ARA SUBMISSION

GSTD 2024/D2: GOODS AND SERVICES TAX: SUPPLIES OF SUNSCREEN

SEPTEMBER 2024

The Australian Retailers Association (ARA) welcomes the opportunity to provide comments to the Australian Taxation Office (ATO) in relation to the draft determination *GSTD 2024/D2: Goods and services tax: supplies of Sunscreen.*

The ARA is the oldest, largest and most diverse national retail body, representing a $420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. 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 in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between.

In principle, the ARA welcomes the proposal and guidance provided by the ATO in the GSTD 2024/D2 but we do have concerns about inconsistencies within the principles proposed in this draft determination.

As a key example, paragraph 24 of GSTD 2024/D2 notes *"The marketing for use as sunscreen must be the principally marketed use – that is, the product must be marketed 'mainly, chiefly, predominantly or preponderantly'[16] for use as sunscreen. Where the marketing of a product includes more than one use, the use of the product as sunscreen must be the main, chief or predominant marketed use.".*

However, the last column in Table 1 notes that common terms and features such as '2-in1' or '3-in-1', 'multiuse' and 'BB cream' are strong indicators that the product is not marketed principally for use as sunscreen.

It is submitted that the terms and features referenced in the last column should not automatically indicate a 'strong indication' that the product is not marketed principally for use as sunscreen. It is, however. acknowledged that such matters should be considered as part of the overall assessment of whether the product is 'mainly, chiefly or predominantly' marketed principally for use as sunscreen.

This is consistent with the sector's long held position that the legislation under consideration, particularly the 'marketed principally' test, lacks clarity and is difficult to apply on a consistent basis. There is no dispute that business has a responsibility to comply with their obligations in respect of GST but inconsistencies, lack of clarity and the current version of the draft determination presents an unreasonable compliance risk for retailers as essentially collectors of tax on behalf of the Commonwealth.

Our members also have concerns that there is too much reliance in this draft determination on the 'marketed principally' factor. The lack of more prescriptive direction means that there could very well be two products almost identical in ingredients, but both marketed differently, causing one to be determined as not being GST-free, whilst the other is. In many cases, the main factor of difference may be simply the marketing. This discrepancy does not align with the objective of making health-related goods GST-free. This seems likely to produce an inconsistent approach.

Another aspect of the draft determination which raises concern for our members are the comments indicating that all suppliers in a supply chain are relevant in making an assessment under the 'marketed principally' test. This places an unreasonable burden on each and every supplier in the supply chain, whereby they must individually source and review the marketing materials of each other supplier in the chain. Further, it is implied that this onerous analysis must be performed on a regular and ongoing basis, as marketing by other suppliers is likely to change over time. It is also noted that this approach is likely to result in inconsistencies in the treatment of products by suppliers, as under the current drafting taxpayers will be required to make a subjective assessment of both which suppliers to consider (as not all suppliers can be reviewed due to resource constraints) and the weighting assigned to each of those suppliers' marketing materials (as there are likely to be differences between those suppliers).

The primary purpose of GST-free status for health goods is to ensure that essential health products are accessible and affordable. By focusing on how a product is marketed rather than its actual composition and intended use, and providing little guidance on how this assessment should be performed in practice, the determination may inadvertently create inconsistencies, unreasonable compliance costs for taxpayers, and unfair tax burdens on consumers.

In summary, the main concern the members of the ARA have is the Commissioner's views within the last column of Table 1. It is for this reason the ARA recommends this column be deleted which would also require paragraph 36 to be deleted.

An alternative, clearer and more objective way to determine whether a sunscreen should be GST-free would be to align it with the Therapeutic Goods Administration (TGA) requirements. TGA Listed sunscreens, which have an Australian Register of Therapeutic Goods (ARTG) number, are subject to rigorous scrutiny regarding their safety, efficacy, and quality. In contrast, cosmetic sunscreens that do not have an ARTG number are not held to the same standards. Therefore, simply stating that sunscreens with ARTG numbers can be GST-free would align the GST treatment with the TGA's established standards.

Additionally, practical guidance or a safe harbor could be provided to increase consistency in the treatment of the products between suppliers. For example:

- A register for sunscreen products that prescribes whether the ATO considers each product is 'principally marketed as a sunscreen' (similar to the existing food and beverage search tool).
- A safe harbor whereby retailers may rely on the assessment made by the manufacturer or wholesaler for GST purposes.
- Limiting the test to only require a supplier to consider the packaging/labelling of the product and the supplier's own marketing materials.

Our members have also once again raised a major area of concern with the ATO's Date of Effect as per paragraph 72 which applies before and after the date of the final Determination. This seems unjust as the ATO states at the beginning of the Determination this publication represents the Commissioners preliminary view. If it is only now the Commissioners preliminary view how can there be a retrospectivity once finalised?

We look forward to working further with the ATO to assist with a more detailed approach to these issues.

Thank you again for the opportunity to provide a submission on these matters. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.