



AUSTRALIAN
FUNERAL
DIRECTORS
ASSOCIATION

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1 November, 2024

Melissa Harrison
Australian Taxation Office
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Consultation – GST Determination: Is the supply of a burial right in respect of a public cemetery subject to GST?

Dear Melissa,

The Australian Taxation Office (ATO) has published a consultation paper on a draft decision that the supply of a burial right in a public cemetery is not subject to GST. The Australian Funeral Directors Association is pleased to provide a submission to the ATO to assist in its review of the GST consequences of a burial right in respect of a public (i.e., state-owned) cemetery.

About AFDA

Formed in 1935, the Australian Funeral Directors Association (**AFDA**) has 154 members accounting for a total of over 500 funeral premises across Australia. In addition, the AFDA has 72 Affiliate Members who are suppliers to the industry. In consequence, AFDA members conduct 55% of the approximately 182,000 funerals conducted in Australia annually. AFDA is widely recognised as the authoritative voice on all funeral industry matters and its key objective is to optimise the funeral experience and ensure quality delivery of service to the wider community by enhancing and promoting professional funeral standards.

AFDA's has provided a response to the specific consultation questions in Annexure 1.

In addition to those matters, there are a couple of key points that the AFDA wishes to bring to the attention of the ATO:

1. Date of effect of Determination; and
2. Incorrectly charged GST and reimbursing customers.

1) Date of effect of Determination

The Determination once formalised will apply "on and after 26 May 2021".

The previous Draft Determination issued in 2021 applied to the previous 9 years.

From the perspective of AFDA members, it is clearly preferable that the retroactive application of the Determination has been limited in time. However, it is questionable as to whether the Determination needs to be retrospective at all.

Given the administrative time and burden for funeral operators as well as the ATO to review and process refunds of GST to consumers (it being inevitable that some degree of refund will be required) an alternative and preferred option is that the Determination be prospective (thus preventing the addition of GST to future sales of burial rights by relevant agencies. In many cases it will be impossible to determine which family member the refund is correctly to go to as it is likely many estates will have been wound up. While there is no prohibition on the making of retroactive laws in Australia, the burden that will be imposed by the Determination, particularly with respect to smaller providers, the potential for confusion from consumers (and perhaps vilification of the funeral services industry for the initial charging of GST) is not warranted where there is a common law presumption against the retrospective operation of laws in Australia.

The AFDA therefore requests on behalf of its members that serious consideration be given to the necessity for the legislation to have retroactive effect and for an explanation to be provided as part of the consultation process as to why it is necessary for the Determination to have such an effect.

2) Reimbursing customers in light of retroactive application

The AFDA notes that the Determination is express that there is no "requirement in the law" to reimburse excess GST to your customers and whether that occurs is a matter for operators and customers.

The practical reality is that some customers, potentially via the media, will become aware of the Determination and any failure to reimburse "excess GST" will become a matter of contention. Given the scrutiny that the funeral services industry has been under in the last several years (ACCC enforcement priority review, IPART reporting, and the reviews of regulatory agencies such as Cemeteries and Crematoria NSW's 11th Hour Report), failure across the industry to provide reimbursement will be extremely damaging, particularly to any operators who choose not to reimburse.

The de facto position will be that operators will need to reimburse and bear the administrative costs of doing so (not only in relation to customers but also in relation to seeking reimbursement from the ATO for such sums). The process that is suggested by the ATO for this purpose appears burdensome (see the comments made in Annexure 1).

We note that Appendix B to the Determination states that "*If you choose to charge your customer an administration fee for the cost of processing a reimbursement of excess GST, and offset this against the amount you reimburse to your customer, you will still be entitled to a full refund of the excess GST unless (a) the customer does not agree to the fee or (b) the fee is not based on a reasonable administration cost incurred for processing the reimbursement.*"

However, it is also stated that "*You will only be entitled to a refund of the amount of GST actually reimbursed to the customer*". In the event that customers do not agree to the fee, it is clear that the administrative costs of compliance with the Determination will be solely born by the operator in circumstances where GST was charged in circumstances where it was not unlawful to do so.

The burden for smaller operators in particular seems disproportionate. The costs of administration cannot be sought from the ATO.

This demonstrates the importance of ensuring that the burdens are not excessive for operators and

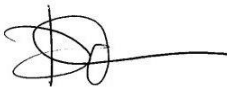
weighs against the Determination having retroactive effect.

Conclusion and Recommendations

AFDA remains concerned about the potential reputational damage to its members and the administrative burden that would have to be carried by funeral directors, many of which are small, family-owned businesses, if the ATO were to require the industry to administer the GST retrospectively.

AFDA wishes to thank the ATO for considering the concerns of the Australian Funeral Directors Association and to be part of this consultation process.

Yours faithfully,

A handwritten signature in black ink, consisting of a stylized, cursive 'D' followed by a horizontal line extending to the right.

Dale Gilson
Chief Executive Officer

Consultation – GST Determination: Is the supply of a burial right in respect of a public cemetery subject to GST?

Response to Consultation Questions

	Consultation Question	Response
1(a)	Does the description of what constitutes a burial right in paragraph 7 and footnote 15 of the final determination align with your understanding of what constitutes a burial right under the respective State and Territory legislation regulating public cemeteries?	<p>The terminology presently being used by the ATO in the Consultation Paper (Paper) is that of a "burial right". In contrast and as noted in footnote 13 of the draft determination, other terminology is used in different geographic regions and by different government bodies.</p> <p>In our view there should be commonality between terminology and what is meant by such terminology as between the State regulators and the ATO. This approach will avoid confusion in the industry.</p> <p>We suggest that each of the relevant State Regulators are invited to comment on the terminology and definitions used by the ATO to ensure consistency in approach and understanding as between government enterprises.</p>
1(b)	Is there any further State and Territory legislation the final determination needs to consider as part of explaining what we mean when we use the term burial rights in the determination?	As for question 1(a) we suggest that each of the relevant State Regulators are invited to comment with respect to this question.
2	Does the explanation in paragraph 5 of the final determination, on what constitutes an Australian government agency, assist industry in determining to whom the ruling would apply?	<p>We understand that the reference to "trusts" which is included in this paragraph expressly includes any entities formed under legislation such as <i>the Crown Lands (General Reserves) By-Law 2006 NSW</i>.</p> <p>Assuming that is correct, we are of the view that the definition is fulsome with respect to identifying relevant government agencies.</p>
3(a)	Do paragraphs 67 to 69 of the determination sufficiently address the range of ways in which funeral directors can facilitate the supply of burial rights by an Australian government agency to a person (including but not limited to arrangements involving agency)?	No further comment, the determination is sufficiently addressed.
3(b)	Do examples 1 and 2 assist the industry in understanding the requirement to apportion payments received in return for a single burial rights package that includes the supply of a burial right by an AGA?	No further comment to Example 1.

		<p>In relation to Example 2, charges for the supply of other goods and services made in relation to a burial or cremation are subject to GST. GST IS payable on gravedigging fees and the cost of memorials. (Clause 10)</p> <p>By contrast, note in “Example 2 - supply of a burial right in a public cemetery made through a funeral director”, reference is made to the deceased’s estate separately arranging a religious service with a “religious institution” and this fee is said to be “GST-free” (clause 20 and footnote 18). The Draft Determination does not make it clear whether the same religious fee is GST-free if the funeral director arranges, engages and charges for the religious institution.</p> <p>By analogy with burial rights, if the religious institution’s fee is GST-free when engaged by the funeral director acting as agent, why wouldn’t all other GST-free disbursements (eg Death Certificate, musicians, international freight, etc) on-charged by funeral directors to clients no longer apply GST to the funeral director’s invoice?</p>
4	<p>Is the proposed web guidance on how Division 142 of the GST Act operates in relation to incorrectly charged GST (excess GST) easy to understand (appendix 2)?</p>	<p>We presume the proposed web guidance will be publicly available (ie, both operators and consumers will be able to review and consider it).</p> <p>We are of the view that the web guidance is appropriate for, and easily understandable, from the perspective of operators. That is, an operator reading the guidance should, in our opinion, be appropriately informed as to the circumstances in which the ATO will refund GST and the steps that must be taken in for a refund to be processed, including the limitations on refunds (ie, entitlement amount and circumstances).</p> <p>We think it would be helpful for the guidance to also expressly make provision for applications for refunds to cover multiple refunds of GST. Currently the guidance reads as if an individual application will be necessary for every refund made. However we foresee circumstances in which multiple refunds will be made in order to ensure community goodwill, and accordingly it would be helpful for the application process to accommodate refunds at scale (ie, a single application accompanied by a spreadsheet that articulated the detail of the refunds made, being a document that supported the application).</p> <p>We think it is unhelpful to require operators to explain to the ATO as part of any application for a refund "how the excess GST arose" and to provide information about "pricing policy and practice" in circumstances where the ATO has changed its opinion as to whether GST is payable on the supply or renewal of a burial right in a public cemetery, or on the supply of any permission obtained under State or Territory legislation about the exercise of such rights.</p>

		<p>To the extent that this guidance is also available to consumers, we are of the view that it would be helpful for the guidance to also provide appropriate and clear commentary which covers the following factors:</p> <ul style="list-style-type: none"> • The potential for a refund of GST is because of a determination made by the ATO in 2024 which mandates that GST is not payable on certain supplies. That was not clear prior to the issue of the determination. The inclusion of information to this effect is important to ensure that the community does not form the view that operators have been unjustly charging GST. • Operators are not obliged to refund GST; and • Operators may charge a reasonable administration cost for proceedings any reimbursement. This should not have to be with the agreement of the customer although it should reflect the reasonable costs of the work that needs to be undertaken in order to: (1) reimburse the customer; and (2) seek reimbursement from the ATO of the funds paid out.
5	<p>It is the ATO's understanding that public cemeteries and crematoriums make up approximately 80% of the industry. Is this percentage reflective of the number of public operators in your State or Territory where there is a mix of both private and public cemeteries and crematoriums? Do you have access to any data that you could provide the ATO that would help us understand this mix in any State or Territory?</p>	<p>This information is best provided by the Australian Cemeteries and Crematoria Association and we suggest that that industry body is invited to comment on the questions set out in this paragraph.</p>

