

# ***TR 2018/D2 - Fringe benefits tax: benefits provided to religious practitioners***



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This document has been finalised by TR 2019/3.



## Draft Taxation Ruling

### Fringe benefits tax: benefits provided to religious practitioners

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Contents	Para
<b>PROPOSED LEGALLY BINDING SECTION:</b>	
<b>Summary – what this draft Ruling is about</b>	<b>1</b>
<b>Previous rulings</b>	<b>2</b>
<b>Ruling</b>	<b>3</b>
<b>Date of effect</b>	<b>34</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1 – Your comments</b>	<b>35</b>
<b>Appendix 2 – Detailed contents list</b>	<b>37</b>

#### **① This publication provides you with the following level of protection:**

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Summary – what this draft Ruling is about

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1. This draft Ruling explains when certain benefits provided by registered religious institutions to religious practitioners will be exempt from fringe benefits tax (FBT).<sup>1</sup>

### Previous rulings

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2. The previous ATO view was expressed in Taxation Ruling TR 92/17 *Income tax and fringe benefits tax: exemptions for 'religious institutions'*. This draft Ruling takes account of law changes, mainly relating to the commencement of the Australian Charities and Not-for-Profits Commission (ACNC) that have occurred since TR 92/17 issued.

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<sup>1</sup> Section 57 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA). All legislative references in this draft Ruling are to the FBTAA, unless otherwise specified.

## Ruling

3. From 3 December 2012<sup>2</sup>, an entity which is an institution can provide exempt fringe benefits to certain employees if it is registered as a charity with the ACNC with the subtype 'advancing religion'.<sup>3</sup>
4. The views in this draft Ruling on the meaning of 'registered religious institution' and 'religious practitioner'<sup>4</sup> can be applied to those terms where they are used in other FBT exemptions.<sup>5</sup>
5. The content of this draft Ruling is summarised as follows:

**A benefit is provided by a registered religious institution**

(This is determined by the entity being established as an institution and its registration with the ACNC (see paragraphs 6 to 9))



**to an employee religious practitioner, or their spouse or child**

(Religious practitioners are, in essence, ordained ministers of religion, lay persons commissioned to perform the ministry of a minister of religion, other persons acting in those capacities from time to time, members of religious orders, and students undertaking certain religious studies or training (see paragraphs 10 to 16))



**in respect of the practitioner's pastoral duties or directly related religious activities**

(If a benefit is provided principally for other activities, the exemption does not apply (see paragraphs 17 to 25))

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<sup>2</sup> Prior to 3 December 2012 it was necessary for the entity to qualify as a 'religious institution', this ruling omits discussion of what a 'religious institution' is.

<sup>3</sup> Section 57 and definition of 'registered religious institution' in subsection 136(1).

<sup>4</sup> 'Religious practitioner' is defined in subsection 136(1).

<sup>5</sup> Sections 58, 58T and 58V for, respectively, live in residential care workers, live in domestic workers and other providers of domestic services.

**A benefit is provided by a registered religious institution**

6. In considering whether a benefit is provided by a registered religious institution<sup>6</sup>, administration by the ATO is limited to determining that the entity is an institution that maintains current ACNC registration with a subtype 'advancing religion'. It does not matter if the entity is also registered under another subtype provided one of the subtypes is 'advancing religion'.

7. In its ordinary sense, an institution is an establishment, organisation, or association, instituted for the promotion of an object, especially one of public or general utility. Such a body is called into existence to translate a defined purpose into a living and active principle.<sup>7</sup>

8. In the context of the FBTAA, the word 'institution' refers to a significant body which is a recognised part of society, and for which the grant of an exemption is seen to provide a public benefit.<sup>8</sup> Whether a body has these characteristics depends on the facts in each case. Relevant factors include an entity's activities, size, permanence and recognition. A structure which conducts activities of limited scale, controlled and operated by family members or friends is not an 'institution' in this context.<sup>9</sup>

9. An institution may be formed in different ways including as a company limited by guarantee, an incorporated association, an unincorporated association, a trust, or pursuant to statute or letters patent.

**To an employee religious practitioner, or their spouse or child*****Employee***

10. To be exempt, the benefit must be provided by a registered religious institution to an employee who is a religious practitioner.<sup>10</sup> 'Employment' is given a wider meaning than its ordinary meaning and includes holding an office or appointment.<sup>11</sup> Employees are recipients of salary or wages.<sup>12</sup> Here the term 'salary or wages' has a wider

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<sup>6</sup> A registered religious institution (as defined in subsection 136(1)) is an institution that is a:

- (a) registered charity, and
- (b) registered under the *Australian Charities and Not-for-profits Commission Act 2012* as the subtype of entity mentioned in column 2 of item 4 of the table in subsection 25-5(5) of that Act.

<sup>7</sup> See *Stratton v. Simpson* (1970) 125 CLR 13 at 157-8 per Gibbs J and Taxation Ruling TR 2011/4 *Income tax and fringe benefits tax: charities*.

<sup>8</sup> *Pamas Foundation (Inc) v. Commissioner of Taxation* (1992) 35 FCR 117 at 118; 92 ATC 4161 at 4162; (1992) 23 ATR 189 at 190 per Davies J.

<sup>9</sup> *Pamas Foundation (Inc) v. Commissioner of Taxation* (1992) 35 FCR 117; 92 ATC 4161; (1992) 23 ATR 189.

<sup>10</sup> Paragraph 57(a).

<sup>11</sup> Definition of 'employment' in subsection 136(1).

<sup>12</sup> Definitions of 'employee' and 'current employee' in subsection 136(1).

meaning than might ordinarily be the case. It includes payments made by a religious institution to a religious practitioner for activities done as a member of the institution in pursuit of the practitioner's vocation.<sup>13</sup>

***Religious practitioner***

11. 'Religious practitioner'<sup>14</sup> is defined to mean:

- (a) a minister of religion;
- (b) a student at an institution who is undertaking a course of instruction in the duties of a minister of religion;
- (c) a full-time member of a religious order; or
- (d) a student at a college conducted solely for training persons to become members of religious orders.

12. The expressions 'minister of religion' and 'member of a religious order' included in the definition of religious practitioner take their ordinary meaning in the context of where they appear. They cover members of the clergy (or their equivalent) across religions.

13. Except in rare cases, a minister of religion would have all of these characteristics:

- (a) is a member of a religious institution
- (b) is recognised by ordination or other admission or commissioning, or, where the religion does not require formal ordination, has authority to carry out the duties of a minister based on theological training or experience
- (c) is officially recognised as having authority on doctrine or religious practice
- (d) is distinct from ordinary adherents of the religion
- (e) is an acknowledged leader in spiritual affairs of the institution, and
- (f) is authorised to act as a minister or spiritual leader, including the conduct of religious worship and other religious ceremonies.

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<sup>13</sup> Section 12-47 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) and paragraph (b) of the definition of 'salary and wages' in subsection 136(1). The further requirement in paragraph 12-47(c) of the TAA that the payment be made in the course or furtherance of an enterprise that the institution carries on is taken to be satisfied for a payer that is a religious institution. See subsection 3AA(2) of Schedule 1 to the TAA, definitions of 'carrying on' and 'enterprise' in subsection 995-1(1) of the ITAA 1997, and paragraph 9-20(1)(e) of *A New Tax System (Goods and Services Tax) Act 1999*.

<sup>14</sup> Defined in subsection 136(1) by adopting the definition in subsection 995-1(1) of the ITAA 1997.

14. Except in rare cases, a religious order would have all of these characteristics:

- (a) members are part of a religious community and are pursuing a religious life on a full-time basis
- (b) the members regularly participate in activities such as private and public prayer, religious study, teaching, care of the aged, missionary work or church reform
- (c) controlled by, or supervised by, or affiliated with, or partially or wholly funded by a religious institution
- (d) in principle, members renounce the possession of private property, and
- (e) members make a long-term commitment to the order.

15. A period of probation (for instance, after completing the prescribed training course before being ordained or otherwise commissioned) does not prevent a person from being a religious practitioner.

16. A missionary will only be a religious practitioner where they also fit within one of the categories in the definition of the term.

**In respect of the religious practitioner's pastoral duties or directly related religious activities**

17. To be exempt, the benefit must not be provided principally for duties other than pastoral duties, or duties or activities that are directly related to the practice, study, teaching or propagation of religious beliefs. In the remainder of this draft Ruling, we call the latter 'directly related religious activities'. The benefit will fail the 'principally' test, and is not exempt, if it is provided principally for duties other than pastoral duties or directly related religious activities.

18. The word 'principally' is not defined in the FBTAA and takes its ordinary meaning of 'for the most part' or 'chiefly'.<sup>15</sup> Each case will depend upon its facts. Generally:

- (a) A benefit provided to a religious practitioner whose duties are exclusively or predominantly pastoral duties or directly related religious activities will satisfy the test (see Example 1 of this draft Ruling).
- (b) A benefit provided to a religious practitioner whose duties are exclusively or predominantly not pastoral duties or directly related religious activities will fail the test (see Example 3 of this draft Ruling).

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<sup>15</sup> *The Australian Oxford Dictionary*, [Online] 2004, rev. 2nd edn, Oxford University Press, Melbourne, viewed 5 July 2018.

- (c) However, a benefit provided to a religious practitioner who undertakes predominantly non-pastoral duties will pass the test where the benefit is provided solely or principally in respect of their pastoral duties and reflects the extent of the pastoral duties performed (see Example 2 of this draft Ruling).

### ***What are pastoral duties?***

19. Pastoral duties are generally duties associated with the spiritual care of people. Examples of pastoral duties undertaken by religious practitioners are:

- (a) communication of religious beliefs
- (b) teaching and counselling adherents and members of the community
- (c) providing adherents and members of the community with spiritual guidance and support
- (d) conducting an in-service seminar of a spiritual nature
- (e) meeting with or visiting adherents, the sick, the poor, and others who need emotional and spiritual support, and
- (f) providing pastoral supervision to those engaged in pastoral duties.

### ***What are directly related religious activities?***

20. The words ‘directly related’ point to a close connection between the duties or activities of the religious practitioner and the practice, study, teaching and propagation of religious beliefs. In this context, duties and activities will be directly related where, in their essential nature, they promote the practice, study, teaching and propagation of religious beliefs.<sup>16</sup>

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<sup>16</sup> In the Note to Clauses to Fringe Benefits Tax Assessment Bill 1986, it is explained that ‘the exemption does not...extend to benefits provided in respect of duties that are not religious in nature’. In the second reading speech for the Bill, the Treasurer the Hon Paul Keating MP stated that the exemption was ‘tightly drawn’ and that ‘the exemption...for religious institutions will only apply to benefits that are given to clergy and other members of a religious order. To ensure equity between employees in like occupations, benefits will be taxable if they are given mainly in respect of secular or commercial activities and not religious duties’.

21. Directly related religious activities may include incidental secular activities, provided there is a direct link between the conduct of those activities and the religious beliefs of the participants. For example, the activities of a religious practitioner involved in training and mentoring church pastors to make them more effective leaders, while secular, are incidental to the conduct of the religious beliefs of the church pastors and their denominations (see Example 4).

22. In contrast, secular or commercial activities that have a mere causative relationship to the practice, study, teaching and propagation of religious beliefs are not directly related activities. For example, the conduct of market research commissioned by a church to discover adherent's preferred style of worship is not a directly related religious activity.

23. Directly related religious activities include the duties or activities undertaken by a full-time member of a religious order to the extent those duties or activities are related to the practice, study, teaching or propagation of their religious beliefs.

24. Benefits provided principally for the missionary work undertaken by a religious practitioner will be exempt, as that work is either pastoral or directly related to the teaching or propagation of religious beliefs.

## **Examples**

### ***Example 1 – duties that are exclusively or predominantly pastoral***

25. *Ted is a pastor in a church that is registered with the ACNC. His duties are exclusively or predominantly of a pastoral nature. The church provides Ted with a residence and a motor vehicle in addition to a stipend for his pastoral duties. The benefits are exempt from FBT. Similarly, if the church pays the school fees for Ted's children, these benefits are exempt.*



**Example 2 – duties that are pastoral and non-pastoral**

26. *Ismail is a full-time member of a religious order supervised by a religious institution registered with the ACNC. The institution provides Ismail with benefits. It meets the cost of Ismail's living expenses, including accommodation and meals. As a part of his duties, and during most of his working hours, he teaches non-religious subjects at a private school, for which he is separately remunerated. This is not pastoral or a directly related religious activity. The institution states that the benefits, in the form of living expenses, are being provided in respect of Ismail's religious duties. The facts show that Ismail's benefits are of the same kind and amount as benefits provided to other members of the religious order who perform similar religious duties (of a comparable kind and amount to Ismail) who do not perform any non-religious duties (such as teaching). The benefits provided to Ismail are exempt, because based on these facts, they are for his religious duties or activities that are directly related to the practice, study, teaching or propagation of religious beliefs as a member of the religious order.*

**Example 3 – duties that are not pastoral or 'directly related religious activities'**

27. *Bob is a minister of religion. His duties, performed in the accounting division of the church, are exclusively or predominantly of an administrative nature. A registered religious institution pays the costs of educating Bob's daughter. This benefit is not exempt because it is not provided principally in respect of pastoral duties or directly related religious activities.*

**Example 4 – duties that are 'directly related religious activities'**

28. *Sam is an ordained minister and the executive officer of an inter-denominational religious organisation registered with the ACNC, which is committed to the advancement of religion through the development of church leadership. Sam's duties mainly involve training and mentoring church pastors to make them more effective leaders and advising church denominations about their leadership development programs. The organisation provides Sam with a residence and motor vehicle in addition to a stipend for these duties. Although Sam's duties are mainly secular in nature, the support he provides to pastors and denominations is directly related to their ability to practice, teach and propagate the religious beliefs of their churches. The benefits provided to Sam are exempt.*

**Example 5 – duties that are predominantly administrative**

29. Kate is a minister of religion who is appointed principal of a private school that is a registered religious institution. Kate's duties are related predominantly to the administration of the school. As part of her remuneration package, Kate is provided with a residence and a motor vehicle. Those benefits are not exempt, because the benefits are provided principally in respect of duties that are not pastoral duties or directly related religious activities.

**Example 6 – duties that are exclusively or predominantly pastoral**

30. Rod is a lay person commissioned to perform the ministerial duties of a church. He is employed by a private school to teach religious studies and to perform other duties as a spiritual guidance officer. The private school is a registered religious institution, which also maintains registration under another ACNC subtype. The school provides Rod with the use of a car in relation to his employment.

31. The benefit is exempt, as the school is a registered religious institution and the benefit is provided in respect of pastoral and directly related religious activities that Rod predominantly or exclusively performs.

**Example 7 – duties that are not exclusively or predominantly pastoral or 'directly related religious activities'**

32. Following from the facts of Example 6, in a subsequent year there is a restructure of the teaching duties at the school and Rod commences teaching the Mathematics and English curricula in addition to providing religious instruction. His role as a spiritual guidance officer is now shared with several other teaching staff. His teaching duties in subjects other than religious instruction take up the majority of his working time. The school continues to provide Rod with the benefits on the same basis.

33. The benefits are not exempt as the arrangement between the school and Rod do not show that the benefits are provided principally for the pastoral duties or directly related religious activities that he performs.

# TR 2018/D2

## Date of effect

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34. When the final Ruling is issued, it is proposed to apply to years of income commencing both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

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**Commissioner of Taxation**

11 July 2018

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## **Appendix 1 – Your comments**

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35. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

36. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

<b>Due date:</b>	<b>24 August 2018</b>
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## Appendix 2 – Detailed contents list

37. The following is a detailed contents list for this draft Ruling:

	<b>Paragraph</b>
<b>Summary – what this draft Ruling is about</b>	<b>1</b>
<b>Previous rulings</b>	<b>2</b>
<b>Ruling</b>	<b>3</b>
A benefit is provided by a registered religious institution	6
To an employee religious practitioner, or their spouse or child	10
<i>Employee</i>	10
<i>Religious practitioner</i>	11
In respect of the religious practitioner's pastoral duties or directly related religious activities	17
<i>What are pastoral duties?</i>	19
<i>What are directly related religious activities?</i>	20
Examples	25
<i>Example 1 – duties that are exclusively or predominantly pastoral</i>	25
<i>Example 2 – duties that are pastoral and non-pastoral</i>	26
<i>Example 3 – duties that are not pastoral or 'directly related religious activities'</i>	27
<i>Example 4 – duties that are 'directly related religious activities'</i>	28
<i>Example 5 – duties that are predominantly administrative</i>	29
<i>Example 6 – duties that are exclusively or predominantly pastoral</i>	30
<i>Example 7 – duties that are not exclusively or predominantly pastoral or 'directly related religious activities'</i>	32
<b>Date of effect</b>	<b>34</b>
<b>Appendix 1 – Your comments</b>	<b>35</b>
<b>Appendix 2 – Detailed contents list</b>	<b>37</b>

## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10; TR 2011/4

### *Previous Rulings/Determinations:*

TR 92/17

### *Legislative references:*

- FBTAA 1986
- FBTAA 1986 57
- FBTAA 1986 57(a)
- FBTAA 1986 58
- FBTAA 1986 58T
- FBTAA 1986 58V
- FBTAA 1986 136(1)
- ITAA 1997
- ITAA 1997 995-1(1)
- ANTS(GST)A 1999
- ANTS(GST)A 1999 9-20(1)(e)
- TAA 1953
- TAA 1953 3AA(2)
- TAA 1953 12-47
- TAA 1953 12-47(c)

- Australian Charities and Not-for-Profits Commission Act 2012

### *Cases relied on:*

- *Pamas Foundation (Inc) v. Commissioner of Taxation* (1992) 35 FCR 117; (1992) 106 ALR 229; (1992) 23 ATR 189; 92 ATC 4161
- *Stratton v. Simpson* (1970) 125 CLR 138; (1970) 44 ALJR 487; [1971] ALR 117; [1970] HCA 45

### *Other references:*

- Explanatory Memorandum to the Fringe Benefits Tax Assessment Bill 1986
- Second Reading Speech to the Fringe Benefits Tax Assessment Bill 1986
- The Australian Oxford Dictionary, [Online] 2004, rev. 2<sup>nd</sup> edn, Oxford University Press, Melbourne

### ATO references

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