GSTR 2011/2EC - Compendium

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The edited version of the Compendium of Comments is an Australian Taxation Office (ATO) communication that is not intended to be relied upon as it provides no protection from primary tax, penalties, interest or sanctions for non-compliance with the law. In accordance with PS LA 2008/3 it only affords level 3 protection.

Ruling Compendium – GSTR 2011/2 appropriations

This is a compendium of responses to the issues raised by external parties to draft GSTR 2006/11DA – Goods and services tax: appropriations

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft addendum.

Summary of issues raised and responses – GSTR 2006/11DA

Issue No.	Issue raised	ATO Response/Action taken
1	Paragraph 48A is inconsistent with paragraph 30. Paragraph 30 states that section 9-15(3) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) is intended to apply to payments of a funding nature, whereas new paragraph 48 states that 9-15(3) does not extend to an appropriation for the supply of services. This statement requires a better understanding. All that is required under the section for the payment to not constitute consideration is that the payment be by way of an appropriation from a government related entity to another government related entity. Section 9-15(3) does not refer to ultimate application. As such, within limitations on a reading of the section, the recipient government entity appears at liberty to apply that appropriation in a broader commercial sense. With respect, the ultimate application of the appropriation should not be the determinative factor. Should the ultimate purpose be determinative, the legislation should be amended to reflect this position.	The reasoning in paragraph 30 of GSTR 2006/11 is not included in the new ruling. The reasoning used in the new ruling to replace GSTR 2006/11 is drawn from paragraphs 62 and 63 of Edmonds J's decision in *TT-Line Company Pty Ltd v. Commissioner of Taxation* [2009] FCAFC 178; (2009) 181 FCR400; 2009 ATC 20-157, (2009) 74 ATR 771 (*TT-Line)*. Perram J agreed with the reasons of Edmonds J at paragraph 65.
2	*TT-line* decision should be read narrowly. The addendum to GSTR 2006/11 will potentially have broad implications. The specific factual scenario in *TT-Line* is being broadly applied in GSTR 2006/11DA to the operation of government funding to non-commercial sectors, such as public health and education. This was never intended when paragraph 9-15(3)(c) was enacted. The ATO should not feel compelled to apply the approaches espoused by the judiciary in *TT-Line* to the general application of section 9-15(3)(c). The judgement should be limited to the factual scenario for which it was designed that is where government makes identical payments to both private and public	The Commissioner does not agree that the *TT-Line* decision can be applied as suggested. The Court's identification of the principle stemming from the policy intent of paragraph 9-15(3)(c) is relevant to all payments specifically covered by an appropriation and can not be limited to the particular factual scenario considered in the *TT-Line* decision.

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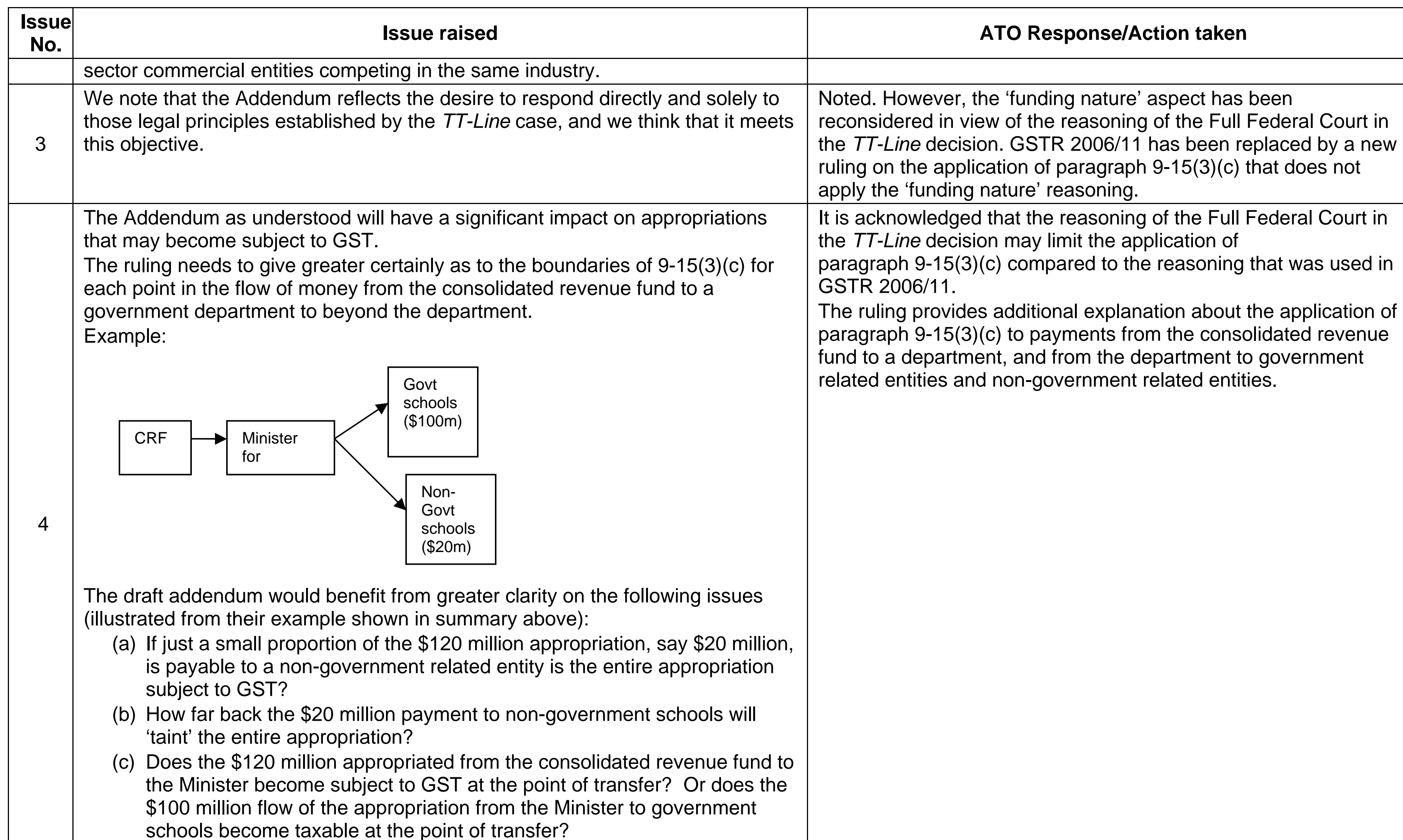
	sector commercial entities competing in the same industry.	
3	We note that the Addendum reflects the desire to respond directly and solely to those legal principles established by the *TT-Line* case, and we think that it meets this objective.	Noted. However, the 'funding nature' aspect has been reconsidered in view of the reasoning of the Full Federal Court in the *TT-Line* decision. GSTR 2006/11 has been replaced by a new ruling on the application of paragraph 9-15(3)(c) that does not apply the 'funding nature' reasoning.
4	The Addendum as understood will have a significant impact on appropriations that may become subject to GST. The ruling needs to give greater certainly as to the boundaries of 9-15(3)(c) for each point in the flow of money from the consolidated revenue fund to a government department to beyond the department. Example:  The draft addendum would benefit from greater clarity on the following issues (illustrated from their example shown in summary above): (a) If just a small proportion of the $120 million appropriation, say $20 million, is payable to a non-government related entity is the entire appropriation subject to GST? (b) How far back the $20 million payment to non-government schools will 'taint' the entire appropriation? (c) Does the $120 million appropriated from the consolidated revenue fund to the Minister become subject to GST at the point of transfer? Or does the $100 million flow of the appropriation from the Minister to government schools become taxable at the point of transfer?	It is acknowledged that the reasoning of the Full Federal Court in the *TT-Line* decision may limit the application of paragraph 9-15(3)(c) compared to the reasoning that was used in GSTR 2006/11. The ruling provides additional explanation about the application of paragraph 9-15(3)(c) to payments from the consolidated revenue fund to a department, and from the department to government related entities and non-government related entities.

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5	A literal application of the draft addendum will lead to GST applying to payments to the public hospital and school sectors, where those payments are currently correctly treated as not being consideration for a supply (and therefore not subject to GST). This clearly was not the intention of Parliament when section 9-15(3)(c) was enacted. The cash flow timing ramifications of this change (that is timing delay between paying the GST and claiming back in the input tax credits) represent a significant impediment to Government's ongoing cash flow. In the absence of increased Commonwealth funding to cover the cash flow timing shortfall, the worst case scenario would be a reduction in the ability to deliver services to the community.	The reasoning in the ruling reflects the reasoning of the *TT-Line* decision. A payment to which paragraph 9-15(3)(c) does not apply will not automatically form consideration for a taxable supply. All elements of section 9-5 need to be satisfied for the payment to be consideration for a taxable supply. It will still be necessary to determine whether the payment is otherwise consideration for a supply when paragraph 9-15(3)(c) does not apply.
6	The current approach requires the funding recipient to determine whether or not a payment is specifically covered by an appropriation; however, it is the funding provider that will generally have better access to the relevant information to enable the correct assessment. It is suggested that the funding supplier should be compelled to supply relevant information with the payment to the funding recipient is entitled to rely on that information to work out their GST situation.	The suggested solution would require the law to be amended and is outside the scope of this ruling. It is necessary to determine the terms of the appropriation in order to determine whether a payment is specifically covered by the appropriation for the purposes of paragraph 9-15(3)(c). Documents relevant to establishing the terms of the appropriation will generally be publicly available, therefore the payee may only need to clarify from the payer which appropriation the payment was sourced from.
7	Suggested transitional arrangements too short. The 2011-12 budget process already underway. Any cash flow consequences need to be determined now.	The transitional arrangements have been extended. GSTR 2006/11 is being withdrawn with effect from 1 July 2012. Entities may continue to rely on GSTR 2006/11 for payments made before 1 July 2012 to allow sufficient time to make necessary changes to their practices and systems. Budget preparations for payments made on or after 1 July 2012 need to consider the views in this ruling that has replaced GSTR 2006/11. If a supplier relies or has relied on GSTR 2006/11 to determine that paragraph 9-15(3)(c) applies to a payment made for a supply, then no GST is payable on that supply. This means that the recipient cannot claim an input tax credit in respect of that payment. (Refer to section 11-25 of the GST Act and subsection 357-60(3) of Schedule 1 to the *Taxation Administration Act 1953*.)

Summary of issues raised and responses – draft version of GSTR 2011/2

(Additional focussed consultation with Commonwealth, States and Territory Representatives)

Issue No.	Issue raised	ATO Response/Action taken
1	The new ruling is clearer than the earlier proposed addendum to GSTR 2006/11. However, the narrower scope of the GST exemption for appropriations, set out in the draft ruling, remains inconsistent with the policy intent of the exemption. We understand, however, the ATO is required to apply the law in a way that is consistent with the Court's decision in *TT-Line* in the absence of legislative changes.	The ruling has been drafted to be consistent with the reasoning of the *TT-Line* decision.
2	The draft ruling takes a form over substance approach to applying the exemption where the language of the appropriation (and supporting documentation) determines the GST outcome rather than the substance of the arrangements. This raises the question of what would be the Commissioner's position in relation to applying general anti-avoidance provisions if appropriations legislation and supporting documentation were redrafted solely for the purpose of maintain the GST exempt status of appropriations.	While Division 165 may apply in particular circumstances, the Commissioner does not consider that Division 165 is likely to be applicable in this context.
3	The range of documents that can assist in establishing the terms of an appropriation is acceptable, particularly given that the key documents in addition to the appropriations legislation (that is budget papers) are still able to be used as supporting documents.	Acknowledged.
4	There is inconsistency between paragraphs 24 (largely repeated in paragraph 96) and paragraph 102 (which does not form part of the binding public ruling). Paragraphs 24 and 96 refer to "Other documents that can be considered in establishing the terms of the appropriation if those other documents *work in conjunction with* the appropriation Act …" (italics added) whereas paragraph 102 refers to documents that "…are not *issued in conjunction with* the appropriation Act". Can documents that work in conjunction with the appropriations Act but are not issued in conjunction with it be used as supporting documents?	These paragraphs have been rephrased (see paragraphs 22 to 27 and 94 to 102).

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5	Paragraphs 24 and 25 of the ruling discuss documents that can be considered in establishing the terms of an appropriation, such as budget papers. These paragraphs are largely repeated in paragraphs 96 and 97 which are contained in Appendix 2. Paragraph 103, which is also in Appendix 2 but does not appear in the ruling itself, says that many documents may assist in establishing which appropriation a payment was sourced from. These include computer records and accounts which link payments to appropriation sources through mechanisms such as cost codes. Can these documents/records be considered in establishing the terms of the appropriation? What is the distinction between "establishing the terms of an appropriation" and "establishing which appropriation a payment was sourced from"? The former has status in the ruling but the later does not so it is not clear what the later phrase adds to the ruling.	These paragraphs have been rephrased to clarify those documents that can be referred to in identifying the terms of an appropriation established by the appropriation Act. Paragraph 102 clarifies documents that will not be relevant in identifying the terms of an appropriation. The documents have been identified as they may assist government related entities determine the appropriation that authorises the relevant expenditure. The government related entity must then identify the terms of the appropriation to determine whether paragraph 9-15(3)(c) applies to the payment. Paragraph 102 is not interpretive and therefore does not appear in the Ruling section.
6	The examples are very simplistic and are reasonably clear in those circumstances illustrated. However, the ruling should also contain the GST implications of more complex examples. For example, where an appropriation separates out payments to government and non-government schools but at some point during the year funds from the allocation for government schools are diverted to non-government schools and this was not anticipated at the time the appropriation is made so is not reflected in the appropriations legislation or supporting documents. Is this an 'adjustment event' that makes the initial GST exempt appropriation now subject to GST? What action does the Department need to take to ensure the correct GST outcome under the law?	The Commissioner considers that the examples illustrate the principles outlined in the ruling which can be applied to other arrangements. Taxpayers may apply for a private ruling on specific factual arrangements.
7	Paragraph 105, which discusses contingency funds, states that "… contingency funds are established by the relevant appropriation Act". Paragraph 105 should accommodate alternative contingency arrangements, that is the sentence "These contingency funds are established by the relevant appropriation Act" should read "These contingency funds or arrangements are established by the relevant appropriation Act or other enabling legislation".	The ruling sets out that an 'appropriation under an Australian law' means an authorisation for the expenditure of money, by a statute of the Commonwealth, a State or a Territory, or by delegated legislation. The ruling refers to such statutes and the relevant delegated legislation as an 'appropriation Act' (see paragraph 8). The 'other enabling legislation' referred to should fall within the term 'appropriation Act' as used in the ruling if the legislation authorises the expenditure of money.
8	It is not clear why the two appendices do not form part of the binding public ruling. If they are helpful to understanding the ruling they should form part of the ruling. If not, they should be removed since they have no status and are not binding.	The two Appendixes have been combined into Appendix 1. Appendix 1 provides further explanation for the principles ruled upon under the ruling section.

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9	Portfolio Budget Statements and other key documents available at the time of the appropriation being considered by Parliament are the most suitable supportive documents. Documents without Parliamentary consideration or that were created after the appropriation may not be considered by a court to be adequate to explain the terms of the appropriation. This approach would seem to support section 15AB of the *Acts Interpretations Act 1901.*	This is addressed in paragraphs 22 to 27 and 94 to 102.
10	We note that paragraphs 28 and 100 suggest that budget papers which mention special or standing appropriations would not be relevant supporting documents. However, we consider that budget papers could be considered relevant supporting documents for all types of appropriations, including special appropriations. This is for three reasons: • Firstly, the budget documents present a picture of the total expenditure proposed, some of which may be in previously approved special appropriations, some in the annual appropriation Acts, to enable Parliament to appropriately consider passing supply. The Government may need to draw Parliament's attention to a changed focus of expenditure under a particular special account etc (for example, a changed class of recipient of benefits or payments). This may be permissible within the expenditure criteria of the special account (which can be loosely drafted) and therefore not require legislative change, but the changed intention may need to be disclosed. • Secondly, the Budget process may establish new special appropriations, for example statutory special accounts under s.20 of the Financial Management and Accountability Act 1997 (FMA Act), or special accounts created under different or soon to be passed legislation, which needs to be described as part of the Budget process; • Thirdly, some annual appropriations, authorised through the annual appropriation bills, may top up special appropriations including special accounts, which may be otherwise limited, particularly as to amount. Therefore Budget documents may need to describe this expenditure.	The Commissioner does not consider that budget papers prepared for budget processes that occur after the relevant appropriation Bill has been passed can be referred to in identifying the terms of the appropriation established by the appropriation Act. However, these documents can be referred to where the appropriation Act is either being created or amended. See paragraphs 27 and 99.

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11	It may be useful to begin this part of the proposed ruling with an overarching statement of what constitutes an appropriation and outline the different types of appropriations. For example, FMA Act section 20 statutory special accounts created under the FMA Act and FMA Act section 21 special accounts created under other legislation. This additional explanation may provide greater clarity in the proposed ruling. We note that it is possible to have multiple appropriation types in one mechanism. For example a Budget Appropriation Bill is able to provide authority for or create special appropriations, as well as ordinary annual appropriations. Perhaps greater flexibility could be provided for within the proposed ruling to reflect that appropriations can be created in a variety of ways and multiple appropriations, of multiple different types, can be found within one source.	We do not consider that it is necessary to provide further explanation on the meaning of an appropriation. The ruling refers to multiple appropriations at paragraphs 19 and paragraphs 90 and 91.
12	We would suggest a small amendment to paragraph 78 to clarify that an actual payment of funds is made, rather than a transfer.	The Commissioner does not consider that it is necessary to make the suggested change as a 'transfer' can still be a 'payment'. This paragraph has been rephrased to clarify the position that the allocation of funds is a 'payment' in the context of paragraph 9-15(3)(c). See paragraphs 11 and 78.
13	Some Cabinet-in-Confidence documents that are not in the public domain should constitute supporting documentation. For example, a sub-committee of Cabinet, may authorise payments independently of the budget process. Minutes from this sub-committee that detail the payments not reflected in budget papers should constitute Supporting Documentation. However, these minutes will not be reflected in the 'above documents' as specified in the final bullet point in paragraph 25.	The Commissioner considers that the authorisation for a payment made by a government related entity is derived from the relevant appropriation Act. Regard must be had to the appropriation Act in order to ascertain the terms of the appropriation. Documentation that may assist with understanding the terms of the appropriation include: • documents that are linked to the appropriation Act by a provision in the appropriation Act; and • documents that were considered by Parliament together with the appropriation Bill. (see paragraphs 22 to 27 and 94 to 102). We do not consider that the documents referred to in the submission may be used to assist understanding the terms of the appropriation established by the relevant appropriation Act.

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14	Our understanding is that the concept of 'funding nature' was a practical approach introduced by the ATO in order to provide parameters for the operation of section 9-15(3)(c). In our opinion, the *TT-Line* decision was a purely legalistic interpretation of section 9-15(3)(c) in the context of a limited understanding of the practical consequences of such an approach to the section. From the case it is clear that there is no legal requirement in section 9-15(3)(c) for the payment to have a funding nature. However, this appears to be inconsistent with the underlying intentions of the Commonwealth Parliament that enacted the GST Act.	The ruling has been drafted to be consistent with the reasoning of the *TT-Line* decision. The 'funding nature' requirement set out in GSTR 2006/11 was reconsidered in view of the reasoning of the Full Federal Court in the *TT-Line* decision and not incorporated into GSTR 2011/2.
15	In light of the competitive neutrality principles espoused by the Federal and Full Federal Courts, the ATO have the opportunity to interpret the section in a manner putting the government sector on a par with the private sector in relation to internal funding payments. In the private sector, such payments may be made in return for the issue of capital, rendering the transaction input taxed and hence without significant GST consequence. The ATO can choose to interpret the section in a manner that gives government the same 'no GST' outcome for internal funding transactions. While the Courts were not required to address this aspect of the legislation, the interpretation being introduced by the ATO would appear to undermine the notion of 'competitive neutrality' espoused by the Courts. It appears that an otherwise taxable supply can now be rendered exempt from GST under the section, a privilege not available to the private sector.	The Commissioner considers that the ruling is consistent with the reasoning of the *TT-Line* decision.

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16	Denying the application of the GST-exemption where payments are only made to government related entities, but where it is "possible" under the terms of the appropriation to make payments to non-government related entities, may lead to uncertainty for both the funding provider and funding recipient. The funding recipient will generally not be in a position to independently determine if it is possible for funding to be paid to non-government related entities under the terms of the appropriation. The budget papers often do not identify which entities, be they private or public, will receive the funding in order to implement the output. In particular, it is generally not practicable to specify in budget papers that recipients of funding for an output will be limited to government related entities. Accordingly, while payments may only be made to government related entities, the ATO's new approach may result in GST applying, despite the fact that payments have and never will be made to non-government related entities for that particular output.	Consistent with the *TT-Line* decision, it is necessary to determine the terms of the appropriation sourced from the relevant appropriation Act. Documents relevant to establishing the terms of the appropriation will generally be publicly available. Therefore the payee may only need to clarify from the payer which appropriation Act authorised the relevant payment. It is acknowledged that the reasoning of the Full Federal Court in the *TT-Line* decision may limit the application of paragraph 9-15(3)(c) compared to the reasoning that was used in GSTR 2006/11.
17	An example, or further detail, should be provided to explain exactly what is meant by "can, under the terms of the appropriation, be payable to either a government related entity or a non-government related entity". The notion that, if it is possible to make a payment to a non-government related entity, any payment to a government related entity is not specifically covered by an appropriation will unnecessarily bring too many payments into the scope of the GST, with all of the associated inefficiencies (that is, cash flow, administration).	Examples 3 to 5 and 7 illustrate the Commissioner's view on when a payment can, under the terms of the appropriation, be payable to either a government related entity or a non-government related entity. The Commissioner considers that the ruling is consistent with the reasoning of the *TT-Line* decision.
18	A concern relates to clearly taxable supplies (that is, not arrangements where the GST treatment, but for paragraph 9-15(3)(c), would be unclear) being treated as exempt from GST. This does not align with any GST exemptions available to the private sector. Further, where an otherwise clearly taxable supply is treated as exempt from GST, this disregards the "competitive neutrality" approach espoused by the Federal Court in TT- Line, which, in general terms requires the GST to apply equally to both the private and public sectors.	The Commissioner considers that the ruling is consistent with the reasoning of the *TT-Line* decision.