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Great Barrier Reef Marine Park Amendment Bill 2004

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 98 2003–04

Great Barrier Reef Marine Park Amendment Bill 2004

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2 March 2004

Contents

Purpose.	1
Background.	1
Main Provisions	3
Schedule 1	3
Concluding Comments.	6
Endnotes.	6

Great Barrier Reef Marine Park Amendment Bill 2004

Date Introduced: 18 February 2004

House: House of Representatives

Portfolio: Environment and Heritage

Commencement: Sections 1 to 3 commence on Royal Assent. The operative sections of the Act (Schedule 1) commence 28 days after Royal Assent.

Purpose

To amend the *Great Barrier Reef Marine Park Act 1975* (the Act) so as to clarify legal liability for, and collection of, the environment management charge payable under the Act. The policy objective is to ensure that no Goods and Service Tax (GST) is payable on the charge paid by tourists visiting the Great Barrier Reef.

Background

The Great Barrier Reef Marine Park (the Park) environment management charge (EMC) was introduced through *Great Barrier Reef Marine Park Amendment Bill 1993* and two associated Acts, the *Great Barrier Reef Marine Park (Environmental Management Charge – General) Act 1993* and the *Great Barrier Reef Marine Park (Environmental Management Charge – Excise) Act 1993*. The EMC was intended to be an additional source for funding for the management of the Park as the substantial increase in tourism in the Park from the 1980s had meant management pressures were outstripping the funds available from Government sources for such purposes. On introduction, the EMC was expected to raise about \$1 million a year. It raised \$6.6 million during the 2003 financial year.

Currently under the Act and associated regulations¹, legal liability to pay the EMC rests with the holder(s) of a ‘chargeable permission’. Such permissions include those held by tourism operators, boat charterers, operators of land-based sewerage outfalls, pearl or clam farmers and boat mooring operators. The regulations also set down what is called a ‘standard tourism program charge’, which is essentially the EMC payable by a tourism operator per day² for every tourist participating in their activities, but there are many other

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types of charges that fall within the definition of an EMC. The tourism operator (or other holder of a chargeable permission) must to pay a total EMC amount to the Great Barrier Reef Marine Park Authority (the Authority) on a quarterly basis.

In 2001, the Minister for Revenue and Assistant Treasurer, Helen Coonan, made a determination under the *A New Tax System (Goods and Services Tax) Act 1999*.³ This provided that the EMC amount paid to the Authority by the holder of a chargeable permission was not subject to the GST. However, it appears that this determination did not affect GST liability where the tour operator effectively 'passed on' the EMC amount to the tourist by including it as one component of the overall cost of the tourist's ticket – in this case the GST applies to that EMC component as it does to the other components to the ticket price. It appears that at least some tourist operators did not levy the GST on this component, resulting in tax liabilities being accrued by them.⁴ Following discussion of the issue in Estimates hearings in June 2003⁵, the following exchange took place in Parliament:

Senator McLucas - My question is to Senator Coonan, the Minister for Revenue and Assistant Treasurer. Does the minister recall her media release of 6 June 2003, or 11 days ago, in relation to the Howard government's broken promise made in June 2000 to marine tourism operators that it would not collect the GST on the environmental management charge, or reef tax? Didn't this media release state:

The Government has recently been advised that audit activity by the Australian Tax Office has revealed that there appears to be confusion or misunderstanding about whether the cost of the EMC should form part of the GST supply in tourism operators' ticket prices.

Can the minister now confirm that she had representations made to her on behalf of Adrenalin Dive from Townsville on 27 August and 10 September 2002, or some 10 months ago, in relation to the application of the GST on the reef tax? How then can the minister say that she was only recently advised of the problem, and what is the Minister for Revenue and Assistant Treasurer doing to assure marine park tourism operators that they will not have to pay this tax on a tax?

Senator Coonan - The EMC is not subject to GST when paid by the tourism operators. The government agreed that it would make a determination under division 81 of the GST act which exempts various Australian taxes, fees and charges from GST. The EMC is listed on the division 81 determination. This means that GST does not apply to the EMC when it is paid by the operators to the Great Barrier Reef Marine Park Authority. However, as I indicated in my press release of 6 June 2003:

The Government has recently been advised that audit activity by the Australian Tax Office has revealed that there appears to be confusion or misunderstanding about whether the cost of the EMC should form part of the GST supply in tourism operators' ticket prices ...

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It would appear that different approaches may have been used by various operators in the industry and, considering that significant unpaid GST liabilities may have accrued, the government is seeking urgent meetings, as I said in my press release, with representatives of the industry and the ATO to determine the extent and indeed the impact of any confusion.

As I said in my press release, the government will work quickly with the industry to gain an appreciation of the extent of any problem and will look at what options may be available to determine an appropriate way forward. It is an example of the government listening to the concerns that are brought to it, not ignoring them but trying to gain an appreciation of where some confusion may have existed in the application of the law.

There has been a significant transition time from the GST but the government does understand that occasionally these matters may not be fully understood and may not be appreciated and that it is appropriate that the government consults with the industry so that these confusions can be cleared up and a determination made about an appropriate way forward.⁶

For some reason, the Authority's 2002-03 annual report does not acknowledge the problems discussed in the above Parliamentary exchange. The report merely comments that, in relation to the EMC:

...a sound compliance framework, which incorporates educational and client review elements, was introduced in 2000-01. It has been managed, adapted and improved to meet ongoing internal and external changes over the last three years. Staff within the EMC Unit are providing ongoing reliable advice and guidance to clients to ensure they are cognisant with their statutory obligations.⁷

The Bill provides that regulations can be made so as to explicitly specify that the tourist ('visitor' in the language of the Bill) is liable to pay the relevant EMC rather than the tourist operator.⁸ In these circumstances the payment of the EMC will be brought into the scope of the Minister's determination referred to above and thus GST will not be payable on it.

Main Provisions

Schedule 1

Item 3 replaces existing subsection 39B(1) with a new version. The new version allows for regulations to specify whether it is the holder of the chargeable permission or the visitor provided with a service by that holder who is legally liable for the payment of the relevant EMC. Presumably in the case of the standard tourism program charge, the regulations will make the visitor liable for the charge.

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Item 4 inserts **new sections 39DA** and **39DB** that set out to whom the EMC is payable. Importantly, **new section 39DB** provides where liability for the EMC is with the visitor (see **item 3**) the visitor must pay the charge to the holder of the chargeable permission who is collecting it on behalf of the Commonwealth.

Item 6 inserts a **new Division 2A (new section 39FA-FE)** into Part VA. It deals with what are termed ‘collected amounts’, which is simply the ‘visitor liable’ EMC collected by the holder of the chargeable permission under **new section 39DB**.

New subsection 39FA(1) follows on from **new section 39DB** in that where the holder of a chargeable permission provides a service to a visitor under that permission, and the visitor is liable to pay the EMC for that service, the holder *must* collect the relevant EMC from the visitor. Failure to do so is an offence and carries a penalty of up to 50 penalty units (\$5 500), or 250 penalty units for corporations. Irrespective of whether a holder is guilty of this offence, they must also pay the Authority amount that they should have collected (the penalty amount): **new subsection 39FA(2)**. If they are found guilty under of an offence under **new subsection 39FA(1)**, a court may order the holder to pay the penalty amount plus a late payment penalty: **new subsection 39FA(6)**.⁹ A late payment penalty is 20% per annum of the penalty amount as calculated from the due date: existing section 39G.

Any penalty amount / late payment penalty owing is in addition to any penalty imposed by the court for a **new subsection 39FA(1)** offence: **new subsections 39FA(5) and (7)**. If two or more persons jointly hold a chargeable permission under which a collected amount has not been collected, they are both liable for the penalty amount (ie they are jointly and severally liable).

A failure by a holder of a chargeable permission to pay the collected amount by its due date is an offence and carries a penalty of 10 penalty units for every day it is overdue, up to maximum of 200 units:¹⁰ **new subsections 39FB(1)-(2)**. Again, if they are found guilty under of an offence under **new subsection 39FB(1)**, a court may order the holder to pay the penalty amount plus a late payment penalty: **new subsection 39FB(3)**. Any penalty amount / late payment penalty owing is in addition to any penalty imposed by the court for a **new subsection 39FB(1)** offence: **new subsection 39FB(4)**. The due date for the purpose of **new subsection 39FB(1)** is to be ‘ascertained in accordance with regulations’: **new section 39FE**.

If two or more persons jointly hold a chargeable permission that gives rise to liability to pay a collected amount to the Authority, those persons are jointly and severally liable for the amount: **new section 39FC**.

Item 9 inserts **new subsections 39G(1A) and (1B)** to the effect that the 20% per annum late payment penalties apply both to collected amounts and penalty amounts.

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Item 10 makes a consequential amendment to existing section 39H. The change is necessary because the word ‘charge’ in existing section 39H is made redundant by the new sections 39DA and 39FD.

Item 11 adds references in existing section 39I to the various new sections inserted by the Bill. Essentially this to ensure the various monies (eg collected amounts) referred to the new sections must be paid into the Consolidated Revenue Fund when received by the Authority.

Existing subsection 38K(1) allows for regulations to prescribe how the EMC and late payment penalties may be paid. **Item 13** amends existing subsection 38K(1) so that these regulations can also cover the various monies (eg collected amounts) referred to in the new sections inserted by the Bill.

Item 14 inserts a new section 39KA to the effect that the *Financial Management and Accountability Act 1997* does not apply with respect to the EMC, collected amounts, penalty amounts and late payment penalties. Neither the Explanatory Memorandum nor the Minister’s second reading speech provide any reason for excluding these payments from the operation of this Act. Presumably it relates to the fact that, at least for collected amounts, the monies in question may be collected by the private sector at first instance before being passed on to the Commonwealth. By comparison, the focus of the *Financial Management and Accountability Act 1997* is the public sector, ie Commonwealth finances and businesses owned or operated by the Commonwealth.

Item 15-17 amends existing subsection 39P(1) to limit the potential requirement under regulations to keep and maintain records relating to liability for the EMC and collected amounts. This liability is restricted to the holder of a chargeable permission. Note that the effect of **item 17** is to provide that the records should cover both the holder’s liability to pay and/or collect the EMC and submit any collected amounts to the Authority. The records must also cover the EMC paid by visitors.

Item 18 provides that regulations may set out requirements relating to banking etc of collected amounts. It also allows that the regulations may enable the holder of a chargeable permission to receive any interest or other amounts derived from collected amounts.

Existing sections 39S-U cover entry and search powers of inspectors¹¹ for the purpose of ensuring compliance with EMC collection requirements. **Items 19-23** essentially allow these powers to be used to determine the liability of a holder of a chargeable permission to pay a collected amount.

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Concluding Comments

The Explanatory Memorandum states that about \$650 000 per annum of GST revenue will be foregone as a consequence of the changes introduced in the Bill.¹² However, neither the Explanatory Memorandum nor the Minister's second reading speech provide any information on the amount of the apparent tax liabilities incurred to date by (some) tourism operators through their failure to levy GST on the EMC component of visitor ticket prices.

The Bill also introduces substantial fines for tourism operators for the failure to collect, or pay on time, the visitor liable EMC. Presumably the Government will ensure that appropriate education programs will be put in place for tourism operators to ensure that they are fully aware of their collection responsibilities.

Endnotes

- 1 Technically, the EMC is imposed by sections 4 of the *Great Barrier Reef Marine Park (Environmental Management Charge – General) Act 1993* and the *Great Barrier Reef Marine Park (Environmental Management Charge – Excise) Act 1993*, but the question of who is actually legally responsible to pay the EMC is determined by section 39B of the Act.
- 2 Although the total standard tourism program charge is limited to three times the daily charge.
- 3 *A New Tax System (Goods and Services Tax) (Exempt Taxes, Fees and Charges) determination 2001 (No. 2)*.
- 4 'Tourism operators fear tax will ruin them', *Courier Mail*, 6 June 2003 p. 8.
- 5 Senate Economics Legislation Committee, *Estimates Hansard*, 3 June 2004 pp 331–336 See: <http://www.aph.gov.au/hansard/senate/commtee/S6475.pdf>.
- 6 House of Representatives, *Debates*, 17 June 2003 p. 11645.
- 7 Great Barrier Reef Marine Park Authority, *Annual Report 2002-03*, at p. 83: http://www.gbrmpa.gov.au/corp_site/info_services/publications/publications/annual_reports/AR2002-2003.pdf
- 8 Note that since it is the regulations that determine liability for the EMC, the statement in the Minister's second reading speech that 'these amendments will place the legal liability for payment of the charge on the visitor, and not the tour operator' is technically incorrect.
- 9 The Explanatory Memorandum to the Bill comments at p. 5 that 'This avoids the need to take separate legal action to recover the penalty amount and the late payment penalty applicable to that amount'.
- 10 Again the penalty for corporations is 5 times this amount.

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- 11 Inspectors are appointed under Part VI of the Act. They have wide enforcement powers, including search and seizure and the power to arrest without a warrant.
- 12 P. 1.

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