Although we are a month in, we would still like to take this opportunity to wish you a Happy New Year!

We have a range of upcoming training, first up being a free training session in conjunction with the ATO to offer you a better understanding of Single Touch Payroll and how it will affect you. Following that we have our 90 minute webinar covering the super reforms and last but not least our FBT training is open for registrations. Scroll down for more details on each session.

This month we remind you of some GST and other deadlines that may affect your organisation as well as the need for Local Councils to ensure that the payroll exemption is being appropriately claimed.

Don't forget you can also join Michael Doran Live Online on Monday 6 February to get a more detailed look into the articles covered in this newsletter, as well as ask any questions you may have.

Happy reading,

The TaxEd team

Payroll – Single Touch Payroll

Further to our articles Payroll - Single Touch Payroll and Payroll - the Advent of Single Touch Payroll in the May and November 2016 newsletters, as 2017 gets underway, it is timely to consider what may be necessary to prepare for the commencement of the Single Touch Payroll (STP) on 1 July 2017.

The legislative framework was enacted on 16 September 2016. The new measures are contained in Schedule 23 to the *Budget Savings (Omnibus) Act 2016*. The Bill as enacted (Act No. 55 of 2016) and the Explanatory Memorandum (see Schedule 23) are both available here.

What is Single Touch Payroll?

As previous updates have reported, STP is a new reporting system which will require 'substantial employers' (that is employers which employ 20 or more employees) to mandatorily electronically report in real-time — using Standard Business Reporting (SBR)-enabled software — payroll and superannuation information, including ordinary times earnings, PAYG withholding (PAYGW) and superannuation guarantee (SG) data. Employers will have the option of making real-time payments, but this will not be mandatory.

Employers will have the option of reporting to the ATO through STP from 1 July 2017, but it will be mandatory from 1 July 2018 for any employer that, on 1 April 2018, employs 20 or more employees.

The ATO has advised that employers with fewer than 20 employees will be able to report to the ATO through STP from 1 July 2017; however, it is not a requirement at this stage. ATO will be running a pilot program with small businesses soon which will allow the Government to explore the benefits of STP for small business.

Further, employees will have access to pre-filled forms including *TFN declaration* and *super choice* when they start a new job. This will be accessed through their myGov account.

SBR-enabled software

In order to use STP, employers will need to have SBR-enabled software, which will require employers to either upgrade existing software or purchase new software. Following consultation, the Government decided not to proceed with a proposed $100 non-refundable tax offset to businesses with a turnover of less than $2 million to acquire or upgrade SBR-enabled software during 2017–18.

The ATO is currently working with payroll solution providers to ensure their products are upgraded for STP reporting from 1 July 2017.

The ATO will be providing regular information on the progress of STP. TaxEd will continue to make sure employers are aware of their obligations, and provide support to help you to transition to STP reporting.

Complimentary webinar

TaxEd is pleased to provide all TaxEd subscribers with complimentary registration at our upcoming webinar — *Single Touch Payroll – implications for Government and the Not-for-profit sector* — to be presented by John Shepherd, Assistant Commissioner – Single Touch Payroll and SuperStream Program, ATO, on **Monday 13 February 2017** at **2.00pm–3.30pm** (AEDT).

Further details and registration information is available here.

(Note you are also welcome to refer the invitation to register for the complimentary session to other Government and Not-for-Profit employees who you anticipate might be interested.)

FBT – Prepayment of Novated Lease

As part of a salary sacrifice arrangement an employee will often enter into a novated lease arrangement with their employee for the provision of a car.

Under the terms of the novation the lease obligations are transferred to the employer for either the term of the lease, or the period for which the employee is employed.

If the employee ceases their employment before the end of the lease the obligations under the lease will revert back to the employee.

In some cases, an employer may wish to make 12 months of prepayments on the lease to cover their yearly obligation.

FBT liability on the prepayment

In a situation where this occurs, and under the terms of the employment agreement the employee is not required to pay back any prepaid lease payments should their employment terminate during the prepayment period, does a FBT liability arise to the employer for the lease prepayments?

All obligations under the novated lease revert to the employee on termination of their employment and they are not required to reimburse the employer for the amount of any lease prepayment outstanding at this time.

Therefore, where the lease has been prepaid the employee will not be required to make payments for a period of the lease for which they have an obligation.

For example, if the employer prepays the lease obligations for the period from 1 April to 30 September and the employee terminates their employment on 30 June the employee will not be required to pay the lease obligations that relate to the period from 1 July to 30 September as the payments for this period will already have been paid by the employer.

On termination of employment, there will be an amount of prepayment outstanding which the employee is not required to reimburse to their employer. The employer has therefore met their obligation to the financier to make lease payments for the amount of the prepayment outstanding at the time of termination.

In terms of section 20 of the *FBTAA*, the outstanding prepayment is a discharge of the employee's obligation to a third person, being the financier. This constitutes the provision of an expense payment fringe benefit by the employer as the provider to the employee as the recipient.

Lease payments relating to the period prior to termination do not result in a fringe benefit arising as these are exempt car expense benefits that relate to the provision of the car fringe benefit to the employee.

Could it be argued that no expense benefit arises in the situation outlined above?

An employment termination payment (ETP) is essentially a payment received by a person in consequence of the termination of their employment. Subsection 136(1) of the *FBTAA* defines the term 'fringe benefit'. Paragraph (k) of that definition specifically excludes payments that are ETPs.

It would seem arguable that, as the employer and employee in the above scenario have agreed that the employee will not be required to repay any lease payments that relate to the period post termination, the amount of those payments is an ETP.

However, ETPs are made in consequence of the termination of the employment of an employee. In this situation, the payment has been made prior to any termination so perhaps the nexus to the termination is too remote to be considered an ETP?

This can be contrasted with the situation where an employer and employee negotiate the transfer of an employer held vehicle to the employee as part of their termination package. The ATO's general view in such circumstances is that the transfer of the vehicle is an ETP assessable to the employee and deductible to the employer (and is subject to PAYGW).

GST – Countertrade Transactions

In our November 2016 Tax Update we discussed the difficulties caused for GST compliance where consideration is provided in non-monetary form.

The difficulties led the ATO to issue Practical Compliance Guideline PCG 2016/18 *GST and countertrade transactions*. PCG 2016/18 is intended to relieve taxpayers from strict GST compliance for certain transactions where consideration is provided in a non-monetary form.

A matter that was initially unclear to us in PCG 2016/18 was whether transactions intended to be covered by it could effectively be ignored for Business Activity Statement reporting purposes.

The ATO has now confirmed that, whilst a taxpayer may opt to continue to report a countertrade transaction in Business Activities Statement (using the concessional approach provided by PCG 2016/18), where the terms of PCG 2016/18 are met it is not necessary for the transaction to be reported.

GST – *McEwans Australia Pty Ltd v Brisbane City Council*

The Queensland District Court decision in *McEwans Australia Pty Ltd v Brisbane City Council* [2016] QDC 347 relates to the interpretation of the obligation of the Brisbane City Council (the Council) to reimburse McEwans Australia Pty Ltd (the Developer) for certain GST, pursuant to an infrastructure agreement (the Agreement) into which they had entered. In particular, the decision construed the reference to GST in the Agreement by adopting the (in the court's terminology) 'popular' interpretation in preference to a technical interpretation advanced by the Developer.

Facts

The facts of the case were:

(a) The Developer purchased two parcels of land (the Land) from separate vendors.

(b) It purchased one parcel (the Levitt Rd land) on the basis that GST was calculated under the margin scheme. The contract which was dated 22 December 2007 was settled on 25 March 2008.

(c) The Developer purchased the second parcel (the Ross Rd land) under a contract that was dated 24 January 2008. Under the contract the Developer was entitled to elect to calculate any GST payable in respect of the sale under the margin scheme. The Developer did not make the election and GST was calculated on the conventional basis.

(d) The Ross Rd land contract was settled on 22 July 2008. The Developer claimed an input tax credit (ITC) of $355,000 in respect of the purchase in its September 2008 BAS.

(e) Subdivisional Development approval in relation to the Land was granted on 2 June 2009 subject to conditions.

(f) The Agreement provided for the Developer to pay a financial contribution (subsequently quantified at $300,917.56) to the Council, for the Council to utilise in providing future community infrastructure.

(g) Under the Agreement, the Council acquired an 8 ha section of the Land (the Park) for use as a sports park. More particularly, the Council required the Developer to provide the Park as a Land Contribution for community purposes and identified that an Infrastructure Offset (valued at $7,370,402.29) applied to the Land Contribution.

(**Observation:** the Brisbane City Council's website explains the current concept of an 'Infrastructure Offset' as follows: 'An infrastructure offset refers to an item of trunk infrastructure (land or works) identified in Council's Local Government Infrastructure Plan which may be provided in lieu of payment of some infrastructure charges.' It appears a similar concept applied in 2009.)

(h) The Park comprised part of the Levitt Rd land and part of the Ross Rd land.

(i) The Council agreed to offset the Infrastructure Offset against the Developer's liability to provide the financial contribution and to pay the balance (the Agreed Balance) to the Developer. The Court noted that this Agreed Balance was of $7,003,024.41. (Reducing the value of $7,370,402.29 by the Court's quantification of the financial contribution of

$300,917.56 leaves a slightly greater amount of $7,069,948.73. The reason for the discrepancy is not apparent.)

(j) The Agreement primarily contemplated that Land Contribution would be GST-free. However, it provided (clause 6.1(b)(ii)) that:

> '... if for any reason Commissioner of Taxation does not accept that the Infrastructure Offset and any amount payable for the provision of ... [the Park] under the Conditions of Approval is a GST free payment of infrastructure charges, the Council ... [and the Developer] agree in accordance with Division 75-5 of the GST Law, that the Margin Scheme shall apply to the provision of ... [the Park] under the Conditions of Approval. **Despite any other term, the Council shall pay, in addition to the Agreed Balance an amount equal to the GST that the ...[the Developer] will have to pay on account of GST associated with the receipt of the Agreed Balance**.'

(k) Following a tax audit, the Commissioner of Taxation assessed the Developer with a GST liability of $250,881 on the basis that the margin scheme applied to the transfer of the Park to the Council.

(l) The Commissioner also assessed the Developer to an increasing adjustment of $161,116 under s. 75-22 of the GST Act in respect of the part of the Park that had originally been included in the Ross Rd land.

Section 75-22(1) applies where a person (e.g. the Developer) makes a taxable supply of land to which the margin scheme is applied; part of that land had been acquired by the person under a supply that was ineligible for the margin scheme (e.g. a taxable supply on which GST had been calculated without applying the margin scheme - s. 75-5(3)(a)); and the person has obtained an input tax credit in respect of the acquisition. The subsection provides that the person has an increasing adjustment equal to the input tax credit.

In effect, the Developer was obliged to repay to the Commissioner the ITC of $355,000 mentioned in item (d) above to the extent it related to the part of the Ross Rd land which was included in the land which the Developer transferred to the Council as the Park.

(m) The Developer sought payment of $411,997 (being the sum of $250,881 and $161,116) from the Council under clause 6.1(b)(ii) set out in item (j) above.

(n) The Council contended the amount due under clause 6.1(b)(ii) was $250,881 and paid this amount. The Developer sued for the full amount of $411,997.

The Decision

The Court (McGill DCJ) held that under clause 6.1(b)(ii) the Council was only obliged to pay $250,881. The clause did not provide for the Council to indemnify the Developer for the increasing adjustment under s. 75-22 in respect of the Ross Rd land. The decision turned on the meaning of GST in the last sentence set out in subparagraph (j) above.

The case is potentially important because it raises a question whether the Developer's interpretation of GST needs to be considered in drafting future contracts, even though it was not considered apposite in the context of the particular provision before the Court. This is especially pertinent as contractual documents frequently (if not invariably) either specifically import the statutory meaning of GST or, more loosely, provide that where a term is used in the GST Act it has the same meaning in the relevant contract. The potential concern has to be tempered by McGill DCJ's preparedness to extend the contractual adoption of the statutory definition of GST for purposes of clause 4 of the Agreement to clause 6.1(b)(ii) and, notwithstanding this, reject the Developer's contention. Nevertheless, drafters will need to note the Court's remarks at paragraph [32] of the judgement.

It is also worthwhile to consider whether an alternative formulation of the Agreement would have produced a more favourable outcome for both the Developer and the Council.

It is appreciated that some readers may prefer to refer the next section (which considers the more technical question posed by the first issue set above) to their technical counterparts and move directly to the consideration of the second issue of the alternative formulation.

The Developer's Interpretation of GST and the Court's Reasoning

The Developer contended that:

(i) the increasing adjustment of $161,116 was GST for purposes of clause 6.1(b)(ii); and

(ii) such GST was 'associated with the receipt of the agreed balance'.

In relation to the amount of an increasing adjustment constituting GST, the Developer pointed out that the tax levied by the *GST Act* is the net amount of GST (the difference between tax on taxable supplies and input tax credits) as adjusted and 'accordingly the presence of an increasing adjustment affects the amount payable under the *GST Act* in the same way as a taxable supply'. The *GST Act* defines GST as the tax that is payable under the *GST Act* and imposed as goods and services tax by relevant imposition Acts.

In applying the margin scheme to the supply of the Park to the Council, the increasing adjustment became payable under s. 75-22 and 'in this way, the imposition on … the Developer of the increasing adjustment came to be associated with, and indeed flowed directly from, the supply of the land under the margin scheme'. (While this comment was directed to point (i), it was also essentially the basis for meeting point (ii), as appears more fully at paragraph [25] of the judgement.)

Observation: The definition of GST in s 195-1 of the *GST Act* has two elements - GST is tax which is payable under the *GST Act* and which is imposed by other legislation. In identifying the concept of GST for the purposes of the definition, it appears the Developer considered it was necessary to identify the tax which is imposed by the relevant imposition Acts and this second criterion points to a more expansive concept of GST - as noted below, the term GST can be used in two senses. The Developer appears to be contending that as the tax is imposed on net amounts as adjusted for increasing/decreasing adjustments, the statutory definition of GST is concerned with such calculated amounts rather than being the tax on the gross amount of the value of a taxable supply or a margin.

In short the Developer's contention was:

> '… the amount payable under the GST Act is the net amount, derived after taking into account by way of addition any relevant increasing adjustment. If, therefore, the term "GST" where it is used in s *(sic)* 6.1(b)(ii) carries the same meaning as that term in the GST Act, it follows that it is an amount which is calculated in a way which includes any increasing adjustment which is payable under the GST Act.'

The Council argued that:

> '… in Clause 6.1 the expression "GST" had its ordinary meaning, which did not include an amount payable by way of an increasing adjustment. Further, it was submitted that this was not GST which was "associated with the receipt of the agreed balance", since the increasing adjustment was not something associated with the receipt of the agreed balance, but something associated with the amount paid on the purchase of the land by … [the Developer]. It was submitted that the only amount associated with the receipt of the agreed balance was the additional GST payable on the transfer of the … [Park] land, which … [the Council] had paid.'

The Court opted to construe the expression 'GST associated with the receipt of the Agreed Balance' as a single composite one rather than to divide into the two components identified by the Developer. The Court also noted the *GST Act* used the term GST in two senses. One of these is the sense of the statutory definition set out in s. 195-1 of the *GST Act*. The second, 'popular', sense is exemplified in ss. 17-5, 75-5(1), 75-5(3)(a) and 75-10(1), being 1/11th of the consideration/margin in relation to a taxable supply. In the circumstances of the case, the Court concluded GST was used in the popular sense.

The Court's view that the existence of the two senses was reinforced by the absence of an asterisk qualifying GST in these sections is questionable, having regard to s. 3-5(3) of the *GST Act*. However, it is noted that use of GST in the popular sense occurs in these provisions in association with a reference to a taxable supply, taxable importation, and margin.

It is beyond the scope of this article to express a definitive view on a drafting matter of the potentially wide import which the Developer's argument potentially raises. In particular, we would want to consider further whether the definition of GST in s. 195-1 is only capable of the construction implicitly ascribed by the Developer and, for instance, have regard to the terms of the legislation imposing the tax.

However, drafters should consider the Developer's argument and, irrespective of the conclusion reached, also consider whether the particular circumstances of the transaction(s) which they are addressing may involve/lead to an increasing/decreasing adjustment that should be factored into the contractual reimbursement arrangements of the contracting parties.

In the next section of this article we advert to a more practical day-to-day matter.

Observations on whether there was an alternative contract formulation leading to a 'win/win' outcome

In the circumstances of this case, where both the Developer and the Council were registered for GST, it is interesting to consider the GST outcome which would have been produced if the margin scheme had not applied to the taxable supply of the Park.

If the parties had contracted on the basis that GST would be calculated in the conventional manner (10% of the value of the taxable supply) on any taxable supply of the Park, an increasing adjustment under s. 75-22 would not have arisen. The Developer would have been liable for GST and the Agreement could have provided for the relevant consideration to be grossed up for the GST payable by the Developer. The Council would have been entitled to a corresponding ITC.

While the Council would have paid a greater total amount, the ITC to which it was entitled would have reduced the actual cost incurred by the Council. The process of applying the margin scheme and for the Council to reimburse the Developer did not give rise to an ITC, with the result that the reimbursed amount became a cost to the Council. A conventional application of GST would have avoided the Council incurring this 'sticky' GST.

GST – A reminder of some deadlines

(a) GST

The ATO has issued the following reminder:

> 'If your not-for-profit (NFP) organisation has elected to pay and report its GST annually, it must do so by 28 February 2017.
>
> Your organisation can choose to report and pay GST annually as long as it:
>
> - is not required to register for GST, and
> - has not elected to pay GST by instalment amounts.
>
> Your organisation can make this election in any financial year:
>
> - from 1 July to 21 August, if it reports monthly
> - from 1 July to 28 October, if it reports quarterly.'

For more information - see the ATO website.

(b) ACNC Annual Return

The ACNC has reminded the NFP sector that:

> 'On 31 January 2017, over 33,000 registered charities will be required to submit their 2016 Annual Information Statement.'

It noted that:

> 'To maintain charity status it is a legal requirement to submit an Annual Information Statement. For medium and large charities a separate annual financial report is also required.
>
> The Charity Register is now being used widely by donors and the public. If your charity is not up to date with its Annual Information Statement, this may be seen as a sign of poor governance.
>
> To help registered charities submit their Annual Information Statement, we have published a range of guidance materials, which you can access free of charge at acnc.gov.au/2016AIS.'

(c) Ancillary Funds

The ATO has reminded all public and private ancillary funds to lodge their annual information return by 28 February 2017. It has added:

> 'Last September, we announced new streamlined reporting requirements for private and public ancillary funds.
>
> - If your ancillary fund is a charity registered with the ACNC, you now only need to report once using the ACNC Annual Information Statement, available at acnc.gov.au

- If your fund is not registered as a charity with the ACNC, you need to download and complete our Ancillary fund return 2016. For step-by-step instructions, see Ancillary fund return instructions 2016.

If you can't lodge by the due date, phone us on 1300 130 248 before the due date to try to arrange extra time to lodge. Otherwise, you may be liable for an administrative penalty.'

Eligibility – Local Councils and Payroll Tax Exemption

A recent case, *Snowy Monaro Regional Council v Chief Commissioner of State Revenue* [2017] NSWCATAD 14, a decision of the New South Wales Civil and Administrative Tribunal, is a reminder for local councils to ensure all activities for which they pay wages are eligible for payroll tax exemption.

The general design of State payroll tax laws is to exempt wages paid by local Councils, but for the exemption not to apply to wages payable in relation to specified activities undertaken by Council. The specified activities are broadly intended to ensure Councils are not given an advantage over other businesses that undertake similar activities but which are required to pay PRT.

In this case, s. 58 of the NSW *Payroll Tax Act 2007* provided an exemption for wages paid by a local council. However s. 60 provided that wages payable by Council in relation to an activity specified in ss. 60(2) are not exempt.

Subsection 60(2) lists a range of activities and ss. 60(2)(d)(v) included the conduct of hostels.

The matter in question involved whether wages paid by the Snowy Monaro Regional Council could be said to be payable to employees engaged in activities being the conduct of a hostel. The relevant employees worked at a facility called Yallambee Lodge Aged Care Centre. The Tribunal needed to determine whether Yallambee was a hostel for the purposes of ss. 60(2)(d)(v).

The taxpayer argued the facility was a specialised age care facility providing palliative care and assistance to elderly residents with complex personal care needs.

The Revenue Office sought to argue the facility was a hostel within the ordinary meaning of that word.

The ordinary meaning of a hostel suggests low cost accommodation (board and lodging) of a temporary nature.

The Tribunal placed emphasis on the facts that residents pay significant sums to reside at Yallambee, effectively becoming permanent residents thereof, and the high need requirements of the residents.

The Tribunal noted that it was not a specific test in ss. 60(2) as to whether the facility competed with other similar care providers which were subject to PRT.

The Tribunal was satisfied the matter turned on whether the Yallambee facility was a hostel within the ordinary meaning of that term and it was satisfied Yallambee was not a hostel.

The decision is a timely reminder to TaxEd member Councils to review your PRT treatment in light of any exclusions to general local Council PRT exemption that may apply in their jurisdiction.

Eligibility – When will the Employment Agent Rules not apply?

A recent case *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 examined what type of transactions are intended to be covered by the employment agency rules found in the NSW *Payroll Tax Act 2007* .

In the particular, UNSW Global procured persons to:

- act as expert witnesses in matters (such as litigation) where an expert opinion was required; and
- act as an expert in 'domestic consulting' assignments entered into by UNSW Global where an expert report was the substance of the consulting assignment.

UNSW Global contracted with the party requiring the expert opinion and separately contracted with the expert. The expert was accepted as an independent contractor and not an employee of UNSW Global.

The NSW Office of State Revenue sought to impose PRT on payments made by UNSW Global to the experts on the basis that the employment agent rules in s. 37 of the *NSW Payroll Tax Act* 2007 applied.

Section 37 provides that an 'employment agency contract' is a contract under which a person (the employment agent) procures the services of another person (a service provider) for a client of the employment agent.

Where the conditions of s. 37 are met the employment agent is taken to be the employer and amounts paid by the employment agent to the service provider are taken to be wages for PRT purposes.

In this case the argument focused on whether s. 37 applied merely where the employment agent procured the services of persons for the benefit of its clients' businesses or whether the work done for the client was required to be in the conduct of the client's business.

Much of the argument revolved around the historical development of the Payroll Tax legislation and specifically the reason for and role played by the employment agency contract rules.

In an historical context, the employment agency rules were introduced to deal with a deficiency in former PRT legislation, whereby temporary employees were able to be supplied by employment agents' to clients of the employment agents without a PRT liability arising.

Parliamentary material (in NSW and Victoria) announcing the new employment agency contract rules expressly confirmed genuine independent contractors supplying services to a client through an intermediary such as employment agent were not intended to be covered by the new rules and instead would continue to be subject to the existing relevant contract rules (which provide a number of exemptions to ensure payments to independent contractors are generally not subject to PRT).

In seeking to impose PRT on UNSW Global for the transactions in question, the NSW Office of State Revenue sought to test whether, despite the words of s. 37 appearing to capture the arrangements under consideration, the scope of s. 37 should be limited to the type of transactions for which the rules had been introduced/intended (being workers who provided employee-like services for a client's business albeit through an employment agent).

The Court found in favour of UNSW Global and interpreted s. 37 in a way that requires the work being done by the service provider to be in the business of the client and not merely for the benefit of the client's business. This interpretation should ensure an independent contractor providing services of that contractor's business through an employment agency will not trigger the s. 37 rules.

It will be interesting to see how widely this decision may impact other employment agency-type scenarios (where PRT is currently being applied).

From a TaxEd member perspective, another issue always worth noting is the possibility that, for PRT exempt employers, their PRT exemption flows through to an employment agent reducing supply costs.

Eligibility – Is the Victorian Farmers Federation a Charity

A recent case, *Victorian Farmers Federation v Commissioner of State Revenue* [2017] VCAT 19 (the VFF) saw the membership based Federation fail in its attempt to be recognised as charity for payroll tax purposes.

The VFF's objects included:

- to advance, promote and protect the interest of Members, the interest of Agricultural industries in which members are engaged and the interests of the Federation in all matters, including economic, legal, environmental, social and any other incidental matters;
- to encourage and promote the development of Agriculture; and to advance policies that will assist members to improve farm profitability.

The relevant Victorian PRT exemption is found in s. 48 of the Victorian *Payroll Tax Act 2007*. Section 48 provides that wages are exempt if the Commissioner is satisfied the wages are paid by a non-profit organisation having as its whole or dominant purpose a charitable purpose.

The parties agreed that if a charitable purpose was to be identified it would fall under the charitable head '…other purposes beneficial to the community'.

As is common with this type of cases, the decision confirmed the general law regarding what is a charity and how an organisation's sole or dominant purposes should be ascertained by reference to both the organisations stated objects and the activities undertaken to ensure they are consistent with those objects.

It is generally accepted law that promotion of members' interests is not a charitable purpose, although promotion of agriculture more broadly is likely to be a charitable purpose.

After weighing up the VFF's stated objects against the nature of activities undertaken it was viewed that VFFs dominant purpose was the benefitting (or more specifically the profitability) of those involved in agriculture as opposed to benefitting agriculture generally.

There have been many cases dealing with whether an organisation is a charitable in recent years.

To the extent certain taxpayers have been successful (*Chamber of Commerce and Industry of Western Australia Inc.* [212] WASAT 146) it was interesting the law was changed effectively to exclude certain types of organisations from exemption. Most cases of late, however, have seen the taxpayer fail generally given the promotion of member interests was considered to be the dominant purpose.

As a further comment, tensions exist between the role of the role of the Australian Charities and Not-for-profit Commission (ACNC) in registering organisations as charities and State Revenue Office's where tax concessions such as PRT, Duties, Land Tax etc. are tied to an organisation's status.

We are aware there is a push for State Taxation law to recognise an organisation as a charity where it is so endorsed by the ACNC. Whilst this outcome would streamline administrative matters, the question will always remain as whether an organisation's objects and activities support the finding that the sole or dominant purpose is charitable.

Eligibility – Public Benevolent Institutions - the ACNC's view

Public Benevolent Institutions (PBIs) are able to access significant Commonwealth tax concessions. One the requirements for access to the concessions is recognition that the entity is a PBI for purposes of the ACNC. This article outlines the ACNC's view as set out in the *Commissioner's Interpretation Statement: Public Benevolent Institutions* (CIS 2016/03 -approved 19 December 2016).

The aim of this article is to indicate the scope of CIS 2016/03 and alert readers to the extent of its guidance in dealing with the ACNC.

The ACNC's view should not be relied upon as definitive guidance when interpreting a reference in State or Territory legislation to a PBI. However, as with any carefully considered analysis the ACNC's thoughts on the general character of a PBI may (as a practical matter) be a useful starting point for considering the general nature of these bodies.

The ACNC considers a PBI in the context of identifying these bodies as a sub-type of charity under the *Charities and Not-for-Profits Commission Act 2012* (ACNC Act). As a result, the ACNC analysis deals with:

(a) the general concept of a PBI; and

(b) specific legislative requirements for registration as a PBI under the ACNC Act.

In order for an organisation to be a sub-type of charity it must be a 'charity', as noted in context of the discussion of requirement (b) below. In particular, the organisation must be established for the pursuit of one or more of those purposes which the *Charities Act 2013* (Charities Act) recognises are charitable, such as advancing social or public welfare. It must not be a 'government entity' within the meaning of the Charities Act (discussed in a separate Commissioner's statement: *CIS 2016/01*).

As PBIs registered by the ACNC will also be 'registered charities', they will be able to access the Commonwealth tax concessions applicable to the later.

Registered PBIs may also be able to access certain additional tax concessions - notably, gift deductibility and some FBT concessions.

The identifying characteristics in subparagraphs (a) and (b) above are considered under the corresponding headings below. Under heading (c) below, we draw attention to some practical aspects PBI registration that are dealt with in CIS 2016/03.

(a) The General Concept of a PBI

The features of a PBI are:

- it is 'public' in the required sense;
- it is benevolent; and
- it is an institution.

The 'public' character required

A PBI must be 'public' in the sense of benefiting a sufficiently extensive set of individuals. Its public character may also be supported by its relationship with the general public such as being subject to public control and accountability, receipt of public funds, or having a connection with government.

The concept of benevolence

The main purpose of a PBI must provide benevolent relief to people.

Fundamentally, a PBI must be specifically targeted at providing relief to people in need (typically, poverty or distress such as sickness, disability, destitution, suffering, misfortune or helplessness). Note that distress may exist without poverty. Charging a whole/partial fee does not necessarily preclude registration as a PBI.

For instance, it is not sufficient to promote social welfare in the community generally such as giving general advice/information, undertaking research or performing advocacy services to the whole/part of the community. Additionally, the relief must be concerned with removing/abating need rather than merely providing services that are targeted at people in need.

However, CIS 2016/03 recognises (see para 5.9.1 *et seq.*) that in certain circumstances prevention of poverty/distress from arising can constitute provision of relief and will be benevolence, while in other instances the prevention work may be too general in nature. Note especially that people who are 'at risk' may thereby be people 'in need'.

The level of poverty/distress which must exist is 'of such seriousness as will arouse community compassion and thus engender the provision of relief'. CIS 2016/03 provides guidance on the ACNC's application of this test in some commonly encountered circumstances: indigenous affairs, stress produced by ordinary human experiences, and provision education/training.

While a PBI may have purposes other than provision of benevolence, these must be ancillary or incidental to the provision of benevolence. It is not sufficient that any non-benevolent purpose is merely minor.

A PBI can provide benevolent relief either directly or indirectly. Indirect provision of relief includes relief provided via or in co-ordination with related or associated entities or through agents/contractors. The statement discusses the requirements for provision of indirect relief in detail, drawing on the Full Federal Court decision in *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69 and referring the ACNC interpretation statement CIS2013/01. Your attention is especially drawn to the ACNC's position that:

> 'a PBI may provide relief via, or in coordination with, related or associated entities that are not PBIs for the fulfilment of benevolent purposes only'.

CIS 2016/03 discusses the eligibility of organisations which have 'a main purpose of providing benevolent relief to persons residing overseas' to be registered as a PBI. It notes that provision of relief to people in countries that the Minister for Foreign Affairs has not declared as 'developing' does not preclude registration. (However, it notes that a PBI's access to the gift deductible recipient (DGR) endorsement is determined by the ATO and seeking such endorsement may entail separate considerations.) As a practical matter, provision of benevolent relief overseas is likely to involve greater difficulty in establishing compliance with governance standards, one of the specific legislative requirements for registration mentioned in Part (b) below.

Institution

In essence, an organisation is an institution where it is created and exists to bring into being charitable purposes and intentions of its founders. The legal structure of a PBI can be take any form - company, trust, unincorporated association - as long as it has a distinct identity. Merely managing trust property which is applied to charitable purposes does not amount to being an institution. Merely being incorporated does not create an institution.

CIS 2016/03 provides guidance on the ways in which a new organisation can demonstrate that it is an institution. The ACNC requires that a new organisation demonstrates that it has concrete plans to operate in the foreseeable future (within one year of establishment) and indicates the manner in which it may be able to show this. Failure to commence operation within one year of establishment without explanation of the reason for not realising its plans may result in the ACNC reviewing the organisation's registration as a PBI.

All PBIs should note that CIS 2016/03 warns that the ACNC may review the registration of an existing PBI which 'has not been operating for six or more months and cannot explain how it nevertheless evidences the bringing of its founders' purposes and intentions into being'.

(b) Specific legislative requirements for registration as a PBI under the ACNC Act

The ACNC Act specifically prescribes that, apart from having character described above, in order for a body to be registered as a PBI it must:

- meet the definition of charity in s. 5 of the Charities Act;
- be a not-for-profit entity (this is both a requirement of the Charities Act and the ACNC Act);
- comply with the governance standards and external conduction standards described in Part 3-1 of the ACNC Act;
- have an ABN; and
- not have been identified as engaging etc. in terrorist or other criminal activities

Observation: We have found that the third requirement is readily overlooked in practice and should, therefore be especially noted.

(c) Practical Considerations in obtaining/maintaining PBI registration

Part 7 of CIS 2016/03 lists sources of information which the ACNC will consider in making a decision in relation to the registration of an organisation as PBI. While the application for registration will require provision some of the material listed, we surmise that other of the listed material would be provided at the option of the applicant or in a supplementary request by the ACNC in problematic circumstances.

Observation: The list includes websites and annual reports. These can be especially informative as to the nature of an applicant for registration and should be carefully reviewed ahead of an application in order to anticipate queries that the ACNC might raise.

Part 7 sets out the principles that the ACNC will apply in determining whether PBI registration will be granted.

Part 8 of CIS 2016/03 stresses the importance of compliance with governance standards and external conduct standards and avoiding contravention of the ACNC Act. It draws attention to the obligation of a registered PBI to notify the ACNC where there has been a failure to comply or a contravention and the failure or contravention is 'significant'.

Observation: Whether there has been significant non-compliance or a significant contravention is set out in s. 65-5(3) of the ACNC Act. Section 65-5(4) prescribes the time within which the ACNC must be notified of the relevant non-compliance/contravention.

Part 9 of CIS 2016/03 contains examples of the manner in which the ACNC will apply its contents.

FBT Q&A - Light meals provided at a business meeting

Question:

One of our business unit divisions has a quarterly staff meeting/seminar off premises. The seminar goes for 2 hours and includes morning tea. Is this subject to FBT? The total cost is $1,100 - $800 for the premises and $300 for food.

Answer:

A light meal in the form of morning tea at a quarterly work seminar/meeting should not constitute meal entertainment. Further, on the basis the venue is a meeting type space, the venue costs shouldn't be an entertainment facility leasing expense.

It is considered the venue hire costs are not a benefit provided to the employees in the circumstances provided.

The morning tea will be the provision of property but the business premises exemption under s. 41 of the *FBT Act* will not be available.

However, as the meeting is a quarterly event one would think it is reasonable to argue the minor benefit exemption applies.

Alternatively, it may be possible to argue that the meeting/seminar is a CPD session and if the employees were to have paid an amount to attend the session the costs would have been otherwise deductible - refer TD 93/195.

FBT Q&A – Property provided to retiring employee

Question:

A long serving employee is retiring and upon his departure we decided to provide him with ownership of their employer provided car. The provision of the car was (previously part of a salary sacrifice arrangement with the employee.

What are the FBT implications of this arrangement? Has a property fringe benefit arisen? If so, how is the value of this benefit determined?

Answer:

Typically the transfer to an employee of an asset of the employer for less than market value will result in a taxable property benefit arising for FBT purposes. The taxable value will be the market value less any relevant employee contribution towards the transfer.

However, where the transfer occurs as part of the employees termination arrangements, the transfer is generally considered to be an employment termination payment (ETP) by the ATO.

An ETP is essentially a payment received by a person in consequence of the termination of their employment.

Subsection 27A(8) of the *ITAA 1936* provides that where a transfer of property has been made to a person for the purposes of making an ETP, the transfer is deemed to be payment of an amount equal to the value of the property immediately before the transfer. The market value of the property immediately before the transfer is generally accepted as the value for the purposes of this provision.

Subsection 136(1) of the *FBTAA* defines the term 'fringe benefit'. Paragraph (k) of that definition specifically excludes payments that are ETPs. Consequently, the transfer of the car to be made to the individual would not be considered a fringe benefit as it represents an ETP.

It should be noted that relevant PAYGW will be required from the 'payment'.

Payroll Q&A - Where a Councillor requests that amounts be paid to their Superannuation Fund Should the amounts be shown as Reportable Employer Superannuation Contributions?

Question:

Where a Councillor requests amounts that be paid to their superannuation fund should the amounts be shown as Reportable Employer Superannuation Contributions?

Answer:

Normally, amounts paid by a local government council to councillors are assessable to the councillor when received (notwithstanding an absence of an employer/employee relationship). It may also be taken to have been received under ss. 6-5(4) *ITAA 1997* where it is otherwise dealt with on behalf of the councillor, or alternatively s. 15-2 of the ITAA 1997 where it is provided in respect of, or for or in relation directly or indirectly to, any employment of, or services rendered by the councillor.

However, contributions made to a complying superannuation fund on behalf of a councillor as part of an agreement between the local government council and the councillor will not fall within the ambit of s. 6-5(4) because it is accepted by the ATO that the councillor has agreed to forgo part of the remuneration before earning the entitlement to receive that amount as ordinary income (refer to ATO ID 2007/205).

Employer contributions to a superannuation fund represent assessable income of the superannuation fund under s. 295-160 *ITAA 1997*. The High Court decision in *Constable v FCT* (1952) 86 CLR 402 supports the view that s. 15-2 *ITAA 1997* does not apply to the making of contributions to a superannuation fund by an employer for the employees benefit. The scheme of superannuation and taxation law has been prefaced on the same view - i.e., contribution by an employer to a superannuation fund is not the income of the employee. In light of this and the decision in *Constable*, the ATO considered (in ATO ID 2007/205) the same reasoning as applied to employees in respect of the application of s. 15-2 would apply with equal force to local government councillors in the circumstance set out above.

Accordingly, contributions made by Council to councillors' complying superannuation funds in the foregoing circumstance would not be assessable to the councillors. Therefore, Council should not report the amount contributed on a payment summary. Nonetheless, it is advisable for Council to inform councillors of the amounts paid into their superannuation fund as those contributions count towards councillors' superannuation contribution cap limits. Contributions paid into superannuation funds are not reportable employer super contributions (RESC) because councillors are not employees and hence should not be reported as such (in case it impacts on the person's liability/entitlement for various Government payments that include RESC in their calculation base).

The amounts certainly are not 'salary sacrifice' as they are not salary however a similar outcome is provided by ATO ID 2007/205 (i.e. the non-employee councillor can forego the entitlement and receive in the form of other than assessable income - in this case super).

GST Q&A – Payments made under an appropriation

Question:

I am hoping you can point me in the direction of good guidance on what 'payments made under an appropriation' actually means and who/how is required to prove that this is the case?

More specifically, must the appropriation and supporting documents (such as Budget Papers), refer to the payment/project, or can the payments come out of a general bucket of appropriated funds?

We have a number of parties now stating a transaction is 'GST N/A' as it is subject to an appropriation but they can't provide specific evidence directly linked to this payment. They can only provide the appropriation bill stating how much they will receive.

Answer:

The relevant provision giving rise to this issue is s. 9-17(3) of the *GST Act*. Insofar as is relates to your query, it states:

> (3) A payment is not the provision of consideration if:
>
> (a) the payment is made by a *government related entity to another government related entity for making a supply; and
>
> (b) the payment is:
>
> (i) covered by an appropriation under an *Australian law; or
>
> ...; and
>
> (c) the payment is calculated on the basis that the sum of:
>
> (i) the payment (including the amounts of any other such payments) relating to the supply; and
>
> (ii) anything (including any payment for any act or forbearance) that the other government related entity receives from another entity in connection with, or in response to, or for the inducement of, the supply, or for any other related supply;
>
> does not exceed the supplier's anticipated or actual costs of making those supplies.

The conditions in s. 9-17(3) essentially provide that if the payment is:

1. made by a government related entity to another government related entity for making a supply;
2. the payment is paid under a government appropriation; and
3. the payment satisfies a non-commercial test (essentially that the amount paid is no more than the cost to make the underlying supplies),

then the payment is not treated as consideration for a supply.

The Explanatory Memorandum to the Bill that introduced s. 9-17(3) makes the following comments:

> 'Is the payment covered by an appropriation under an Australian law?

2.17 These amendments require that the payment must be covered by an appropriation under an Australian law. This requirement is met if the payment is made pursuant to an appropriation. [Schedule 2, item 2, subparagraph 9 17(3)(b)(i)]

2.18 The payment need not be 'specifically covered' by an appropriation under an Australian law. The term 'specifically' has not been included in these amendments. This is to clarify that this exception has been expanded.

2.19 The government related entity supplier does not need to be specified under the terms of the appropriation, either by name, or as part of a class of government related entities, for subparagraph 9 17(3)(b)(i) to be satisfied. Subparagraph 9 17(3)(b)(i) is satisfied where the terms of the appropriation state the purpose for which funds are appropriated, rather than the entities to which the funds can be paid. A payment is therefore covered by an appropriation for the purposes of subparagraph 9 17(3)(b)(i), if the terms of the appropriation authorise the payment to be made.

2.20 Furthermore, the exception can apply where the terms of the appropriation under which the payment is made do not confine the payment to government related entities, either by name or to a class of government related entities. Accordingly, a payment is covered by an appropriation where the terms of the appropriation authorise payments to be made to both government related entities and non government related entities.'

Hopefully these comments provide sufficient guidance of the intent of the law. At the very least, therefore, the relevant entity should be able to point to the terms of the appropriation that states the purpose for which funds are appropriated, and the terms of the appropriation authorise the payment to be made.

Also note, however, that the appropriation component is only one condition in s. 9-17(3) and the other conditions need to be met before the transaction is treated as 'GST N/A'.