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Registration as a community housing provider with the National Regulatory System for Community Housing

BY Alison Sadler, Lawyer

The Federal government has committed to providing $375.3 million over three years from 2018-2019 onwards toward the provision of homelessness support services, to be matched by the States and Territories. To ensure your organisation can access this funding, it should register as a housing provider with the National Regulatory System for Community Housing (**NRSCH**) as registration may be a precondition to receiving funding.

This article will set out the role of the NRSCH, eligibility for registration, the national regulatory code, and the registrar's powers.

The NRSCH

The NRSCH was established through consistent State and Territory legislation, known as the National Law. In 2012, the New South Wales Parliament enacted the National Law by passing the *Community Housing Providers (Adoption of National Law) Act 2012* (NSW) (**Act**). The Act commenced on 1 January 2014.

The NRSCH was established to deliver a well-governed and well managed national community housing sector that meets the housing needs of tenants, and provides assurance to the government and investors.

Registration with the NRSCH is available to all non-government entities that deliver housing for people on low or moderate incomes, or for people with additional needs (e.g. the person may not be able to live independently without support).

Eligibility for Registration

Currently there is no obligation for community housing providers to be registered with the NRSCH. Government policy and funding agencies, however, may make registration a precondition for receiving funding or investment, and for delivering funded housing services.

For a community housing provider to become and remain registered with the NRSCH, the community housing provider must meet the standard conditions of registration, as well as any relevant requirements under the State or Territory community housing laws in any jurisdiction in which it operates.

The standard conditions of registration with the NRSCH are as follows:

- an appropriate corporate structure for the proposed tier of registration;
- a clause in the organisation's constitution which ensures that in the event of winding-up and/or deregistration, surplus assets remaining after the payment of liabilities continue to be available for social housing;
- maintenance of a list of all community housing assets in a form approved by the registrar;
- providing the registrar with any information about the exercise of the organisation's functions, including arrangements with other parties;
- ensuring a suitably qualified officer attends any meetings requested in writing by the registrar;
- allowing the registrar to carry out inspections at any reasonable time of the organisation's premises or records;
- notifying the registrar of the following occurrences as soon as practicable:
    - a decision to appoint a voluntary administrator or to wind up the organisation;
    - the appointment of a receiver to the organisation;
    - a decision to apply for the cancellation of the organisation's registration;
    - a change in the organisation's affairs that could adversely impact its compliance with the relevant community housing legislation;
    - a decision to conduct a vote at a meeting on a matter that could affect the organisation's eligibility for registration; and
- demonstrating capacity to meet and achieve ongoing compliance with the National Regulatory Code.

The registrar may impose additional standard conditions of registration on any organisation when determining an application or issuing a notice in writing to the organisation.

Once registered as a community housing provider, your organisation will be placed on a national register in one of three tiers according to the scope, scale and complexity of your activities.

For further information about tiers and the eligibility requirements, please visit the NRSCH website.

The National Regulatory Code

Community housing providers must ensure that they comply with the National Regulatory Code (**Code**) at all times. The Code sets out the performance requirements that community housing providers must comply with under the National Law.

Your organisation should consider whether it should register as a community housing provider with the NRSCH, as registration may be a precondition to receiving funding.

The Code emphasises the achievement of outcomes in the following areas:

- tenant and housing services;
- housing assets;
- community engagement;
- governance;
- probity;
- management; and
- financial viability.

The governing body and management of the community housing provider are responsible for ensuring the organisation complies with the National Law.

Registrar's Powers

The registrar will monitor the performance of the community housing provider, intervene when non-compliance occurs, and cancel the registration of non-compliant community housing providers.

The registrar will only take enforcement action if non-compliance is significant and requires more than regulatory engagement to ensure compliance is achieved.

Summary

In summary, your organisation should consider whether it should register as a community housing provider with the NRSCH, as registration may be a precondition to receiving funding. Community housing providers can apply for national registration via an online application form. Please note that registration may take up to three months.

A new NDIS Quality and Safeguards Commission

BY Naomi Brodie, Associate

The NDIS Quality and Safeguards Commission was recently established and commenced operations on 1 July 2018, following the amendments to the *National Disability Insurance Scheme Act 2013* (Cth) by the passage of the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 (Cth), on 4 December 2017.

The Commission was announced in the 2017-18 Budget with an initial allocation of $209 million over four years, to implement the NDIS Quality and Safeguarding Framework released by the COAG Disability Reform Council back in February 2017.

The rollout of the NDIS, which was first launched in 2013, has seen a fundamental change to the way in which supports for people with disability are funded and delivered across Australia.

A key component of the scheme is to implement a nationally consistent approach to quality and safeguards, as contemplated by the NDIS Quality and Safeguarding Framework, to improve consistency in the registration and regulation of providers and promote high quality supports and a safe environment for all those receiving NDIS funded services (known as 'participants'). This is intended to assist, empower and support participants to exercise choice and control with respect to their services in the new market environment. The Commission is designed with these objectives in mind, and aims to fully implement a national quality and safeguards system by mid-2020.

Increase in Service Providers

The number of organisations providing services under the NDIS continues to increase. This is despite ongoing concerns reported about the pricing model not being sufficient to cover service costs, and the challenges to long term sustainability facing service providers operating in the market, particularly not-for-profits. The National Disability Insurance Agency (NDIA) has previously reported that the number of registered providers almost tripled during the period from September 2016 to September 2017, from 3,696 to 10,507. There are now approximately 16,755 registered providers operating in the market according to the figures recorded as at June 2018 in the COAG Disability Reform Council Quarterly Report, representing a 17 per cent increase on the previous quarter.

The number of service providers operating in the market is expected to increase over the coming years in response to participant demand. While the recent COAG Disability Reform Council Quarterly Report indicates that there are approximately 183,965 participants in the scheme as at 30 June 2018, there is an estimated 460,000 participants expected to be seeking services under the NDIS once it is fully rolled out, by mid-2020.

Service providers should now be taking stock of the recent legislative changes and the current and future impact on their operations.

The Commission's key regulatory functions and responsibilities

The Commission's core functions and framework are set out in Chapter 6A of the *National Disability Insurance Scheme Act 2013* (Cth). The Commission is responsible for a range of functions under the National Quality and Safeguarding Framework, aimed at protecting and preventing harm to people with disability in the NDIS market. The Commission's role is to serve as the regulator of the NDIS market, with key functions including:

- a National Registrar responsible for registering providers and monitoring their compliance with registration and other requirements, including the new NDIS Code of Conduct and Practice Standards;
- handling and responding to complaints about the quality and safety of NDIS supports and services, and reportable incidents, including abuse and

neglect of NDIS participants;

- monitoring the use of restrictive practices within the NDIS, with the aim of reducing and eliminating such practices;
- to design and implement a nationally consistent NDIS worker screening process; and
- education, capacity building and development for people with disability, NDIS providers and their workers, including providing guidance and best practice information to NDIS providers on how to comply with their registration responsibilities.

The NDIA will continue to be responsible for the registration and regulation of NDIS providers until the Commission commences operating in each jurisdiction, at which time the NDIA's responsibilities will be limited to:

- the delivery of the NDIS, including providing individualised support plans to people with disability, coordinating service bookings, payments and access to plans for providers; and
- handling complaints about the NDIA itself and participant plans.

A phased roll out

On 1 July 2018 the Commission began operating in New South Wales and South Australia, and will progressively roll out in other States and Territories over the next two years. The Commission is set to commence operations from 1 July 2019 in the NT, ACT, QLD, VIC and Tasmania, and from 1 July 2020 in WA.

What does this mean for service providers now?

The arrangements currently in place with respect to quality and safeguarding continue to apply in each State and Territory until the Commission begins operating in their individual relevant jurisdiction.

Now is the time for all current NDIS providers and organisations considering entry into the market, particularly in NSW and SA where the Commission has commenced operations, to become familiar with the various changes and new requirements that have been introduced alongside the commencement of the Commission on 1 July 2018. These reforms are detailed in a raft of 14 new NDIS Rules and Guidelines, made by the NDIS Quality and Safeguards Commissioner.

These recent legislative reforms include:

- a national provider registration system;
- NDIS Practice Standards and NDIS Code of Conduct – applying to providers and their workers;
- a new national worker screening system;
- a new complaints management and resolution system;
- new incident management requirements, including the obligation for registered providers to report to the Commission on reportable incidents including the death of a participant, serious injury, abuse and neglect, sexual misconduct and the unauthorised use of a restrictive practice; and
- new behaviour support requirements, with a view to reducing and eliminating restrictive practices.

Enforcement powers

Providers operating in this market should also be aware of the Commission's wide range of enforcement powers under the *National Disability Insurance Scheme Act 2013* (Cth). These powers include the ability to:

- monitor provider performance and undertake investigations;
- issue compliance notices, if the Commissioner is satisfied or is aware of information suggesting that a provider is non-compliant with their obligations and requires a provider to take certain action or refrain from certain action to address the non-compliance or possible non-compliance;
- issue banning orders, prohibiting or restricting specified activities by a provider in certain circumstances;
- deregister non-compliant providers;
- enter into enforceable undertakings;
- seek injunctions;
- issue infringement notices; and
- seek the application of civil penalties.

As the Commission ramps up its regulatory and enforcement capabilities, it is important that providers are familiar with their ongoing obligations and responsibilities under the new regime. Current providers of supports and services under the NDIS and those looking to enter the market should be mindful of the registration requirements and ongoing obligations set out in the various NDIS Rules and Guidelines, the timeframes for these changes taking effect and the scope of the Commission's regulatory powers.

Now is the time to consider the impact of the phased roll out of the Commission on your organisation. This includes considering what policy and operational changes may need to be implemented to ensure ongoing compliance with your obligations, as well as ensuring that standards of care for those to whom you are delivering services are in line with the new regime.

Draft ruling on the 'in Australia' requirement for deductible gift recipients and charitable tax exemptions

BY Clarissa Sukkar, Law Graduate

On 4 July 2018, the Australian Taxation Office (**ATO**) released a draft taxation ruling (**TR 2018/D1**) providing the Commissioner's view on the following conditions in the *Income Tax Assessment Act 1997* (**ITAA 97**):

- the condition that certain deductible gift recipients (**DGRs**) be 'in Australia' before a gift or contribution to them is tax deductible;
- the condition that certain entities have a 'physical presence in Australia' before their income is exempt from tax (under division 50 of the ITAA 97); and
- the condition that a registered charity or DGR have a 'physical presence in Australia' before it qualifies for a refund of franking credits.

The effect of the draft ruling is that:

- a DGR, depending on whether it is a trust, authority or institution, has some flexibility with regard to physical storage of assets and the location of purposes or beneficiaries, provided that the entity is established and legally recognised in Australia;
- regarding entities which must have a 'physical presence in Australia', compliance action will only be taken where evidence shows that more than 50% of expenditure (less disregarded amounts) is incurred in Australia – this affords entities some flexibility as to their overseas expenditure in a particular income year;
- to be entitled to the refund of franking credits for a franked distribution received during an income year, a registered charity or DGR must at all times during that income year have physical presence in Australia and, to that extent, incur its expenditure and pursue its objectives principally in Australia; and
- there is new guidance on how the Commissioner treats

disregarded amounts as well as the tracing of gifts and government grants.

DGR 'in Australia' condition

A DGR is required to be 'in Australia' in order to retain its DGR endorsement.

The term 'in Australia' has its natural meaning and will be satisfied if the DGR (being a fund, authority or institution) meets the following two requirements:

- Established or legally recognised in Australia:
  - **fund**: will or instrument established in Australia by obtaining an ABN for a trust or registering as a charity;
  - **authority**: must be established and recognised by the Commonwealth or state government; and
  - **institution**: registered under the *Corporations Act 2001*, established by instrument or trust, an incorporated association under state or territory legislation, an Australian government agency, unincorporated association or registered charity or corporation; and
- Operates in Australia at that time:
  - **fund or trust**: all or a substantial part of its store of assets or money is established and legally owned or held by a trustee or other entity in Australia, and managed by a trustee or other entity located in Australia – it does not matter where the assets or money of the fund are located;
  - **authority**: must exercise control, power or command for public advantage in Australia, or execute a function in the public interest in Australia; and
  - **institution**: must be managed on a day-to-day basis by a local committee of management or similar structure located in Australia – though purposes or beneficiaries need not be located in Australia.

This means that in some cases, a DGR's charitable activities can occur substantially or even wholly overseas, so long as the day-to-day activities of that DGR are conducted in Australia. Using the example of a public benevolent institution (**PBI**), this draft ruling clarifies that a PBI can conduct all of its work overseas, so long as its board and administration are located in Australia. This was not always clear in the law.

Division 50 'physical presence in Australia' condition

An entity which is not a DGR needs to satisfy the 'physical presence in Australia' condition in order to be exempt from income tax.

An entity will satisfy this condition if it meets the following two requirements:

- Has a physical presence in Australia:
  - the physical place of operations must be in Australia;
  - the entity can be conducting these operations either as a separate legal personality or through a division, subdivision or branch; and
  - mere ownership of property in Australia, or the conduct of some operations by the agents for the entity would be insufficient.
- Where an entity had a physical presence in Australia, it must also, to that extent, incur its expenditure and pursue it objects principally in Australia:
  - **the words 'to that extent'** requires examination of the degree to which the entity's expenditure and objectives are sourced or result from the conduct of Australian operations (all of the entity's operations and objectives must be identified and compared);
  - where physical presence is in Australia only, expenditure must be incurred, and objectives pursued, principally in Australia;
  - where physical presence is in Australia and also overseas, only the expenditure incurred and objectives pursued that are attributable to an entity's physical presence in Australia are examined;
  - **the word 'principally'** depends upon the facts, however, more than 50% would generally satisfy the requirement;
  - **the words 'incur its expenditure and pursue its objectives'** takes into consideration the following:
    - it does not require that an entity actually incur its expenditure principally in Australia for a particular income year – rather that, at a particular time, the entity can be described as having incurred expenditure principally in Australia for a particular income year;
    - characterisation of the past and current activities of the entity, as well as its objective intentions for the future (current activities are given greater weight);
    - the place where an entity **'incurs its expenditure'** will depend on the whole of the circumstances including where the decision to make the expenditure is made, where the expenditure is made, where the recipient of the expenditure is located and where the goods or services are consumed;

- **'objectives are pursued'** where an entity does things in an attempt to realise those objectives in Australia (the things can be done overseas if they are just the means for that attempt); and
- certain distributions can be disregarded, such as gifts or government grants that it has received (known as "disregarded amounts").

The following entities do not need to meet this condition to be income tax-exempt:

- a DGR which is a registered charity, scientific institution, public educational institution or hospital;
- a society, association or club, if it meets the qualifying conditions to be a DGR;
- a "prescribed institution", society, association or club located outside Australia and exempt from income tax in the country in which it is resident, and a registered charity that is a prescribed institution that has a physical presence in Australia but which incurs its expenditure and pursues its objectives principally outside Australia; and
- certain "prescribed institutions" which are registered as charities.

Therefore, the requirements for organisations which are not DGRs to be income tax-exempt are stricter, in that the test looks at the location of their beneficiaries, as well as where they are physically located. An entity must continue to test the requirements of this condition in each income year for which a tax exemption is sought.

Refund of franking credits condition

To be entitled to the refund of franking credits for a franked distribution received during an income year, a registered charity or DGR must at all times during that income year:

- have a physical presence in Australia, and;
- to that extent, incur its expenditure and pursue its objectives principally in Australia (within the same meaning as discussed for the Division 50 'physical presence in Australia' condition); and

disregarded amounts do not apply to the refund of franking credits condition.

Therefore, while a DGR is generally not required to satisfy the Division 50 'physical presence in Australia' condition in order to retain its DGR endorsement, it will be in order to obtain refunds of franking credits.

Date of effect

When the final ruling is issued, it is proposed to apply prospectively and retrospectively. However, the ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date the final ruling is issued.

Appendix 1 – compliance approaches

This appendix sets out the practical approach the Commissioner will take in relation to some of the conditions discussed above:

- Division 50 'physical presence in Australia' condition:
  - continuous test which considers the state of an entity at a particular time, having regard to its overall operations, including past, current and intended actions; and
  - no compliance action will be taken where evidence shows that more than 50% of expenditure (less disregarded amounts) is incurred in Australia.
- Disregarded amounts (tracing gifts and government grants):
  - no compliance action will be taken where evidence shows that an entity treats the proceeds of a gift or government grant as having been distributed overseas, and that treatment is not inconsistent with the factual circumstances and conditions in which that gift or grant has been made.

Summary

The call for written submissions on the draft ruling has closed. While the ruling is in draft form, it is still an indication of the likely approach that the ATO will take regarding overseas operations of DGRs, charities and other income tax-exempt entities.

How does the EU General Data Protection Regulation affect your not-for-profit organisation?

BY Laura Bueti, Lawyer

What is the European Union General Data Protection Regulation?

The European Union (**EU**) General Data Protection Regulation (**GDPR**) came into effect on 25 May 2018, replacing all existing privacy laws within the EU.

The aim of the GDPR is to 'harmonise' the national data protection laws in the EU, to ensure consistency and uniformity across the EU jurisdictions, and to expand the territorial scope of the EU's privacy framework worldwide.

Notably, the GDPR implements the following changes to the privacy framework of which you should be aware:

(a) there is a new definition of 'consent', being that it must be '*freely given, specific, informed, and an unambiguous indication of the data subject's agreement to the processing*';

(b) data subjects (individuals whose personal data is being dealt with by an organisation) now have further rights to have their personal information deleted, and have a right of 'data portability';

(c) organisations will have further accountability and governance requirements, to demonstrate consideration and integration of data protection into processing activities;

(d) there is further regulation around how information is to be collected and used for the purpose for which it was collected;

(e) there is a new requirement for 'data protection impact assessments' to be undertaken;

(f) there is a requirement for mandatory data breach notifications to be made within 72 hours of becoming aware of any data breach;

(g) some organisations will be required to appoint a 'data protection officer'; and

(h) there are now higher penalties for breaching the privacy regulation, including fines of up to €20 million or 4% of an organisation's annual worldwide turnover, whichever is greater, for certain types of contraventions.

Personal Data

The GDPR only applies to 'personal data', meaning any information relating to an identifiable person who can be directly or indirectly identified. The GDPR refers to these individuals as 'data subjects'.

The definition of 'personal data' draws strong links to the definition of 'personal information' under the *Australian Privacy Act 1988* (Cth).

Data Controllers and Data Processors

The GDPR will only apply to an organisation which is deemed to be a 'data processor' or 'data controller', dealing with personal data.

Data controllers are generally defined as organisations which determine how personal data will be processed and used.

Data processors are generally defined as organisations that process personal data on behalf of the controller.

Key principles (Article 5 of the GDPR)

The following six points outline the key principles that organisations will need to comply with, in relation to personal data.

Personal data will be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject;

(b) collected for specified, explicit and legitimate purposes, and not further processed in a manner that is incompatible with those purposes;

(c) adequate, relevant and limited to what is

necessary in relation to the purposes for which they are processed;

(d) accurate and, where necessary, kept up to date;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data is processed; and

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage.

Does your not-for-profit / charity fall under the scope of the GDPR?

It is not typical for laws to apply to entities that are not established within its jurisdiction (i.e. laws applying extraterritorially). The GDPR, however, applies to all organisations which process or control personal data regarding individuals within the EU.

This application extends to organisations which may not be geographically located or registered within the EU, and includes charities and not-for-profits.

Therefore, the GDPR not only applies to organisations geographically located within the EU, but also to organisations located outside of the EU, if they offer goods or services to, or monitor the behaviour of, EU data subjects (i.e. the organisation amounts to a 'data processor or data controller').

The GDPR will apply to your organisation if one of the following criteria is met:

(a) if your organisation has an office, or is established in the EU; or

(b) if your organisation offers goods or services to individuals in the EU (including free goods or services); or

(c) if your organisation tracks or monitors individuals in the EU (i.e. collects information which identifies a person), for the purpose of profiling, analysing or predicting that person's behaviours.

The GDPR applies to not-for-profits / charities in the same way that it would a 'for profit' organisation, and not-for-profits / charities could be liable for sanctions under the GDPR with fines of up to €20 million or 4% of an organisation's annual worldwide turnover.

It would be wise for Australian organisations processing personal data of UK data subjects, to expect that they will be required to comply with very similar obligations, post-Brexit.

Brexit

Brexit raises interesting questions about whether an Australian organisation will be caught by the scope of the GDPR if it is only processing or controlling personal data in relation to United Kingdom (**UK**) data subjects.

At this stage in time, it is unclear whether Brexit will provide any relief for Australian organisations of any obligations under the GDPR, as we are yet to see how the UK government will respond.

It is, however, likely that the UK will implement an equivalent (or very similar) privacy framework to the GDPR post-Brexit. It would be wise for Australian organisations processing personal data of UK data subjects, to expect that they will be required to comply with very similar obligations, post-Brexit.

How should your Not-for-Profit /Charity comply?

The Office of the Australian Information Commissioner (**OAIC**) clearly sets out the GDPR governance requirements, and provides Australian organisations with guidance on how to ensure they are compliant with the requirements of the GDPR.

Not-for-profits / charities which fall under the scope of the GDPR should consider their current privacy policies and procedures to ensure that they are complying with the governance requirements.

If your organisation is already meeting its obligations under the *Australian Privacy Act 1988* (Cth), it is likely that you will already be complying with many of the requirements and obligations under the GDPR.

If you are concerned about your organisation's compliance with its domestic and international privacy obligations, you might consider taking the time to review and refresh your privacy policies and procedures.

New Draft Tax Ruling – Fringe Benefits Tax Exemptions for Charities

BY John Vaughan-Williams, Lawyer

Charities and not-for-profits in Australia are entitled to certain concessions and exemptions regarding fringe benefits tax (**FBT**) for their employees. A new draft tax ruling has been issued by the Australian Taxation Office (**ATO**), clarifying the FBT exemptions available to certain charities.

What is FBT?

While there are several exceptions which can apply, a fringe benefit, put simply, is a benefit which is given to an employee by an employer in lieu of salary. It can take the form of a right, a privilege or a service. The general question, when considering whether an employee has received a fringe benefit, is whether the employee would have received that benefit without being employed in the relevant position.

Most employers are required to pay tax on fringe benefits which they pay to employees, so long as those benefits are covered by the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBT Act**).

General Exemptions and Concessions – FBT Rebate

The broad position (independent of the new draft tax ruling), is that certain not-for-profits are entitled to an FBT Rebate. Organisations which benefit from the FBT rebate are entitled to a discount of 47% of FBT which would otherwise be payable per employee (with this percentage changing slightly from year to year), capped at the amount of tax which would be payable on $30,000.00 worth of fringe benefits to that employee.

A not-for-profit is entitled to the FBT rebate if:

(a) it is registered with the ACNC as a charity; or

(b) it is not a registered charity, but "self-

assesses" as falling within one of several categories of exemption (e.g. community within one of several categories of exemption (e.g. community service organisations or resource development organisations).

Further, a not-for-profit must be an "institution" to benefit from the rebate, which generally means that a mere trust or fund is not entitled to it.

For charities, it is easy to determine whether they are entitled to the rebate, as the rebate will be shown publicly on the Australian Business Register. The rebate is generally granted automatically with charity endorsement.

However, not-for-profits which are not endorsed as charities are required to "self-assess" their eligibility for the rebate. This means that these not-for-profits must make their own determination as to whether their objects and activities fall within one of the categories of exemption. Ideally, the board should conduct such an assessment annually, or at the worst, biennially. If an organisation gets its self-assessment wrong, but based its decision on reasonable justification, then it is less likely to be charged any penalty tax or interest, if the ATO later determines that the organisation was not entitled to the rebate. Conversely, if a not-for-profit has never conducted the assessment, and wrongly assumed that it was entitled to the rebate, then the ATO is more likely to charge penalties or interest.

Conversely, if a not-for-profit has never conducted the assessment, and wrongly assumed that it was entitled to the rebate, then the ATO is more likely to charge penalties or interest.

General Exemptions and Concessions – PBIs and HPCs – FBT Exemption

Every organisation which is registered as a charity in Australia must be registered under at least one of 14 available "sub-types". Two of these subtypes of charity in Australia are public benevolent institutions (**PBI**s) and health promotion charities (**HPC**s). PBIs and HPCs are arguably entitled to the richest tax endorsements and concessions in Australia.

Additionally to being deductible gift recipients, and benefiting from all other tax concessions for charities, PBIs and HPCs are also entitled to the FBT exemption.

Whereas the FBT rebate is a discount on the amount of FBT payable, PBIs and HPCs are entitled to a complete exemption from FBT, up to a cap of the amount of FBT which would be payable on per employee, capped at the amount of tax on $30,000.00 worth of fringe benefits per employee.

New Draft Ruling – Background

Certain religious organisations are entitled to an FBT exemption beyond the more general concessions and exemptions which have been detailed in this article.

The new draft ruling, 'TR 2018/D2 - Fringe benefits tax: benefits provided to religious practitioners' (**TR2018/D2**), brings greater clarity to the exemptions which are

enjoyed by such religious organisations.

While the nature of the exemptions discussed in TR2018/D2 are not new, TR2018/D2 has clarified the application of the law to the current legislative scheme for charities (particularly, catering for the establishment of the Australian Charities and Not-for-profits Commission (**ACNC**), and the introduction of the *Charities Act 2013* (Cth)). Before TR2018/D2, the exemption in question was discussed in another tax ruling, 'TR 92/17W - Income tax and fringe benefits tax: exemptions for 'religious institutions'' (**TR92/17W**). However, that ruling was out of date, as it did not reflect the role of the ACNC. TR2018/D2 has abolished TR92/17W.

TR2018/D2 clarifies that any institution which is registered with the ACNC as a charity under the sub-type of "advancing religion" is entitled to an FBT exemption to certain fringe benefits provided to a "religious practitioner", as that term is defined in the FBT Act, as well as some of the practitioner's family members.

There are four primary requirements for the exemption, as set out in TR2018/D2:

(a) The organisation must be an institution;

(b) The organisation must advance religion;

(c) The fringe benefits must be provided to an employee who is a "religious practitioner", or certain family members; and

(d) The fringe benefits must be in respect to the practitioner's pastoral duties or directly related religious activities.

Requirement 1 for Exemption – Institution

As with the other concessions and exemptions, in order to benefit from this exemption, the organisation must be an "institution". There is considerable law regarding when an organisation will be considered an "institution". The most common (but not exhaustive) types of institution are public companies limited by guarantee and incorporated associations.

Notwithstanding this, even some organisations which are public companies limited by guarantee or incorporated associations will not be considered "institutions" (for example, if they only raise funds for other organisations).

Requirement 2 for Exemption – Advancing Religion

Since the introduction of the ACNC in 2012, there is a publicly searchable register of all charities, including the sub-type under which they are endorsed. Therefore, so long as an organisation appears on the public

register with the sub-type of "advancing religion", they will be considered to advance religion for the purpose of this FBT exemption. It does not matter whether the organisation is simultaneously registered under another sub-type (for example, some religious organisations must also be registered under the sub-type of "advancing education", if they conduct religious instruction).

Importantly, TR2018/D2 has clarified (where TR92/17W did not) that the organisation must be registered with the ACNC under the relevant subtype. Even if an organisation would be eligible to be registered but has not applied to the ACNC, it will not be eligible for the exemption.

Requirement 3 for Exemption – Religious Practitioner, or Certain Family Members

The term "religious practitioner" is defined similarly to how it is in other areas of tax law. The term can cover a minister of religion, an individual studying to become a minister of religion, or a full-time member of a religious order.

Certain fringe benefits which are paid to religious practitioners, as well as to their spouses and children, will be exempt from FBT.

A minister of religion will normally have the following characteristics (as well as others):

(a) be recognised by ordination, or otherwise has authority to carry out the duties of a minister based on theological training or experience;

(b) be distinct from ordinary followers of the religion; and

(c) is authorised to conduct religious worship and other religious ceremonies.

Further, a "religious order" will normally have the following features (and others):

(a) members make long-term commitment to the order;

(b) members are part of a religious community and are pursuing a religious life on a full-time basis; and

(c) the order is controlled by, or supervised by, or affiliated with, or partially or wholly funded by an organisation which is a religious "institution" (as described earlier).

Requirement 4 for Exemption – Pastoral Duties or Directly Related Religious Activities

Finally, in order to be exempt, the fringe benefits must be principally for the "pastoral duties" or "directly related religious activities" of the practitioner.

The term "principally" is not defined in the FBT Act, and will be determined by the individual facts and circumstances, as discussed in detail in TR2018/D2. Generally, if the only duties conducted by the practitioner fall within either of these definitions, then the fringe benefits will be "principally" for "pastoral duties" or "directly related religious activities".

A pastoral duty is generally one connected with spiritual care of people. This includes (but is not limited to) communicating religious beliefs, teaching and counselling members of the community, and visiting individuals who are in need of pastoral care.

Similarly, directly related religious activities are ones that promote the practice, study, teaching and propagation of religious beliefs. Importantly, these activities can sometimes be secular, if directly linked to religious beliefs (some examples will include educational activities conducted by religious organisations, which are motivated by religious principles, but are not direct religious instruction).

Conclusion

Calls for submissions on TR2018/D2 are now over. While it is in draft form, it is likely to reflect the approach of the ATO moving forward.

As set out in this article, the application of the exemption to individual religious organisations will vary, so organisations should undertake detailed analysis and/or seek advice before determining that they can benefit from the exemption.

A new interment rights system for NSW - Complying with Part 4 of the Cemeteries and Crematoria Act 2013 (NSW)

BY Clement Ngai, Paralegal

The *Cemeteries and Crematoria Act 2013* (NSW) (**Act**) is the centrepiece to a series of reforms to the NSW interment industry, initiated by the NSW State Government in 2012.

The reforms were primarily introduced as a response to a diminishing supply of burial space, particularly in the greater metropolitan Sydney area. Key measures introduced in the Act included the establishment of Cemeteries and Crematoria NSW (**CCNSW**) as a regulatory agency for the interment industry, a register of all the cemeteries and crematoria within NSW, the development of codes of practice for the interment industry, and a consistent regulatory basis for the management of all cemeteries and crematoria in NSW, regardless of whether they are Crown, local government or private operators.

On 25 June 2018, Part 4 of the Act commenced alongside the *Cemeteries and Crematoria Amendment Regulation 2018* (NSW) (**Regulation**), which together introduce a new interment rights system for NSW. The new system introduces significant changes to the requirements for the granting of interment rights by cemetery operators, and allows all cemeteries to grant renewable interment rights subject to certain conditions.

What are Interment Rights?

Having long existed under English law, interment rights are generally established through an agreement between a person and an authority that administers a cemetery. Interment rights generally provide a right to 'designate a particular burial plot in the cemetery as being available for use as the burial place of any person nominated by the person who acquires the right.'[1]

Interment rights do not, however, necessarily need to be perpetual in nature. In particular, some cemeteries in NSW currently offer 'renewable interment rights', which provide a right to inter human remains, and for these remains to be undisturbed for an initial period, along with an option of renewing the right for additional periods. If this interment right is not renewed, the interment site may be re-used, subject to certain requirements.

Before 25 June 2018, state legislation did not allow Crown cemeteries to offer renewable interment rights. On the other hand, interment rights granted by private cemeteries, and cemeteries managed by local governments, were created and defined by numerous pieces of legislation, contracts or other agreements, which could allow for 'renewable interment rights'.

A new interment rights system

With the *Cemeteries and Crematoria Act 2013* providing a consistent regulatory basis across Crown, private and local government cemeteries, the new interment rights system similarly applies to cemetery operators across all three areas of the cemetery sector.

Section 46 of the Act outlines the nature of interment rights, and the general obligations that cemetery operators have to uphold the rights. Included in the section are obligations to permit interment in accordance with the cultural or religious practices applicable to the particular part of the cemetery, and obligations to leave remains undisturbed in perpetuity unless the a renewable interment right applies.

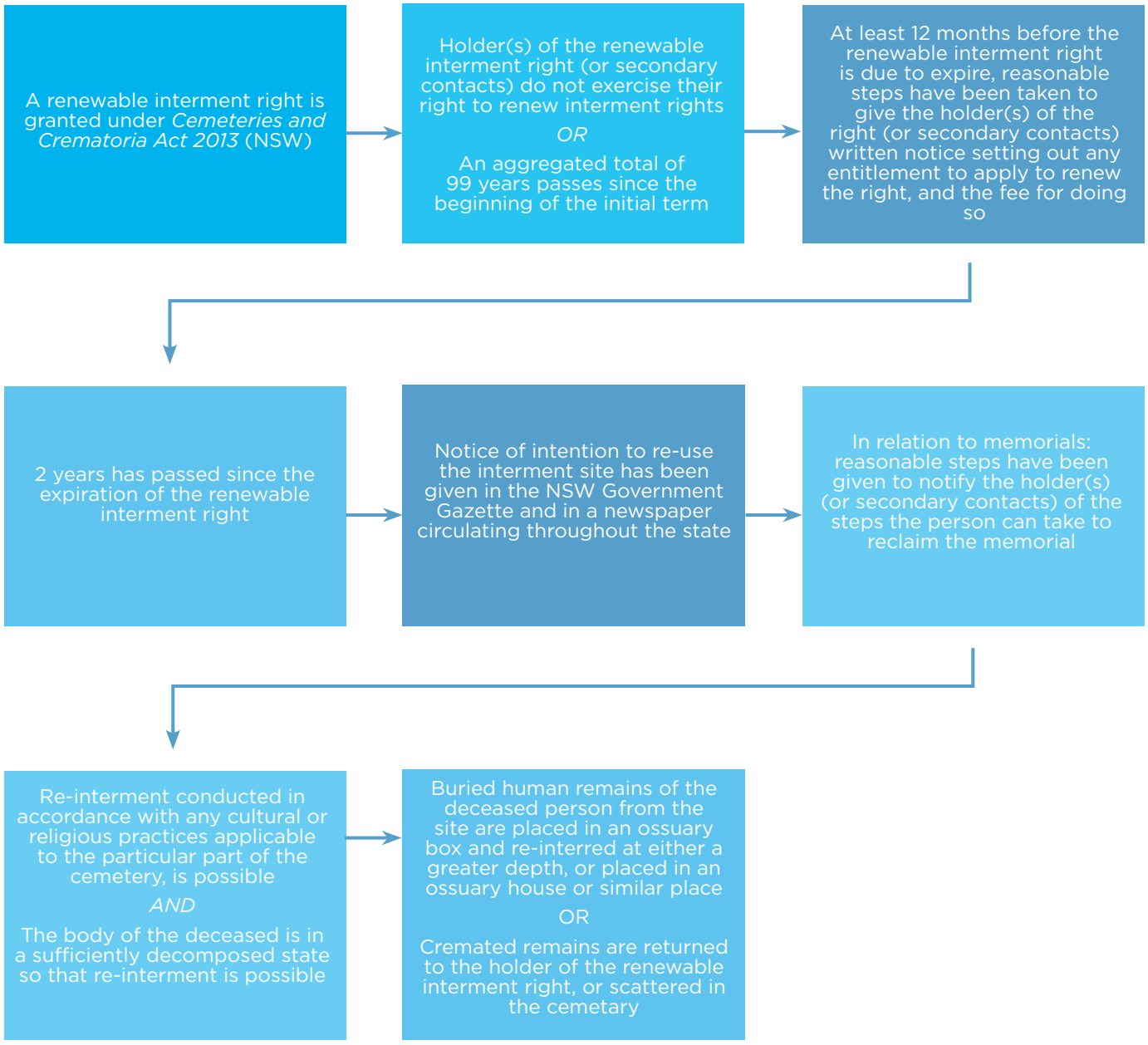
Section 47 of the Act outlines the two types of interment rights that may be granted by all cemeteries:

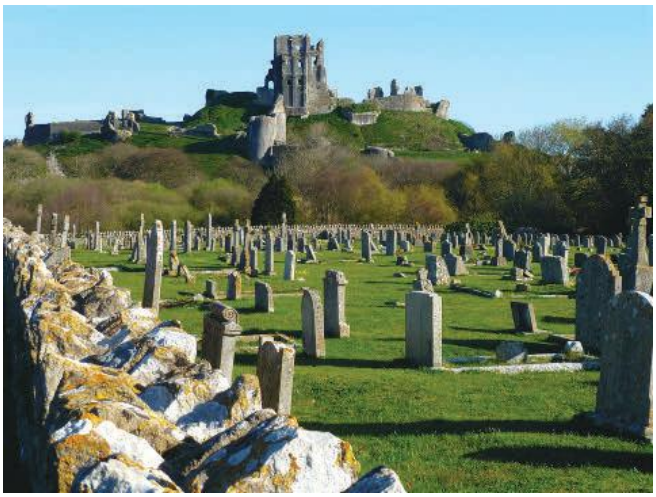
1. **Perpetual interment rights** – which remain in force in perpetuity (s 48)
2. **Renewable interment rights** - which remain in force for an initial term of up to 99 years where cremated remains are interred (s 48), and an initial term of 25 years for human remains (s 54)

[1] *Vosnakis v Arfaras* [2015] NSWSC 625, [65].

When can interment sites be re-used?

Sections 54 and 55 of the Act contain numerous requirements that must be satisfied before an interment site may be reused. The flowchart below provides a brief outline of these requirements.





What do cemetery operators need to do in response?

Complying with all the requirements of the new interment rights system is likely to require the adoption of changes to practice, procedures and policies throughout the organisation. Some of the key changes that cemetery operators may need to make include:

1. ensuring that interment rights:
   (a) identify the person or persons to whom the right is granted,
   (b) identify the interment site to which the right relates,
   (c) specify the number of persons whose remains may be interred pursuant to the right at that site,
   (d) identify the person or persons or class of persons whose remains may be interred pursuant to the interment right or provide that a specified person or person of a specified class may, at a future time, nominate the person or persons whose remains may be interred pursuant to the interment right,
   (e) identify whether the interment right is granted as a perpetual interment right or as a renewable interment right,
   (f) specify that the interment right may (subject to section 56 (4)) be transferred, and
   (g) subject to any applicable mandatory code of practice requirement imposed under section 31, specify any other conditions on which the interment right is granted;
2. ensuring that applications for transfers of interment rights are in a form approved by CCNSW, meeting all requirements under section 58 of the Act;
3. preparing certificates of interment rights, to be provided whenever an interment right is granted, renewed, or transferred, in a form approved by CCNSW, and meeting all requirements under section 65 of the Act;
4. developing and maintaining a register of all interment rights granted, memorials erected, interments carried out, and cremations carried out at the cemetery, in accordance with section 63 of the Act; and
5. establishing a heritage advisory committee to advise on the heritage value of memorial and interment sites.

Complying with all the requirements of the new interment rights system is likely to require the adoption of changes to practice, procedures and policies throughout the organisation.

Although Part 4 of the Act commenced on 26 June 2018, a 12 month transition period has been put in place until May 2019, in order to assist with the implementation process. CCNSW has further committed to progressively publishing information and resources on its website to assist both cemetery operators and consumers with adjusting to the new interment rights system. Throughout the transition period, cemetery operators must take active steps to ensure that their organisations fully comply with both the Act and the Regulation, and keep abreast of any information and resources published and provided by CCNSW.

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