

## ARA SUBMISSION

# DRAFT DETERMINATION - GOODS AND SERVICES TAX: SUPPLIES OF COMBINATION FOOD

NOVEMBER 2023

The Australian Retailers Association (ARA) welcome the opportunity to express our views regarding the Draft Determination on the classification of combination foods under the Goods and Services Tax (GST) regime.

The ARA is Australia's oldest, largest and most diverse retail body, representing a \$420 billion sector that employs 1.4 million Australians. As Australia's peak retail body, we represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership.

Our members operate across all categories - from food to fashion, hairdressing to hardware, and everything in between. A number of our largest members would be directly impacted by any changes in this space.

The ARA appreciates that the Australian Taxation Office (ATO) is aiming to provide comprehensive guidance through the Draft Determination, with the intent of assisting businesses in achieving correct classifications.

However, we believe that certain aspects of the ATO interpretation of 'combination food' in the Draft Determination extend beyond the parameters set by the Chobani case and introduce complexities that may hinder rather than simplify the classification process.

One of our primary concerns pertains to the introduction of the concept of 'separately identifiable' defined as when a food can be individually perceived by ordinary visual inspection.

This subjective test, relying on the individual's interpretation and perception, does not provide a uniform basis for applying classification rules to food products. We propose the use of more commonly understood terminology such as 'separate and distinct from.'

In this context, food should be deemed 'separately identifiable' when it is physically separated, similar to the case in Chobani. We believe this interpretation will remove subjectivity and minimise the likelihood of differences in opinion and classification disputes, particularly when compared to the example of caramel-flavoured yogurt.

Regarding the ATO's announcement to remove the "hampers" commentary from the Food Industry Partnership, we would like to clarify that Chobani's implications do not extend to hampers. These products constitute mixed supplies rather than combination foods, and as such, there may be no necessity to alter or remove the existing guidance in this regard.

Furthermore, we appreciate the examples provided in the Draft Determination. However, we propose contrasting examples that illustrates what constitutes a combination food to enhance clarity for businesses.

Within the Draft Determination, examples form a significant portion, and we wish to draw your attention to two specific examples that raise concerns.

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| <p><b>Example 5:<br/>'sufficiently joined together' food</b></p> | <p>The ATO aims to classify separately packaged items, such as tuna and biscuits in separate sealed containers held together with a cardboard wrapping, as combination foods. This approach contradicts the previous classification of such products as mixed supplies.</p> <p>We find it challenging to understand how the outcome in the Chobani case supports a change in the GST treatment for these types of products, especially when contrasted with the Chobani product where yogurt and dry ingredients were packaged together in separate compartments under the same lid.</p> |
| <p><b>Example 6:<br/>Layered food</b></p>                        | <p>This test introduces a novel concept based on what appears to be a bright-line test.</p> <p>Specifically, if 10% of a food product consists of an otherwise taxable food product (for example, toasted nuts) then the entire product is deemed a taxable 'combination food,' regardless of whether the various foodstuffs are separated to some extent or combined within the same package.</p> <p>Based on member feedback that the commercial value of these inputs is relatively and absolutely low, this would overstate the tax to be paid on the combination foods.</p>         |

We request clarification on the legislative basis for this 10% test, beyond the reference to Chobani where "dry inclusions" constituted 10% of the product. We believe that this interpretation complicates the definition of an "ingredient" within a product and appears to deviate from the Chobani case's outcome.

Practically, applying this concept at a retail level may prove unworkable, as suppliers often lack sufficient information to determine the percentage representation of the supposed taxable component. Consequently, we are concerned that the ATO's position could increase the risk of potential misclassification of food products, rather than facilitating clear and simple determination of combination foods.

Furthermore, the implication of the 10% test, will lead to inflationary outcomes where a whole product is taxed GST, for an otherwise 10% taxable component. We suggest that such inflationary application of the tax system are particularly inappropriate at this time.

Finally, the ARA seeks reassurance that should the draft determination be adopted, a retrospective application of the determination will not be applied. This issue is of great concern to our members and in some cases may challenge their current financial viability.

In conclusion, the ARA and its members acknowledge the ATO's efforts to provide guidance on the classification of combination foods. However, we respectfully request a reconsideration of certain aspects of the Draft Determination to ensure that it offers clear, workable and consistent guidance to businesses.

Thank you again for the opportunity to provide a submission on this draft determination. Any queries in relation to this submission can be directed to our policy team at [policy@retail.org.au](mailto:policy@retail.org.au).