

ARA SUBMISSION

GSTD 2024/D3: GOODS AND SERVICES TAX: SUPPLIES OF FOOD OF A KIND MARKETED AS A PREPARED MEAL

NOVEMBER 2024

The Australian Retailers Association (ARA) welcomes the opportunity to respond to the Australian Taxation Office (ATO) in relation to the draft determination *GSTD 2024/D3: Goods and services tax: supplies of food of a kind marketed as a prepared meal*.

The ARA is the oldest, largest and most diverse national retail body, representing a \$430 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.

The ATO's draft GST determination, GSTD 2024/D3, has been designed to clarify the GST treatment for food marketed as "prepared meals." Based on the Federal Court's *Simplot* decision, it sets criteria to define what constitute prepared meals, including factors like quantity, composition, and presentation. Prepared meals typically feature multiple ingredients in balanced proportions, limited consumer preparation, and are designed as a complete meal.

The ARA acknowledges the intent of the GSTD 2024/D3 guidance in response to *Simplot v. Commissioner of Taxation* but has several concerns around clarity, consistency, and practicality within this draft determination. Retailers face ongoing compliance challenges due to ambiguity and the subjective nature of the approach to classifying products, leading to heightened compliance burdens and risks, as reflected in our members' concerns.

Concerns on Legislative Ambiguity and Compliance Risk

The *Simplot* decision underscored issues surrounding the current legislative framework, highlighting "arbitrary exemptions" that inhibit cohesive tax outcomes. This resonates with the sector's ongoing concerns: GST legislation remains vague, introducing compliance risks for retailers. While the ARA agrees with the need for compliance, the lack of clear and consistent guidelines, especially on "prepared meals," places an unfair burden on retailers.

The ARA recommends that the ATO urge Treasury to enhance regulatory clarity. A clearer legislative framework would reduce interpretive ambiguity, benefiting both the ATO and the retail sector by simplifying the classification of prepared meals.

Prospective Application Only

The ARA has consistently advocated for any determination to be prospective only in its application. Retrospective application is not appropriate, and the determination should only have prospective application given the subjective nature of determining which products GST applies to coupled by a lack of previous specific guidance from the ATO.

In paragraph 103 of the draft, the ATO proposes applying GSTD 2024/D3 both before and after its issuance date, posing potential GST exposure for past supplies. The ARA strongly advocates for a **prospective-only application** of this determination, at least in respect of compliance activities by the ATO, citing concerns over financial stability for retailers in an uncertain economic climate.

Pursuant to paragraph 3 of **PS LA 2011/27**, the ATO is expected to weigh previous publications that might convey a different interpretation, such as Issue 5 and the Detailed Food List. Retrospective application would be an unfair and undue financial burden for retailers, especially given the lack of specific guidance on GST classifications of prepared foods before this draft determination.

Marketing test

Paragraph 16 of the draft determination overstates or places an undue restriction on the nature of the marketing to be considered. Paragraph 105 of the *Simplot* decision is referenced but that paragraph is not consistent with the statement in paragraph 16 of the draft determination. Subsequent paragraphs of the decision outline the Court's approach and indicate a broader approach to what marketing is relevant. This should be addressed in the final determination.

Subjectivity in Classification: Quantity, Composition, and Presentation

The reliance on subjective evaluation of a food item's quantity, composition, and presentation—remains a complex compliance issue. Members have noted that the current process requires them to assess whether an item aligns with a “class or genus” of products marketed as prepared meals, which demands a subjective comparison across similar products beyond those produced or sold by that member.

To reduce this interpretive burden, the ARA recommends simplifying these legislative provisions as well as the approach to guidance from the ATO, creating a more straightforward process for retailers to follow.

Need for Clarity on “Snack” vs. “Meal” Classifications

The determination's treatment of snacks and light meals is also a significant concern. Consumers and retailers often perceive these categories differently, and the ARA believes the ATO should clarify its stance on this issue. For example, if certain snacks are considered taxable as “prepared meals,” this distinction should be explicitly outlined in the determination to ensure consistent classification across the sector.

New entries to the Detailed Food List

We appreciate the ATO's commitment to providing clarity to taxpayers by updating the Detailed Food List, where appropriate. However, we urge the ATO to reconsider the new ‘Taxable’ entry for a Greek Salad. Applying the test of ‘common sense and common experience’, we consider that a Greek salad is traditionally viewed by people generally as a GST-free meal component. We believe there is a clear distinction between a traditional meal component salad (i.e. a Greek salad) versus a more substantial Caesar salad.

Caution Against Overreach

Finally, the ARA urges the ATO to apply GSTD 2024/D3 narrowly, in line with the products directly referenced in the Simplot case. Expanding the determination's scope could result in additional compliance burdens for products not specifically considered in the decision.

The ARA looks forward to continuing to work with the ATO to develop a determination that ensures compliance while supporting operational feasibility for the retail sector.

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.