

Dear Sir / Madam

Chartered Accountants Australia and New Zealand (CA ANZ) appreciates the opportunity to comment on the GST and feminine hygiene products [Consultation paper](#) released by Treasury. This consultation follows the unanimous decision of the States and Territories at the Council on Federal Financial Relations meeting to remove GST from the supply of feminine hygiene products from 1 January 2019.

In this brief submission, we provide our comments on two issues that arise out of the consultation paper:

1. the proposed means of giving effect to the GST-free treatment by way of Determination; and
2. the proposed definition of "feminine hygiene products" to be used to apply the GST-free treatment, and table.

## Key comments

### 1. Determination-making power and scope

The Consultation paper states that it is proposed to include the definition of "feminine hygiene products" in a Health Minister's Determination to make these products GST-free.

We support the use of a Determination as the proposed means to give effect to the GST-free treatment, in preference to enacting a new legislative provision under Division 38, because of the relative ease of amending the Determination if and when required in the future.

In relation to the legislative power to be used to make the Determination, the Consultation paper does not indicate which legislative power will be used, however we assume that the [existing Determination made under section 38-47 of the GST Act](#) – Other GST-free health goods may be used:

#### Section 38-47 - Other GST-free health goods

"(1) A [supply](#) is [GST-free](#) if it is a [supply](#) of [goods](#) of a kind that the \* [Health Minister](#), by determination in writing, declares to be [goods](#) the [supply](#) of which is [GST-free](#).

(2) However, a [supply](#) is not [GST-free](#) under [subsection](#) (1) if the supplier and the \* [recipient](#) have agreed that the [supply](#), or supplies of a kind that include that [supply](#), not be treated as [GST-free](#) supplies."

If this is the Determination to which the feminine hygiene products will be added, then for this Determination, we note that the products must be goods "required to be included in the Australian Register of Therapeutic Goods, or are goods in a class of goods required to be included in the Australian Register of Therapeutic Goods."

We understand that tampons are required to be on the Therapeutic Goods Register (the register), but sanitary pads are not. To come within the scope of the Determination therefore, panty liners and maternity pads would need to qualify as goods in a "class of goods" required to be included in the register.

While we discuss the definition in greater detail below, it seems to us that the drafters have struggled to define the meaning of "feminine hygiene products" clearly and succinctly for this

Determination. There is distinction without a difference between para (a) and (b). Meanwhile, a distinction that could have been drawn was not drawn, i.e. between feminine hygiene products used for internal protection and those for external protection. However, we wonder whether the drafters' dilemma is that they are trying not to create a separate class of goods, between those that are for internal protection, and those that are for external protection because if the definition makes that clear, then panty liners and pads would probably fall outside of the scope of the existing Health Determination, being in a different class of goods to tampons etc.

To overcome this problem, we suggest that the drafters of this new GST-free exemption not apply the Therapeutic Goods Register restriction to feminine hygiene products, and accordingly make the Determination operate more broadly to the extent it applies to feminine hygiene products. Alternatively, if that is not possible, a separate Determination under section 38-47 may be necessary specifically for feminine hygiene products.

We now provide our comments on the draft definition and table, as well as our suggested changes that we believe would improve it.

## 2. Definition and table

The following draft definition of "feminine hygiene products" is proposed to be included in a Health Minister's determination to make these products GST-free.

'Feminine hygiene products' refers to:

- (a) products that are specifically designed to absorb or collect menstrual or vaginal blood, such as tampons, pads and menstrual cups; and
- (b) panty liners and maternity pads specifically designed to absorb or collect menstrual or vaginal blood.

The Consultation paper also includes a table which provides an explanation of the types of products proposed to be included in the definition of "feminine hygiene products". The table will be included in explanatory material supporting the Determination.

Our comments on the definition, and the table are:

- (i) In our view, the drafting of the definition could be improved and simplified substantially as it is repetitive and inefficiently worded, in that the definitions used for the products in para (a) and para (b) are identical, other than the examples of the products themselves. This means that panty liners and maternity pads in para (b) could have been listed amongst the products in para (a) of the definition, and the definition collapsed into one paragraph, instead of two. Or if paras (a) and (b) are to be used, we would expect that there would be a material distinction between the products listed under each paragraph. Eg, a distinction between para (a) and para (b) goods may be as between products used for internal protection and those used for external protection.
- (ii) In terms of a preferred definition, we recommend that Treasury consider adopting the [former item 92\(1\) definition](#) of sanitary products (Schedule 1, Chapter 9 of *Sales Tax (Exemptions and Classifications) Act 1992*), as it proved to be simple and practical to apply. It also seems sufficiently broad and therefore capable of covering any new feminine hygiene products that are coming onto the market now and in the future. It

would also be broad enough to apply to products that are designed to absorb menstrual blood or vaginal blood post-birth.

We also note that the words “sanitary pads or tampons” must be considered sufficiently clear as they are currently used to exclude these products from ‘the continence pads’ GST-free item:

“Disposable/reusable continence pads, pants and nappies required for continence use (excluding nappies for babies, sanitary pads or tampons)”  
– see item 18, [Schedule 3 of the GST Act](#)

- (iii) We welcome the use of the table to be included in the explanatory materials to accompany the Determination as an aid to interpretation. However, we note that it is not an operative part of the law, and therefore the definition is the most important aspect to be drafted as clearly and pragmatically as possible, so that it can be interpreted in accordance with its ordinary meaning, without ambiguity.

In the table, we note one source of ambiguity for Treasury’s further consideration. The definition itself seems to make it clear that products for “menstrual or vaginal blood” are covered by the GST-free treatment. However, the comments next to examples in the table seem to limit the products to “menstrual or vaginal blood *during menstruation*”. For example, see the very last item and comments in the table. This means that the table may create uncertainty rather than greater clarity around what is intended to be covered.

We trust that these comments are of assistance to Treasury in finalising the proposed definition and in giving effect to it by way of Determination.