

ARA SUBMISSION

SIMPLOT AUSTRALIA PTY LIMITED V COMMISSIONER OF TAXATION DECISION IMPACT STATEMENT

DECEMBER 2023

The Australian Retailers Association (ARA) welcomes the opportunity to provide comments with respect to *Simplot Australia Pty Ltd v Commissioner of Taxation*¹ and the Australian Taxation Office's Decision Impact Statement in response to this case.

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. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects, and unifies our independent, national, and international retail community.

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.

EXECUTIVE SUMMARY

The ARA welcomes the ATO's Decision Impact Statement (DIS) in response to the *Simplot Australia* case. We appreciate the ATO's timely and comprehensive DIS, and the intention to assist businesses in achieving correct classifications.

The *Simplot Australia* case concerned the GST classification of certain frozen food products supplied or imported by Simplot Australia Pty Ltd. The products contained vegetables with spices or seasonings, and some included grains. Some products were labelled as 'sides', while others provided serving suggestions.

The Commissioner issued assessments on the basis that the supply or importation of the products were subject to GST because they were 'food of a kind marketed as a prepared meal.' Simplot Australia objected to the assessments, the Commissioner disallowed the objections and Simplot Australia appealed to the Federal Court.

The statutory question considered in the case was whether the product was 'a member of a class of foods that are marketed as prepared meals.' The Court found that while the actual marketing of the product may be of some relevance, it is not determinative. What is required is consideration of the marketing generally of products of the same kind as the product in question by other sellers.

The Court noted that there is no necessary dichotomy between a meal component or side dish and a meal. The legislation draws no distinction between the two. Food can be of a kind marketed as a prepared meal despite it being a meal component. The Court found that the attributes of a 'prepared meal' are to be discerned from common experience, and include quantity, composition, and presentation.

¹ *Simplot Australia Pty Ltd v Commissioner of Taxation* [2023] FCA 1115

The Court found that foods of a kind marketed as a prepared meal refers to ‘foods of a sufficient quantity, mix and seasonings as to be regarded by the ordinary person as being of a kind that are marketed as a prepared meal.’²

The decision confirmed the Commissioner’s classification.

CONSULTATION FEEDBACK

Based on the advice received through our consultations, our members and stakeholders welcome the DIS and the approach taken by the ATO. We understand the ATO has adopted the view that the decision does not change how it interprets and applies GST law. Our understanding is that past principles and rulings will not be disturbed, unless there is a product that is similar in nature to those specifically identified in this case. We welcome the approach of not disturbing longstanding positions taken by the ATO and taxpayers, and we would like to see more of this approach in the ATO’s future interactions with the retail industry.

We note the ATO has provided some guidance with respect to products that will not be affected by the decision, however in our view the ATO has the potential to broaden the type of product that can be classified as taxable because it must now be determined whether a product falls within a class or genus of a food marketed generally as having the attributes of a prepared meal, instead of considering whether the product itself is a prepared meal. We note the *Simplot Australia* case does not provide enough clarity regarding the criteria of marketed advertisements and we therefore seek further guidance from the ATO with respect to ‘food of a kind marketed as a prepared meal.’

We note the ATO is encouraging taxpayers to seek ATO advice while further public guidance is developed. We look forward to the preparation of further public advice regarding the implications of the decision. Furthermore, we would appreciate the opportunity to review future ATO draft public guidance materials and provide feedback to ensure they are appropriate for the retail industry.

Our members would also appreciate further guidance regarding retrospective charges. We note decisions will be made on a case-by-case basis with each individual product, and each taxpayer will be required to separately negotiate with the ATO, however we are raising this is an area of concern to our members because retrospective charges may challenge their financial viability.

CONCLUSION

In conclusion, the ARA welcomes the ATO’s DIS in response to the *Simplot Australia* case. We appreciate the ATO’s approach and efforts to provide guidance. We seek further clarity regarding the criteria for food of a kind marketed as a prepared meal. We look forward to the preparation of further guidance materials regarding implications of the decision, and we seek the opportunity to review drafts and provide feedback to the ATO to ensure the guidance materials are appropriate for the retail industry.

Thank you again for the opportunity to provide comments with respect to the *Simplot Australia* case and the guidance provided by the ATO’s DIS. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.

² At [125].