

EXPLANATORY STATEMENT

A New Tax System (Goods and Services Tax) Act 1999

A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022

The *A New Tax System (Goods and Services Tax) Act 1999* (“Act”) provides the basic rules, exemptions and special rules for the application of the goods and services tax (“GST”). The GST is a broad-based consumption tax that applies to the supply of goods and services with certain exceptions. Division 38 of the Act sets out the supplies that are GST-free. If a supply is GST-free, then no GST is payable on the supply but any entitlement of the supplier to an input tax credit for anything acquired or imported to make the supply is not affected (see section 9-5, subsection 9-30(1), Division 11 and Division 15 of the Act).

Paragraph 177-10(4)(b) of the Act provides that the Health Minister may, by legislative instrument, make a determination for the purposes of subsection 38-47(1) of the Act. Subsection 38-47(1) of the Act provides that 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. Under section 195-1 of the Act, the Health Minister means the Minister administering the *National Health Act 1953*. Consistent with the Administrative Arrangements Order in force at the time of making this determination, the *National Health Act 1953* is administered by the Minister for Health and Aged Care.

The *A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022* (“the Determination”) is made by the Minister for Health and Aged Care under paragraph 177-10(4)(b) of the Act for the purposes of declaring goods, the supply of which is GST-free. The goods declared under the Determination (“the declared goods”) are:

- (a) condoms;
- (b) barrier dams, femidoms and harness devices;
- (c) personal and surgical lubricants that are water-soluble and suitable for use with condoms;
- (d) preparations for use by humans that contain folic acid as the only active ingredient and have a recommended daily dose of 400 to 500 micrograms of folic acid;
- (e) sunscreen preparations for dermal application that are marketed principally for use as sunscreen and are SPF15 or higher; and
- (f) nicotine for use as an aid in withdrawal from tobacco smoking where the nicotine is administered in preparations for transdermal use or oromucosal use.

The effect of the Determination is to exempt the supply of these declared goods from the application of GST for the purposes of the Act.

The Determination repeals and replaces the *GST-free Supply (Health Goods) Determination 2011* (“the Former Determination”), which was due to sunset on 1 April 2022 under the sunset provisions of the *Legislation Act 2003*. The Determination replaces the Former Determination without substantive changes and continues to declare the same goods as GST-free health goods.

Consultation

No public consultation was undertaken as the Determination has been made to ensure that the existing GST-free treatment is retained. The Department of Health undertook consultation with Treasury and the Australian Taxation Office.

The Office of Best Practice Regulation advised Treasury that a regulation impact statement was not required for this proposal as there is no change to existing arrangements.

Details of the Determination are set out in **Attachment A**.

The Determination is compatible with human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in **Attachment B**.

The Determination is a disallowable legislative instrument for the purposes of the *Legislation Act 2003* and commenced on 31 March 2022.

Details of the *A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022*

Section 1 – Name

This section provides that the name of the instrument is the *A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022* (“the Determination”).

Section 2 – Commencement

This section provides that the Determination commences on 31 March 2022.

Section 3 – Authority

This section provides that the legislative authority for making the Determination is paragraph 177-10(4)(b) of the *A New Tax System (Goods and Services Tax) Act 1999* (“the Act”).

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. This instrument is made in accordance with that provision.

Section 4 – Definitions

This section provides the definitions of certain terms used in the Determination. The section notes that some terms have the meaning given in the Act, including ‘GST-free’ and ‘supply’. Other terms have been defined for the purposes of the Determination, including ‘Australian Register of Therapeutic Goods’.

Section 5 – GST-free health goods

This section provides that the goods of a kind mentioned in Schedule 1 to the Determination and that are required, or included in a class of goods required, to be included in the Australian Register of Therapeutic Goods, are declared to be goods the supply of which is GST-free for the purposes of subsection 38-47(1) of the Act. The effect of this section is to exempt the supply of these goods from the application of GST for the purposes of the Act.

Section 6 – Repeals

This section provides that each instrument that is specified in Schedule 2 to the Determination is repealed as set out in the applicable items in that Schedule.

Schedule 1 – GST-free health goods

This Schedule lists the kinds of health goods the supply of which is GST-free for the purposes of subsection 38-47(1) of the Act.

Schedule 2 – Repeals

This Schedule provides that the *GST-free Supply (Health Goods) Determination 2011* is repealed.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of legislative instrument

The *A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022* (“the instrument”) is made by the Minister for Health and Aged Care under paragraph 177-10(4)(b) of the Act for the purposes of declaring goods the supply of which is GST-free. The goods declared under this Determination (“the declared goods”) are:

- (a) condoms;
- (b) barrier dams, femidoms and harness devices;
- (c) personal and surgical lubricants that are water-soluble and suitable for use with condoms;
- (d) preparations for use by humans that contain folic acid as the only active ingredient and have a recommended daily dose of 400 to 500 micrograms of folic acid;
- (e) sunscreen preparations for dermal application that are marketed principally for use as sunscreen and are SPF15 or higher; and
- (f) nicotine for use as an aid in withdrawal from tobacco smoking where the nicotine is administered in preparations for transdermal use or oromucosal use.

The effect of the declaration under the instrument is to exempt the supply of these declared goods from the application of GST for the purposes of the Act.

The instrument repeals and replaces the *GST-free Supply (Health Goods) Determination 2011* (“the former instrument”), which is due to sunset on 1 April 2022 under the sunset provisions of the *Legislation Act 2003*. The instrument replaces the former instrument without substantive changes and continues to declare the same goods as GST-free health goods.

Human rights implications

The instrument engages the right to health in Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (“the ICESCR”). Article 12 of the ICESCR promotes the right of all individuals to enjoy the highest attainable standards of physical and mental health.

In *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000), the United Nations Committee on Economic, Social and Cultural Rights states that health is a ‘fundamental human right indispensable for the exercise of other human rights’, and that the right to health is not to be understood as the right to be healthy, but includes the right to a system of health protection, which provides equal opportunity for people to enjoy the highest attainable level of health.

The instrument takes positive steps to promote the right to health by removing the application of GST from the supply of the declared goods in Australia, and thereby increasing their affordability at the point of sale. The instrument supports the right to health by preserving more affordable access for consumers to these health goods and ensures that the cost barriers to these products that support individuals’ health needs can be lowered.

Conclusion

The instrument is compatible with human rights because it promotes the right to health in Article 12 of the ICESCR and otherwise does not raise any other human rights issues.