

# ***TR 2019/3EC - Compendium***



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## **Public advice and guidance compendium – TR 2019/3**

This is a compendium of responses to the issues raised by external parties to draft Taxation Ruling TR 2018/D2 *Fringe benefits tax: benefits provided to religious practitioners*.

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

### **Summary of issues raised and responses**

<b>Issue No.</b>	<b>Issue raised</b>	<b>ATO response / action taken</b>
1	<p><b>Date of effect of the Ruling</b></p> <p>The date of effect is ambiguous. The final Ruling should apply prospectively and not retrospectively.</p> <p>A literal reading of the Ruling means that the Ruling could apply with no retrospective limit. Retrospective application will not allow employers to renegotiate or adjust terms of employment. A retrospective liability would hurt organisations and the disadvantaged people they serve.</p> <p>If the Ruling is applied retrospectively it could result in a large tax burden where employees who qualified under Taxation Ruling TR 92/17 <i>Income tax and fringe benefits tax: exemptions for 'religious institutions'</i> have fringe benefits tax (FBT) salary arrangements of prior years' set aside.</p> <p>There are significant differences between TR 92/17 and TR 2018/D2 and a retrospective application of the Ruling could create unnecessary cost in assessing retrospective adjustments.</p>	<p>Paragraph 59 of the final Ruling has been added to clarify the date of effect. The final Ruling is intended to be consistent, in general terms, with TR 92/17 which it has replaced. However, for the avoidance of doubt, taxpayers who relied on TR 92/17 prior to its withdrawal will have the protection of that Ruling.</p> <p>The legislative change to the definition of 'registered religious institution' on 3 December 2012 only applies from that time.</p>

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	Due to the change in the definition of 'registered religious institution', the application of the Ruling could not predate the introduction of the Australian Charities and Not-for-profits Commission.	
2	<p><b>Definition of employment</b></p> <p>The final Ruling should include an expanded definition of employment that explicitly states that employees do not have to receive money to meet the definition. This would cover situations where monks or nuns take a vow not to handle money and therefore cannot get a stipend or get paid.</p>	Paragraph 11 of the final Ruling has been amended to provide clarity that salary and wages can include non-cash benefits.
3	<p><b>Definition of religious practitioner</b></p> <p>The current definition of 'religious practitioner' excludes many people providing spiritual care (the pastoral activities described in paragraphs 19(c) to 19(f) of the draft Ruling.</p> <p>The ATO should define 'religious practitioner' based on activities performed rather than on the type of professional qualifications.</p> <p>This would reflect the growing number of practitioners providing spiritual care, many of whom are not ordained, for example, Catholic women who are employed by the church to provide spiritual care but cannot be ordained.</p>	The definition of 'religious practitioner' in paragraph 12 of the final Ruling is a restatement of the defined term 'religious practitioner' in section 136 of the <i>Fringe Benefits Tax Assessment Act 1986</i> . A change to the definition based on activities performed, or to exclude the requirement to meet the characteristics in paragraph 12 of the final Ruling, would require a change to the legislation and is out of scope for this Ruling.

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4	<p><b>Application of the Ruling to lay persons</b></p> <p>The final Ruling should clarify that it applies to lay persons acting in the capacity of a minister. A paragraph to the effect of paragraph 17 of TR 92/17 should be included in this Ruling, making it clear that a lay person acting in the capacity of a minister of religion or equivalent capacity can be treated as a minister while acting in that capacity. Paragraph 13 of the draft Ruling narrows the scope of who is considered a minister of religion which appears to exclude lay people given they are unlikely to meet all of the characteristics in that paragraph. For example, in many instances, lay people employed by religious institutions to act in the capacity of a minister of religion would not have theological experience.</p>	<p>The 2<sup>nd</sup> dot point in paragraph 14 of the final Ruling has been amended to clarify that the definition of ‘minister of religion’ includes a person who ‘has authority to carry out the duties of a minister based on theological training or other relevant experience’.</p> <p>The final Ruling is clear that there may be circumstances where lay persons may be considered to be religious practitioners and entitled to exempt benefits. For example:</p> <ul style="list-style-type: none"> <li>• Paragraph 6 of the final Ruling includes a description of a religious practitioner as ‘a lay person commissioned to perform the ministry of a minister of religion’.</li> <li>• Example 5 of the final Ruling includes a ‘lay person commissioned to perform the ministerial duties of a church’.</li> </ul>
5	<p>Example 3 of the draft Ruling could be improved. It is unclear whether Bob is employed as a minister but only undertakes the accounting duties, or whether he undertakes incidental ministerial duties.</p> <p>Additions to the example may clarify the issue. For example, Bob’s involvement in the accounting division is only incidental to his duties as Minister. An additional example relating to other duties, for example music resources, IT and the church website would be useful.</p>	<p>Example 3 of the final Ruling has been amended to outline that although Bob is a minister of religion, his only duties are in the accounting division of the church and are exclusively or predominately administrative in nature.</p>

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6	<p><b>Use of the term ‘lay persons’</b></p> <p>In paragraph 5 of the draft Ruling, the words ‘lay persons’ should be removed and replaced with ‘persons commissioned to perform the ministry of a minister of religion’.</p> <p>There is concern that some non-ordained practitioners, such as non-ordained youth ministers, could not be described as a ‘lay person’ and therefore not be a ‘lay person commissioned to perform the ministry of a minister of religion’. Also there is concern that the term ‘lay person’ is open to various interpretations.</p>	<p>‘Lay person’ is a term used frequently in the sector.</p> <p>Paragraph 6 of the final Ruling summarises the requirements for the exemption and states the definition of religious practitioner includes ‘lay persons commissioned to perform the ministry of a minister of religion’ and ‘other persons acting in those capacities from time to time’. This last phrase is broad enough to include a range of non-ordained practitioners. Further, paragraphs 11 to 17 of the final Ruling set out the specific requirements that must be met to be ‘a religious practitioner’ and ‘non-ordained’ practitioners are not excluded from meeting the requirements.</p>
7	<p><b>Characteristics of a minister of religion – change from ‘many, if not all’ to ‘except in rare cases’</b></p> <p>The change of the wording in paragraph 13 of the draft Ruling requires a minister of religion to have all of the listed characteristics except in rare circumstances.</p> <p>The absolute of having to satisfy all of the characteristics is too rigid from a policy perspective.</p> <p>This change makes it more difficult to apply the ruling and has the capacity to exclude a larger number of people; in particular lay missionaries with pastoral roles but no formal qualifications would not meet the characteristic in subparagraph 13(b) of the draft Ruling.</p> <p>The change in wording does not take into account contemporary practice of many religious institutions to employ specialist church workers to oversee ministries. These workers would not meet all the criteria,</p>	<p>The change from ‘many, if not all’ to ‘except in rare cases’ is only intended to express the longstanding view in TR 92/17 in clearer terms, and does not change the view in TR 92/17, on who is considered a ‘minister of religion’.</p> <p>The updated wording in paragraph 14 of the final Ruling provides clarity on how the law has been and will continue to be administered and does not exclude lay missionaries who do not have formal qualifications from being a ‘minister of religion’.</p> <p>The 2<sup>nd</sup> dot point in paragraph 14 of the final Ruling has been amended to include lay persons ‘with authority of the religious institution to carry out the duties of a minister based on theological training or other relevant experience’ and to allow lay missionaries who have the requisite authority to meet this characteristic.</p> <p>The ATO recognises that there are rare cases where a person can be a minister of religion even if they don’t have all of these characteristics. Taxpayers can seek certainty on their specific circumstances through the private ruling process.</p>

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	particularly the requirement to be 'recognised as having authority on doctrine or religious practice' in the same way as the senior minister of the church would be. The final Ruling should be amended to require the minister to have 'many of these characteristics'.	
8	<p><b>Characteristics of a religious order – change from 'many, if not all' to 'except in rare cases'</b></p> <p>The final Ruling should be amended to require the order to have 'many of these characteristics'.</p>	<p>The change from 'many, if not all' to 'except in rare cases' is only intended to express the longstanding view in TR 92/17 on what is considered a 'religious order' in clearer terms.</p> <p>The updated wording in paragraph 15 of the final Ruling provides clarity on how the law has been and will continue to be administered.</p> <p>Taxpayers can seek certainty on their specific circumstances through the private ruling process.</p>
9	<p><b>The meaning of 'member of a religious institution'</b></p> <p>The final Ruling should clarify what membership is and whether it is restricted to a legal/voting member of an organisation. The meaning should be wider or more interpretive.</p>	<p>Footnote 16 has been inserted in the final Ruling to clarify the meaning of 'member'.</p>
10	<p><b>Exempt benefits provided to spouse or child</b></p> <p>The link between benefits provided to a religious practitioner's spouse or child and the practitioner's pastoral duties should be clarified.</p>	<p>Paragraph 22 of the final Ruling clarifies that the test is concerned with the connection between the benefit and a religious practitioner's duties or activities, rather than the nature of the advantage the benefit represents.</p> <p>A benefit provided to a religious practitioner <i>in respect of</i> the practitioner's pastoral duties does not require the benefit to relate to the pastoral duties undertaken. It must be a benefit provided because the religious practitioner has undertaken pastoral duties. The benefit can include <i>any</i> benefit provided to the religious practitioner or his or her spouse and children. The benefits may be related to a religious practitioner's pastoral duties, such as a car used for pastoral duties, or may be private benefits in nature, such as the payment</p>

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		of a holiday or children's school fees.
11	<p><b>Unclear drafting</b></p> <p>The wording at paragraph 17 of the draft Ruling is confusing and could lead to two contrary meanings. The correct meaning should be clarified.</p>	Paragraph 18 of the final Ruling has been updated to provide greater clarity.
12	<p><b>Clarification about which benefits can be exempt</b></p> <p>What constitutes a benefit, for example, does paying a minister's parking fine constitute a benefit?</p> <p>The final Ruling should clarify which benefits are exempt.</p> <p>Usual benefits and equivalent benefits are not fringe benefits, they are not provided because of a particular activity, but because of membership of a religious order. More examples should be provided to cover these situations.</p>	Any type of benefit, provided to a religious practitioner for performance of pastoral duties, can be an exempt benefit. Paragraph 18 of the final Ruling has been updated to provide greater clarity.
13	<p><b>Some of the examples provided are not suitable or could be improved</b></p> <p>It is not clear that Rod meets the definition of a 'religious practitioner' in Example 6 of the draft Ruling.</p> <p>Example 6 indicates that a lay person commissioned to perform religious duties meets the definition of a minister of religion. This is inconsistent with the expectation that ministers meet all the set criteria.</p>	Example 5 of the final Ruling has been amended to clarify that Rod meets all the criteria to be a minister of religion.

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14	<b>Provide more examples</b> The final Ruling should have further contemporary examples outlining who may be a minister of religion.	We are working on providing further web guidance on this issue.
15	The final Ruling should include an example of a lay minister who undertakes duties but does not have an employment contract.	A minister of religion that does not have an agreement with a religious institution to provide pastoral duties and does not receive a payment or benefit for providing the pastoral duties will not be an employee (see paragraph 11 of the final Ruling).
16	<b>Practitioners who have a dual role</b> Clarification is required as to when payments made to practitioners who have a dual role will be principally in respect of their pastoral duties.  The final Ruling should include an additional example regarding benefits provided to a minister of religion employed by a religious institution performing teaching duties in an associated private school.	Example 2 of the final Ruling clarifies when payments made to practitioners who have a dual role will be principally in respect of their pastoral duties. We are working on providing further web guidance on this issue.
17	Welcomes the inclusion of subparagraph 19(f) of the draft Ruling.	Noted.
18	Recommend providing a cap on FBT exempt expenditure.	The application of a cap to FBT exempt expenditure would require a change to the legislation.
19	<b>Directly related to</b> Consider including additional case citations in relation to meaning of the words 'directly related to' in paragraph 20 of the draft Ruling.	The interpretation of 'directly related' is based on the words and context of the legislation, Paragraphs 49 to 53 of the final Ruling provide clarity when other duties or activities are directly related to the practice, study, teaching or propagation of religious beliefs.



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20	<p><b>Principally</b></p> <p>The final Ruling should include further guidance on the meaning of the word ‘principally’, similar to paragraph 49 of the ‘In Australia’ draft Taxation Ruling TR 2018/D1 <i>Income tax: the ‘in Australia’ requirement for certain deductible gift recipients and income tax exempt entities</i>, extracted below, which referred to a more than 50% ‘rule of thumb’:</p> <p><i>The word ‘principally’ is not defined in the ITAA 1997 and takes its ordinary meaning of mainly or chiefly. Each case will depend upon its facts. It is not possible to specify a particular percentage, however, more than 50% would generally be considered to meet the ‘principally’ requirement...</i></p> <p>The final Ruling should be consistent in the use of terminology, variants of ‘principally’ have been used throughout, for example:</p> <ul style="list-style-type: none"> <li>• ‘predominantly’ – in paragraphs 27, 29 and the heading to Example 5</li> <li>• ‘predominantly or exclusively / exclusively or predominantly’ – paragraph 31, and headings to Examples 1 and 6.</li> </ul>	<p>Paragraph 20 of the final Ruling has been updated to confirm that ‘principally’ takes its ordinary meaning of ‘mainly’ or ‘chiefly’.</p> <p>‘Predominantly’ or ‘solely’ is used in the Ruling to describe the employees duties in a set of factual circumstances, Paragraph 23 of the final Ruling clarifies that a benefit which is provided only in respect of duties which are solely or predominantly pastoral or which are directly related religious activities, will satisfy the test.</p> <p>The final Ruling has been updated to use ‘solely’ instead of ‘exclusively’ for consistency.</p>

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21	<p><b>Secular</b></p> <p>The use of the word 'secular' in paragraph 21 of the draft Ruling is confusing in context noting that the generally accepted definition of 'secular' is that it is not connected with religious or spiritual matters.</p> <p>Suggest that the second sentence of paragraph 21 of the draft Ruling is removed as it is worded slightly differently to Example 4 of the draft Ruling, which could lead to suggestions that there are differences between the two.</p>	<p>Paragraph 50 and Example 7 of the final Ruling have been updated for clarity.</p>