

**THE TAX INSTITUTE**

SESSION 13:

**Medicine, Food and Beverages  
The Crooked Line in the Sand Between  
GST-free and 10%**

Presenter:

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# GST Design and History

GST was introduced as a 'broad based tax on consumption in Australia' yet:

- No presumption of consumption for there to be a supply
- Liability does not arise upon any act of consumption
- Liability does not arise for consumers
- Liability does not arise for all consumption
- A key feature is that both local and non-resident businesses gain relief from GST (through registration and GST input tax credits: \$77 billion in FY21)

We got away with it and GST is now well and truly here to stay. Businesses 'comply' with GST, and consumers 'bear the brunt of GST' (Hill J. 'the genius of the system')

# GST is 21 Years Old

How's GST going after 21 years?

There have been many court challenges, legislative tweaks and corrections, anti-avoidance mitigation, and global leadership in raising tax beyond our jurisdiction, but same rate & base

It's said by some that it's working very well (too well?): \$73 billion net collected in FY21, and said by some that it's not working well (at all?) and will slip further behind in future:

- Unanticipated shift to non-taxed consumption
- Not the promised 'growth' tax' (States/Territories want/need/demand > 100 cents in the \$)
- Tax on tax, distorts market, regressive for consumers, not competitively neutral, not contemporary, black market, and of course our Constitution, sovereign rights and morals!

# Is it Time (Now, Again or Always Was)

Is it now time to undertake a 'substantial renovation' of our GST?

Many have been saying ever since 2000 that both rate and base should be reconsidered

Numerous and continuing commentary by some like:

- Arms, legs, heads of numerous Australian governments and agencies
- Australian commentators like Ken Henry and Bernard Salt
- Global organisations like OECD and IMF
- Various groups holding themselves out as 'think tanks', economists, trade advisors
- Industry, professional, market sector, academic, institutional representatives, media
- Don't forget psychics, fortune tellers, social media and 'those who know everything'

# But ...

While it's consistently said that we do need tax reform, including a large GST component:

Let's wait

Politics

The Other Guy

Self interest

Populism

MMT

So when?

There would have to be a necessary and multi-year transition (the first step is the hardest)

*“Trust me- it really is going to happen” (as soon as the next lot of elected officials decide they no longer want to have a job in politics)*

It will likely take a massive political landslide or a devastating disaster (> GFC > Covid)

# What is Not My Message?

I would never say things like so many of the so-called 'experts out there' do:

- We should tax everything (like infant cancer treatment, FBT and other taxes, home mortgage interest, government school 'costs', and medicare services; well, I don't mean EVERYthing)
- We should make it 5% so you can just divide the price by 20 (it would actually be 21)
- Just make 'rich people' pay GST, or make the rate lower for 'poor people'
- Make mine GST-free and their's taxable
- If I was writing the law ...

# What is My Message?

There are many corrections, rectifications, improvements that could and should be made to GST in context of our overall interdependent and intertwined economy and society, locally and globally, fiscally and morally.

For today, I'm prepared to call out and identify just the 2 following priorities for change, and while this is a micro focus, my view is that it must be part of a macro reform:

- Food & Beverages (s 38-2 to s 38-6)
- Consumer Health Products (s 38-45)

Best Ever Attempt at Strategic Tax (BEAST sounds more bold and determined than ANTS)

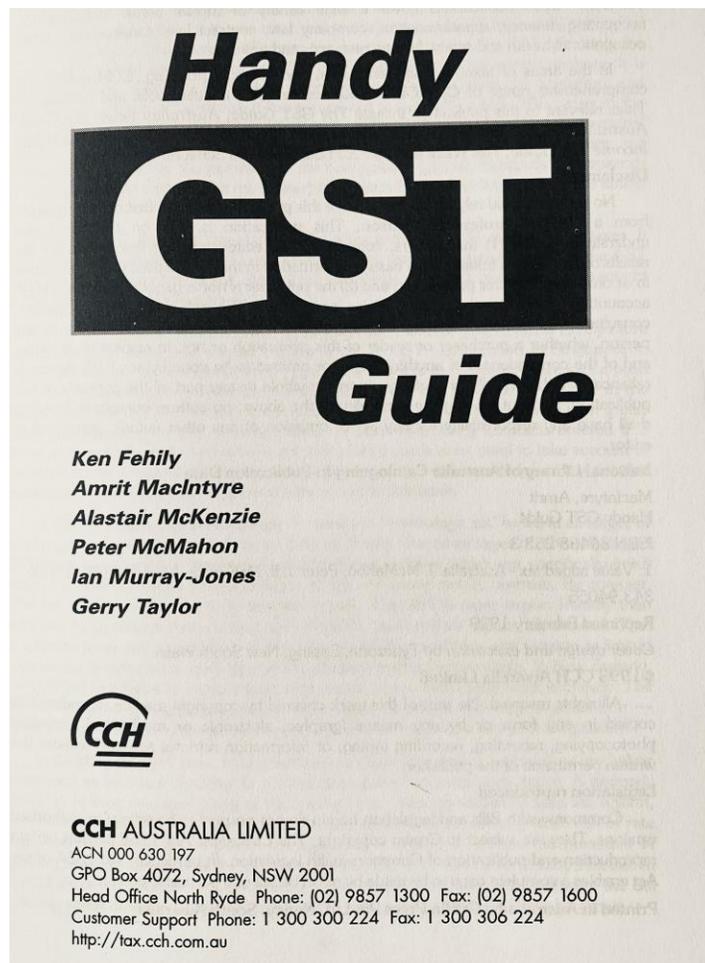
# Crooked Lines in the Sand

WARNING TO FUTURE TAX REFORMERS  
BEWARE DRAWING LINES IN THE SAND

***DON'T DO IT***

**BUT...**

# F&B Exemption: Not to be Seen in 1998



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## GST-FREE SUPPLIES

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By Ken Fehily and Gerry Taylor, Arthur Andersen

What supplies are GST-free? .....	¶11-000
Health .....	¶11-010
Education .....	¶11-020
Childcare .....	¶11-030
Exports .....	¶11-040
Religious services .....	¶11-050
Charities .....	¶11-060
Water and sewerage .....	¶11-070
Supplies of going concerns .....	¶11-080
International transport and related matters .....	¶11-090
Precious metals .....	¶11-100
Supplies through inwards duty-free shops .....	¶11-110
Grants of freehold and similar interest by government .....	¶11-120
Subdivided farmland .....	¶11-130
Cars for use by disabled people .....	¶11-140

¶11-000 What supplies are GST-free?

Although GST is intended to be a broad-based indirect tax, it does not cover every single good, service or thing consumed in Australia. The Bill specifically identifies and categorises certain supplies as GST-free or input taxed (¶12-000). GST is not payable in relation to GST-free supplies as they are not taxable supplies. A supply cannot be GST-free unless it is specifically provided for in the legislation.

Even though GST is not payable on GST-free supplies, suppliers will be entitled to an input tax credit for creditable acquisitions relating to those supplies (¶15-030). This is contrasted with input tax supplies where the supplier is not entitled to an

¶11-000

# “The Cake” Keeps Giving After 30 years

**Willesee:** "If I buy a birthday cake from a cake shop and GST is in place, do I pay more or less for that birthday cake?"

**Hewson:** "...If it is a cake shop, a cake from a cake shop that has sales tax, and it's decorated and has candles as you say, that attracts sales tax, then of course we scrap the sales tax, before the GST is..."

**Willesee:** "OK — it's just an example. If the answer to a birthday cake is so complex — you do have a problem with the overall GST?"

# Words in the GST Act Are Easy

interpretation NOW!

Episode 66

Circle of Meaning

Acts Interpretations Act

## Text/Context/Purpose

*interpretation NOW!*  
Episode 66 – Circle of Meaning – 30 November 2020

  
Australian Government  
Australian Taxation Office



Interpretation involves a process of working out what legislation means. It's not intuition, it's not revelation, and it's not working back from some desirable outcome. The basic process under our 'modern approach' is directed by the High Court<sup>1</sup>. Start with the text, consider context up-front in the 'widest sense'<sup>2</sup>, choose between open meanings firstly by reference to purpose, and finish by returning to the text – **text > context > purpose > text**. This *Circle of Meaning* may be no guarantee of perfect answers. What it provides, however, is a practical framework within which to perform the task, and some assurance that the right things are considered in the right order and in the right way.

start  finish 

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graph TD; start((start)) --> text((text)); text --> finish((finish)); context((context)) --> purpose((purpose)); purpose --> text;
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# Words in the GST Act Are Easy



# Sales Tax Transition to GST

Classifications under the Sales Tax (Exemption and Classifications) Act (1930 to 2000) were inconsistent, out of date (after government policy and lobbying for over 70 years) and getting impossible to administer. It was to be fixed/corrected/updated by new GST, but:

- Many of the Sales Tax classifications problems were simply carried forward into GST
- The “Lines in the Sand” became highly politicised by government, political parties, industry, the public and the experts
- GST-free status on only some foods was forced on government and was rushed
- Highly emotive
- Highly impactful on lower income citizens

# Food & Beverages

**Food (GST-free, but Taxable by exception)**

**Beverages (Taxable, but GST-free by exception)**

# Words and Phrases in 38-2 to 38-6

“for consumption”

“on the premises”

“of a kind specified”

“an ingredient for”

”interpreted subject to”

“for culinary purposes”

”under cultivation”

”preparations”

“for human consumption”

“away from the premises”

“a combination of”

“requiring processing or treatment”

“not subject to any process or treatment”

“alteration of form, nature or condition”

“hot food”

“marketed as ingredients for”

# Words and Phrases in 38-2 to 38-6

“packaging ... necessary”

“prepared food”

“arrangements of food”

“similar foodstuffs”

“consisting principally of”

“marketed principally as”

“marketed in ready-to-drink form”

“at least 90% by volume”

“packaging ... normally supplied”

”similar ... food”

“food known as ...”

“any food similar to”

“marketed principally as a prepared meal”

“substitutes”

“to the extent of at least 95%”

“wholly”

# Eat or Swallow



## Water

How hard can it be to determine the GST classification a plain and simple 500ml bottle of non-carbonated water?

## Bottle of Water



“water” not defined in GST Act

s 9-5 supply of goods: taxable, but

s 38-285(1) water: GST-free, but

s 38-285(2)(3) water in a container with a capacity <100 litres (regardless of actual volume of water in the container): taxable, but since:

38-4(2) ‘beverage’ is defined to ‘include water’

38-4(1)(c) ‘food’ is defined to include ‘beverages’

38-4(1)(d) “food” is defined to include ‘ingredients for beverages’

38-2 food: GST-free, but

38-3(1)(d) beverages (or ingredients for beverages): taxable, but

Item 17, Schedule 2: Water; natural, non-carbonated and no additives: GST-free, but

38-3(1)(a)(b)

- Food for consumption on premises of supply: taxable
- Hot food away from premises of supply; taxable

38-3(2) and GST Regulation 38-3

- Water that would be taxable under 38-3(1)
- Sold in a vending machine
- For consumption in the premises where the vending machine is: GST-free

- GST-free but...
- Lockdown rules, where goods must be taken away and not consumed on site, meaning:
  - The place where the supply took place
  - Grounds surrounding a café, public house or outlet
  - The whole of enclosed spaces (football ground, garden, showground, amusement park); (taxable), but
  - But not any part of public thoroughfare (GST-free) unless designated for use by food outlet (taxable)
- ATO's GST Detailed Food Guideline
- Packaging
- Mixed supplies like hampers (the cheese and biscuit ATO ruling win a prize)

## Consumer Health Products

# 38-45 Consumer Health Products

38-7 to 38-60, Schedule 3, GST Regulations 38-7.01 and 38-5.01

Focusing on what I refer to as 'consumer health' products

- In particular, 38-45 and Schedule 3
  - specifically designed for people with an illness or disability, and
  - not used widely by people without an illness or disability, and
  - Schedule 3 comprehensive list

# 38-45 Consumer Health Products

## A New Tax System (Goods and Services Tax ) Bill 1998, Explanatory Memorandum

### 38-45 Medical Aids and Appliances

- The supply of certain medical appliances for use by people with medical conditions or disabilities, such as wheelchairs, crutches, artificial limbs and modifications to motor vehicles for the disabled, is GST-free.
- 5.27 Certain aids and appliances designed for people with an illness or disability which are not of a kind ordinarily used in the wider community are GST-free. The list of GST-free aids and appliances is at *Schedule 1. Subsection 38-45(1)*
- A supplier and recipient can agree that a supply of medical aids or appliances is treated as a taxable supply. *Subsection 38-45(2)* This option is available to ease administration for entities that make both taxable and GST-free supplies

# 38-45 Consumer Health Products

Many have a nature and character of ordinary consumer items that are not medical in nature at all, but are merely used by many people suffering from an illness or disability. That was intended.

- Item 22: Category- Contenance: Aid or Appliance- protection for beds (eg adult size mattress protectors but not cot size mattress protectors)
- Item 37: Category- Diabetes: Aid or Appliance- needles and syringes (eg virtually all medical style/quality needles, but need not be anything to do with diabetes)
- Item 47: Category- Hearing/Speech: Aid or Appliance- visual/tactile alerting devices (eg loud door bells for the hearing impaired and large telephone keypads for the sight impaired)

# 38-45 Consumer Health Products

- Item 58: Category Mobility Disability: Aid or Appliance: Motor vehicle modifications (only the modification)
- Item 62: Category Bedding for Disabilities: Aid or Appliance: (eg all electronically operated adjustable beds) (Refer recent Draft Determination GSTD 2021/D1)
- Item 82: Category- Positioning for Disabilities: Aid or Appliance- night-time positioning equipment modifications (eg therapeutic pillows- note that ordinary beds and mattresses are 'night-time positioning equipment', and therapeutic pillows, but not ordinary pillows, are modifications to them)
- Item 143: Category-Vision: Aid or Appliance- tactile or braille books, magazines or newspapers

# 38-45: Sick Care or Health Care

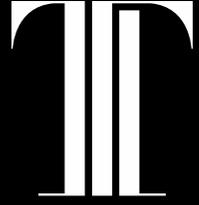
- “not widely used by people without an illness or disability”. Interpretation difficulties arise from use of a negative test (supplies *not widely used*), and use of an unusual term of *widely* (rather than mainly or principally). Not for preventative or mere medical conditions
- The supplies must be specified items listed in Schedule 3. Note that column 2 is not operative (that is as helpful as it is unhelpful)
- If the supply meets all three tests, the supplies are ‘unconditionally’ GST free (ie regardless of where/how/who makes the supplies and regardless of who uses them for any purpose).
- This is different to section 38-50 for drugs or medicinal preparations that gives GST free status only if supplied under a prescription.

# CALL TO ACTION: GST REFORM

- Examine where we are as an economy/society today
- Determine where we want to be by 2030, 2040 and 2050
- Appoint a non-partisan Federal Fiscal & Tax Reform Committee:
  - Remove the amendment limits of the GST Inter-Government Agreement
  - Fully resourced to deliver a Reform Plan within 3 years
  - Relieve political parties of the burden of tax design
  - Design a holistic 'system', that necessarily includes tax reform, and all levels of government
  - Impose the outcome on the government of the day

# DON'T TAKE CHANCES BY ROLLING THE DICE ON GST





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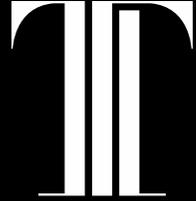
*Thank you*

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