

## ***New Zealand's GST v Exclusions: A Case for the Exclusion of Basic Food and Menstrual Products from Goods and Services Tax in New Zealand***

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*The New Zealand Goods and Services Tax (GST) is a straightforward system with very few exclusions. Any exclusions pale in comparison to the multitude of exemptions and differing GST rates across the rest of the world. Since the introduction of New Zealand's GST regime, successive governments have strived to maintain its simplicity and broad base. However, the debate about whether this is the correct approach is ongoing. Many countries treat some subsets of food and menstrual products preferentially under their Value Added Tax (VAT) or GST regimes, aiming to reduce the disproportionate burden of VAT and GST on low-income households and women. These jurisdictions recognise food and menstrual products as essential items upon which tax should be imposed at a reduced rate, if at all. This article calls for New Zealand to do the same — to exclude basic food and menstrual products (products used for menstruation, vaginal discharge and bodily functions related to the vagina) from GST. It explains how these items should be excluded and why they should be excluded. It also explores arguments opposing the exclusion of these items and examines international examples from which New Zealand can learn. Ultimately, it concludes that New Zealand's GST legislation should be amended to exclude basic food and menstrual products on equity grounds.*

### **II INTRODUCTION**

Value Added Taxes (VAT) are an important source of revenue for governments. Today, over 150 countries have some form of VAT.<sup>1</sup> Under VAT, different supplies of goods and services can be excluded from taxation through exemption or zero-rating. The choice to exempt or zero-rate certain

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1 James Mirrlees and others *Tax by Design: The Mirrlees Review* (Oxford University Press, London, 2011) at 148.

goods will often be due to equity concerns or because there are some supplies on which it is difficult to impose VAT.<sup>2</sup>

Many countries treat some subsets of food and menstrual items preferentially under their VAT or GST regimes.<sup>3</sup> This preferential treatment usually aims to achieve distributional objectives (such as to ameliorate the regressive impact of GST) or other social objectives (such as to remove the tax from goods that are considered essential, or to increase the consumption of healthy products).<sup>4</sup> The United Kingdom, Canadian and Australian VAT systems all have broad provisions that zero-rate food, with some exceptions. Canada, Ireland and France's VAT systems contain provisions that zero-rate menstrual items, while the United Kingdom applies a reduced VAT rate to such items. By contrast, New Zealand's Goods and Services Tax Act 1985 gives no preferential treatment to any food or menstrual products.

The same distributional issues and equity concerns raised overseas are often also raised in New Zealand. It has been argued that the effect of New Zealand's current GST system is regressive on low income earners.<sup>5</sup> This leads to debate over whether food and other necessities should be excluded from GST to assist those with low incomes. Most recently, in 2018, the New Zealand Tax Working Group (Tax Working Group) considered arguments on whether further exemptions should be made from New Zealand's GST base.<sup>6</sup>

By the standards of the developed world, New Zealand's approach is eccentric and outrageous. This article argues that basic food items and menstrual products should be zero-rated in New Zealand because they are necessities. Although New Zealand's GST is generally considered a stable and efficient tax, it imposes a disproportionate burden on households with lower incomes. Further, the imposition of GST on menstrual products is discriminatory as it essentially taxes a product that is a biological necessity for most women.

Part II of the article considers the current legislative framework for taxing food and menstrual products, including the history of why these items are currently included within New Zealand's GST base. Part III proposes how these items should be excluded from New Zealand's GST base. Part IV examines the case for zero-rating these items and why levying GST on these products is not reasonable policy. Finally, Part V considers arguments against zero-rating these items. It also considers the practices in other jurisdictions of zero-rating food and menstrual products, from which New Zealand could learn. The article concludes that New Zealand's GST legislation should be amended to zero-rate basic food and menstrual products on equity grounds.

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2 At 176.

3 See generally OECD *Consumption Tax Trends 2018: VAT/GST and Excise Rates, Trends and Policy Issues* (OECD Publishing, Paris, 5 December 2018) at 68–78.

4 Inland Revenue Department and New Zealand Treasury *GST: Background Paper for Session 2 of the Tax Working Group* (February 2018) at 13.

5 Bill Rosenberg "New Zealand's tax system: weak at reducing inequality" *CTU Monthly Economic Bulletin* (New Zealand, September 2018) at 4–5; and Inland Revenue Department and New Zealand Treasury, above n 4, at [65]–[72].

6 Inland Revenue Department and New Zealand Treasury, above n 4, at 1.

## II THE CURRENT LEGISLATIVE BACKDROP

GST in New Zealand is a broad-based value-added tax on general consumption of goods and services, imposed under the Goods and Services Tax Act 1985 (GST Act). The tax is levied at a single rate, currently 15 per cent. The principal objective of GST is to raise tax revenue in a way that is both fair and efficient. New Zealand's current GST regime aims to achieve these goals by taxing the consumption of various goods and services equally and not distorting consumers' choices.<sup>7</sup>

GST was introduced as part of a package of measures, along with benefit increases and some tax reductions,<sup>8</sup> that intended to move from a narrow to a broad tax base.<sup>9</sup> This shift aimed to reduce "the economic distortions created by the tax system as well as the compliance and administration costs associated with ... narrow bases".<sup>10</sup>

### New Zealand's Broad Base

Internationally, New Zealand has one of the broadest GST bases. The Organisation for Economic Cooperation and Development (OECD) value added tax revenue ratio is a measure of the revenue-raising performance of a VAT or GST system. A ratio of one reflects a VAT system that applies a single rate to a comprehensive base of all expenditure on goods and services consumer, with perfect enforcement of the tax.<sup>11</sup> New Zealand's value added tax revenue ratio was 0.95 in 2016, far above the OECD average of 0.56.<sup>12</sup> A ratio of 0.95 indicates that New Zealand's GST is applied very broadly by international standards and that New Zealand has one of the broadest GST bases in the OECD.<sup>13</sup> The New Zealand GST is comprehensive, and, in contrast to earlier European VAT regimes, only a minimal number of concessions were made to allow exemption from GST or zero-rating. At present, GST captures almost everything except rental housing and financial transactions.<sup>14</sup>

In developing New Zealand's GST regime, members of the public argued against applying GST to goods such as food and literature, contending that it was wrong to increase the cost of essential items. However, the Government asserted that designing a system that accounted for such preferential choices was "costly and ineffective".<sup>15</sup> The Government was unconvinced that the regressive nature of the GST required carve-outs to

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7 Inland Revenue Department and New Zealand Treasury, above n 4, at 4.

8 Grant Pearson, Mark Keating and Craig Macalister *GST in New Zealand: 2018 Edition* (Thomson Reuters, Wellington, 2017) at 8.

9 Inland Revenue Department and New Zealand Treasury, above n 4, at 4.

10 At 4.

11 At 56–57.

12 OECD, above n 3, at 90–91.

13 At 90; and Inland Revenue Department and New Zealand Treasury, above n 4, at 8.

14 Inland Revenue Department and New Zealand Treasury, above n 4, at 1; and Goods and Services Tax Act 1985, s 14.

15 Pearson, Keating and Macalister, above n 8, at 9.

exclude necessities. Ultimately, it argued that a broad-based standard rate would reduce complexity costs.<sup>16</sup> This would allow the government to collect higher revenues that could be distributed through more targeted measures. Furthermore, it seems that bad experiences with zero-rating food in other countries, notably the United Kingdom, made policymakers keen to avoid the kind of classification problems that arose out of their zero-rating provisions.<sup>17</sup> Consequentially, a distinctive feature of New Zealand's GST regime is its simplicity.

New Zealand's GST is now often praised worldwide for its simplicity and comprehensive base.<sup>18</sup> Levying GST at a single rate, avoids the complexity that comes with having different tax rates for various goods and services.<sup>19</sup> The GST Act has remained substantially in the same form since its enactment. Amendments have generally been technical refinements, rather than structural or policy changes. The most significant changes have been increases in the rate of GST — which increased from 10 per cent to 12.5 per cent on 1 July 1989 and to 15 per cent on 1 October 2010<sup>20</sup>, and the extension of GST to catch imported services.<sup>21</sup>

The broad coverage of the New Zealand GST system makes it an economically efficient tax and allows the Government to collect a relatively large proportion of its tax revenue from GST levied at a relatively low rate. A universal rate with very few exemptions has significant administrative benefits for many, including the Inland Revenue Department (IRD), businesses that process GST returns and the public, who do not have to expend unnecessary time and energy calculating GST. There is less scope for avoidance; businesses do not try to squeeze their service or product into an excluded category to obtain a competitive price advantage. However, this initial choice to have such a broad base does not mean that certain goods should not be, and cannot be, excluded from the base in the future. Almost all VAT and GST systems overseas provide for exclusions from their consumption taxes to achieve distributional and social objectives. New Zealand should do the same by excluding basic food and menstrual products from GST.

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16 At 9.

17 Jeff Todd “Implementing GST — Information, Education, Co-ordination” in Richard Krever and David White (eds) *GST in Retrospect and Prospect* (Thomson Brookers, Wellington, 2007) 27 at 30.

18 Andrew Maples and Adrian Sawyer “The New Zealand GST and its Global Impact: 30 Years on” (2017) 23 NZJTL 9.

19 At 9.

20 At 9.

21 Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Act 2016, pt 3; and Goods and Services Tax Act 1985, s 5B. Section 5B was inserted on 1 January 2005, by s 145 of the Taxation (GST, Trans-Tasman Imputation and Miscellaneous Provisions) Act 2003.

### III PROPOSED PREFERENTIAL TREATMENT

#### Exemption Versus Zero-Rating: Which Form Should Preferential Treatment Take?

In New Zealand, a supply of goods or services can be excluded from GST in one of two ways. The supply can either be zero-rated or exempt.<sup>22</sup> A zero-rated supply is taxable at a rate of zero per cent.<sup>23</sup> Producers will receive input credits for tax paid on purchases used to produce zero-rated supplies, but the consumer pays no GST. On the other hand, an exempted supply is excluded entirely from GST; no input credits are available.<sup>24</sup>

Food and menstrual products should be excluded from New Zealand's GST by being zero-rated. Zero-rating would be better than an exemption at reducing cost and ameliorating the regressive impact of GST. Consumers would not have to pay GST on these items, and producers would pay less tax (therefore, it reasonably could be presumed that prices on these items would be lower). The costs borne by suppliers (for example, buying fruit and vegetables from the wholesaler, transporting costs and rent) would be subject to GST, and therefore could be offset to get an input credit. Zero-rating is also less complex to administer from the viewpoint of businesses. Moreover, it is preferable as suppliers would be in a favourable GST position. The GST on the supply is charged at zero per cent, but the supplier can obtain a refund for GST paid on relevant inputs.

This contrasts with an exempt supply. If basic food and menstrual products were merely exempt from GST, only consumers would be exempt. As with zero-rating, consumers would not have to pay GST for these items. However, the supplier would not receive credit for any GST paid in producing the goods. The supplier of exempt goods and services bears the burden of the GST. This means that the consumer will likely absorb the GST paid by a supplier or producer in the price they pay for the exempted good or service. Problems would also emerge with apportioning costs to non-GST or GST turnover. In 2010, the Māori Party introduced the Goods and Services Tax (Exemption of Health Food) Amendment Bill 2010 into Parliament to exempt healthy food from GST.<sup>25</sup> The suggestion to exempt healthy food, rather than zero-rate it, contributed to the failure of the Bill to pass its first reading. It was acknowledged during the reading that an exemption would not allow the desired tax relief effects to flow through to consumers.<sup>26</sup> It was also noted that in other jurisdictions, GST or VAT are not charged on certain items.<sup>27</sup> Canada,

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22 Wolters Kluwer *2019 New Zealand Master Tax Guide* (CCH New Zealand, Auckland, 2019) at 1,510.

23 At 1,545.

24 At 1,526–1,527.

25 Goods and Services Tax (Exemption of Healthy Food) Amendment Bill 2010 (140-1), cl 4.

26 (8 September 2010) 666 NZPD 13808.

27 At 13806.

the United Kingdom, Ireland and Australia all afford preferential treatment to food and do so by zero-rating.<sup>28</sup>

### Zero-Rating Food

Only basic groceries should be zero-rated. “Basic groceries” is taken to mean most foods intended to be prepared and consumed at home. The principle behind this exception is to ameliorate the regressive impact of GST by removing GST from necessities, which should not be taxed, thus reducing the price of these essential items. The rules to zero-rate basic groceries need to be consistent with this principle, and consistent with each other.

The legal provisions that zero-rate food in Australia follow a similar underlying principle. The provisions legislate that basic, unprepared foods should not be subject to GST while hot, prepared or cooked foods, and foods that are not considered essential (such as confectionary and biscuits) are taxable. Australia introduced GST in 2000 — one of the more recent introductions of a VAT regime among OECD countries.<sup>29</sup> It seems that the Australian legislators learned from the experiences of other jurisdictions in formulating Australia’s VAT regime. Provisions to exclude various food items from the GST base in Australia appear more coherent than comparable provisions in the United Kingdom and Canada.

There have been few Australian cases reported on the classification of food since the introduction of GST.<sup>30</sup> This limited amount of case law regarding the interpretation of the Australian provisions speaks to their success. By contrast, the courts in the United Kingdom have heard a large number of cases on the VAT status of various foods, beverages and food products. The VAT and Duties Tribunal alone has heard over 60 cases since May 2003.<sup>31</sup> The most recent case was decided just this year. It considered whether an allergen-free chocolate bar was “cooking chocolate” (which is zero-rated) or “confectionary” (which is not zero-rated).<sup>32</sup> The significantly smaller number of Australian cases could be evidence that the Australian legislation and Australian Taxation Office (ATO) ruling procedure have been more effective in achieving certainty and simplicity in the law. Therefore, the Australian provisions should be the model from which New Zealand should draw in reforming GST legislation.

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28 Excise Tax Act RSC 1985 c E-15, sch VI pt III; Value Added Tax Act 1994 (UK), sch 8 pt II group 1; Value-Added Tax Consolidation Act 2010 (Ireland), sch 2 pt 2; and A New Tax System (Goods and Services Tax) Act 1999 (Ch), ss 38-2–38-6.

29 Alain Charlet and Jeffrey Owens “An International Perspective on VAT” (2010) 59 Tax Notes International 943 at 945.

30 Most notably *P & N Beverages Australia Pty Ltd v Federal Commissioner of Taxation* [2007] NSWSC 338, (2007) 210 FLR 202; *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329, (2010) 76 ATR 19; *Cascade Brewery Co Pty Ltd v Commissioner of Taxation* [2006] FCA 821, (2006) 153 FCR 11; *JMB Beverages Pty Ltd v Commissioner of Taxation* [2009] FCA 668, (2009) 73 ATR 191; and *Re Food Supplier and Commissioner of Taxation* [2007] AATA 1550, (2007) 66 ATR 938.

31 Tribunals Judiciary “Decisions” <[financeandtax.decisions.tribunals.gov.uk](http://financeandtax.decisions.tribunals.gov.uk)>.

32 *Kinnerton Confectionery Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2018] UKFTT 382 (TC).

To maximise certainty, the legislation requires a clear definition of which foods are taxable and which are to be zero-rated. This article suggests that preferential treatment for food should begin with a general exclusion and that a “supply of food” should be taxed at a zero-rate of GST. To add further clarity to the exclusion, food should be defined. As Lockhart J relevantly stated in *Bristol-Myers Co Pty Ltd v Federal Commissioner of Taxation*, “‘food’ is what is eaten or taken into the body for nourishment, to maintain life and growth.”<sup>33</sup> In other words, “food” constitutes goods or substances intended for human consumption, and so any definition of food should reflect this.

The Australian legislation, A New Tax System (Goods and Services Tax) Act 1999 (Cth) (Australian GSTA) defines food to mean any (or a combination) of the following:<sup>34</sup>

- (a) food for human consumption (whether or not requiring processing or treatment);
- (b) ingredients for food for human consumption;
- (c) beverages for human consumption;
- (d) ingredients for beverages for human consumption;
- (e) goods to be mixed with or added to food for human consumption (including condiments, spices, seasonings, sweetening agents or flavourings); or
- (f) fats and oils marketed for culinary purposes.

The general principle behind this definition is that food for human consumption is zero-rated. New Zealand should adopt an identical definition in its GST regime. This definition clarifies that food constitutes those substances intended for humans to consume, and thereby any “food that is not consumable (rotten food) ... will not be classified as food”.<sup>35</sup>

GST should be applied where a food item is not for human consumption at a particular stage in the supply chain. Pursuant to the Australian GSTA, the following are not included in the definition of food:<sup>36</sup>

- (a) live animals (other than crustaceans and molluscs);
- (b) unprocessed cow’s milk;
- (c) untreated grains, cereal or sugar cane; or
- (d) plants under cultivation that can be consumed (without being subject to further process or treatment) as food for human consumption.

Each of these is not zero-rated until it has been processed or treated and is suitable for human consumption. An animal carcass, for example, will only

33 *Bristol-Myers Co Pty Ltd v Federal Commissioner of Taxation* (1990) 90 ATC 4553 at 4556.

34 Section 38-4(1).

35 Paul Kenny “The Goods and Services Tax and Food” (Research Paper, Flinders University of South Australia, 2000) at 6.

36 Section 38-4(1)(g)–38-4(1)(i).

be zero-rated once it has passed the relevant standards and authority regulations and deemed suitable for human consumption. Inedible parts of an animal are not food for human consumption and thus, are not subject to the zero-rate.

The general zero-rate of food should then be limited by exceptions that make certain supplies of food taxable. Prepared, hot or cooked foods, and foods and beverages that are not necessities, should not be zero-rated. Meanwhile, basic, unprepared foods remain zero-rated. The Australian GSTA does not include five types of supplies of food in the zero rate. These exceptions should also apply in New Zealand.

A supply of food should not be zero-rated if it is a supply of any of the following:

- (a) food for consumption on the premises from which it is supplied; or
- (b) hot food for consumption away from those premises;
- (c) a food, or food of a kind excluded by being listed in a schedule to the Act that excludes items from the zero-rate;
- (d) a beverage, other than a beverage included in the zero-rate by being listed in a schedule to the Act; or
- (e) food of a kind specified in regulations made for the purposes of this exclusion.

### *1 Food for Consumption on the Premises*

Any food provided for consumption on the premises from which it is supplied should be excluded from the zero-rate. Such a supply is neither essential nor a necessity and so should not be zero-rated. For clarity, “premises” should be defined. New Zealand could adopt a definition identical to that used in the Australian GSTA, which defines premises supplying food as “the place where the supply takes place; or the grounds surrounding a café or public house, or other outlet for ... supply; or the whole of any enclosed space.”<sup>37</sup> Premises in relation to a sale of food would therefore include:

- (a) the place where the sale of food takes place, for example: restaurants, supermarkets, cafes, hotels, clubs, boats, trains, venues for catered functions or food courts that have tables supplied for customers;
- (b) the grounds surrounding places where the sale of food takes place; and
- (c) venues associated with leisure sport or entertainment that have clear boundary limits. Examples of these types of venues would include rugby stadiums, gyms, ice-skating rinks,

swimming pools, tennis grounds, theatres, theme parks, aquariums, museums, zoos, cinemas and concert halls.

## 2 *Hot Food for Consumption Away from Those Premises*

This removes hot takeaway food from the zero-rate. Again, such a supply is neither essential nor a necessity, and so should not be zero-rated. Hot food here means food that has been heated to above room temperature — this could be made clear by an explanatory note, as was done in Australia.<sup>38</sup> However, food sold while it is still warm because it happens to be freshly baked, but is otherwise zero-rated, should remain zero-rated unless it falls under another category of taxable food. Freshly baked bread would be zero-rated. If hot and cold food is supplied together, such as a hot sausage wrapped in cold bread, it should be subject to the standard rate of GST.

## 3 *Excluded Food*

All foods and beverages that are not basic groceries should not be zero-rated. They can be excluded by listing them in schedules to the Act. This is similar to the Australian GSTA, which specifies that a supply of “food of a kind specified in the third column of the table in clause 1 of schedule 1” is not GST free.<sup>39</sup> Foods that should not be zero-rated, and so listed, include those under the following headings:<sup>40</sup>

- (a) prepared food;
- (b) savoury snacks;
- (c) bakery products;
- (d) ice cream food;
- (e) bakery goods;
- (f) food of a kind specified in the former categories; and
- (g) food of a kind specified in regulations made for the purposes of the exclusion.

### (a) Prepared Food

The Australian GSTA uses three conditions to determine whether a meal is a prepared meal. First, the meal “directly competes against takeaways and restaurants”; secondly, the meal “requires refrigeration or freezing for storage”; and thirdly, the meal is “marketed as a ‘prepared meal’”.<sup>41</sup> Examples of prepared meals are listed in the third column of Schedule One of Australian GSTA and include:<sup>42</sup>

38 A New Tax System (Goods and Services Tax) Bill 1998 (further supplementary explanatory memorandum) (Cth) at [1.28].

39 Section 38-3(1)(c).

40 See generally sch 1.

41 Australian Taxation Office *GST food guide: Rules to work out the goods and services tax (GST) status of food items you sell* (Australian Taxation Office, NAT 3338-07.2005, July 2005) at 5.

42 Schedule 1 cl 1 items 1–7.

- quiches;
- sandwiches (using any type of bread or roll);
- pizzas, pizza subs, pizza pockets and similar food;
- hamburgers, chicken burgers and similar food;
- hot dogs; and
- food marketed as a prepared meal.

#### (b) Savoury Snacks

This includes foods such as “potato crisps, ... seeds or nuts that have been processed or treated by a process like salting, spicing, smoking or roasting”.<sup>43</sup> Also under this heading are foods similar to these items regardless of their ingredient composition and food that consists principally of these foods.<sup>44</sup>

#### (c) Bakery Products

Several bakery products are listed in the Australian GSTA and are excluded from the zero-rate. These products include cakes, slices, muffins, pavlovas, meringues, doughnuts, croissants, tarts, scones, scrolls and bread with a sweet filling or coating.<sup>45</sup> Plain bread and rolls are not listed and are therefore zero-rated. The case should be the same for New Zealand as plain bread is basic food and should be included in the zero-rate.

#### (d) Ice Cream Foods and Biscuit Goods

Ice cream foods include items such as ice cream, ice blocks, frozen confectionery and frozen yoghurt. Biscuit goods include food that is, or consists principally of, biscuits, cookies, crackers, pretzels, cones or wafers.<sup>46</sup> Again, these foods are not basic food, so should be excluded from the zero-rate of GST.

### 4 *Included Beverages*

For simplicity, the reverse should be done for beverages and only those listed should be zero-rated. This is again what the Australian GSTA does. It prescribes a list of beverages that are GST-free.<sup>47</sup> In the Australian GSTA, this list covers milk products, including alternative milk (such as rice and soy, but not flavoured kinds of milk), teas and coffee, and non-alcoholic fruit and vegetable juices that contain more than 90 per cent fruit or vegetable content.<sup>48</sup> However, in keeping with the principle that only basic groceries should be zero-rated, in New Zealand this list could be limited to milk products only.

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43 Schedule 1 cl 1 items 15–16.

44 Schedule 1 cl 1 items 18–19.

45 Schedule 1 cl 1 items 20–27.

46 Schedule 1 cl 1 items 28–32.

47 Schedule 2.

48 Schedule 2 cl items 1–14.

Arguably, the other beverages are not essential nor necessary staple grocery items.

### 5 *Food and Beverages “of a Kind”*

The Australian GSTA makes use of the phrase “of a kind”, for example, “food of a kind specified in the third column of the table in clause 1 of Schedule 1” is not GST free.<sup>49</sup> This means that in the case of the Australian GSTA, sch 1 operates to include foods that may not be explicitly listed, but that are foods of a kind. If a particular food item is food of a kind listed in sch 1, then it will be subject to GST at 15 per cent. Likewise, if a beverage is a beverage “of a kind” listed in sch 2, then it will be zero-rated. The same phrase is used in the zero-rating provisions in New Zealand. This phrase allows the rules to be flexible enough to cover new food types or new technology. It also acts as guidance for the courts should there be a dispute over whether a particular food is zero-rated or not. *Lansell House Pty Ltd v Federal Commissioner of Taxation* provides an example of how the “food of a kind” notion works.<sup>50</sup> The Federal Court of Australia found that the “Mini Ciabatte” imported by the appellant were crackers rather than bread for the purpose of GST.<sup>51</sup> Bread is zero-rated, but crackers are not as they fall under “food of a kind specified” in sch 1: “food that is, or consists principally of, biscuits, cookies, crackers, pretzels, cones or wafers”.<sup>52</sup> The Mini Ciabatte are small, hard and crisp and, therefore, similar to a cracker.<sup>53</sup> The Court considered the ordinary meaning of the words of the legislation and noted that the use of the phrase “food of a kind specified” in the legislation widened the scope of foods excluded from the zero-rate.<sup>54</sup>

### 6 *Food of a Kind Specified in Regulations Made for the Purposes of the Exclusion*

Finally, a supply of food should not be zero-rated if it is a supply of food of a kind specified in regulations made for the purposes of the exclusion. This final carve-out is, again, based on a similar provision in the Australian GSTA that enables the Governor-General of Australia to alter the GST status of particular food and beverages by way of regulation.<sup>55</sup> In making such a regulation, the Governor-General can exclude specific food from the application of the zero-rating provisions contained in the Australian GSTA. This allows the zero-rating rules to be flexible and adapt.

Food packaging should also be zero-rated when the food itself is zero-rated. This is analogous to s 38-6 of the Australian GSTA. However, this should not be unlimited — where the packaging is more than what is

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49 Section 38-3(1)(c).

50 *Lansell House Pty Ltd*, above n 30.

51 At [109].

52 A New Tax System (Goods and Services Tax) Act 1999, sch 1 cl 1 item 32.

53 *Lansell House Pty Ltd*, above n 30, at [109].

54 At [19].

55 Section 38-3(2).

considered usual, it should be taxable.<sup>56</sup> For example, if Weetabix cereal is supplied in a tin container intended for re-use, rather than the usual cardboard box packaging, the tin container is taxable.

Under the proposed rules, many luxury food items will fall within the scope of zero-rated foods. Game meats and birds, for example venison, quail and pheasant supplied in a form for human consumption (such as steaks, chops, ribs, minced or ground, in pieces, or as a boneless breast) would all be zero-rated as they are food for human consumption that is not of a kind excluded by the Schedule of exclusions. The case would be the same for items such as blue cheese, oysters, salmon and truffles (fungi). Yet, these items are not basic foods and so do not truly deserve a preference from GST. These foods could be listed explicitly in the schedule of food excluded from the zero-rate, or excluded by regulations made for the exclusion.

### Why Not Healthy Food?

It is often contended that GST should be removed from only healthy foods or fresh fruit and vegetables. However, this article argues that confining the exclusion to these subgroups would be problematic. A basic diet necessarily includes items other than fruit and vegetables. Further, it is much more challenging to set a boundary between healthy and unhealthy foods. Although some foods have widespread public and industry acceptance as being healthy, “healthy” is not an objective criterion. The Goods and Services Tax (Exemption of Health Food) Amendment Bill exemplified this problem. The Bill proposed exempting healthy food, but the scope of what is “healthy food” proved to be problematic. During its first reading, Heather Roy, an ACT Member of Parliament, noted that “fish and chips could be considered healthy because it contains fish and vegetables”, both of which would have been exempt from GST under the proposed Bill.<sup>57</sup> Excluding only healthy food or fresh fruit and vegetables from GST would also fail to address the important issue of socioeconomic inequality. Fresh fruit and vegetables are more likely to be consumed by high-income households.<sup>58</sup> Thus, excluding only these items from GST may further contribute to socioeconomic inequality and, therefore, would not ameliorate the regressive impact of GST.

### Zero-Rating Menstrual Products

The second argument of this article is that menstrual products should also be zero-rated. As with most goods in New Zealand, menstrual products are subject to GST at 15 per cent. Although in the minority, there are a few countries that do not impose a GST or VAT on feminine hygiene products.

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56 A New Tax System (Goods and Services Tax) Bill 1998 (further supplementary explanatory memorandum) (Cth) at [1.57]–[1.58].

57 (8 September 2010) 666 NZPD 13803 at 13810.

58 Claire Smith, Winsome Parnell and Rachel Brown *family food environment: barriers to acquiring affordable and nutritious food in new zealand households* (Families Commission, Blue Skies Report No 32/10, February 2010) at 20.

These include Ireland, Jamaica and Nigeria.<sup>59</sup> In Ireland, the exception applies to the “supply of sanitary towels and sanitary tampons”.<sup>60</sup> In Jamaica, tampons and sanitary towels are exempted from the general consumption tax.<sup>61</sup> In Nigeria, all medical and pharmaceutical products, which includes menstrual products, are exempted from the VAT.<sup>62</sup> In Canada, from 1 July 2015, the Excise Tax Act was amended, reducing the VAT to zero on menstrual products.<sup>63</sup> A zero-rate is applied to feminine hygiene products, that is, products “marketed exclusively for feminine hygiene purposes”, which includes “a sanitary napkin, tampon, sanitary belt, menstrual cup or other similar product”.<sup>64</sup> In the United Kingdom, the debate on the imposition of VAT on feminine hygiene items has been ongoing since a legislative reform in 2001 to reduce the VAT on these items from the standard rate of 20 per cent to five per cent. This reduced rate of VAT applies to “the supply of any sanitary protection product that is designed and marketed solely for the absorption or collection of menstrual flow or lochia (discharge from the womb following childbirth)”.<sup>65</sup>

This article proposes that New Zealand should adopt a definition similar to that used in the United Kingdom and that “the supply of any sanitary protection product that is designed and marketed exclusively for the absorption or collection of menstrual flow or lochia” should be zero-rated. This exception is broad enough to encompass the essential feminine hygiene products needed by women when menstruating. At the same time, it is also specific enough, through using the word “exclusively”, to ensure that other products not intended to fall within the exception remain outside its scope. An example of other products could include adult diapers. Although they could be used to collect menstrual flow, they are not designed exclusively for this purpose, and so would not be subject to the zero-rate. Sanitary pads, tampons, panty liners, and other similar products would all fall within this exception, provided that they are designed and marketed solely for the absorption or collection of menstrual flow or lochia. Rather than using a term such as “tampon” or “sanitary pad”, using the words “sanitary protection product” adds flexibility to the exception and will allow for other appropriate types of sanitary products to fall within the scope. Menstrual cups, for example, are designed and marketed solely for the collection of menstrual flow so would fall within this definition, therefore would be subject to a zero-rate of GST.

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59 Jessica Phelan “Tampon tax is real. Women everywhere pay their governments extra to have periods” (15 August 2015) PRI <[www.pri.org](http://www.pri.org)>.

60 Value-Added Tax Consolidation Act 2010 (Ireland), s 46(1)(b) and sch 2 cl 13(3).

61 The General Consumption Tax Act 1991 (Jamaica), sch 3 pt I cl 45.

62 Value Added Tax Act 1993 (Nigeria), sch 1 pt I cl 1.

63 Jessica Ware “Tampon tax scrapped in Canada after petition convinces conservative government” (29 May 2015) Independent <[www.independent.co.uk](http://www.independent.co.uk)>.

64 Excise Tax Act RSC 1985 c E-15, sch VI pt II.1 cl 1.

65 HM Revenue & Customs “Women’s sanitary products (VAT Notice 701/18)” (4 July 2011) United Kingdom Government <[www.gov.uk](http://www.gov.uk)> at [1.1] and [2.1].

## IV THE CASE FOR ZERO-RATING

New Zealand's complete lack of GST preference for basic food and menstrual products is manifestly inequitable. Basic food items and menstrual products are necessities. Access to these goods is an end to itself, a fundamental right which should not be taxed on principle. Furthermore, the GST on these items is highly regressive.<sup>66</sup> GST applies at a flat rate. Regardless of a person's income, they must pay 15 per cent GST when they purchase food or menstrual items. As such, it is a regressive tax as these items have a higher proportional cost for low-income earners than high-income earners. Although New Zealand's GST is widely acclaimed internationally as a model VAT,<sup>67</sup> the increase of GST to 15 per cent in 2010 has only increased the pressure low-income families and women face.

### Food

Purchasing food is not optional. Food is necessary for human survival. Most countries with a VAT or GST recognise that food is necessary and give some subsets of food preferential tax treatment for this reason. The United Kingdom, Canada, Australia, South Africa and Malaysia all zero-rate some classes of food given they are essential items, and to reduce the burden of VAT and GST on low-income households.<sup>68</sup>

The question of whether GST should be applied to food has been raised intermittently since the introduction of the tax. Groups within the general public have been supportive of a policy that zero-rates some classes of food. The Residents Action Movement, for example, gathered over 20,000 signatures in a petition to remove GST on all food in 2008 (the petition).<sup>69</sup> The petition was launched in response to increasing food prices. The 2010 increase in the GST rate, from 12.5 per cent to 15 per cent, renewed pressure on the Government to consider exempting or zero-rating necessities such as food. One source of this pressure was the Goods and Services Tax (Exemption of Healthy Food) Amendment Bill.<sup>70</sup>

Both the petition and the Bill were unsuccessful. The Tax Working Group has summarised succinctly the key arguments for maintaining New Zealand's broad GST base in its Interim Report. The Tax Working Group considered the possibility of introducing GST preferences in 2018. It received many submissions from the New Zealand public calling for the introduction of new GST exceptions, from goods such as food and drink, to

66 John Quiggin "Equity and efficiency effects of food taxes" The University of Queensland, Australia <www.uq.edu.au>.

67 Annabelle Mourougane *Toward a More Efficient Taxation System in New Zealand* (OECD Publishing, ECO/WKP(2007)17, 11 June 2007) at 2.

68 Alida van Klink "How to Zero-rate the GST on Food: Best and Worst Practice from the United Kingdom, Canada, and Australia" (2012) 18 NZJTL 276 at 280–282 and 287–289; and Maples and Sawyer, above n 18, at 11–13, 16 and 20.

69 (8 September 2010) 666 NZPD 13803 at 13803.

70 Goods and Services Tax (Exemption of Healthy Food) Amendment Bill.

reduce the impact of GST on lower-income households.<sup>71</sup> The Tax Working Group commented that removing the GST from food would probably not result in the sought-after welfare effects, and that it would be higher income households that would derive a greater dollar benefit from the removal. Additionally, the Working Group indicated that zero-rating food would only add complexity to New Zealand's GST system, and increase compliance costs. The potential for classification issues and that this would open the door to concessions for other necessities was also raised.<sup>72</sup>

However, imposing a zero-rate of GST on basic food could improve the equity and progressivity of the tax. Price is an important determinant of the choices consumers make when buying food.<sup>73</sup> Food insecurity (the lack of assured access to sufficient nutritious food) is evident in New Zealand. Many people on low incomes experience financial stressors and are forced to buy cheaper, less nutritious food, or to go without.<sup>74</sup> Lower-income households spend a greater proportion of money on specific goods and services, compared to higher-income houses. For example, expenditure on food and drink represents approximately 20 per cent of the average weekly household expenditure of a decile one household while representing only 14 per cent for a decile 10 household.<sup>75</sup> If GST was removed from food items, it would have a proportionally more significant impact on lower-income households than on higher-income households, making GST more progressive.

## Menstrual Products

Excluding sanitary products from the GST base is another way to create a fairer tax system for all New Zealanders. Like food, feminine hygiene products are an essential health item upon which it is offensive to impose a tax. Periods are not a luxury and women cannot choose not to menstruate. Women do not buy tampons and pads for pleasure. These items are certainly not a treat, luxury item, or something used sporadically to provide a feeling of content or respite. They are fundamental health requirements for most women of reproductive age in New Zealand and are essential for hygiene and health.

In New Zealand, the costs of these products are prohibitive. Lacking these essential health items impacts the ability of women to live a normal life. Not using sanitary products can lead to serious health risks and jeopardise a woman's ability to maintain a normal life. A number of schoolgirls in New Zealand take time off school because they cannot afford menstrual products. Girls are also using alternative items, such as newspapers, telephone books or

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71 Tax Working Group *Future of Tax: Interim Report* (Tax Working Group New Zealand, 20 September 2018) at 7.

72 At 89.

73 A Lee and others "Monitoring the price and affordability of foods and diets globally" (2013) 14 (Suppl 1) *Obesity Reviews* 82.

74 Kristie N Carter and others "What are the determinants of food insecurity in New Zealand and does this differ for males and females?" (2010) 34 *ANZJPH* 602 at 602.

75 Tax Working Group, above n 71, at 88.

rags.<sup>76</sup> Those who cannot afford the products are at risk of having inadequate hygiene, and increased risk of contracting general infections.<sup>77</sup>

The cost of menstrual products and the GST on these items is an expense that women have to incur every month throughout the entirety of their reproductive life. Moreover, as with food, the GST levied on these items disproportionately impacts women with lower incomes as a consequence of their savings and consumption patterns.<sup>78</sup> Women menstruate for three to seven days every month from when they first begin menstruating (sometime in their early teens) until they reach menopause (around age 50 or older). According to Dr Sylvia Rosevear, the average woman will “have 480 periods, use 12,000 tampons or pads and spill 14 litres of blood” during her lifetime.<sup>79</sup> For the average woman, this means using 315 tampons a year. Most women do not use just tampons, however, but use a combination of sanitary products, at various stages during their menstrual cycle, which adds additional costs. There are approximately 2.3 million women in New Zealand, and at least two-thirds of this group constitutes the reproductive population of females (1.38 million). Assuming a box of tampons costs \$4, women collectively spend approximately \$76 million a year on tampons, meaning the government is collecting just under \$10 million in GST on these essential items.<sup>80</sup>

New Zealand is not unique in applying GST to feminine hygiene products. The United States is “the only country in the OECD that employs a retail sales tax, rather than a broad-based consumption tax (such as a VAT or GST)”.<sup>81</sup> However, a growing number of jurisdictions are removing the VAT and GST from these essential items. Canada was among the first to zero-rate feminine hygiene products in 2015. In the United States, several states have made female hygiene products exempt from sales tax. In 2016, the French government voted to reduce the VAT rate on menstrual products from 20 per cent to 5.5 per cent. The French Finance Minister, Michel Sapin, described the move as a reduction “in the interest of half of humanity”.<sup>82</sup> Most recently, in October 2018, Australia’s states and territories agreed to remove the GST from menstrual products. This decision follows a vote in Australia’s Senate to pass the Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018, which will remove the 10 per cent GST on menstrual products —

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76 Eleanor Ainge Roy “New Zealand schoolgirls skip class because they can’t afford sanitary items” *The Guardian* (online ed, Dunedin, 30 July 2016).

77 Rajanbir Kaur, Kanwaljit Kaur and Rajinder Kaur “Menstrual Hygiene, Management, and Waste Disposal: Practices and Challenges Faced by Girls/Women of Developing Countries” [2018] *Journal of Environmental and Public Health* 1 at 2.

78 Kathleen Barnett and Caren Grown *Gender Impacts of Government Revenue Collection: The Case of Taxation* (Commonwealth Secretariat, 2004) at 40.

79 Florence Kerr and Georgia Forrester “Counting up the cost of sanitary items” (22 April 2017) Stuff <www.stuff.co.nz>.

80 Calculated based on 2018 New Zealand Census data, see Stats NZ “2018 Census” (2018) <www.stats.govt.nz>. Total amount collected is estimated to be around \$9,913,043.48.

81 OECD *Consumption Tax Trends 2019 — the United States* (OECD Publishing).

82 Hayley Gleeson “Tampon tax: Australian debate reignited after France drops VAT on sanitary products” (18 March 2016) ABC News <www.abc.net.au/news>.

products that had been inexplicably considered non-essential under the Australian GSTA.<sup>83</sup>

In these jurisdictions, however, the GST or VAT base is not broad like New Zealand's, and numerous concessions are made for other health and medical goods. In Australia, male products like condoms or lubricant, and other health items like incontinence pads and sunscreen are all excluded from GST.<sup>84</sup> This arguably gives rise to a discriminatory and unfair effect. Likewise, in Canada, before feminine hygiene products were zero-rated, other medical products like incontinence pads, prescription drugs, and hearing aids were all exempt from the GST, but sanitary items were not.<sup>85</sup> The case is the same in the United Kingdom and various states in the United States, where there have been calls for the tax on sanitary items be removed or reduced.<sup>86</sup>

In these jurisdictions, adding menstrual products to the list of exclusions is logical and only fair. Otherwise, gross discriminatory effects arise when other health and medical goods are excluded, but menstrual products are not. In New Zealand, however, the same argument cannot be made. GST is levied on a broad base, and currently, no exclusions are made for any health items. Despite this, the imposition of GST on feminine hygiene items remains a form of indirect discrimination, which arises "when there is an unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute".<sup>87</sup> At face value, GST in New Zealand complies with the principle of formal equality as it applies consistently to men and women. Also, nothing suggests that the government of the time intended to discriminate against women when formulating the scope of GST. Yet, GST on sanitary products only applies to a particular group of people who menstruate — women — and therefore, GST represents the unequal treatment of some of New Zealand's population.

Although other hygienic necessities, such as toilet paper, nappies and soap are not excluded from GST in New Zealand, sanitary products deserve special treatment. Menstruation and the products required for it are simply different. There is no male product comparable, or analogous hygiene need for men. Menstruation is a monthly biological function, and feminine hygiene is not a choice. Women who use unhygienic methods during menstruation (that is, those who do not have access to menstrual products) are more likely to report symptoms of reproductive tract infections, abnormal vaginal discharge, vulvar irritation and lower abdomen pain, and are more prone to

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83 Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018 (explanatory memorandum) (Cth) at 1.

84 See A New Tax System (Goods and Services Tax) Act 1999, subdivision 38-B, listing the health supplies that are zero-rated.

85 See Excise Tax Act RSC 1985 c E-15, schedule VI; the schedule lists zero-rated supplies.

86 Ema Sagner "More States Move To End 'Tampon Tax' That's Seen As Discriminating Against Women" (25 March 2018) National Public Radio <npr.org>; Karen Zraick "22 States Considered Eliminating the 'Tampon Tax' This Year. Here's What Happened." *The New York Times* (online ed, New York, 12 July 2019); and Rose Troup Buchanan "Tampon tax: Pressure grows on UK after Canada abolishes duty on sanitary products" *The Independent* (online ed, London, 30 May 2015).

87 Australian Human Rights Commission "Indirect Discrimination" <www.humanrights.gov.au>.

other significant health risks.<sup>88</sup> Furthermore, many essential medical products and health items, like those exempted from GST or VAT in other jurisdictions that are regarded as essential by the State, are already subsidised.<sup>89</sup> The Pharmaceutical Management Agency (PHARMAC) is a New Zealand Crown entity that decides which medicines and pharmaceutical products are subsidised, reducing price barriers on essential products and making them more affordable for New Zealanders.<sup>90</sup> Menstrual products, however, are not funded by PHARMAC. PHARMAC determined it was outside its current powers to include menstrual products in its funding regime. In April 2017, PHARMAC rejected a request from a private citizen to fund all women's sanitary items on the ground that such items were not medicines. By law, however, PHARMAC can only fund medicines and medical devices or products that provide therapeutic benefits relating to a health need. It found that sanitary products are not medicines or medical devices, nor was there a link to therapeutic benefits related to a health need.<sup>91</sup>

## V ARGUMENTS AGAINST ZERO-RATING BASIC FOOD AND MENSTRUAL PRODUCTS

GST exemptions for food and feminine hygiene items are frequently opposed on multiple grounds. The Tax Working Group cited several of these arguments in its 2018 Interim Report. The report did not recommend introducing new exceptions to New Zealand's GST base, stating three reasons for this position. First, "GST exceptions are a poorly-targeted mechanism to achieve distributional goals". Secondly, exceptions generally create arbitrary boundaries, adding further complexities. Finally, zero-rating some items and not others may lead to a floodgate effect.<sup>92</sup> These three arguments against zero-rating are addressed below, followed by additional arguments commonly raised against introducing new exceptions to GST.

### Alternatives to Zero-Rating

The Tax Working Group is not the first to suggest that GST exceptions are a poor mechanism to achieve distributional goals. The OECD noted that reducing the rate of consumption tax would be less redistributive than if

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88 Kaur, Kaur and Kaur, above n 77; and Enu Anand, Jayakant Singh and Sayeed Unisa "Menstrual hygiene practices and its association with reproductive tract infections and abnormal vaginal discharge among women in India" (2015) 6 *Sexual & Reproductive Health* 2015 249.

89 Pharmaceutical Management Agency "Introduction to PHARMAC" (16 September 2011) <[www.pharmac.govt.nz](http://www.pharmac.govt.nz)>.

90 Pharmaceutical Management Agency *Guidelines for Funding Applications to PHARMAC* (2017) at 2.

91 Rachel Thomas and Damian George "No funding for women's products" *The Dominion Post* (Wellington, 20 April 2017) at 4.

92 Tax Working Group, above n 71, at 89.

compensation were delivered to households through transfer payments.<sup>93</sup> The Tax Working Group believes there are more effective ways to increase progressivity than changes to GST. One of their suggestions — and what they suggested as the most appropriate method to improve incomes for very low-income households — was to increase welfare transfers.<sup>94</sup> The Tax Working Group indicated that the revenue that would be lost due to the GST exemptions could be used instead to fund more targeted support for low-income households. This scheme would provide more significant benefits to low-income households at the same fiscal cost. As an example, the New Zealand Tax Working Group estimated that an exception for all food and drink would reduce GST revenue by \$2.6 billion. If this sum were instead spent on redistribution, the Government could fund a cash transfer to each household of \$28.85 per week.<sup>95</sup>

It is plausible that alternative measures to zero-rating could be used to address the regressive effects of GST and any equity concerns. Such alternate measures could, for instance, include targeted compensation measures or subsidies. However, designing a comprehensive measure may be just as difficult and costly. Any compensation would need to be targeted; otherwise, as Quiggin suggests, it could be so expensive that it would wipe out all or most of the revenue raised by tax. However, targeted compensation may increase “the effective marginal tax rate faced by households that have their compensation withdrawn as their income increases”.<sup>96</sup> This increased effective marginal tax rate will bring increased efficiency costs that may be higher than the cost of the revenue generated by keeping these items in the GST base.<sup>97</sup> Further, there is no way to ensure that any compensation or transfer payments would be spent on basic food items or menstrual products. Zero-rating these items ensures that everyone will receive the benefit of removing GST.

Even if a suitable compensation package were feasible, imposing GST on these essential items would still be undesirable unless it could be shown that the necessary compensation measures would be introduced and maintained over time. Compensation packages are unlikely to remain intact for long, and what one government promises, another can take away. Any compensatory measures and transfer payments to aid lower income families could be wound back by future governments. This was the case when GST was first introduced into New Zealand. Under the tax reform package of 1987, food was taxed at the full GST rate and the Government introduced compensation measures for low-income earners. The 1991 budget, however, wiped out these accompanying compensation measures when the Government made welfare cuts.<sup>98</sup>

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93 Isabelle Joumard, Mauro Pisu and Debbie Bloch “Tackling income inequality: The role of taxes and transfers” [2012] *OECD Journal: Economic Studies* 37 at 40.

94 Tax Working Group, above n 71, at 86.

95 At 89.

96 Quiggin, above n 66.

97 Quiggin, above n 66.

98 Quiggin, above n 66.

## Arbitrary Boundaries and Definitional Difficulties

Although a significant number of countries give some sort of preferential treatment to food under their respective VAT regimes, problems with their preferential treatment are often cited in arguments against zero-rating food in New Zealand. In particular, these problems arise from arbitrary classification of zero-rated and non-zero-rated foods and litigation disputes over interpretation. In its Interim Report, the Tax Working Group argued that an exemption for food would create definitional problems that could wreak havoc for businesses and the IRD.<sup>99</sup> Opponents commonly cite the convoluted and voluminous body of case law in the United Kingdom, determining which items are and are not zero-rated, as a reason to avoid zero-rating.

This article, however, contends that it is not the zero-rating of food that is problematic. Instead, many of the problems experienced with arbitrary classification are a consequence of *how* food has been zero-rated. Further, problems experienced in other jurisdictions are unique to the history and circumstances of those jurisdictions' particular VAT regimes. New Zealand does not face many of the political and historical factors that have hindered the success of zero-rating food in other jurisdictions. Therefore, New Zealand would not necessarily experience these issues.

Problems with arbitrary distinctions and classifications can be avoided if provisions to zero-rate food are drafted in a principled way. Clarity of purpose is important in drafting most types of tax legislation, but it is especially important when zero-rating food. Tax legislation requires enough detail to maintain the tax base and provide certainty, but detailed rules cannot answer every question or provide complete certainty in the law. If specific rules are based on clear principles, principles can resolve a borderline case when specific rules cannot. The principle behind zero-rating basic groceries should be clearly stated within the legislation. Then, where an item of food lies on a problematic boundary between the zero and standard rate of GST, the courts would be able to take a purposive approach when making a decision by explicitly referencing the principle and purpose underlying the legislation.

The experience of the United Kingdom exemplifies how a lack of guiding principles behind zero-rating creates problems and ambiguities. The provisions of the United Kingdom's VAT were primarily transplanted from earlier legislation, the Purchase Tax, seemingly without adequate reconsideration.<sup>100</sup> Parliament gave little consideration as to why food should be zero-rated in the first instance, let alone why certain specific foods should or should not be zero-rated, resulting in inconsistent and incoherent rules. Any legislation that aims to demarcate different supplies will naturally give rise to classification problems; however, it appears that the lack of clear, coherent principles in the legislation is what contributed to the kind of arbitrary distinctions that the United Kingdom has since faced. Decisions on the GST status of foods are based on literal interpretation of the legislation, rather than

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99 Tax Working Group, above n 71, at 89.

100 Van Klink, above n 68, at 281.

policy. Courts in the United Kingdom have been limited to analysing the wording of the legislation and applying it strictly in each case. This approach can, and did, create absurd results. It resulted in judgments as arbitrary as the zero-rating provisions themselves, creating inconsistent distinctions between types of food and beverages.

*Proctor & Gamble UK v Revenue and Customs Commissioners* illustrates the unnecessarily complicated and literalistic approach taken by the United Kingdom courts absent clear principles on zero-rating food.<sup>101</sup> The issue in this case was whether regular “Pringles” fell within the standard rate category of “potato crisps, potato sticks, potato puffs, and similar products made from the potato, or from potato flour, or from potato starch”<sup>102</sup> or whether they fell into the category of potatoes, which are zero-rated.<sup>103</sup> Much of the High Court’s analysis had centred on the “potatiness” of Pringles. Rather than taking a purposive approach, the Court of Appeal applied various tests to determine whether the potato content of Pringles was sufficient to be “made from potato” and whether they were “similar” to potato crisps.<sup>104</sup> In New Zealand, potatoes would be considered a basic grocery item, while chips would not; regardless of the “potatiness” of Pringles, they would not be considered a basic food item and would be subject to the standard rate of GST.

*United Biscuits (UK) Ltd (No 2)* is another example of a case that involved a lengthy analysis over zero-rating boundaries.<sup>105</sup> The issue in the case was whether “Jaffa Cakes” — biscuit-sized cakes made of a sponge base, a layer of orange flavoured jam and a coating of chocolate — were cakes or biscuits for the purpose of the VAT.<sup>106</sup> Under the zero-rating provisions in the United Kingdom, cakes and plain biscuits are zero-rated, but biscuits with a chocolate topping are subject to the standard rate of the VAT.<sup>107</sup> In making its decision, the VAT and Duties Tribunal intensely examined the physical properties of Jaffa Cakes. Such properties included the ingredients, the texture and size of the Jaffa Cake, along with how it was marketed and packaged, and what the proportion of sponge to chocolate was in the product.<sup>108</sup> This case exemplifies, like *Procter & Gamble*, the superficial, complex and somewhat absurd tests that tribunals and courts apply when classifying goods due to the absence of clear principles on zero-rating food. If the question of whether a zero-rate of VAT applies rests on the physical properties of the items, the determination is unconnected in any way to a rational policy purpose. This case also illustrates the problems that can arise if distinctions made in rules are arbitrary, and not consistent with an underlying principle or reason. It makes little sense that cakes should be zero-rated but that chocolate biscuits should not be.

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101 *Proctor & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990.

102 Value Added Tax Act 1994 (UK), sch 8 pt II cl 1.

103 Schedule 8 pt II.

104 *Proctor & Gamble UK*, above n 101, at [13] and [74].

105 *United Biscuits (UK) Ltd (No 2)* [1991] BVC 818.

106 At 2–3.

107 Value Added Tax Act 1994 (UK), sch 8 pt II cl 1.

108 *United Biscuits*, above n 105, at 5–6.

The Canadian provisions are based on the principles of zero-rating basic groceries. Under pt III of sch VI to the Excise Tax Act 1985, basic groceries are included as zero-rated supplies.<sup>109</sup> The presence of this clear intention to zero-rate only basic groceries rather than all food seems to have reduced classification issues and the number of disputes going to court. Since 1988, seven cases have been heard in the Tax Court of Canada.<sup>110</sup> *1146491 Ontario Ltd* demonstrates how the underlying principle to zero-rate only basic groceries has been used as a guide when classifying food for GST purposes.<sup>111</sup> This case considered whether a salad kit fell within the zero-rating provisions. The kit contained all the necessary ingredients to make a salad, but it was not in a form ready for consumption. Salads that are not canned or vacuum sealed are not eligible for zero-rating under the Excise Tax Act.<sup>112</sup> Rather than basing his decision on a strict interpretation of the legislation, Judge Miller examined the schedule of food and beverages excluded from the zero-rate to determine “the flavour to the nature of the exception”.<sup>113</sup> He considered that the list essentially excluded ready-to-eat food, “snacks or junk food” and “convenience food”.<sup>114</sup> The salad kit, however, required further preparation. Judge Miller concluded that it could therefore not be classified as a ready-to-eat salad in the state in which it was sold and therefore was zero-rated.<sup>115</sup>

### Administrative Difficulties and Added Complexity

Another principal objection to zero-rating, and argued by the Tax Working Group, is that it would add complexity to New Zealand's GST. Boundaries created by zero-rating some items and not others generate additional compliance costs as businesses must identify zero-rated items and then separate them from those which are not.<sup>116</sup> Tax compliance costs refer to direct costs incurred by businesses when complying with the legal requirements of the tax system.<sup>117</sup> The current simplicity of New Zealand's GST system leads to lower administration and compliance costs than in other countries. Sijbren Cnossen notes that a substantial body of literature indicates that:<sup>118</sup>

... the consumption base of the VAT should be defined as broadly as possible and that all goods and services should be taxed at a uniform rate. This promotes fiscal neutrality and administrative simplicity.

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109 Schedule VI pt III.

110 Van Klink, above n 68, at 290.

111 *1146491 Ontario Ltd v Her Majesty the Queen* [2002] CarswellNat 1056 (TCC).

112 Schedule VI pt III cl 1(o.1).

113 *1146491 Ontario Ltd*, above n 111, at [8].

114 At [12].

115 At [1], [12] and [16].

116 Tax Working Group, above n 71, at 89.

117 European Commission's Directorate-General for Taxation and Customs Union *A review and Evaluation of Methodologies to calculate tax compliance costs* (Working Paper N 40, 25 October 2013) at 3.

118 Sijbren Cnossen *Value-Added Tax and Excises: Commentary* (The Institute for Fiscal Studies, 19 February 2008) at 2.

Any new exemption to GST or zero-rating will bring with it additional compliance and administration costs for businesses and the government. Zero-rating basic food and menstrual items will inevitably add complexity to New Zealand's GST system. However, given the necessity of basic food and menstrual products, simplicity concerns should not outweigh equity considerations. Ensuring that the tax is progressive (or less regressive), and therefore more equitable, should be a priority. Moreover, it is worth arguing that if Australia can manage the changes, so too can New Zealand. Various mechanisms can be introduced alongside the zero-rating provisions to reduce compliance costs and any additional administrative complexities associated with the different rates of GST. In Australia, computerised accounts and simplified accounting measures have reduced the costs associated with the exclusions. GST is simplified for small businesses through the Simplified Accounting Methods. These allow taxpayers to estimate their zero-rated sales and purchases using one of five types of methods, under the authority of the GSTA.<sup>119</sup> These methods have reduced compliance costs for small businesses, which encourages support of the zero-rating regime and potentially increases the flow of economic benefits of the zero-rate to consumers.<sup>120</sup> Another initiative Australia uses is the GS1-net, a technological advance in the GST classification of food. The GS1-net administers a numbering and barcoding system that allows for correct GST classification through every step of the GST supply chain.<sup>121</sup> The use of GS1-net provides increased certainty for consumers and reduces potential losses that may result from misclassification of goods. These additional measures provide further certainty and ease compliance. This system would be easy to replicate in New Zealand.

The IRD could also provide guidance about the provisions for zero-rating food. Australia's legislative scheme is supported by extensive guidance from the Australian Tax Office. The Australian Tax Office has produced a guide to accounting for GST. The GST food guide prescribes simple rules that can be used to determine the GST status of food supplies and gives guidance as to when in the supply chain GST is applied to food.<sup>122</sup> The guide also prescribes the GST status of particular supplies, defines GST terms and provides flowcharts to aid in determining the GST status of various foods and beverages.<sup>123</sup> It seems to reduce uncertainty and compliance costs for businesses. The Australian Tax Office also has the power to make rulings on the GST status of specific food items<sup>124</sup> and has a searchable list of foods that allows users to search a particular food item to determine its GST status.<sup>125</sup> The IRD should be given the same administrative power to make regulations and binding determinations to ensure the success of these provisions. Not only does this power provide certainty in interpreting the legislation, it also fills

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119 Section 123-5.

120 Van Klink, above n 68, at 297.

121 Australian Taxation Office *Practice Statement Law Administration* (PS LA 2012/2 GA, 19 July 2012) at [7]–[10].

122 Australian Taxation Office, above n 41.

123 At 2.

124 Australian Taxation Office, above n 121.

125 Australian Taxation Office "Detailed food list" <[www.ato.gov.au](http://www.ato.gov.au)>.

gaps in classifying new food products or developments beyond the scope of parliamentary contemplation at the time that zero-rating rules are created.

### **Zero-Rating Food and Menstrual Products Will Open the Floodgates**

Another objection raised by the Tax Working Group was that an exemption for food or menstrual products would create pressures to do the same for other commodities. The Group argued that it would be difficult to argue against further exceptions on similar grounds. This would generate requests for the expansion of GST-free status to other goods, creating the potential for floodgates to be opened.<sup>126</sup> For example, if menstrual products were zero-rated, it may be claimed by parents of infants who use nappies that they are a societal group being indirectly discriminated against by the GST. Nappies, like menstrual products, are arguably an essential health product used by children to deal with a natural, and unavoidable, bodily function. Therefore, if food or feminine hygiene products were excluded from GST, this may open the floodgates to further claims for necessary or essential goods to be zero-rated, which could cause the current GST system to unravel.

The floodgates argument contributed to the original decision not to zero-rate or exempt any essential items from the GST base and remains a dominant argument in favour of maintaining the GST base. Legislating in this manner and excluding only some goods from the standard rate of GST could cause positive direct discrimination on other groups who would then want other items excluded from the standard rate. However, to claim that basic food and menstrual items should not be zero-rated simply because the Government would be unable to withstand pressures to make other concessions could be considered “an admission of incapacity to govern”.<sup>127</sup> The weight given to this argument does not justify the indirect tax discrimination suffered by New Zealand women as a result of the GST on feminine hygiene items. No other group of the New Zealand public are indirectly discriminated against by GST to the same extent as women. Menstrual items are used only by one sex (and to be precise, by some transgender people). Therefore, it is probably the only example of sex-based discriminatory taxation of an essential good.

### **Zero-Rating Will Not Benefit Those Intended**

It is often argued that if food and beverages are removed from the GST base through zero-rating, higher-income households will receive a higher absolute benefit than lower-income households. Higher-income households will likely “derive a greater *dollar* benefit” if basic food is zero-rated, as “[h]igher income households spend more money on food and drink overall”.<sup>128</sup> The Tax Working Group estimated that removing GST from food and drink would “benefit a household in the highest income decile by \$53.03 per week,

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126 Tax Working Group, above n 71, at 89.

127 Quiggin, above n 66.

128 Tax Working Group, above n 71, at 87.

whereas a household in the second lowest income decile will benefit by \$14.35 per week".<sup>129</sup> This expenditure, however, represents a smaller proportion of their total income. Therefore, while all consumers will benefit from the exemption, zero-rating basic food and drink will have a proportionally more significant impact on lower-income households.

Furthermore, basic food is an essential item, needed by *everyone*. Although a disproportionate part of low-income families' income is paid on GST on food purchases compared to that paid by high-income families, food is not an optional purchase for anyone. Every household, regardless of income, needs food to survive. It is grossly unjust to impose GST on such an essential item; thus, the removal of GST is something *all* New Zealanders will benefit from. Likewise, menstrual products are a necessity for every menstruating woman, not just those with low incomes. Zero-rating menstrual products is something that *all* women will benefit from.

## VI CONCLUSION

Ultimately, a policy choice must be made between the goals of equity and those of simplicity and efficiency. New Zealand's GST system is praised internationally for its simplicity and broad base. Historically in New Zealand, goals of simplicity and efficiency have always won out. However, this is not the case for the rest of the world. In most other OECD countries with VAT and GST regimes, different rates or preferential treatment is given to items considered essential to reduce the degree to which the tax is regressive.

Basic food items and menstrual products are essential items. Neither is an optional purchase choice for those who consume them. New Zealand's complete lack of GST preference for both basic food and menstrual products is manifestly inequitable. Furthermore, the imposition of GST on menstrual products is discriminatory; it is a tax on products that are a biological necessity for women.

There are strong equity grounds for exempting both food and female health items that outweigh considerations of simplicity and economic efficiency. Although the arguments against zero-rating these items are well known and commonly cited, none are insuperable. Clear boundaries can be drawn between these classes of goods and others, meaning the risk of the floodgates being opened is minimal. Zero-rating basic food and menstrual products from GST will add complexity to New Zealand's relatively straightforward system. However, this added complexity can be mitigated and managed through using simplified accounting measures, numbering and barcoding systems alongside guidance and support from the IRD. It is inaccurate to use the experiences of the United Kingdom and Canada to suggest that zero-rating food would also result in a muddled system in New Zealand. The principle to zero-rate basic food can be articulated within

the provisions, which will avoid the creation of arbitrary boundaries between zero-rated food and food subject to the standard rate of GST. Furthermore, this principle will act as a guide if decisions on the GST status of food need to be made, reducing lengthy litigation experienced in jurisdictions like the United Kingdom. Any additional costs and complexities are outweighed by gains from having a fairer tax system and alleviating its regressive and discriminatory impact.

New Zealand has the advantage of being able to improve on the models of other jurisdictions. This article proposed certain exclusions from New Zealand's GST base by zero-rating and how these provisions can be structured so as to avoid the problems faced in other jurisdictions. As with the original GST regime introduced in 1986, New Zealand can design zero-rating provisions to lead the world by example. The current New Zealand GST system is widely regarded as a highly effective VAT around the world. This reputation can be maintained if food and menstrual products become zero-rated by ensuring that legislation is carefully implemented.