

REFORMING THE CHARITABLE CONTRIBUTION DEDUCTION

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The Australian Charitable Contribution Deduction

Overview

In Australia, income tax is levied at the federal level and there are provisions for taxpayers to claim a deduction for certain gifts made to specified types of nonprofit organisations (deductible gift recipients). Generally the deductible amount is uncapped, apart from the restriction that the deduction can only be set off against assessable income, so it cannot create a tax loss. Unlike the situation in the United States there are no gift deductions for estate or gift tax, simply because these taxes no longer exist at any level of government.

The latest tax statistics indicate that in 1998/99, 3.26 million individual taxpayers (33.4% of all individual taxpayers) claimed tax deductions for gifts totalling \$A632 million (.22% of taxable income). Overall giving in the Australian community is estimated to be \$A2.8 billion which is much more extensive than that claimed as a tax deduction.¹ There are no taxation statistics available for gift deductions claimed by business taxpayers.

The federal government has over the last three years initiated a series of gift deduction reforms. These reforms can be divided into two categories, one being the introduction of provisions to encourage philanthropic giving such as widening the range of acceptable forms of gifts and the other being administrative and compliance regulations which is part

¹Mark Lyons, *Third Sector - the contribution of nonprofit and cooperative enterprises in Australia*, Allen & Unwin, Sydney, 2001 at p 163.

of a wider review of the Australian taxation system.

This paper firstly outlines the general framework of the Australian taxation system followed by a detailed examination of the basis of tax deductible donations. The basis of tax deductible donations describes the recipients of tax deductible gifts, types of acceptable gifts and the amount of tax deduction permitted. The paper then turns to examine special gift situations that are exceptions to the general rules, international giving and administration of gift deductions. In order to reform deductible gift policy it is useful to have an indication of the trends in deductible gifts and the paper examines such data available in Australia.

The Australian Taxation System: An introduction

Income tax was first imposed in Australia by state governments in the 1880s, but by 1936 a uniform federal tax system was largely achieved with the enactment of the Commonwealth *Income Tax Assessment Act 1936*. In 1942 the federal government assumed all responsibility for the imposition and collection of income tax, with revenue sharing between it and the Australian states. Since 1 July 2000, a federal Goods and Services Tax (a broadly based value added tax at the rate of 10%) has been imposed and the revenues channelled to the states. State governments also raise revenue from stamp duties, pay-roll, land and gambling taxes and business franchise licence fees imposed on tobacco, alcohol and petrol. Local governments rely on federal and state government

funding and property taxes in the form of municipal rates and charges.

Both income tax and the goods and services tax is administered by the Australian Taxation Office (ATO), headed by a Commissioner of Taxation who reports to the Commonwealth Parliament. The ATO has developed a taxpayer's charter that outlines the rights of taxpayers under the law, their obligations and the standard of services the public can expect from the ATO. The tax legislation requires strict secrecy of taxpayer information to be observed by the ATO and other government departments.

The ATO has its own internal review process and independent reviews are made through tribunals and courts. There is an extensive public tax rulings system in place. Over the last decade the administration of the collection of income tax has shifted to a self-assessment regime. Every taxpayer is required to prepare an annual return of key details with an onus to keep sufficient records to enable verification of returns during a subsequent audit. There is no standard deduction without the need for record keeping as applicable in the United States, although this policy option is under consideration.²

Since 1993 the federal government has been implementing a project to rewrite the tax laws. To date only the core provisions have been rewritten and are contained in the *Income Tax Assessment Act 1997*, with the *Income Tax Assessment Act 1936* still applicable to remaining provisions. The project has rewritten the gift deduction provisions

² Costello, P. Tax Reform - Not a New Tax - a New Tax System, August 1988, Treasury, Canberra, p 148.

(Division 30) and the income tax exemption provisions (Division 50). The project has been overshadowed by a major tax reform program of the Commonwealth government that has included the introduction of a broad based value added tax set at 10%, and other taxation administration reforms.

The tax base upon which income tax is imposed is "taxable income" which is derived from ascertaining the "assessable income" of a taxpayer and subtracting "allowable deductions".³ Assessable income includes ordinary income as understood in the common law and "statutory income" such as net capital gains that are specified under the provisions of either the *Income Tax Assessment Act* 1936 or 1997.⁴ Allowable deductions include a deduction that is either:

- (a) a general deduction, that is, any loss or outgoing to the extent that it is incurred in gaining or producing assessable income or is necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income;⁵ or
- (b) a specific deduction such as a gift to a donation deductible recipient.⁶

Prior to 1987 a corporate taxpayer was taxed as a separate legal entity and individual

³ Sec 4-5(1) ITAA97

⁴ sec 6-5; 6-10 ITAA97

⁵ sec 8-1 ITAA97

⁶ s 8-5 ITAA97

shareholders were taxed on dividends received without any recognition of the tax paid by the company on the profits out of which dividends were paid. This has been replaced by an imputation system of company taxation where the shareholder is entitled to a tax credit for the tax paid at the company level that avoids "double taxation".

The general rates of income tax applicable to individual taxpayers for 2000/01 are as follows:

Residents		
Taxable Income	Tax Payable \$	% on excess
\$		(marginal rate)
6,000	Nil	17
20,000	2,380	30
50,000	11,380	42
60,000	15,580	47

There is a health levy for the 2000/01 year of 1.5% with an extra 1% levy surcharge applying to higher income earners who do not have private health insurance. The general rate of tax on income derived by private and public companies is 30% for 2001/02 with special rates for friendly society, life assurance and pension companies.

The Basis of Tax Deductible Donations

Not all gifts to nonprofit organisations attract the tax deductibility provisions, or even charitable organisations as is the general case in the United States. Australia has adopted a far narrower group of entities and/or activities that can attract the gift deductibility. Classes of organisations and specifically named organisations described in Division 30 of the *Income Tax Assessment Act 1997* can be the recipients of tax deductible gifts, some subject to further conditions. Sub-Division 30-A of the Act specifies:

- ◆ who the recipient of the gift or contribution can be;
- ◆ the type of gift or contribution that a donor can make;
- ◆ how much the donor can deduct for the gift or contribution; and
- ◆ special conditions that apply.

This provides a convenient division to examine the basis of the general provisions of gift deductibility.

Who

Sub-Division 30B of the *Income Tax Assessment Act 1997* is organised around thirteen general categories of deductible gift recipients under the Act. These include:

- ◆ health;

- ♦ education;
- ♦ research;
- ♦ welfare and rights;
- ♦ defence;
- ♦ environment;
- ♦ industry, trade and design;
- ♦ the family;
- ♦ international affairs;
- ♦ sports and recreation;
- ♦ philanthropic trusts;
- ♦ cultural organisations; and
- ♦ other recipients.

Under each general category the tax statute lists specific organisations or specific classes of organisations that are to be donation deductible. For example, in the welfare and rights category, there are specific organisations mentioned by name such as "Amnesty International" and the "Royal Society for the Prevention of Cruelty to Animals" as well as a specific class being Public Benevolent Institutions. The thirteen broad headings are a device to organise a diverse array of organisations, rather than indications of what broad activities are gift deductible.

Specific organisations have found their way into the statute by Parliament being persuaded that the organisation is deserving of the status of being a deductible gift recipient. There are

about one hundred and thirty of such organisations. The listing of specific organisations as being deductible as mentioned is occasionally the product of overt political forces. Two examples illustrative of the policy process are the listing of Nursing Mothers and the political research organisations of major political parties. Championed by the Australian Democrats (a minor party of the Australian Senate), the initial attempt to amend legislation to include Nursing Mothers failed. During the debate, Senator Walsh, the Minister for Finance, conceded that "there is an element of semi or quasi-arbitrariness in the selection" of such organisations⁷ whilst Senator Stone, former Head of the Treasury admitted that, "It has been one of the most contentious, time-consuming and difficult areas of tax law for many years."⁸ Nursing Mothers initiated a grassroots political campaign to alter the decision. After six months of association members lobbying their members of Parliament, 10,000 letters and personal representations by wives of members of Parliament who were members of the organisation, the Senate agreed to Nursing Mothers being listed.

Another example is the listing of the Evatt and the Menzies Foundations that are commonly referred to as the 'think-tanks' of the major political parties. They would not qualify for donation deductibility status under any other category in the taxation legislation. On the first of April, 1998, Hansard records the following in relation to a question without notice asked by Mr Crean of the Prime Minister, Mr Howard:

⁷ Australia, Senate Hansard, 1989, at p. 3766.

⁸ Australia, Senate Hansard, 1989, at pp. 3769-70.

Mr Howard: ... The honourable member comes to a decision that was taken on 1 October 1996 by the government to grant \$100,000 to the Menzies Foundation and also grant \$100,000 to the Evatt Foundation.

Mr McLachlan: The Evatt Foundation!

Mr Howard: Hang on, it gets better. We also granted tax deductible status to the Menzies Research Centre. Let me say a couple of things about that and then I will come to the issue of declaration which has been asked by the Member for Hotham. The first thing I would report to you is that, on the day cabinet met, I happened to ring the Leader of the Opposition. I rang the Leader of the Opposition and I said, 'Kim, we have it in mind to give \$100,000 to the Menzies centre. In the interests of political balance, we will give \$100,000 to the Evatt Foundation and grant tax deductibility to the Menzies Research Centre because Evatt has already got it.' I might add in parenthesis that I was the Treasurer who, in 1981, granted tax deductibility to the Evatt Foundation."⁹

There are also named classes of organisations such as public benevolent institutions, higher educational institutions, public authorities for research, and ancillary funds. These classes of organisations are not the same as charitable institutions or funds. Although the concept of

⁹ Australia, House of Representatives Hansard, 1998, p. 2118.

charitable institution and funds is used to determine income tax exemption, a different classification system is used for gift deductibility purposes. This is in stark contrast to the situation in the United States where nearly every organisation that is federally income tax exempt as a charitable organisation will also be considered a charitable organisation for the purposes of the federal income tax charitable contribution deduction.

The classes of organisations describing deductible gift recipients are either:

- institutions,
- public funds, or
- public authorities.

These terms are not defined in the legislation and have been interpreted by the courts. An institution has been defined as "an establishment, organisation, or association, instituted for the promotion of some object, especially one of public utility, religious, charitable, educational etc."¹⁰ An organisation will not be an institution if it is in the form of a trust that merely manages or holds trust property or it is an organisation that is established and controlled by family members and friends.¹¹ A recent review of the definition of charities and related organisations has recommended that this term be omitted and it would be enough that the organisation is an 'entity' recognised by tax law.¹² A 'public authority' is an agency of the government exercising power or command for the public advantage and for

¹⁰ Gibbs J in *Stratton & Ors v Simpson & Ors* (1970) 125 CLR 138 at p 158.

¹¹ *Trustees of the Allport Bequest v FC of T* 88 ATC 4436.

¹² Ian Sheppard, Robert Fitzgerald & David Gonski, *Report of the Charities Definition Inquiry*, Australian Government Printing Service, 2001, p. 256

example would include railway and transport authorities, local governments and water supply boards. A 'public fund' is a fund that is open for subscription to the public and must also be a fund to which the public do in fact contribute.¹³

The most notable and common class of organisations is the public benevolent institution. The term 'public benevolent institution' entered the taxation legislation after the Privy Council over-ruled the High Court of Australia on the definition of 'charity' in an estate duty case.¹⁴ The High Court had taken the narrower popular definition of charity, rather than the wider four heads of charity set out in the English case of *Income Tax Special Purposes Commissioners v Pemsel* [1891-4] ALL E.R. 28. The government of the day responded by limiting taxation benefits to specified organisations, one of which was a public benevolent institution, which were a subset of the wider charitable organisation.¹⁵ *In the Perpetual Trustee Co. Ltd v Federal Commissioner of Taxation* [1931] 45 CLR 224 the High Court defined the phrase as an institution organised for the relief of poverty, sickness, destitution, helplessness, suffering, distress or misfortune. The definition of Public Benevolent Institution has not been before the High Court since 1942¹⁶ and has not benefited from judicial revision to take account of more modern concepts of prevention and indirect assistance. The Report of the Charities Definition Inquiry has recommended that "the category of public benevolent institution be replaced by a subset of charity to be known as Benevolent Charity, that is a charity whose dominant purpose is to benefit, directly or

¹³ Bray v FC of T 78 ATC 4179, Commissioner of taxation, Taxation Ruling 95/27.

¹⁴ *Chesterman v Federal Commissioner of Taxation* [1925] 37 CLR 317.

¹⁵ Treasurer, Dr Earle Page, House of Representatives 1928, Debates, pp6567-6568.

¹⁶ *Lemm v FC of T* (1942) 66 CLR 399 and *Maughan v FC of T* (1942) 66 CLR 388.

indirectly, those whose disadvantage prevents them from meeting their needs."¹⁷ If this recommendation is adopted, the definition will be broadened and include many more organisations as gift deductible recipients.

The taxation legislation does not use the term 'foundation'. The closest concept is that of an ancillary fund.¹⁸ This is a public fund that is established under a will or trust deed solely for the purpose of providing grants to establish or benefit other deductible gift recipients. It must be controlled by responsible persons having some accountability to the community and who are not associated with the founder.¹⁹ The fund can only invest its funds as allowed by Australian law and it cannot carry on any other activities. Although there is no specific statutory requirement to disburse a set percentage of income each year, the Commissioner of Taxation is of the opinion that unless there are special circumstances, a fund should distribute at least substantial part of its income each year.²⁰

A recent amendment to the Division has been made to allow a 'prescribed private fund' to be a deductible gift recipient from 1 July 1999.²¹ The object of the amendment was to encourage philanthropic giving. This new fund has the same attributes and requirements of an ancillary fund, apart from having to seek and receive contributions from the public and have public control mechanisms. The prescribed private fund may be established by a

¹⁷ Ian Sheppard, Robert Fitzgerald & David Gonski, Report of the Charities Definition Inquiry, Australian Government Printing Service, 2001, p. 258.

¹⁸ S 30-15 ITAA 97.

¹⁹ Commissioner of Taxation, Taxation Ruling 95/27.

²⁰ Commissioner of Taxation, IT 340.

²¹ S 30-15 item 2 ITAA 97.

single taxpayer without seeking or receiving any further public support and the controlling body and the funds controlling body only needs to have one person who is generally responsible to the community with no association to the donor except in a professional capacity.²² An application to the government is necessary and approval by the Treasurer.

Type of Gift

Until 1 July 1999, generally only certain types of gifts were tax-deductible under Division 30. These include:

- ◆ Gifts of \$2 or more (money);
- ◆ Property which has been purchased by the donor less than 12 months before the gift was made; and
- ◆ Trading stock disposed of outside the ordinary course of business.

After 1 July 1999 some provisions were relaxed to permit an income tax deduction of property worth more than \$5,000, regardless of when or how the property was acquired and is discussed in the next section.

The term "*gift*" is not defined in the *Income Tax Assessment Act 1997*, and thus takes on its ordinary judicial meaning. However, for a gift to be a tax-deductible donation and claimed

²² Commissioner of Taxation, Guidelines for Prescribed Public Funds, March 2001 available at <http://www.ato.gov.au>.

as an income tax deduction in individual income tax returns, the gift must usually have the following characteristics, in that it:

- * is made voluntarily;
- * does not provide a material benefit to the donor; and
- * essentially arises from benefaction, and proceeds from detached and disinterested generosity.²³

Generally, for a payment to be considered a gift it must be unfettered, that is, there must be no obligation to do anything in recognition of the gift and no expectation on the part of the donor to receive anything in return for the donation. The following are *not* considered gifts:

- ◆ purchase of raffle or art union tickets;
- ◆ purchase of token chocolates, pens, flowers;
- ◆ the cost of attending a fundraising dinner, even if the cost exceeds the value of the dinner;
- ◆ membership fees; and
- ◆ payments where the person has an understanding with the recipient that the payment will be used to provide a benefit to the donor.²⁴

²³ FC of T v McPhail (1968) 117 CLR 111; Leary v FC of T 80 ATC 4438

²⁴ ATO, GiftPack, p 57.

The introduction of a Goods and Services tax has raised the profile of issues about what is a mere acknowledgement of a gift and something of value in return. The listing of donors on a donor board, acknowledgement by a token of insubstantial value (badge, token or refreshment) will be permitted as gifts.²⁵

Gifts with conditions may be disallowed as deductions where there is an arrangement whereby:

- ◆ its value to the donee institution is less than the value of the property at the time the gift is made;
- ◆ the donor (or an associate) obtains a collateral benefit in connection with the gift; or
- ◆ the donee institution undertakes to acquire property from the donor or an associate of the donor.²⁶

Supplying a service does not fall in any of the gift types. There is no deduction for a gift of a service, as no money or property is transferred to the deductible gift recipient. For example, volunteers' expenses in carrying out voluntary work are not considered tax-deductible.²⁷

Testamentary gifts are not deductible, except in respect of cultural bequests which are discussed below. A deduction can be claimed for a *quid pro quo* transaction in respect of a

²⁵ Charities Consultative Committee, Resolved Issues Document, Part 6, 2001, available at <http://www.taxreform.gov.au>.

²⁶ S 78A ITAA 36.

²⁷ S43 85ATC 343 & Commissioner of Taxation, Taxation Determination 93/185.

political party which is discussed below in special gift situations.

Amount of deduction

Generally every person, whether an individual, the trustee of a trust estate or superannuation fund, a partnership or a company, and whether a resident or non-resident of Australia is entitled to a deduction from assessable income for individual gifts of \$2 or more made during the financial year to nominated funds, authorities, institutions, or bodies or classes of them, or specified persons. Gifts of property, as discussed in the previous section are required to have a value over \$5,000 as valued by the Commissioner of Taxation.

There is generally no cap for the gift deduction, apart from the deduction must not cause an overall tax loss. The exceptions to this statement are discussed below under special gift situations. The minimum amount of \$2 has not altered since the provisions inception in 1936 and in relative value would now be worth about \$63.²⁸ An inquiry recommended that this minimum figure be set not by legislation, but left to the discretion of individual gift deductible recipients.²⁹ The reasoning was to encourage a higher level of giving and to reduce organisation's receipt and record keeping costs for low value donations. This recommendation has not been adopted.

Where there is a gift of joint property, the taxpayer can deduct so much of the gift as is

²⁸ Based on the Australian Consumer Price Index (all groups) for 1936 and 2001.

²⁹ Industry Commission, Charitable Organisations in Australia, Report No. 45, 16 June, 1995, Australian

reasonable having regard to the taxpayer's interest in the property.³⁰

As a further incentive to encourage philanthropic, from 1 July 1999 donors have been permitted to spread their deductions over a five year period for cultural, environmental and heritage gifts.³¹ The Government has announced its intention to permit all deductions to be spread over a five year period from 1 July 2002.³²

Special Conditions

Most categories have conditions that the fund, authority, institution or organisation be endorsed as gift deductible recipients by the Commissioner of Taxation, issue appropriate receipts for donations, conduct self reviews of their status and be 'in Australia'. Some less frequent special conditions are that donations will only be deductible if made between certain dates or for particular purposes of the organisation.

Special Gift Situations

Special gift situations occur for:

- ◆ cultural gifts,

Government Publishing Service, Melbourne, at p. 287-89.

³⁰ S 30-225 ITAA 97.

³¹ s 30-DB, s 30-DC & s 30-DD ITAA 97.

³² John Howard, Community-Business Partnership Develops New Initiatives to Promote Philanthropy, Press

- ◆ cultural bequests,
- ◆ gifts to environmental organisations,
- ◆ gifts to the National Estate,
- ◆ political party contributions. and
- ◆ perpetual conservation covenants.

Cultural gifts such as works of art (but not land or buildings) can be deductible gifts provided that the deductible gift recipient is a public library, public museum, public art gallery, institutions consisting of two or more of these, the Australiana Fund and the Commonwealth for the purposes of Artbank.³³ The cultural gifts program is administered by the Department of Communications, Information Technology and the Arts. Art works are generally valued by taking the average of two approved valuer's valuation and if the gift is conditional the deduction is reduced by a reasonable amount.³⁴ Recent amendments have permitted donors to spread their deductions over five years.³⁵

A gift of places listed in the Register of the National Estate to Deductible Gift Recipients that are National Trust bodies are deductible.³⁶ The Register is kept under the authority of the *Australian Heritage Commission Act 1975* and lists places that are part of the natural and cultural environment of Australia and have aesthetic, historic, scientific or social significance or other special value for present and future generations. It does not apply to

Release 30 March 2001, available at <http://www.pm.gov.au>.

³³ s 30-15 ITAA 97.

³⁴ For example, where the organisation does not receive immediate custody and control.

³⁵ S 30-247 ITAA 97.

testamentary gifts, but recent amendments have permitted donors to spread their deduction over five income years.³⁷

As an extension to the cultural gifts program, deductions can also be claimed for certain cultural bequests.³⁸ When a testator dies, there must be in force a certificate from the Minister for Communications, Information Technology and the Arts who approves the gift and specifies its value.³⁹ The other unusual feature of this provision is that the Minister must before approving any gifts for the year in question determine in writing the maximum total value for all gifts approved by him or her.⁴⁰

Gifts to an organisation that is listed on the Register of Environmental Organisations kept by the Department of the Environment and Heritage are deductible.⁴¹ There are about 150 organisations registered. To qualify for inclusion on the list the organisation must be nonprofit, but may include a cooperative society and have as its principal purpose the protection and enhancement of the natural environment or the provision of information or education of the natural environment. The organisation is not permitted to act as a conduit for the donation of money or property to other organisations and is obliged to provide a periodic statistical data on donations and their source to the supervising Department. Recent

³⁶ s 30-15 ITAA 97.

³⁷ s 30-249D ITAA 97

³⁸ s 30-230 ITAA 97.

³⁹ s 30-235 ITAA 97.

⁴⁰ S 30-240 ITAA 97

⁴¹ S 30 - 15 & s 30-265 ITAA 97

amendments have permitted donors to spread their deductions over five years.⁴²

Political parties occupy a privileged position in Australian deductibility laws as not only gifts, but contributions are deductible.⁴³ The deduction may be in the form of a gift, or a *quid pro quo* transaction, such as a membership fee.⁴⁴ The contribution is capped at \$100 a year and is only available to individuals, not companies. The recipient must be a political party that is registered under Part XI of the *Commonwealth Electoral Act* 1918. Proposed amendments to lift the cap to \$1,500 have failed to pass the Parliament.

On 20 August 2001 the Prime Minister announced amendments to permit income tax deductions to landholders who enter into perpetual conservation covenants for no consideration with deductible gift recipients.⁴⁵ The measure is intended to provide an incentive to landholders to enter into perpetual covenants in order to maintain the environment. In June 2001, the Federal Treasurer announced that he intended to introduce amendments to the capital gains tax rules to ensure that landowners who set aside part or all of their land for conservation in perpetuity will have a lower tax liability.⁴⁶

International Giving

With the exception of ancillary funds, all deductible gift recipients (including specially

⁴² s 30 - 255 ITAA 97.

⁴³ s 30 - 15 ITAA 97.

⁴⁴ Commission of Taxation, Taxation Determination 92/114.

⁴⁵ John Howard, Address to The Prime Minister's Awards for Excellence in Community Business Partnerships, 2001, 20 August, 2001, available at <http://www.pm.gov.au>.

⁴⁶ Peter Costello, Capital Gains Tax Amendments and Private Conservation, Press Release No. 44, 15 June, 2001.

named organisations) must be 'in Australia'.⁴⁷ This generally requires that the fund, institution or authority is established and operates in Australia and has purposes and beneficiaries in Australia. The purposes or beneficiaries of a fund do not have to be in Australia, if:

- ◆ the fund is an overseas aid relief fund,
- ◆ a public fund on the register of environmental organisations, or
- ◆ a specifically listed deductible gift recipient that when listed in the Income Tax Assessment Act by the government was approved for overseas purposes or beneficiaries.

In practice this restricts deduction of gifts to non-Australian organisations. Giving to international purposes is largely facilitated through the special category for overseas aid relief funds. There are about 120 approved relief funds. To receive status as a relief fund it must be:

- ◆ a public fund, established by an organisation declared by the Minister of Foreign Affairs to be an approved organisation;
- ◆ solely for the relief of people in a country declared by the Minister for Foreign Affairs to be a developing country;
- ◆ be endorsed as such by the ATO;

⁴⁷ s 30-15 ITAA 97

- ◆ be in Australia; and
- ◆ declared by the Treasurer as a relief fund.

It is possible for expatriates of some countries who have become residents of Australia to make deductible gifts to overseas aid funds by transferring monies to endorsed relief funds in other countries.⁴⁸ Laws in some developing countries prohibit or "block" expatriates of that country from transferring money to Australia, and such monies can be donated to the Australian overseas aid relief fund account in that country.

Institutions and authorities (not funds) must be established and operated in Australia. This means that the control of their activities and assets are in Australia, as well as having their purposes and beneficiaries in Australia. If the overseas activities are merely incidental to its Australian operations or minor in extent and importance, an institution or authority can still meet the 'in Australia' requirement.⁴⁹

The Australian deductible gift regime does not permit domestic organisations to serve as a conduit for a foreign charitable organisation without discretion and control over the funds transmitted. An Australian corporation might deduct as a general business expense what may look like 'gifts' such as sponsorships without any cap. In comparison, a US corporation is capped at ten percent of its pre-tax profits for gifts made to US charitable corporations, even

⁴⁸ Commissioner of Taxation, Taxation Ruling 2355.

⁴⁹ ATO, GiftPack, 1999, at pp 13-14.

though the gift may be used overseas.

Administration

As indicated in the overview, gift deductions are administered by the Australian Taxation Office, a national agency of the federal government. It has over the last decade pursued decentralisation of some of its functions into regional centres and adopted self-assessment regimes. Until 1 July 2000, donation deductible status for organisations was primarily a matter of self assessment. However, the ATO was often requested to provide a private ruling on the status of an organisation. This was the result of several pressures. The ATO encouraged organisations to seek a ruling and placed the organisation on a data base of organisations with such status that was open for public inspection. The public ruling was often required by organisations to satisfy the requirements of state revenue authorities, government funding bodies and foundations that were restricted by their founding documents or the taxation law to only provide grants to certain types of tax deductible organisations.

The regionalisation of the ATO administration and self assessment appears to have contributed to a situation of some inconsistent decision making in respect of gift deductible status. A federal government agency, The Industry Commission was given terms of reference to inquire into charitable organisations and came to such a conclusion.⁵⁰ It recommended

⁵⁰ Industry Commission, Charitable Organisations in Australia, Report No. 45, 16 June, 1995, Australian Government Publishing Service, Melbourne, at pp. 306-309.

that the definitions of such gift deductible organisations should be simplified,⁵¹ and that the ATO should introduce a process of regular review of their tax status.⁵² These recommendations, nor the vast majority of the report's recommendations were ever specifically acted upon.

The administrative process for determination of taxation exemption of charitable institutions and funds⁵³ and gift deductible recipients⁵⁴ was instituted from 1 July 2000 as a part of the Commonwealth government's A New Tax System reform. The stated policy objective is to ensure the integrity of the taxation system in respect of deductible gift recipients and income tax exempt charities.⁵⁵ All gift deductible recipients were required to be endorsed for their gift deductibility status whether they had previous private rulings or not. Each gift deductible entity was required to also register for an Australian Business Number, a unique identifier for the taxation system. The Australian Business Number is used primarily to identify those entities that are registered for the purposes of the value added taxation system and is a publicly searchable register.⁵⁶

The amending legislation required such endorsed organisations to maintain a fund (called a gift fund) in which all gifts are to be deposited.⁵⁷ This includes both deductible and non-deductible monetary gifts and property gifts must also be noted in a gift assets register.

⁵¹ Ibid, at p 307.

⁵² Ibid, at p 309.

⁵³ s 50-5 ITAA 97

⁵⁴ Division 30 ITAA 97

⁵⁵ Costello, P. Tax Reform - Not a New Tax - a New Tax System, August 1988, Treasury, Canberra, p. 114-115.

The fund must be maintained for the principal purpose of the deductible gift recipient and no other monies may be mixed with those of the fund. It is also a requirement that if the entity ceases to be gift deductible then it is required to transfer any surplus in the fund to another gift deductible recipient. The amendments also specifically state that a gift deductible recipient is required to inform the ATO on ceasing to be entitled to be endorsed as a gift deductible recipient.⁵⁸

The Commissioner has issued a public ruling on gift funds and has stated that a separate bank account is needed to satisfy the legislative meaning of "fund".⁵⁹ This has caused questioning by some, as a separate bank account entails greater compliance costs than the previous mere accounting fund record.

The amendments also addressed the issue of receipts for a gift to a deductible gift recipient.⁶⁰ Although the legislation does not require a receipt to be given, if one is given, it is required to include the name of the organisation, its Australian Business Number and the fact that it is a receipt. Oddly the legislation does not require such information such as the amount of money or a description of the property donated or the date of the gift, but a donor would be in a better position to substantiate a deduction claim with a receipt.

As part of the political negotiations with minor parties to pass the major tax reform

⁵⁶ The register can be searched on the Internet at <http://www.business.gov.au>.

⁵⁷ s 30-125.

⁵⁸ s 30-160.

⁵⁹ Commissioner of Taxation, Taxation Ruling 2000/12 Income Tax: deductible gift recipients - the gift fund requirements and Addendum 6 September, 2000.

⁶⁰ S 30-228 ITAA 97.

legislation,⁶¹ the Commonwealth Treasurer agreed to institute an inquiry into the definitions of charitable and related organisations. The report of the Inquiry was released on 24 August 2001 and made several recommendations that bear upon the administration of donation deductible recipients.⁶² It recommended that all levels of government adopt a national definitional framework for charities and related entities⁶³ and that an independent administrative body be established to administer such definitions.⁶⁴ The recommendation relies heavily on the model of the Charity Commission of England and Wales. The federal government is still considering the recommendations.⁶⁵

The report again recognised concerns about the lack of consistency in decision making by the ATO for endorsement of deductible gift recipients, probably predating the endorsement process.⁶⁶ The ATO submitted to the Committee responsible for the report that it had:

" set up a specialist unit known as the Non-Profit Centre, with staff located in a number of regional offices, to provide expert technical guidance on issues relating to charities and other not-for-profit entities. Other specific measures include:

⁶¹ Letter from the treasurer to Senator John Woodley dated 8 December 1999.

⁶² Ian Sheppard, Robert Fitzgerald & David Gonski, Report of the Charities Definition Inquiry, Australian Government Printing Service, 2001.

⁶³ Ibid, p18.

⁶⁴ Id.

⁶⁵ P Costello, Release of the Report of the Charities Definition Inquiry, Treasurer's Press Release No. 062, 24 August, 2001.

⁶⁶ Ibid at p 280 & 286.

- ◆ development of a legal database which includes summaries of key decisions which may be used as precedent by other decision makers;
- ◆ an enhanced quality assurance process which rates the quality and appropriateness of decisions by ATO officers; and
- ◆ a process for staff to refer significant issues encountered in their decision making to specialist teams in the Non-Profit Centre for advice. ⁶⁷

However, the Report still went on to recommend that an independent body be established to register charitable and other categories of nonprofit bodies, review the definitions and keep them current, monitor the accountability of charities, give advice and support and act as an information source for and about the nonprofit sector.⁶⁸

It is uncertain what the attitude of the government will be to such proposals and a federal election is probable in the coming months. It is also usually difficult to obtain the consent of all state and territory governments to any sort of national administrative scheme. These proposals have revenue and administrative cost implications for governments and compliance costs for nonprofit organisations that will also slow their implementation.

Quantifying Deductible Gifts and Trends⁶⁹

⁶⁷ Ibid at p 288-9.

⁶⁸ Ibid at p 293.

⁶⁹ For a more detailed analysis see Myles McGregor-Lowndes, Stephen Marsden & Ted Flack, An

Quantifying the amount of deductions for gifts and identifying trends is a useful tool in any analysis to reform gift deduction policy. While those in the United States have a wealth of information from Form 990 filings and analysis of gift deduction claims, Australia has much less helpful source data.⁷⁰ This results from a combination of income tax exempt organisations not being required to file any annual return or report to taxation authorities, secrecy obligations of the tax administration and non-itemisation of gift deductions for those other than individual taxpayers.

The Australian Taxation Office does produce an annual publication *Taxation Statistics* that provides an overview and profile of the income and taxation status of Australian taxpayers using information contained in their personal income tax returns for the relevant financial year. During the introduction of the self-assessment regime, the annual tax return did not provide for separate reporting of gift donations for individual taxpayers and this is still the case of corporate taxpayers. However, analysis is possible over a seven year period using information from the ATO.⁷¹

Examination of Tax Deductible Donations made by Individual taxpayers in Australia for 1998/99, Working Paper 101, Program on Nonprofit Corporations, Queensland University of Technology, 2001.

⁷⁰ For example, David R Morgan, Trends in Corporate Charitable Contributions, New York Law School Law Review, Vol 41, 1997, p 771.

⁷¹ Australian Taxation Office, Taxation Statistics 1998-99 - a summary of taxation superannuation and child support statistics, Canberra, March, 2000 and Explanatory Memorandum to A New Tax System (Tax

Table 1 Donating Taxpayer Participation provides a seven year summary of total tax-deductible donations made by Australian individual taxpayers between the 1992/93 and 1998/99 financial years. In 1998/99, 3,260,758 Australian individual taxpayers donated a total of \$A632 million to charities, representing an 8.8% increase over the previous year.

TABLE 1

Donating Taxpayer Participation 1992/93 to 1998/99

All amounts are in Australian dollars.

	1992/93	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99
Total Number of Taxpayers	9,272,971	9,391,090	9,619,010	9,851,521	9,861,063	9,805,575	9,755,392
Number of Donating Taxpayers	3,134,553	3,156,223	3,170,370	3,201,891	3,150,500	3,200,513	3,260,758
Percentage of Donating Taxpayers	33.80%	33.61%	32.96%	32.50%	31.95%	32.64%	33.43%
Total Tax-Deductible Donations (in \$millions)	\$439	\$471	\$495	\$528	\$541	\$581	\$632
Inflation rate pa. (CPI)	1.86%	1.74%	4.50%	3.10%	0.33%	0.67%	1.074%

Administration) Bill 1999 at p. 7.

	1992/93	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99
Inflation-adjusted tax-deductible donation – using 1992/93 as the base year	\$439	\$446	\$466	\$480	\$481	\$484	\$489
Total Tax-Deductible Donations over and above inflation-adjusted amount (in \$millions)	N/A	\$25	\$29	\$48	\$60	\$97	\$143

Using a base year of 1992/93, the inflation-adjusted tax-deductible donation is exceeding the inflation rate as measured by the Consumer Price Index. The percentage of taxpayers making tax-deductible donations has not been keeping pace with the overall growth of taxpayers as there has been a declining trend, with the gap widening between the total number of taxpayers and the number of donating taxpayers. This trend may even be longer, as the last kept records in 1987/88 showed that 41.08% of taxpayers made tax-deductible donations and in 1998/99, this percentage has dropped to 33.43%.

Table 2 Average Tax-Deductible Donations provides a seven year summary of the average amount of tax-deductible donations made by Australian taxpayers up to the 1998/99 financial year. In 1998/99, each donating Australian taxpayer made an average tax-deductible donation of \$A193.78 to charities. This represents an increase of \$A53.73 (or 38%) over the six years and has more than kept pace with inflation.

TABLE 2

Average Tax-Deductible Donations 1992/93 to 1998/99

All amounts are in Australian dollars.

	1992/93	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99
Average Tax-Deductible Donation	\$140.05	\$149.23	\$156.13	\$164.90	\$171.72	\$181.38	\$193.78
Inflation (CPI)	1.86%	1.74%	4.50%	3.10%	0.33%	0.67%	1.074%
Inflation-adjusted tax-deductible donation – using 1992/93 as the base year	\$140.05	\$142.48	\$148.89	\$153.05	\$154.02	\$155.04	\$156.70
Average Tax-Deductible Donation over and above inflation-adjusted amount	N/A	\$6.75	\$7.24	\$11.85	\$17.70	\$26.34	\$37.08

Table 3 Tax-Deductible Donation as a Percentage of Taxable Income provides a seven year summary of the percentage of taxable income that Australian taxpayers claim as deductions. Over the seven year period Australians maintained a constant percentage of gifts as a proportion of their taxable income. The records shown that in 1986/87 the percentage of gifts as a proportion of taxable income was 0.213%, so it may be that this is an even longer stable trend.

TABLE 3

Tax-Deductible Donation as a Percentage of Taxable Income – 1992/93 to 1998/99

All amounts are in Australian dollars.

	1992/93	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99
Number of Donating Taxpayers	3,134,553	3,156,223	3,170,370	3,201,891	3,150,500	3,200,513	9,755,392
Total Tax-Deductible Donations (in \$millions)	\$439	\$471	\$495	\$528	\$541	\$581	\$632
Taxable Income of Donating Taxpayers (in \$millions)	\$210,903	\$222,712	\$236,580	\$253,564	\$263,849	\$277,089	\$286,914

Tax-Deductible Donation as a Percentage of Donating Taxpayers Taxable Income	0.20815%	0.21148%	0.20923%	0.20823%	0.20504%	0.20950%	0.22023%
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Table 4 Average Tax-Deductible Donation by Band details the average tax-deductible donation by income bands over the past seven years. Information pertaining to the 1992/93 financial year was not available in *Taxation Statistics 1992/93*. The higher one's taxable income, the greater the amount of tax-deductible donations claimed.

TABLE 4

Average Tax-Deductible Donation by Income Band – 1993/94 to 1998/99

All amounts are in Australian dollars.

Income Band	1992/93 ⁷²	1993/94	1994/95	1995/96	1996/97	1997/98	1998/199
Under \$10,000	N/A	\$125.52	\$130.25	\$134.10	\$81.28	\$84.15	\$153.78
\$10,000-\$14,999	N/A	\$96.76	\$98.61	\$97.88	\$98.98	\$100.59	\$104.14
\$15,000-\$19,999	N/A	\$105.44	\$109.62	\$109.11	\$106.47	\$109.95	\$124.75

⁷²The breakdown according to income bands was not available in *Taxation Statistics 1992/93*.

Income Band	1992/93 ⁷²	1993/94	1994/95	1995/96	1996/97	1997/98	1998/199
\$25,000- \$24,999	N/A	\$100.39	\$105.66	\$108.90	\$104.79	\$110.02	\$127.75
\$25,000- \$34,999	N/A	\$110.10	\$111.14	\$115.56	\$112.72	\$114.97	\$129.58
\$35,000- \$49,999	N/A	\$151.70	\$149.07	\$154.38	\$146.81	\$148.85	\$163.08
\$50,000- \$99,999	N/A	\$402.95	\$273.92	\$268.23	\$258.97	\$256.09	\$252.29
\$100,000- \$499,999	N/A	N/A	\$1,106.80	\$1,069.47	\$1,116.26	\$1,036.53	\$1,031.47
\$500,000- \$999,999	N/A	N/A	\$9,175.77	\$8,192.83	\$7,375.58	\$5,370.03	\$5,311.27
\$1,000,000 and over	N/A	N/A	\$16,302.25	\$22,236.63	\$31,632.23	\$35,993.98	\$26,638.25
Average:	N/A	\$149.54	\$156.42	\$164.94	\$171.68	\$181.38	\$193.78

Table 5 Tax-Deductible Donation as a Percentage of Taxable Income by Income Band

details amount of tax-deductible donation expressed as a percentage of taxable income by income band over the past six years. American researchers have identified a U-shape

relationship between percent of income contributed to philanthropy and income.⁷³ The U-shaped curve indicates that low-and high-income earners gift larger proportions of their income than do middle income earners. The data in the Australian reveals a 'J curve' with those having more than one million in taxable income being up to four times the percentage of middle income band earners and low income brackets being twice their percentage.

TABLE 5

Tax-Deductible Donation as a Percentage of Taxable Income by Income Band

1993/94 to 1997/98

Income Band	1992/93 ⁷⁴	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99
Under \$10,000	N/A	0.42383%	0.42950%	0.41002%	0.22477%	0.23877%	0.46832%
\$10,000-\$14,999	N/A	0.21296%	0.21246%	0.20502%	0.21671%	0.22111%	0.20601%
\$15,000-\$19,999	N/A	0.18466%	0.18671%	0.18154%	0.18051%	0.18699%	0.20376%
\$25,000-\$24,999	N/A	0.15799%	0.16004%	0.15898%	0.14907%	0.15755%	0.18151%
\$25,000-\$34,999	N/A	0.15834%	0.15318%	0.15320%	0.14568%	0.14770%	0.16355%
\$35,000-\$49,999	N/A	0.18731%	0.17737%	0.17672%	0.16369%	0.16306%	0.17350%
\$50,000-\$99,999	N/A	0.28590%	0.23216%	0.22279%	0.22063%	0.21697%	0.20618%
\$100,000-	N/A	N/A	0.36799%	0.36352%	0.41044%	0.38570%	0.35977%

⁷³ Hodgkinson, V.A. & Weitzman, M.S. Giving and Volunteering in the United States: Findings from a national survey, Washington, DC Independent Sector, 1988; Schervish, Paul G.& Havens, John J., Do the Poor Pay More: Is the U-Shaped Curve Correct? 1995 Nonprofit and Voluntary Sector Quarterly Vol 24, no. 1, p79.

⁷⁴The breakdown according to income bands was not available in *Taxation Statistics 1992/93*.

\$499,999							
\$500,000- \$999,999	N/A	N/A	0.74516%	0.70136%	0.72652%	0.54102%	0.49174%
\$1,000,000 and over	N/A	N/A	0.47207%	0.70024%	1.22284%	1.34648%	0.84939%
Average:	N/A	0.21192%	0.20962%	0.20829%	0.20499%	0.20950%	0.22023%

Table 6 Percentage of Donating Taxpayers to Total Taxpayers by Income Band details the number of taxpayers who made tax-deductible donations according to various income bands over the past six years relative to the total number of taxpayers in that particular income band. The trends across all income bands are fairly constant, but there are slight trends to greater participation for those in the highest income brackets and a slight decrease in the middle income brackets.

TABLE 6
Percentage of Donating Taxpayers to Total Taxpayers by Income Band –
1993/94 to 1998/99

Income Band	1992/93 ⁷⁵	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99
Under \$10,000	N/A	15.82%	15.14%	14.25%	10.94%	11.01%	16.02%
\$10,000-	N/A	27.52%	26.91%	26.14%	25.81%	25.98%	24.95%

⁷⁵The breakdown according to income bands was not available in *Taxation Statistics 1992/93*.

\$14,999							
\$15,000- \$19,999	N/A	30.70%	29.84%	29.12%	28.23%	28.73%	29.26%
\$25,000- \$24,999	N/A	35.29%	34.00%	32.78%	30.77%	30.90%	32.49%
\$25,000- \$34,999	N/A	42.55%	40.82%	39.31%	37.05%	36.89%	37.59%
\$35,000- \$49,999	N/A	50.59%	48.86%	47.16%	44.60%	43.92%	44.30%
\$50,000- \$99,999	N/A	54.69%	53.82%	52.91%	51.87%	51.71%	52.32%
\$100,000- \$499,999	N/A	N/A	52.41%	53.19%	53.80%	54.56%	55.01%
\$500,000- \$999,999	N/A	N/A	54.11%	56.79%	58.85%	60.02%	61.06%
\$1,000,000 and over	N/A	N/A	54.47%	59.14%	62.94%	62.06%	61.72%
Average:	N/A	33.61%	32.96%	32.50%	31.95%	32.64%	33.43%

In summary Australian tax deductible gifts are increasing in gross and real dollar amounts. The number of Australian taxpayers claiming gift deductions is steady as is the proportion of income gifted. Although a longer term view over a decade shows a decreasing number

of taxpayers claiming a gift deduction. However, those on higher incomes appear to be participating more and contributing at a greater rate than those in middle range taxable incomes. The release in 2002 of the gift deductibility statistics for 1999/00 will be of interest as this was the first year of increased scope of gift deductibility of property. The government on the introduction to the amendments estimated a further \$A5.5 million would be contributed in deductible gifts in the 1999/00 income year, \$A51 million in 2000/01 and \$A71 million in 2001/02.⁷⁶

Conclusion

The Australian charitable deduction inhabits a different taxation environment to that existing in the United States. Australia does not have any gift or death taxes, being abolished some twenty years ago. Many of Australia's foundations date from a period of high state and federal death duties, which could be mitigated by a bequest of assets to certain nonprofit organisations.⁷⁷ Some Australians have pointed to the larger scale of charitable contributions in the United States and advocated adopting a more American approach to such matters.⁷⁸ Recent amendments to encourage philanthropy such as the apportionment of deductions over five years, gifts of property and prescribed private funds appear to have an American inspiration. However, the greatest fillip for giving may be the re-introduction of gift and death duties, a proposal that may not find popular approval

⁷⁶ Treasurer, Explanatory Memorandum, Taxation laws Amendment Bill (No.8) 1999 at p3.

⁷⁷ The state of Victoria in which it is estimated that 85% of Australia's foundations reside once had a significant death duty tax.

⁷⁸ Industry Commission, Charitable Organisations in Australia, Report No. 45, 16 June, 1995, Australian

with the majority of Australians.

The other significant difference is the reliance on self-assessment in the Australian taxation system for deductible gift recipients. Until recently there has been no need to even inform the Australian taxation authorities of a deductible gift recipient's existence, let alone its activities. Such organisations, although now required to be endorsed and publicly listed on a register with the taxation authorities are not required to disclose as a matter of course to the taxation authorities or usually any other public body their financial or other affairs. There is no equivalent to the United States Form 990 return or its public disclosure. The compliance costs of Australian deductible organisations would be much lower than those in the United States, but there are concerns about a lack of accountability that such self-regulation brings with it.⁷⁹

The range of Australian deductible gift recipients is narrow in comparison to United States. The Report of the Charities Definition Inquiry has suggested a re-definition of some of the terms used in the taxation statutes which if implemented will have the result of broadening and simplifying the range of organisations capable of being deductible gift recipients.⁸⁰ It still does not approach the breadth of eligible organisations in the United States. However, account must be taken of the lack of a general donation cap that is generous by comparison to most developed nations provisions.

Government Publishing Service, Melbourne, at p. 249.

⁷⁹ Ibid at p. 201 - 219; Ian Sheppard, Robert Fitzgerald & David Gonski, Report of the Charities Definition Inquiry, Australian Government Printing Service, 2001, p. 293.

⁸⁰ Ibid, at p. 258.