

# ***GSTD 2024/2 - Goods and services tax: is the supply of a burial right in respect of a public cemetery subject to GST?***

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! This document has changed over time. This is a consolidated version of the ruling which was published on *4 December 2024*



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Status: **legally binding**

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## Goods and Services Determination

# Goods and services tax: is the supply of a burial right in respect of a public cemetery subject to GST?

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### **📌 Relying on this Determination**

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

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### **What this Determination is about**

1. This Determination explains how the special rules in Division 81 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and the associated regulations in Division 81 of the *A New Tax System (Goods and Services Tax) Regulations 2019* (GST

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Regulations) operate to exempt the supply of a burial right made by an Australian government agency from goods and services tax (GST). For the purposes of this Determination, such supplies are referred to as supplies of burial rights in public cemeteries.

2. This Determination also considers the GST consequences of the:
- supply by an Australian government agency of the permission required to exercise a burial right in a public cemetery
  - renewal by an Australian government agency of a burial right and the recording of the granting or transfer of a burial right in a public cemetery
  - supply of other goods and services in relation to a burial or cremation, including memorial plaques and gravedigging services, and
  - supply of a burial right in a public cemetery where a funeral director arranges for the supply, including as an agent for the public cemetery operator or as an agent for the purchaser of the burial right.

3. The GST exemptions in Division 81 of the GST Act and Division 81 of the GST Regulations only apply to supplies made by Australian government agencies. Consequently, this Determination and the GST exemptions explained in it, do not apply to the supply of a burial right or the renewal of a burial right by an entity that is not an Australian government agency. A burial right that is granted or renewed by an entity that is not an Australian government agency is subject to GST, where the grant or renewal of the burial right meets the definition of a taxable supply in section 9-5 of the GST Act.

## Background

4. Taxable supplies are subject to GST.<sup>1</sup> Supplies are defined to include the supply of goods<sup>2</sup>, the supply of services<sup>3</sup>, and the grant of any right.<sup>4</sup> If there is no consideration for a supply, the supply is not a taxable supply and is therefore not subject to GST.

5. Division 81 of the GST Act and the GST Regulations exclude from GST certain legislatively imposed fees and charges by ensuring these payments do not constitute consideration for a supply.<sup>5</sup> This exclusion from GST does not apply to a fee or charge that is prescribed to be consideration by the GST Regulations.<sup>6</sup>

6. The GST Act refers to a fee or charge that is subject to these special rules as an Australian fee or charge. An Australian fee or charge is defined to mean a fee or charge, however described but not including an Australian tax that is imposed under an Australian law, and which is payable to an Australian government agency.<sup>7</sup>

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<sup>1</sup> Section 9-40 of the GST Act.

<sup>2</sup> Paragraph 9-10(2)(a) of the GST Act.

<sup>3</sup> Paragraph 9-10(2)(b) of the GST Act.

<sup>4</sup> Paragraph 9-10(2)(e) of the GST Act. The word 'right' is not defined for GST purposes and has a very broad meaning under the general law. A 'right' has been defined as '[g]enerally, a benefit or claim entitling a person to be treated in a certain way': see paragraphs 25, 26 and 53 of Goods and Services Tax Ruling GSTR 2003/8 *Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2)*.

<sup>5</sup> Sections 81-1, 81-10, 81-15 and 81-20 of the GST Act.

<sup>6</sup> Section 81-1 of the GST Act.

<sup>7</sup> Section 195-1 of the GST Act.

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7. An Australian law is defined to mean the law of the Commonwealth, a state, or a territory and therefore includes state or territory legislation.<sup>8</sup> An Australian government agency is defined to mean the Commonwealth, a state, a territory, or a Commonwealth, state or territory authority.<sup>9</sup> This definition encompasses entities including trusts formed by state or territory governments under state or territory legislation<sup>10</sup>, local municipal councils and shire councils.<sup>11</sup> Cemeteries operated by these kinds of entities or councils are referred to as public cemeteries in this Determination.

8. State and territory legislation that regulates burials and cemetery operations empowers public cemeteries to grant to a person the right to bury or inter human remains (including cremated human remains) in a public cemetery in exchange for the payment of a fee or charge.<sup>12</sup> This right is referred to as a burial right in this Determination. Depending on the state or territory legislation involved, a burial right may also include the right to place a memorial on the land that is the subject of the right.<sup>13</sup>

9. A burial right is different to any permission that an Australian government agency must provide to a person under state or territory legislation, in order to allow the exercise of a burial right in a public cemetery by performing the physical act of burying human remains, or creating a memorial at the location covered by the burial right. This permission may be referred to as an order for interment or an interment authorisation depending on the state or territory legislation involved.<sup>14</sup>

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<sup>8</sup> Section 195-1 of the GST Act and section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).

<sup>9</sup> Section 195-1 of the GST Act and section 995-1 of the ITAA 1997.

<sup>10</sup> A charitable trust created by statute for the purpose of operating a cemetery under the supervision of a state or territory government on government-owned land may, depending on all the relevant facts and circumstances, be capable of satisfying the definition of an Australian government agency. Entities in this situation should consider the principles explaining when an entity will be regarded as being part of the Commonwealth, a state or a territory in Goods and Services Tax Ruling GSTR 2006/5 *Goods and services tax: meaning of 'Commonwealth, a State or a Territory'* to determine if they satisfy the definition of an Australian government agency.

<sup>11</sup> See GSTR 2006/5 in relation to the inclusion of local municipal and shire councils and other entities formed by state or territory governments to perform generally accepted governmental functions in the Australian government agency definition.

<sup>12</sup> A burial right may be known by different names such as a right of interment or an interment right in Victoria, New South Wales and South Australia, and an exclusive right of burial, right to burial or right to interment in Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory. See section 73 of the *Cemeteries and Crematoria Act 2003* (Vic), section 56 of the *Cemeteries and Crematoria Act 2013* (NSW), section 30 of the *Burial and Cremation Act 2013* (SA), section 25 of the *Cemeteries Act 1986* (WA), section 41 of the *Burial and Cremation Act 2019* (Tas), section 50 of the *Burial and Cremations Act 2022* (NT), and sections 8 and 9 of the *Cemeteries and Crematoria Act 2020* (ACT). The *Local Government Act 2009* (Qld) empowers local governments to make local laws pertaining to their local government area. It is through such laws that a right to be buried in a public cemetery is granted.

<sup>13</sup> See, for example, section 30 of the *Burial and Cremation Act 2013* (SA) which enables the holder of a burial right to create a memorial to a deceased person at the location covered by the burial right subject to obtaining the approval of the relevant authority and complying with any other applicable terms of the right. See also section 25 of the *Cemeteries Act 1986* (WA), which enables the holder of a burial right to place a memorial on the site that is the subject of the right.

<sup>14</sup> See, for example, section 67 of the *Cemeteries and Crematoria Act 2013* (NSW), which provides that an interment cannot take place in a cemetery without the cemetery operator issuing an order for interment and section 115 of the *Cemeteries and Crematoria Act 2003* (Vic), which prohibits a person from interring bodily remains in a public cemetery unless the cemetery trust responsible for that public cemetery has granted an interment authorisation for the interment.

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Status: **legally binding**

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**Ruling**

10. The following supplies made by an Australian government agency are not subject to GST:

- the supply of a burial right in a public cemetery
- the renewal of a burial right in a public cemetery, and
- the supply of any permission that must be obtained under state or territory legislation to exercise a burial right by physically burying human remains or creating a memorial at the location covered by the burial right.

11. The fees or charges payable to an Australian government agency in relation to the agency recording the granting or transfer of a burial right in a public cemetery are not consideration for a supply and therefore not subject to GST.

12. The fees or charges payable to a public cemetery operator, funeral director, or to another entity for the supply of other goods and services made in relation to a burial or cremation, including memorial plaques and gravedigging services are consideration for a supply. The supply of these goods or services are a taxable supply where the other requirements in section 9-5 of the GST Act are met.<sup>15</sup>

13. Where an Australian government agency that operates a public cemetery is paid fees or charges for supplying burial rights which are not subject to GST, together with fees or charges for supplying other goods or services which are subject to GST, the operator must apportion the total amount of fees or charges between the amount that relates to supplying the burial right which is not subject to GST, and the amount that relates to making taxable supplies of other goods or services on which GST must be accounted for.<sup>16</sup>

14. A funeral director that arranges for the supply of a burial right in a public cemetery, including by acting as an agent for the Australian government agency that operates the public cemetery or for the purchaser in relation to the supply of the burial right, must ensure that GST is not applied to any amount they receive that is payable to the Australian government agency for the supply of the burial right. A funeral director is liable for GST on any taxable supplies of goods, services or of other things that the funeral director itself makes to the purchaser of the burial right.

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**Example 1 – grant of a burial right by an Australian government agency**

15. *Essandtee Public Cemetery (EPC) is an Australian government agency which operates and manages a public cemetery for the Essandtee Municipal Council.*

16. *Kerron purchases a burial right from EPC. The right is for a period of 25 years, with an option to renew for a period of up to a total of 99 years. The right allows Kerron to determine who can be buried in a specified location in the cemetery and install an approved memorial of the deceased on the site. EPC will supply and install a memorial for a separate fee. EPC will also provide a gravedigging service for a separate fee.*

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<sup>15</sup> The other requirements for making a taxable supply in section 9-5 of the GST Act are that the supply is made in the course or furtherance of an enterprise carried on by the supplier, that the supply is connected with the indirect tax zone, and that the supplier is registered or required to be registered for GST.

<sup>16</sup> For further information on the ATO's view regarding apportionment see Goods and Services Tax Ruling GSTR 2001/8 *Goods and services tax: Apportioning the consideration for a supply that includes taxable and non-taxable parts.*

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17. Under Division 81 of the GST Act and Division 81 of the GST Regulations, the payment received by EPC from Kerron in return for the grant of the burial right is not the provision of consideration. The supply of the right is therefore not a taxable supply and no GST is payable by EPC.

18. If the initial 25-year period is renewed, the payment for the renewal is also not the provision of consideration and the supply is not a taxable supply.

19. However, the supply and installation of the memorial and the supply of the gravedigging service are both subject to GST.

20. Had Kerron's deceased estate purchased the burial right together with the other taxable supplies from EPC after Kerron's death, EPC would have needed to apportion the total fee or charge for all of the supplies it makes to the deceased estate to ensure that GST is not applied to the portion of the total fee or charge that is payable for the supply of the burial right.

**Example 2 – supply of a burial right in a public cemetery arranged by a funeral director**

21. The executor of Mary's deceased estate engages a funeral director to arrange Mary's funeral in a public cemetery. The funeral director arranges items that include the following:

- supply of the burial right by the Australian government agency that operates the public cemetery
- supply of the gravedigging services
- services of a monumental mason
- the public cemetery's permission to conduct a burial and place a monument at the burial site
- supply of a religious ceremony by a religious institution as part of the funeral, and
- supply by an Australian government agency of a death registration certificate for the deceased.

22. In addition to this, the funeral director supplies the coffin and the services of preparing the deceased for burial to the estate.

23. The funeral director invoices Mary's estate. The invoice itemises the amounts payable for the burial right, the permission to conduct the burial and place the monument, the gravedigging services, the services of the monumental mason, the religious ceremony, the supply of the death registration certificate, the sale of the coffin, the preparation of the deceased and the funeral director's fee for arranging Mary's funeral.

24. The funeral director is liable for GST on the amounts on their invoice to Mary's estate which relate to the taxable supplies that the funeral director makes to the estate – for example, the taxable supply of the funeral director's service of arranging the purchase of the burial right, arranging the permission to conduct the burial, arranging the gravedigging services, arranging the services of the monumental mason, arranging the religious ceremony, arranging the supply of the death registration certificate, the sale of the coffin, the preparation of the deceased, and the taxable supply of any other goods or services made by the funeral director to the estate.

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25. *As the funeral director is only arranging the Australian government agency's supply of the burial right and permission to conduct the burial, the amount that the funeral director invoices Mary's estate does not include any GST on the fees payable to the Australian government agency for the supply of the burial right and the permission. This is because the supply of the burial right and the supply of the permission by the Australian government agency, are supplies that are made by the agency and are not subject to GST.*<sup>17</sup>

26. *The funeral director is required to ensure that GST is not applied to the cost of the religious ceremony if the religious ceremony was provided by a religious institution that satisfied the requirements in section 38-220 of the GST Act.*<sup>18</sup> *The funeral director would also be required to ensure that GST is not applied to the fee charged by the Australian government agency for issuing the death registration certificate.*<sup>19</sup>

27. *If the funeral director's invoice did not separately itemise the amounts payable for the different goods and services involved in providing the funeral, the funeral director would still be required to ensure that GST was not applied to any part of the invoiced amount that was for any fees charged by Australian government agencies, religious institutions or other entities that were not subject to GST. This would include the fees charged by an Australian government agency for supplying the burial right, the permission to conduct the burial and the death registration certificate.*

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## Date of effect

28. This Determination applies on and after 4 December 2024, being the date of publication of this Determination. However, the Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

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**Commissioner of Taxation**

4 December 2024

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<sup>17</sup> The fee payable to the Australian government agency for the supply of the burial right in the public cemetery to the deceased estate is not subject to GST, whether or not the funeral director acts as an agent for the Australian government agency in relation to the supply of the burial right.

<sup>18</sup> Section 38-220 provides that a supply is GST-free if it is a supply of service that is supplied by an Australian Charities and Not-for-profit Commission (ACNC)-registered religious institution and is integral to the practice of that religion.

<sup>19</sup> As subsection 81-10(5) of the GST Act excludes this fee from being the consideration for a supply.

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## Appendix – Explanation

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**ⓘ** *This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### Division 81 of the GST Act and Division 81 of the GST Regulations

29. Subsection 81-10(1) of the GST Act excludes from consideration certain Australian fees or charges if they are covered by subsections 81-10(4) or 81-10(5) of the GST Act. Section 81-15 of the GST Act also enables the GST Regulations to prescribe that kinds of Australian fees or charges are excluded from being consideration.

30. If these exclusions apply, the supply to which the fees or charges relate is not subject to GST, because the supply is not made for consideration.

31. The exclusions from GST cover the following kinds of fees or charges imposed by and payable to Australian government agencies under state or territory legislation:

- a fee or charge paid in relation to (or in relation to an application for) the provision, retention or amendment under state or territory legislation, of a permission, exemption authority or licence however described – see subsection 81-10(4) of the GST Act
- a fee or charge paid in relation to the agency recording, copying, modifying, allowing access to, receiving, processing or searching for information – see subsection 81-10(5) of the GST Act, or
- a fee or charge paid for a supply of a regulatory nature made by an Australian government agency – see paragraph 81-15.01(f) of the GST Regulations.

32. As an exception to these exclusions from GST, subsection 81-10(2) of the GST Act permits the GST Regulations to prescribe that certain payments of Australian fees or charges are to be treated as consideration. The prescribed fees or charges that are treated as consideration include a fee or charge paid to an Australian government agency:

- for a supply of a non-regulatory nature – see paragraph 81-10.01(1)(g) of the GST Regulations, or
- for a supply that may also be made by a supplier that is not an Australian government agency – see paragraph 81-10.01(1)(h) of the GST Regulations.

33. When these regulations apply, the fee or charge is deemed to be consideration for a supply made by the Australian government agency.<sup>20</sup> Consequently, that fee or charge becomes subject to GST if the other requirements for making a taxable supply are met.<sup>21</sup>

34. To determine if the fee or charge payable to a public cemetery operator for a burial right is excluded from being consideration, it is therefore necessary to consider:

- whether the fee or charge relates to the provision, under state or territory legislation, of a permission, authority or licence however described

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<sup>20</sup> See subsection 81-10(3) of the GST Act.

<sup>21</sup> A fee or charge paid to an Australian government agency for a supply of a regulatory nature that can also be made by a supplier that is not an Australian government agency, will be consideration for a supply: see subsection 81-15.02(2) of the GST Regulations.



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- whether the fee or charge is for a supply of a non-regulatory or regulatory nature, and
- whether the supply of the burial right in the public cemetery is a supply that may also be made by a supplier that is not an Australian government agency.

### **Supplies of a regulatory nature**

35. When considering if the fee or charge paid to an Australian government agency is for a supply of a non-regulatory or regulatory nature, the fee or charge must be capable of being characterised as an amount that is paid for the supply. That supply, in turn, must be able to be characterised as being of a regulatory nature for an exclusion from GST to apply.

36. The nature of a supply refers to the combination of qualities and characteristics belonging to that supply.<sup>22</sup> The qualities and characteristics of the supply made by an Australian government agency in return for the payment of a legislatively imposed fee or charge must be considered in the circumstances of each case, to determine whether, based on those qualities and characteristics, the supply can properly be characterised as being of a non-regulatory or regulatory nature.

37. The word 'regulatory' is not defined in the GST Act. To 'regulate' ordinarily means to control or direct by rule<sup>23</sup> and the word 'regulatory' means something that regulates or relates to regulation.<sup>24</sup> In accordance with this ordinary usage, something that is done to regulate will relate to regulation.

38. In the context of Division 81 of the GST Act, which deals with legislatively imposed fees or charges for permissions, exemptions, authorities and licences that Australian government agencies provide under Commonwealth, state or territory law to enable entities to engage in different forms of behaviour or conduct, a supply is of a regulatory nature if the supply relates to the regulation of behaviour or conduct.

39. A supply made by an Australian government agency relates to the regulation of behaviour or conduct, if the supply itself regulates behaviour or conduct in accordance with Commonwealth, state or territory legislation, or furthers in some integral way, the operation of rules under Commonwealth, state or territory legislation that govern behaviour or conduct.

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<sup>22</sup> The *Macquarie Dictionary* defines 'nature' to mean the particular combination of qualities belonging to a person or thing by birth or constitution; native or inherent character' (Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), accessed 19 November 2024).

<sup>23</sup> The *Macquarie Dictionary* notes that the word 'regulatory' is an adjective related to the verb 'regulate', which it defines to mean 'to control or direct by rule, principle, method, etc' (Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), accessed 19 November 2024).

<sup>24</sup> The *Oxford English Dictionary* defines 'regulatory' firstly as 'of or relating to regulation or regulations', secondly, as something 'that regulates', and when used in relation to an entity, thirdly as 'given to or responsible for regulating.' (Oxford University Press, *Oxford English Dictionary*, [www.oed.com/](http://www.oed.com/), accessed 21 November 2024).

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40. The supply that an Australian government agency makes in return for the payment of a legislatively imposed fee or charge to an entity seeking to undertake a particular form of conduct, that is regulated by Commonwealth, state or territory legislation, is more likely to be of a regulatory nature if:

- the regulated behaviour or conduct is of a kind that must be undertaken under Commonwealth, state or territory legislation and the legislatively imposed fee or charge is paid to acquire the supply from the agency to permit that behaviour or conduct to occur (that is, there is a legal requirement to undertake the regulated behaviour and to pay the agency for a supply, such as a licence or an approval, which enables the behaviour or conduct to occur), or
- there is no requirement to undertake the behaviour or conduct that is regulated by the Commonwealth, state or territory legislation, but all entities that choose to undertake the behaviour or conduct, must as a condition of doing so, pay the legislatively imposed fee or charge to acquire the supply from the agency in order for the behaviour or conduct to occur (that is, there is a practical requirement to pay the agency the fee or charge to acquire the supply in order to undertake the chosen form of behaviour or conduct which is regulated by legislation).

41. In these circumstances, the supply made by the Australian government agency is capable of characterisation as being regulatory in nature, given that the payment of the legislatively imposed fee or charge for the supply is integrally involved in furthering the operation of rules that govern behaviour or conduct under Commonwealth, state or territory legislation.

42. The payment of the fee or charge for a supply will be integrally involved in furthering the operation of rules that govern behaviour or conduct under Commonwealth, state or territory legislation where the making of the supply for which the fee or charge is paid is a necessary step in or aspect of a legislative regime for regulating an area of human activity.

43. However, not all supplies made by Australian government agencies are regulatory in nature. Supplies made by Australian government agencies will not be regulatory in nature where, for example, the supply from the Australian government agency does not relate to regulating (that is, to controlling or directing) behaviour, ensuring consumer protection, or ensuring compliance with certain standards; these being indicators of the regulatory nature of a supply.<sup>25</sup>

44. Additionally, government regulation of prices in an area does not of itself mean that a legislatively imposed fee or charge is paid for a supply that is of a regulatory nature.

45. Further, if the legislatively imposed fee or charge is paid to an Australian government agency for a supply (of goods, services or anything else) which the payer chooses to acquire, without the payment for that supply being a necessary step in a regulatory regime, the supply is likely to be characterised as being non-regulatory in nature. This could arise where the supply made by the Australian government agency does not further, in some integral way, the operation of legislative rules that govern behaviour or conduct.

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<sup>25</sup> See page 4 of the Explanatory Statement to the *A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No. 2)* which in distinguishing supplies of a regulatory nature from supplies of a non-regulatory nature, set these matters out as examples of the characteristics of a supply that is of a regulatory nature.

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**Burial rights – fee or charge excluded from GST**

46. The fee or charge imposed under state or territory legislation for the purchase of a burial right in a public cemetery relates to the provision of a permission, authority or licence, however described under state or territory legislation, and is therefore excluded from being consideration for GST purposes by subsections 81-10(1) and (4) of the GST Act.

47. This is because, under the state or territory legislation governing burials and cemetery operations, the grant of a burial right in a public cemetery permits or authorises the holder of the right to have human remains buried or interred at the location covered by the right, subject to any conditions applicable to conducting a burial or interment. Such conditions can include the requirement to obtain an additional permission from an Australian government agency to physically conduct a burial or create a memorial at the location covered by the burial right (for example, an order for interment, interment authorisation, or other similar form of permission as described by paragraph 9 of this Determination).

48. In determining if the supply of a burial right in a public cemetery is non-regulatory in nature, public cemetery operators are bound by state or territory legislation governing burials and cemetery operations to maintain public cemeteries in which human remains (including cremated human remains) are to be lawfully buried or interred and have their operations regulated by this legislation.

49. The legislation prohibits or restricts the burial or interment of human remains outside the grounds of a public cemetery in states or territories where only public cemeteries exist<sup>26</sup>, or otherwise subjects the grant (and any subsequent use) of a burial right to regulation when an entity chooses to be buried in a public cemetery instead of a privately operated one.

50. In certain states or territories, the holder of a burial right cannot transfer, assign or otherwise deal with the right, unless this occurs in accordance with the legislation governing public cemetery operations in that jurisdiction.<sup>27</sup> The legislation in certain jurisdictions can also permit a public cemetery operator to refuse granting a burial right or to refuse approving the transfer of a burial right if this would tend to create a monopoly or encourage dealing in burial rights.<sup>28</sup>

51. The grant of a burial right can be made subject to the holder's compliance with the rules and regulations of the public cemetery that supplied the right, and with the provisions of the legislation governing burials in public cemeteries in that jurisdiction.<sup>29</sup> The exercise of a burial right in a public cemetery is typically further governed by a legislative requirement to obtain from an Australian government agency, the permission to exercise the burial right before a burial can occur at the location covered by the right.

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<sup>26</sup> See, for example, section 114 of the *Cemeteries and Crematoria Act 2003* (Vic) which makes it unlawful for bodily remains to be interred in a place other than a public cemetery unless the Department of Health has granted an approval for that interment. Under section 114 of the *Cemeteries and Crematoria Act 2003* (Vic), a fine and or period of imprisonment applies for non-compliance with this provision.

<sup>27</sup> See, for example, section 79 of the *Cemeteries and Crematoria Act 2003* (Vic) which permits the transfer of a burial right in a public cemetery subject to the terms of that legislation. Under sections 79 and 80 of the *Cemeteries and Crematoria Act 2003* (Vic), those terms include the requirements that the transfer occur for no more than the cost of the same type of burial right in the same public cemetery, and that the transferee notify the public cemetery of the transfer and pay the applicable fee to have the transfer recorded.

<sup>28</sup> See, for example, section 60 of the *Cemeteries and Crematoria Act 2013* (NSW).

<sup>29</sup> See, for example, section 104 of the *Cemeteries and Crematoria Act 2003* (Vic), which imposes a duty on the holder of a burial right in a public cemetery to maintain or cause to be maintained in a safe and proper condition, any memorial constructed at the location that is the subject of the burial right.

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Status: **not legally binding**

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52. In summary, the granting by an Australian government agency of burial rights in public cemeteries under state or territory legislation in exchange for a legislatively imposed fee or charge, is integral to furthering the legislative control over, and therefore, the regulation of the behaviour or conduct involved in burying or interring human remains. There is a practical, if not legal requirement, to pay an Australian government agency that operates a public cemetery the legislatively imposed fee or charge, initially for the supply of a burial right, and then for any permission required to conduct a burial or create a monument at the location covered by the right, to be lawfully buried in a public cemetery.

53. This makes the payment of the legislatively imposed fee or charge, for the grant of a burial right in a public cemetery, a necessary step in, or aspect of, the legislative regime for regulating burials and interments.

54. It follows that, based on its qualities and characteristics, the supply of a burial right in a public cemetery is a supply of a regulatory nature made by an Australian government agency.

55. Therefore, subsection 81-10(2) of the GST Act and paragraph 81-10.01(1)(g) of the GST Regulations, which treat fees or charges paid for non-regulatory supplies as consideration, do not apply to make the fee or charge payable to an Australian government agency for the supply of a burial right in a public cemetery consideration for GST purposes.<sup>30</sup> As the supply by an Australian government agency of a burial right in a public cemetery is of a regulatory nature, paragraph 81-15.01(f) of the GST Regulations would also exclude the fee or charge from being consideration in these circumstances.

#### **Renewal of burial rights – fee or charge excluded from GST**

56. The supply that an Australian government agency that operates a public cemetery makes in renewing a burial right in accordance with the state or territory legislation governing burials and cemetery operations, relates to the provision or retention under state or territory legislation, of a permission, exemption, authority or licence (however described), and is therefore excluded from being consideration by subsection 81-10(1) and subsection 81-10(4) of the GST Act.

57. The supply made in renewing a burial right may take the form of the grant of a new, further or refreshed right to bury or inter human remains at the location within the public cemetery covered by the burial right, or at another location within that cemetery.<sup>31</sup> The supply is of a regulatory nature for the same reasons outlined in paragraphs 46 to 55 of this Determination above regarding the initial grant of a burial right.

#### **Permissions required to exercise burial rights – fee or charge excluded from GST**

58. A condition that applies to exercising a burial right in a public cemetery can include complying with a requirement under the state or territory legislation, to obtain a permission from an Australian government agency to conduct a burial or create a memorial at the location covered by the burial right (for example, an order for interment, interment authorisation, or other similar permission required by legislation, however described).

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<sup>30</sup> Paragraph 81-15.01(f) of the GST Regulations would also exclude the fee or charge from being consideration in these circumstances.

<sup>31</sup> See, for example, section 54 of the *Cemeteries and Crematoria Act 2013* (NSW), section 32 of the *Cemeteries and Cremation Act 2013* (SA) and section 74 of the *Cemeteries and Crematoria Act 2003* (Vic).

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59. The legislatively imposed fee or charge payable to an Australian government agency for obtaining the permission to exercise a burial right in a public cemetery, by performing the physical act of burying or interring human remains or creating a memorial at the site covered by the burial right, is not subject to GST.<sup>32</sup>

60. This is because, under subsections 81-10(1) and 81-10(4) of the GST Act, the payment of this fee or charge to an Australian government agency relates to the provision under state or territory legislation, of a permission, authority or licence (however described), and is therefore not consideration for GST purposes.<sup>33</sup>

61. The supply of a permission from an Australian government agency to exercise a burial right in a public cemetery, is a supply of a regulatory nature because it is integral to furthering the legislative control over the conduct of human burials and interments (as explained in paragraph 52 of this Determination).

### **Burial rights in public cemeteries – only able to be supplied by Australian government agencies**

62. The following supplies by an Australian government agency cannot be made by a supplier that is not an Australian government agency:

- a burial right in a public cemetery
- the renewal of a burial right in a public cemetery, and
- a permission to exercise a burial right by conducting the physical act of burial or creating a memorial at the location covered by the right.

63. The supply of a burial right and the supply of a renewal of a burial right by an Australian government agency involve the grant of a right that permits the holder to have human remains buried or interred at a specific location within the public cemetery that is operated by the agency.<sup>34</sup> That location may be at a site within the public cemetery selected by the holder of the right, or at a location within the public cemetery selected by the public cemetery operator.<sup>35</sup>

64. Accordingly, the supply in question involves the grant by an Australian government agency of a right which concerns a particular location within a public cemetery operated by that agency. Therefore, this is not a supply that may also be made by another supplier that is not an Australian government agency.

65. Under the state or territory legislation governing burials and cemetery operations, an Australian government agency must provide a permission to allow the exercise of a burial right in a public cemetery by conducting the physical act of burial or creating a memorial (for example, an order for interment or an interment authorisation). The supply of this permission cannot also be made by a supplier that is not an Australian government agency.

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<sup>32</sup> Subsections 81-10(1) and 81-10(4) of the GST Act.

<sup>33</sup> Sections 81-10(1) & 81-10(4) of the GST Act.

<sup>34</sup> See, for example, subsection 3(1) of the *Cemeteries Act 1986* (WA) which defines a burial right to mean the right to use a specified area of a cemetery for burial. See further, section 46 of the *Cemeteries and Crematoria Act 2013* (NSW) which provides that a burial right permits the interment of the remains of the person to whom the right relates at the site in the cemetery identified in or in accordance with the burial right.

<sup>35</sup> See, for example, section 76 of the *Cemeteries and Crematoria Act 2003* (Vic) which classifies burial rights as allocated rights for interment at a particular place in a public cemetery or as unallocated rights of interment in a public cemetery, which permit interment at locations within a public cemetery nominated by the public cemetery operator.

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66. The exception in subsection 81-10(2) of the GST Act and paragraph 81-10.01(1)(h) of the GST Regulations, which treats as consideration, the fee or charge paid for supplies that can be made by both Australian government agencies and other suppliers, therefore does not apply.

67. Consequently, the supply by an Australian government agency of a burial right in a public cemetery, the supply made when an Australian government agency renews a burial right in a public cemetery, and the supply by an Australian government agency of a permission to exercise a burial right in a public cemetery by conducting the physical act of burial or creating a memorial, are not taxable supplies and are not subject to GST.

### **Recording the granting or transfer of burial rights**

68. The state or territory legislation governing burials and cemetery operations can require the recording of the grant or transfer of a burial right in a public cemetery within the registers or other records that the cemetery must maintain.<sup>36</sup>

69. Subsections 81-10(1) and 81-10(5) of the GST Act exclude from consideration a legislatively imposed fee or charge paid to an Australian government agency if the fee or charge relates to the agency receiving, recording, modifying or processing information, as would occur when a public cemetery operator or other Australian government agency records the granting or transfer of a burial right in a public cemetery.<sup>37</sup>

70. The fee or charge set under state or territory legislation for an Australian government agency to record the granting or transfer of a burial right in a public cemetery, is therefore excluded from being consideration for a supply by subsection 81-10(5) of the GST Act and is not subject to GST.

71. The supply of gravedigging, stonemasonry and of plaques or memorials, whether made by an Australian government agency that operates a public cemetery or by a funeral director or by another entity, is subject to GST where these supplies satisfy the definition of a taxable supply in section 9-5 of the GST Act. None of the exclusions from GST in Division 81 of the GST Act and Division 81 of the GST Regulations apply to these supplies.

### **Agency and the arrangement of burial right supplies by funeral directors**

72. Funeral directors may arrange for an Australian government agency to supply a burial right in a public cemetery to a customer of the funeral director's business, such as the administrator of a deceased estate.

73. A funeral director's arrangement of the supply of a burial right by an Australian government agency, to a customer of the funeral director's business, may involve an agency relationship.

74. Agency relationships arise when a principal appoints an entity to act as its agent. A funeral director acts as an agent, if an Australian government agency that operates a public cemetery appoints the funeral director to act as an agent of the Australian government agency for the purpose of supplying burial rights in public cemeteries to customers of the funeral director's business. A funeral director may also act as an agent, if a customer of the funeral director's business appoints the funeral director to act as the

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<sup>36</sup> See, for example, paragraph 80(1)(b) of the *Cemeteries and Crematoria Act 2003* (Vic) and section 32 of the *Burial and Cremation Act 2013* (SA).

<sup>37</sup> None of the subsections in section 81-10.01 of the GST Regulations that treat a fee or charge paid to an Australian government agency as consideration are applicable to such a fee or charge.

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customer's agent for purposes including making the purchase of a burial right in a public cemetery from an Australian government agency.

75. The appointment of an agent can be specifically agreed to by the parties and documented in the records kept regarding their transaction, or can be implied from the conduct of the parties based on the facts of each case in circumstances where the agent's appointment is not specifically recognised in the agreements or other records kept in relation to the transaction.<sup>38</sup>

76. When acting in that capacity, an agent creates a relationship between the principal and the third party with which the agent transacts on the principal's behalf.<sup>39</sup> Supplies and acquisitions made as part of that relationship are made between the principal and the third party for GST purposes.<sup>40</sup>

77. In the context of burial rights, this means that a funeral director is not the entity that makes a supply of a burial right, when the funeral director acts as an agent for an Australian government agency or acts as an agent for a customer of the funeral director's business, in relation to arranging the sale and purchase of a burial right in a public cemetery. The supplier of the burial right is the Australian government agency and the recipient of the supply of the burial right is the customer of the funeral director's business to whom the burial right is granted.

78. The Australian government agency remains the supplier of the burial right, where a funeral director arranges for the supply of a burial right in a public cemetery to a customer of the funeral director's business, without any agency relationship arising. Only public cemetery operators can grant burial rights for public cemeteries under the state and territory legislation governing burials and public cemetery operations. While a funeral director may arrange for an Australian government agency to grant a burial right in a public cemetery, the funeral director is not itself the entity that grants the right. Under the legislation, the entity that grants the right remains the Australian government agency that operates the public cemetery in which the burial right is granted.

79. Therefore, whether or not an agency relationship is involved, when a funeral director arranges for a customer of its business to be granted burial rights in a public cemetery, the funeral director does not make the supply of the burial right to the purchaser for GST purposes. Rather, the Australian government agency that operates the public cemetery is the supplier of the burial right, with the consequence that the supply of the burial right is not subject to GST given the operation of Division 81 of the GST Act and Division 81 of the GST Regulations to exclude the fee or charge paid for the burial right to the Australian government agency from GST.

### **Apportionment**

80. A GST liability arises on making a taxable supply and the GST that is payable is included in the consideration for that supply.<sup>41</sup> An Australian government agency that supplies a burial right in a public cemetery (which is not subject to GST), together with other supplies that are subject to GST, such as gravedigging services, must therefore ensure that GST is not included in the fee or charge that relates to the supply of the burial

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<sup>38</sup> *Crown Estates (Sales) Pty Ltd v Commissioner of Taxation* [2016] FCA 335 at [41]. The agent's authority may be express or implied from the agreement between the principal and agent if the agent has actual authority. Otherwise the authority might be apparent from the conduct of the principal.

<sup>39</sup> *Crown Estates (Sales) Pty Ltd v Commissioner of Taxation* [2016] FCA 335 at [41]. See also paragraphs 10 to 13 of Goods and Services Tax Ruling GSTR 2000/37 *Goods and services tax: agency relationships and the application of the law*.

<sup>40</sup> Paragraphs 15 and 55 of GSTR 2000/37.

<sup>41</sup> See sections 9-5, 9-40, 9-70 and 9-75 of the GST Act.

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Status: **not legally binding**

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right. They are separate supplies that have different GST treatment. It is not a single supply of funeral services.

81. A funeral director must ensure that GST is not applied to the public cemetery's fee or charge for supplying the burial right where they:

- act as an agent for
  - an Australian government agency that operates a public cemetery in supplying a burial right, or
  - the purchaser in acquiring a burial right from an Australian government agency, or
- otherwise arrange for an Australian government agency that operates a public cemetery to supply a burial right, and also make their own taxable supplies of other goods and services to the purchaser of the burial right.

82. This is because Division 81 of the GST Act and Division 81 of the GST Regulations exclude this fee or charge from GST.

83. The funeral director is, however, liable for GST on the fees or charges payable for the taxable supplies that the funeral director makes to the purchaser of the burial right. This means that GST will apply to any fees or charges payable to the funeral director for arranging the grant of the burial right in the public cemetery by the Australian government agency, and to any fees or charges which are payable to the funeral director for other goods or services that the funeral director supplies.

84. If a funeral director charges a single undissected amount for the service of providing a funeral that includes arranging for the supply of a burial right by an Australian government agency, GST should not be applied to any part of the undissected amount that is referable to the fee or charge payable to the Australian government agency for the supply of the burial right.

85. Where a funeral director includes the cost of purchasing a burial right from an Australian government agency in their invoice for providing a funeral service, and also adds an amount to the invoice as the funeral director's fee or charge for arranging the supply of the burial right, the funeral director's fee or charge for arranging the supply of the burial right (but not the underlying fee or charge that was payable to the Australian government agency for the burial right) is subject to GST as consideration for the funeral director's taxable supply of the funeral service.



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