services by the imposition of GST.

Kinds of service that may be GST-free

Under subdivision 38B, health supplies will not attract GST. Generally, services provided by medical practitioners (described as "medical services" in the GST Act) will be zero-rated (GST-free).[29] Other paramedical services ("health services") may also qualify for GST-free status.[30] For a health service to be GST-free, it must be a service of a kind listed in the GST Act or regulations.[31] The services listed are: Aboriginal and Torres Strait Islander Health services, acupuncture, audiology and audiometry, chiropody, dental, dietary, herbal medicine, naturopathy, nursing, occupational therapy, optometry, osteopathy, paramedical, pharmacy, psychology, physiotherapy, podiatry, speech pathology, speech therapy and social work.[32]

The range of services that may be GST-free is much broader than the range of services qualifying for tax-exempt status in Canada or the United Kingdom.[33] In both countries, as in Australia, general medical services (such as general practice consultations and radiology) are exempt, as are a range of ancillary health services. Neither country exempts alternative therapies such as naturopathy. The fact these services may qualify as GST-free in Australia could be perceived as highlighting the importance of holistic healthcare to society. There is however, no uniform basis for excluding these medical and selected health services from the tax base, as the chronicle of the development of the healthcare exclusion has shown.

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27 Sections 38-7, 38-10, 195-1.

28 Section 38-10.

29 Section 38-7 of the GST Act 1999.

30 Section 38-10 of the GST Act 1999.

31 Ibid.

32 Ibid.

33 Above n 2.

DETERMINING THE GST STATUS OF SERVICES

The most significant impact of the GST legislation is that it will require health workers to consider whether the services they render are subject to tax. Not all services are subject to tax; some services will always be GST-free, others always taxed. Some services will be tax-free when rendered in some circumstances, but taxed in others. The context in which the service is rendered is significant. Other jurisdictions have taken differing approaches to determining tax status. A basic outline of the Australian legislative framework is required in order to understand better its impact on both practitioners and patients.

Australian approach to medical services

The approach to taxation of doctors' services (as opposed to allied health services) is as follows: under the GST Act, the supply of a "medical service" is GST-free.[34] Two types of services qualify as medical services.[35] First, services attracting Medicare benefits are GST-free.[36] Second, other services supplied by medical practitioners or pathologists will be GST-free if they are generally accepted in the medical profession as necessary for the appropriate treatment of their recipient.[37] Initially, the definition of medical service in s 195-1 of the Act included only the second limb. After calls for clarification, it was modified to ensure Medicare rebateble services were not taxed. Under the original "general acceptance" definition, services such as fitness-to-drive examinations could have been taxed, although covered by Medicare. The amendment is consistent with the approach to health supplies outlined in the ANTS proposal.

Though most general practice, specialist and diagnostic services will fall within the provisions, the supply of these services may still be taxed.[38] Most medical services contained in s 14 of the Health Insurance Regulations will be subject to GST, as will services rendered for cosmetic reasons for which no Medicare benefit is payable.[39]

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34 Section 38-7(1).

35 Section 195 GST Act. Indirect Tax Legislation Amendment Act 2000, Schedule 2.

36 Ibid.

37 Section 195-1 of the GST Act.

38 Section 38-7(2).

39 Section 38-7(2)(a), (b). The services referred to in regulation 14 of the Health Insurance Regulations are not commonly used. Services in regulations s 14(2)(ea), (f) and (g) may still be GST-free.

Canadian approach

The Australian method of determining a service's tax status is similar to the Canadian approach. In Canada, GST-exempt status applies to medical services to the extent that they are reimbursed by a provincial health care plan.[40] This is the primary exempting provision under its Excise Act. However, a second provision exists to exempt all other non-reimbursable services rendered by medical practitioners. Exempt status also applies to the supplies of a consultative, diagnostic, treatment or other health care service, provided it is not a cosmetic service.[41]

The Canadian exemption of medical services is therefore broader than its Australian zero-rating counterpart. It does not import a consideration as to whether the service rendered is actually appropriate for the patient's complaint. It is without the element of uncertainty implicit in such an assessment. Again, in Australia, the tax status of medical services not covered by Medicare will depend on whether the medical profession considers them necessary for the patient's appropriate treatment.[42]

United Kingdom approach

The UK approach to the taxation of health care services is different again. Medical (and health) services, whether or not covered by the National Health Service, will be VAT exempt if their provider is registered with the appropriate registration board.[43] The service provided must fall within the qualification of the provider.[44]

The exemption is also constrained by the EC Sixth VAT Directive, incorporated into UK domestic law by the VATA. It states that member states shall exempt under conditions "the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned".[45] For their services to be exempt, practitioners must be providing "care".

The exemption has been construed strictly by the European Court of Justice. The services covered by it must be provided outside hospitals and in the context of the confidential relationship between (human) patient and

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40 Excise Act Schedule V, Pt II – Exemptions (Health Care Services), s 9.

41 Ibid at s 5.

42 Section 195-1 of the GST Act.

43 Value Added Tax Act 1994 (UK) ("VATA"), Schedule 9, Group 7, Items no 1, 2, 3, 4.

44 Commissioners of Customs and Excise UK. *Health VAT Leaflet 701\31* (1992).

45 Above n 11, Art 13A(1)(c).

practitioner.[46] To be exempt, the services must also be carried out habitually and principally as part of the practitioner's profession.[47] The mediation services of a doctor, for example, would be taxed at the standard rate.

Difficulties in determining the tax status of a non-medicare rebateable service

As is apparent from the preceding descriptions, there is an element of uncertainty in assessing the tax status of those services not covered by Medicare. Provided these services are not deemed subject to GST (eg, they are not cosmetic, and hence taxed), they will if provided in the correct circumstances, also be GST-free. In Australia, if doctors – and allied health professionals – do not charge GST where appropriate, they may be liable for non-compliance with the GST Act.[48] As in for other goods and services, contravening practitioners may be liable for $1/11^{th}$ of the consultation fee.[49] They will not be able to claim contribution from the patient.

Given the legislative framework, it is imperative that health care practitioners feel confident in their ability to assess the tax status of their services. Clear guidelines for making such a determination are essential. Arguably, Australia has failed in this respect. The requirements for a tax-free service may superficially, appear clear. On analysis, the GST Act contains terms and sets standards that are yet undefined. It exposes practitioners to an unacceptably high risk of non-compliance.

In Australia, the ATO has attempted, rather unsuccessfully, to clarify its approach to determining the tax status of a medical service. It has consulted the medical profession, through its representative bodies, in this task. However, many of the grey areas in the legislation remain. Its position, coupled with analysis of the subdivision 38 provisions, suggests that three factors will effectively determine the GST status of a service, where that service is not subject to a Medicare benefit.

1 Voluntariness of patient's attendance at consultation.

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46 *Sparekassernes Datacenter (SDC) v Skatteministeriet* (Case C-2/95) [1997] STC 932 at para 20 (European Court of Justice); *EC Commission v United Kingdom* (Case 353/85) [1988] 2 All ER 557 (ECJ) at para 33; and *EC Commission v Italy* (Case 122/87) [1988] ECR 2685 at para 9.

47 *Von Hoffman v Finanzamt Trier* (Case C-145/96) [1997] STC 1321 approved of in respect of medical services in the UK in *d'Abrumenil v Commissioners of Customs and Excise* (1999) VAT decision 15977.

48 Australian Medical Association, *Goods and Services Tax: Business Skills for Health Professionals* (2000), pt 5.

49 Ibid.

2 Whether the service is generally accepted in the medical profession as being within the provider's domain and is clinically relevant to the patient.
3 Whether the service is provided for cosmetic reasons.

By analysing each aspect, the difficulties caused by nebulous terminology and undefined standards can be considered, as can the legislation's impact on practitioners and patients.

1 Voluntariness of patient's attendance for service

The voluntariness of a patient's attendance for a service may determine the GST status of that service, irrespective of its appropriateness for the patient's condition. Where a patient is asked by a third party (such as an insurer or employer) to attend a medical consultation, the patient is compelled to attend, and has little control over its outcome, the service will be subject to GST. The reason the consultation is taxed is that where a patient is obligated to attend a consultation, the ATO regards the party obliging attendance as the recipient of the service performed.[50] For example, in the context of a life insurance medical, the patient is effectively compelled to attend for examination. If he or she does not, the insurer may refuse to insure him or her. The patient, at the conclusion of the service, cannot direct the practitioner to send copies of his/her report to other practitioners. In this circumstance, the insurer will be held the recipient of the examination. The consequence of the insurer as recipient is that it is nonsensical to apply the second limb of the definition of a medical (and therefore GST-free) service.[51] To do this would prompt the question: is this service generally accepted in the medical profession as necessary for the appropriate treatment of the insurer (the recipient of the supply)? Because the test cannot be fulfilled, and no Medicare benefit is payable for the service, it will be subject to GST.

If a third party merely requests the patient's attendance, the service will not automatically be subject to tax, however. The insurance example can be contrasted with that in which a medical practitioner asks a patient to take a non-Medicare rebatable blood test. The pathology service will be a separate service; the recipient of that service will not be the requesting medical practitioner however.[52] The patient is the recipient, as, it is argued, he or she is not obliged to attend for the test. Although his or her doctor's treatment plan will be stymied if the test is not taken, the patient has a choice as to whether to have it performed. Furthermore, the patient has the ability to

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50 ATO Health Industry Issues Register at 1a available at: <http://www.taxreform.ato.gov.au/ind_partner/health/issues/issue1.htm> (at 20 July 2000).
51 Section 195-1 of the GST Act.
52 Above n 48 at 1a.7.

control the release of the test results. The requesting doctor will have ordered the test, yet the patient may ask the pathologist to send copies to other practitioners. Where the patient is deemed the recipient, the question of whether the treatment is appropriate and generally accepted may be considered. If the treatment is accepted as appropriate, it will be GST-free, although performed at the request of a third party.

The deeming of an insurer or employer as the recipient of a service is an arbitrary method of ensuring that the medical service exclusion is limited to its original purpose. It is intended to exclude commonly-used medical services from GST. Employment and insurance examinations cannot be described as commonly-used. However, it is difficult to see the distinction between a consultation for insurance purposes (in which the patient is actually examined) and a pathology service. The insurance examination may be as integral to preservation of the patient's good health as the pathology test. Each increases the patient's knowledge of his/her health. In both cases, the patient is not the direct recipient of the report; it is unrealistic to suggest that a patient has a real choice whether to attend for a blood test. How is a practitioner to assess the voluntariness, the motivation, for a patient's attendance? The distinction between voluntary and compelled attendance is fine and difficult to apply in practice.

Interestingly, voluntariness of attendance at a consultation has been rejected as a determinant of tax status in the United Kingdom. In *D'Abrumenil v Commissioners of Customs and Excise*,[53] it was held:

> Particularly hard to see an invasive procedure requiring to be carried out by a doctor ... as not being the provision of care because of the reason why the procedure is undergone. If one views the nature of what is happening objectively, as in my judgement one must, it is not material that the direct beneficiary of the advice may not be the individual examined but a prospective employer or insurer.[54]

In the United Kingdom, an insurance or employment medical is the "provision of care" as required for a VAT exempt supply. Canada has also chosen to exempt from GST employment and insurance reports for which the practitioner has examined the patient.[55]

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53 (1999) VAT Decision 15977 (unreported).

54 Ibid, penultimate para.

55 Revenue Canada Healthcare Services Memorandum (GST 300-4-2) (1993) available at: <http://www.ccra-adrc.gc.ca/E/pub/gm/ag30042e/g30042.dos.html> (at 19 May 2000) paras 25, 26.

2 Whether the service is within the service provider's domain and is clinically relevant to the patient

Under the GST Act, a service (for which no Medicare benefit is payable) will only be GST free if it is generally accepted in the medical profession as necessary for the appropriate treatment of the patient.[56] Additionally, it must be provided by or (on behalf of) a registered medical practitioner or pathologist. It must not have been rendered for cosmetic reasons. The first criterion elicits two questions. First, how will "generally accepted" services be identified? Indeed, what constitutes general acceptance in the medical profession? Secondly, what is appropriate treatment, and when will a service be necessary for it?

General acceptance

There is no definition as to what denotes "general acceptance" of a particular service in the medical profession. The ATO Issues Log is vague, noting unhelpfully the words indicate "that it will ultimately be the medical profession that determines what services will be generally accepted".[57] But how is the medical profession to do this? At what point can it be said that a service or procedure is "generally accepted"? Would substantial empirical evidence of a service's efficacy be sufficient? Or, must a service have the support of a relevant professional association before it can be considered generally accepted within the medical profession? Certainly, scientific evidence as to efficacy coupled with professional association support should be regarded as general acceptance. Both are required for placement of services on to the Medicare Benefits Schedule ("MBS").[58] Services on the MBS attract a Medicare benefit and are therefore GST-free. By analogy, services that will, but are yet to be approved for placement on the MBS, should be considered generally accepted.

Necessary for the appropriate treatment

"Appropriate treatment" will be proved where a practitioner assesses the recipient's state of health and determines a process to pursue in an attempt to preserve, restore or improve the physical or psychological wellbeing of the recipient.[59] It includes the principles of preventative medicine.[60] This definition is extremely broad; the Canadian Excise Act predicates a much

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56 Sections 38-7(1), 195-1.

57 Above n 48 at 1a.

58 Australian Medical Association *Goods and Services Tax: Business Skills for Health Professionals* (2000) at 20.

59 Above n 48 at 1a.

60 Ibid.

narrower definition of "treatment", distinguishing "treatment services" from "diagnostic" and "consultative services".[61] The British Value Added Tax Act 1994 ("VATA") does not use the word "treatment" in its exemption of medical and paramedical services, however the Sixth EC VAT Directive on which it is based refers to exemption of supplies of "medical care".[62] This phrase has been held broader in scope than "treatment"; in the UK, a doctor assuaging a patient's fears is providing care, but not providing treatment.[63]

The Australian definition of treatment however is sufficiently wide to encompass the assuagement of a patient's fears. This assuagement could improve/preserve/restore a patient's psychological wellbeing.[64] Similarly, referral to a specialist could constitute appropriate treatment in Australia. The purpose of such a referral is improvement of the patient's wellbeing.

The phrase "necessary for the appropriate treatment" may also be contentious because of the medical questions involved in determining what is necessary (as opposed to merely desirable) treatment in a specific case. This has been pre-empted, the ATO reiterating that the necessity/desirability of a treatment may vary according to the particular circumstances of a patient.[65] A treatment that would ordinarily be desirable (because of the lack of evidence as to its efficacy) may become "necessary" when used to treat the ailment of a patient with a terminal illness and few months to live.

For the ATO, like the medical profession itself, the phrase will be problematical. How will an auditor verify that a service was necessary for the patient's appropriate treatment? The ATO has been silent as to the framework used to second-guess medical opinions.

3 Whether the service is rendered for "cosmetic reasons"

If a service (not subject to a Medicare benefit) is generally accepted as appropriate for the treatment of a patient, it will be GST-free unless performed for cosmetic reasons.[66] The GST Act does not define "cosmetic reasons". However, the ATO has stated that a service will be rendered for cosmetic reasons if it is predominantly performed for, or is rendered for the

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61 Above n 40.

62 Above n 11, Art 13A(1)(c).

63 Above n 51, though the question of the interpretation of the provision was to be referred to the ECJ. This has not yet occurred; both parties are awaiting the ECJ's decision in *Vanessa Susanne Dotter v Erich Williamaier* (sub nom *D v W*) (Case C-384/98). The court's opinion (currently unavailable in English) seems to support the interpretation of the provision taken by the VAT Tribunal in *d'Abrumenil*.

64 Above n 48 at 1a.

65 Ibid at 1a3.

66 Section 38-7(1), (2) GST Act.

purpose of permitting, the improvement of a patient's appearance.[67] On this definition, it appears that services with an ancillary purpose of enhancing appearance will not be subject to GST. Medical practitioners must determine whether a service has been rendered for cosmetic purposes on a case by case basis.[68] Services performed for medical reasons that have cosmetic effects will be GST free.[69] For a service to be performed for medical reasons it must be predominantly performed for, or rendered for the purpose of permitting the alteration of a significant defect in appearance caused by disease, trauma or congenital deformity.[70] Also, the service must be recommended by a psychiatrist or psychologist for the psychological wellbeing, or for the appropriate treatment of a psychiatric condition, of a patient.[71] A psychiatric recommendation is not required where the patient is under 18, and the defect is in an area of the body that is normally unclothed.[72] Ordinarily, nose reconstruction would be subject to GST; where reconstruction is required because of an industrial accident, and is advised by a psychiatrist, this service will be GST-free.

The criteria for a service performed for medical reasons mirror the Canadian criteria. The legislation provides an easy method of circumventing the taxed status of cosmetic surgery; it is not difficult to imagine unscrupulous practitioners conspiring with psychologists to afford their patients the chance of GST-free surgery.

GST STATUS OF HEALTH SERVICES

As with medical services, the GST Act has caused confusion in allied health fields. Health practitioners will need to assess the tax status of their services, in order to comply with the legislation. Like medical services, ancillary health services may be GST-free, potentially GST-free, or taxed. Again, the context in which the service is performed is significant in assessing tax liability, as is its recipient: this much is clear. The problems facing health practitioners spawn from the ambiguous terminology used in the legislation. Certain fields suffer because the Act assumes that peer support will determine tax status. Non-traditional health fields do not necessarily have representative bodies able to perform this function.

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67 Above n 48 at 1b.
68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.

Initially, for a health service to be GST-free, it must be of a kind specified under the Act.[73] Twenty-one types of services are listed, ranging from Aboriginal and Torres Strait Islander Health to social work. A "recognised professional" must also supply the service.[74] The supply must also be generally accepted, in the profession associated with supplying services of that kind, as being necessary for the appropriate treatment of the recipient.[75]

Recognised Professional

A person will be considered a "recognised professional" in relation to s 38-10 if that person registered to provide that type of service in a state where there is mandatory regulation of suppliers.[76] If there is no state registration, the person must be a member of a professional organisation that has uniform national registration requirements regarding the supply of that kind of service.[77] This requirement, that those providing tax-free services be regulated, reflects the Vos Committee's concern.

For most health practitioners, the "recognised professional" criterion will be easily met. Dentists, psychologists and physiotherapists are subject to state regulation in Queensland; so too are chiropractors, osteopaths and podiatrists.[78] However, this criterion has caused concern for acupuncturists, naturopaths and herbal medicine practitioners. These professions have, until recently, been untouched by state registration; self-regulation is neither national nor uniform. To afford GST-free status to the services of these practitioners, the legislature has amended the "recognised professional" requirement.[79] The criterion has been suspended until 1 July 2003, allowing practitioners in these fields time to meet the state/self-regulation requirement.

Naturopaths and Herbalists as "Recognised Professionals"

Due to the fragmented nature of the fields, it is difficult to predict the number of acupuncturists, herbalists and naturopaths able to comply with the interim requirements. The Commonwealth Department of Health and Aged Care believes that a majority of practitioners in each area will meet the

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73 Section 38-10(1)(a) GST Act.

74 Section 38-10(1)(b) GST Act.

75 Section 38-10(1)(c) GST Act.

76 Section 195-1 GST Act.

77 Ibid.

78 Information obtained from telephone conversation with Medical Board of Queensland as at 20 May 2000.

79 Section 21(1) A New Tax System (Goods and Services Tax Transition) Act 1999.

stipulations.[80] Under the temporary provisions, services of herbal medicine practitioners and naturopaths will be GST-free, if the supplier is appropriately qualified.[81] Regulations have been drafted as to what are "appropriate qualifications".[82] Until 2003, where a field is state-regulated, the supplier must comply with regulation requirements.[83] Where there is no state regulation, practitioners commencing practice before 8 July 1999 must have been a member of a national professional association on that date and be a member at the time the service is rendered.[84] Alternatively, before the service is performed, they must have satisfied the requirements for an Australian diploma, advanced diploma or degree in the discipline by completing a course of accredited study.[85] Overseas qualifications equivalent to Australian qualifications are acceptable. If the supplier has commenced practice after 8 July 1999, he or she must have completed a qualification as noted above, before the service is provided.[86] This regulation again reflects the Vos Committee's belief that GST-free status should be granted to those practising responsibly.[87]

Generally accepted as necessary for the appropriate treatment

As with medical services, health services must be generally accepted (by the relevant profession) as necessary for a patient's appropriate treatment before they will be GST-free.[88] Again, whilst "appropriate treatment" is that for the purpose of preserving or improving wellbeing, there are no clear guidelines as to what constitutes general acceptance within a particular health discipline.[89] For the more traditional health services such as dentistry and physiotherapy, effectively mandatory-membership professional associations will determine what is acceptable practice and what is not.[90] However, in less regulated fields such as naturopathy, how will general acceptance be determined? There are no umbrella organisations representing the views of all practitioners of these disciplines (compared with colleges of medical specialties). This problem has been recognised in terms of the recognised

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80 Information obtained during telephone conversation with Catherine Wall, Department of Health and Aged Care, Canberra, 20 July 2000.

81 Ibid s 21(2), (3).

82 A New Tax System (Goods and Service Tax Transition) Regulations 2000 No 111, Regulation 7 – Acupuncture, Naturopathy and Herbal Medicine.

83 Ibid at s 2.

84 Ibid at s 4.

85 Ibid at s 4.

86 Ibid at s 5.

87 Above n 12 at ch 4.

88 Section 38-10(1)(c).

89 Above n 48 at 1a.

90 Ibid at 1a7.

professional requirement. However, no consideration appears to have been given to the constitution of general acceptance in these fields. This is only of concern until 1 July 2003, the date at which these professionals must comply with the usual standard of regulation required.[91] Presumably, properly representative bodies will emerge before this time. In the interim, the GST status of services may be difficult to determine.

THE INTERSECTION OF THE MEDICAL AND HEALTH SERVICES PROVISIONS: SOME CONCERNS

Provider determines tax treatment of the supply

A significant problem in terms of the operation of the medical and health services provisions is that the GST status of a service will fluctuate depending on its provider. A service may be subject to GST if rendered by a medical practitioner, but zero-rated if rendered by a health service provider or vice versa. If a GP, for a fee, offers a certain type of manipulation much used in the chiropractic field but considered unacceptable in the medical profession, this service will be subject to tax.[92] Where the same service is provided by a registered chiropractor, and considered generally acceptable, it will be GST-free.[93]

The "general acceptance" criterion found in both the medical and health services exclusions causes fluctuating tax status. The criterion is intended to limit the services that will be afforded GST-free status. Services outside the realms of ordinary, professional practice will be taxed. The imposition of GST on such services will perhaps better the standard of health services; services without peer support are more than likely of dubious efficacy. However, the medical profession as a whole, with its emphasis on scientific evidence of efficacy, is much less likely to accept the less stringently tested practices of another field, such as herbal medicine. It will be much easier for services generally accepted in one discipline to meet the requirements for general acceptance in another discipline where the two disciplines have similar standards as to proof of validity.

A service will be afforded differential tax treatment when supplied by a practitioner of a discipline not included under s 38-10. Beauty therapy provides such an example. If a GP renders a full-face chemical peel for acne scarring, this will be GST-free under s 38-7(1) because there is a Medicare

91 Above n 82.

92 Section 38-7 of the GST Act.

93 Section 38-10 of the GST Act.

benefit payable in the circumstances.[94] Even if no Medicare benefit were payable, such a service would be GST-free. Chemical peeling is generally accepted in the medical profession as necessary for the appropriate treatment of acne scarring. However, if the patient, exercising her freedom of choice, decided to visit a beauty therapist for precisely the same service, she would be charged GST. Beauty therapy is not covered by the health exclusion.

The repercussions from linking tax status to supplier

The differential tax treatment of services will harm service providers and consumers. The legislation discriminates against both groups. Some practitioners will have the administrative and compliance burden of accounting for GST when they provide a particular service; other suppliers providing the same service for the same ailment will not. The unwitting consumer may be charged for a service provided; the canny consumer may receive the service GST-free. For low-income earners, the difference between the GST-inclusive and GST-free price may be significant.

The degree to which medical practitioners charge private fees for services provided (during a consultation) may limit the detriment of differential tax treatment. Much will depend on how medical practitioners choose to describe their treatment. For example, iridology is not accepted within the medical profession as appropriate treatment. Naturopaths accept it. If a doctor charges for an iridology service (performed during a ten-minute appointment), GST will apply. If the practitioner charges for the ten-minute level B consultation only, a Medicare benefit is payable; GST does not apply. The medical profession's approach to what is "generally accepted" will also determine the number of services with fluctuating tax status performed by both medical and health service providers. What is generally accepted in the profession will be influenced by community demand. The use of alternative therapies in the 1990s has resulted in increasing acceptance of complementary healthcare in traditional medical fields.[95]

Cosmetic procedures taxed inconsistently

Anomalies in the treatment of cosmetic services are also of concern. As examined earlier, medical services rendered for cosmetic purposes are subject to GST.[96] However, dental services, (provided they are supplied by a registered dentist and fulfil the general acceptance test) are GST-free, irrespective of the fact they may have been rendered for a beauty-enhancing

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94 Medicare Benefits Schedule Item Nos 45019, 45020.

95 McFie, "Complementary Medicine: the Way of the Future?" (14-17 July 2000) *AMAQ News*.

96 Section 38-7(2)(b) of the GST Act.

purpose.[97] The canny consumer would have been well advised to have rhinoplasty pre-30 June 2000. Yet, she could safely have booked her teeth-whitening appointment for 1 July 2000. Why does the tax treatment of the services differ? Is cosmetic dentistry regarded more essential than cosmetic surgery? The Canadian GST legislation, which treats cosmetic medicine in the same way as Australia, subjects cosmetic dental services to GST.[98] It is submitted that Australia should act consistently in its treatment of cosmetic services and apply GST to cosmetic dentistry.

THE FUTURE

Analysis of the health services provisions suggests that the Senate Committee's description of them was correct: they are complex, confusing and contradictory.[99] Certainly, they are detrimental to both practitioners and patients. They are detrimental to practitioners, because of vague terminology, ill-defined (indefinable?) standards, and the risk of contravening the act when a service is not clearly GST-free or subject to tax. Patients are no better served. Though a broad range of services may qualify as GST-free, the Senate's insistence that complementary medicine qualifies for GST-free status causes considerable concerns. The incorporation of the competing (conflicting) objectives of patient protection and patient choice into the provisions results in the fluctuating GST status of services. The "general acceptance" requirement does not sit well with the expansion of the health services fields to include alternative healthcare.

The detriment to patients and practitioners caused by inconsistent treatment of services will only be ascertained over time. Despite the difficulties arising from application of the medical and health services provisions, it is unlikely this will lead to litigation. The British and Canadian experiences suggest this, though both countries' taxing statutes set out broader tax exemptions over a more limited range of services.[100] In Canada, the UK and the EU generally, the cases coming before the courts have been those in which medical practitioners have been rendering services far outside the limits of everyday practice.[101] In Australia, if litigation does occur, it may be to clarify the definition of surgery for "cosmetic purposes". For most health professionals,

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97 Section 38-10 of the GST Act.

98 Above n 55 at paras 10, 11, 12.

99 Above n 18 at 10.97.

100 Above n 2.

101 In Canada, the sole case considering the interpretation of the Excise Act's Health Care Services exemption – CAD *Ringrose Therapy Institute v R* [1995] GSTC 10 – involved a physician, permanently suspended from the provincial College of Physicians, providing psychological services for smoking cessation and treatment of obesity. In the UK, see eg, *d'Ambrumenil v Customs and Excise Commissioners* (1999) VAT decision 15977 (unreported).

it will be a case of working around the legislation to minimise the impact of GST on patients.