

Australia

Current as of May 2014

Comments related to any information in this Note should be addressed to [Brittany Grabel](#).

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I. Summary

A. Types of Organizations

Australia has a common law system. There are three levels of government: federal, state (including several territories), and local. The federal government, states, and territories all have legislation enabling the creation of nongovernmental, not-for-profit organizations (NPOs).

The most common NPO organizational forms are:

- ☐ Incorporated Associations;
- ☐ Charitable Trusts; and
- ☐ Companies Limited by Guarantee.

Other not-for-profit legal forms, which are outside the focus of this Note due to their limited interaction with foreign grantmakers, include religious organizations, political parties, political movements, and trade unions.

B. Tax Laws

The federal government has responsibility for the income tax, capital gains tax, fringe benefits tax, customs duties, and Goods and Services Tax (GST). State and territory governments are responsible for taxes, such as land, payroll, and stamp duties. Local authorities levy rates and charges. At each level of government, NPOs are, to varying degrees, exempt from taxation. (One intended function of the ACNC Act, discussed below, is to harmonize and streamline state regulation of NPOs.)

In general, a natural or legal person, including a company, is entitled to a deduction from assessable income for cash donations over Australian Dollar (AUD) \$2 to certain NPOs, public funds, public authorities, and specified persons. To be deductible, gifts of property must have a value exceeding AUD \$5,000 as valued by the Commissioner of Taxation, unless they are publicly listed shares. [1]

The [Australian Taxation Office \(ATO\)](#) has in recent years vastly increased the amount of information readily accessible on the taxation of NPOs and incentives for philanthropy. It maintains a comprehensive website containing legislation, cases, policy statements, and plain English fact sheets and guides. The ACNC also has a growing set of resources and tolls on its [website](#).

II. Applicable Laws

Australia is a federal system with laws at the federal, state/territorial, and local level applicable to NPOs. In addition, a majority of states and territories have legislation regulating fundraising, and each attorney general has inherent responsibility to supervise charitable trusts.

The Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act) governs eligibility of a not-for-profit entity to be registered as a charity, and it establishes governance standards and reporting requirements that registered organizations must meet to maintain their registration. Registration is a prerequisite for access to Commonwealth tax concessions and for other purposes. The ACNC came into effect on 3 December 2012, new governance standards for charities became operational 1 July 2013, and the statutory definition of charity established by the Charities Act 2013 came into effect on 1 January 2014.

The incoming government in 2013 proposed a bill to repeal the ACNC Act and abolish the ACNC, but as of May 2014 had not settled on a replacement or its details; as such, however, it may be important for researchers to verify the status of the Act. [2]

Key legislation includes:

Commonwealth Acts

- ☐ [A New Tax System \(Goods and Services Tax\) Act 1999](#)
- ☐ [Commonwealth Electoral Act 1918](#)
- ☐ [Corporations Act 2001](#)
- ☐ [Income Tax Assessment Act 1936 \(ITAA 1936\)](#)
- ☐ [Income Tax Assessment Act 1997 \(ITAA 1997\)](#)
- ☐ [Racial Discrimination Act 1975](#)
- ☐ Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act)
- ☐ The Charities Act 2013

State and Territory Acts

Australian Capital Territory (ACT)

- ☐ [Associations Incorporation Act 1991](#)
- ☐ [Charitable Collections Act 2003](#)
- ☐ [Discrimination Act 1991](#)
- ☐ [Perpetuities and Accumulations Ordinance 1985](#)

New South Wales (NSW)

- ☐ [Anti-Discrimination Act 1977](#)
- ☐ [Associations Incorporation Act 1984](#)
- ☐ [Associations Incorporation Act 2009](#)
- ☐ [Charitable Fundraising Act 1991](#)
- ☐ [Charitable Fundraising Act Regulation 1998](#)
- ☐ [Charitable Trusts Act 1993](#)
- ☐ [Perpetuities Act 1984](#)
- ☐ [Trustee Act 1925](#)

Queensland (Qld)

- ☐ [Anti-Discrimination Act 1991](#)
- ☐ [Associations Incorporation Act 1981](#)
- ☐ [Charities Funds Act 1958](#)
- ☐ [Collections Act 1966](#)
- ☐ [Collections Regulation 1998](#)
- ☐ [Education \(General Provisions\) Act 1989](#)
- ☐ [Education \(General Provisions\) Act 2006](#)
- ☐ [Trusts Act 1973](#)

South Australia (SA)

- ☐ [Associations Incorporation Act 1985](#)
- ☐ [Charitable Trusts Procedure Act 1922](#)
- ☐ [Collections for Charitable Purposes Act 1939](#)
- ☐ [Public Charities Funds Act 1935](#)
- ☐ [Trustee Act 1936](#)

Tasmania (Tas)

- ☐ [Associations Incorporation Act 1964](#)
- ☐ [Collections for Charities Act 2001](#)
- ☐ [Perpetuities and Accumulations Act 1992](#)
- ☐ [Trustee Act 1898](#)
- ☐ [Variation of Trusts Act 1994](#)
- ☐ [Variation of Trusts Regulations 1994](#)
- ☐ [Variation of Trusts Regulations 2004](#)

Western Australia (WA)

- ☐ [Associations Incorporation Act 1987](#)
- ☐ [Charitable Collections Act 1946](#)
- ☐ [Charitable Trusts Act 1962](#)
- ☐ [Trustees Act 1962](#)
- ☐ [Vocational Education and Training Act 1996](#)

Victoria (Vic)

- ☐ [Associations Incorporation Act 1981](#)
- ☐ [Charities Act 1978](#)
- ☐ [Education Act 1958](#)
- ☐ [Perpetuities and Accumulation Act 1968](#)
- ☐ [Trustee Act 1958](#)

Additional information resources may be found at the end of this Note. [3]

III. Relevant Legal Forms

A. General Legal Forms

Incorporated Associations

Incorporated associations are membership-based NPOs created under the legislation of a particular state/territory. An incorporated association can take the form of a society, club, or institution. They cannot be formed for pecuniary gain or trade and can only carry out lawful objects. [4] There are approximately 136,000 such organizations. This type of legal structure is used mainly by small sporting clubs and community organizations.

Charitable Trusts

The common law of each state and territory allows for the creation of charitable trusts, with some modification provided by the trust legislation of each state. A charitable trust, by definition, is not charitable unless its assets and property are used for the advancement of religion, relief of poverty, advancement of education or other purposes beneficial to the community (but always in the public benefit). [Charitable Trusts Act 1962 (WA), Charitable Trusts Act of 1993 (NSW), Charitable Trusts Procedure Act 1922 (SA)] Often a company limited by guarantee acts as a trustee of a charitable trust.

Companies Limited by Guarantee

The federal government's [Corporations Act 2001](#) permits the incorporation of companies limited by guarantee, most of which are not-for-profit. A company limited by guarantee is modeled on the English company limited by guarantee. It has no shareholders, but instead has members who guarantee to pay a certain sum to creditors if, upon dissolution, the company is unable to pay its debts. (The guarantee sum is found in the constitution of the company and is usually quite nominal.) It is treated as a public company with a higher standard of regulation than that for proprietary or private companies.

The company limited by guarantee was a popular corporate, not-for-profit structure before the introduction of the incorporated association form in the 1980s. There are currently about 12,400 of these companies in Australia, and they can be formed for any lawful purpose. In practice, however, their formal objects, as stated in their constitution, often restrict their purposes. [5]

B. Public Benefit Status

The Charities Act 2013, which commenced on 1 January 2014, addresses entities that directly or indirectly serve the public benefit. The purpose of the Act is to provide a statutory definition of “charity” and “charitable purpose” for the

Commonwealth (not states and territories). [6] Prior to the Act's commencement, the definition of charity in Australia was dependent on the common law and on the Statute of Charitable Uses 1601. Section 5 of the Act defines a charity as an entity:

- (a) that is a not-for-profit entity; and
- (b) all of the purposes of which are:
 - (i) charitable purposes... that are for the public benefit...; or
 - (ii) purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i); and...
- (c) none of the purposes of which are disqualifying purposes...; and
- (d) that is not an individual, a political party or a government entity.

Section 3(1) provides that "not-for-profit entity" has the same meaning as that found in the Income Tax Assessment Act 1997 (Cth).

Section 6 addresses "purpose for the public benefit," which it defines as a purpose directed to a benefit which is available to members of the general public or a sufficient section of the general public. [Charities Act Section 6(1)(b)] "Sufficiency" is to be measured by the surrounding circumstances, including the numerical size of the share of the general public involved. [Charities Act Section 6(4)]

There is a special presumption of public benefit for certain groups and activities, such that the public benefit test set forth in Section 6(1)(b) does not apply. These include:

- ☐ Relief of persons in necessitous circumstances (who may number only one or a few); [Charities Act Section 8]
- ☐ Indigenous groups (e.g. who may all be related by blood). [Charities Act Section 9(1)] These groups must be in receipt of an amount (cash or non-cash) under the provisions of the *Native Title Act 1993* (Cth), or relating to traditional indigenous rights of ownership, occupation, use or enjoyment of land; [Charities Act Section 9(2)]
- ☐ Open and non-discriminatory self-help groups. [Charities Act Section 10(1)] These groups must a) have an open and nondiscriminatory membership; b) have the purpose of assisting individuals affected by a particular disadvantage or discrimination, or by a need that is not being met; c) be made up of, and controlled by, individuals who are affected by the disadvantage, discrimination or need; d) have all of the entity's criteria for membership related to its purpose; and e) have the entity's membership open to any individual who satisfies the criteria.
- ☐ Closed and contemplative religious orders who offer prayerful interventions at the request of members of the general public. [Charities Act Section 10(2)].

In addition, certain purposes are presumed to be for the public benefit. [Charities Act Section 7] These are:

- a) preventing and relieving sickness, disease or human suffering;
- b) advancing education;
- c) relieving the poverty, distress or disadvantage of individuals or families;
- d) caring for and supporting the aged or individuals with disabilities; and
- e) advancing religion.

"Charitable purposes" are defined in Section 12. (The purposes in this Section also embrace those in Section 7.) The purposes are:

- a) advancing health;
- b) advancing education;
- c) advancing social or public welfare;
- d) advancing religion;
- e) advancing culture;
- f) promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- g) promoting or protecting human rights;
- h) advancing the security or safety of Australia or the Australian public;
- i) preventing or relieving the suffering of animals;
- j) advancing the natural environment;

k) any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j);

l) promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:

i.) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or

ii.) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

These purposes may be directed toward something in Australia or overseas. [Charities Act Section 12(3)]. Sections 14-17 provide additional detail. In the case of a purpose that was a charitable purpose prior to the commencement of the Charities Act 2013, and to which the paragraphs of this definition do not apply, these are also considered charitable, according to Schedule 2, item 7 of the Charities (Consequential Amendments and Transitional Provisions) Act 2013 (Cth). Schedule 2 also commenced on 1 January 2014.

A disqualifying purpose is dealt with in Section 11. Such a purpose is: a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or b) the purpose of promoting or opposing a political party or a candidate for political office. [7]

For the most part, the Australian states and territories have not defined "charity" or "charitable purposes" in legislation but have left it to the courts to apply common law. However, in some jurisdictions there are statutory definitions, which, to varying degrees, expand or modify the common law definition.

IV. Specific Questions Regarding Local Law

A. Inurement

Incorporated Associations

Although the legislation in each Australian jurisdiction is slightly different, an association may only be incorporated for a lawful purpose, "but not for pecuniary gain of its members." Thus distributing "dividends" or "income" to members is not permitted. Some jurisdictions limit a member's remuneration or pecuniary gain to the amount that the person would have been entitled to receive had the person not been a member of the association. [Associations Incorporation Act 1991 (ACT) §4.1]

In most jurisdictions, there is no explicit prohibition on paying committee/board members, and the legislation is silent on excess benefits. Some licenses such as fundraising approvals may consider such matters in their grant. Common law is clear that excessive benefits would breach a committee/board member's fiduciary duties to the corporate body. Nor are there specific provisions regulating the compensation of senior employees.

Charitable Trust

Under common law, a charitable trust cannot distribute dividends or similar forms of income. In most jurisdictions, trustees cannot seek remuneration unless authorized by the trust deed, and such remuneration is subject to review by the courts. Trustees may be removed from duties for "misconduct and mismanagement," [8] and common law regulates conflicts of interest, which are strictly dealt with under the law of trusts. In some jurisdictions, however, there are no specific provisions regulating the compensation of senior NPO employees.

Australia does have a history of private companies providing professional trustee services (trustee companies). Trustee companies are regulated by special laws that restrict their fees, and such matters are supervised by the courts or the attorney general. The federal government now regulates such private trustee companies. Schedule 2 of the Corporations Legislation Amendment (Financial Services Modernisation) Act 2009 inserted Chapter 5D (Licensed

trustee companies) into the Corporations Act 2001. Chapter 5D implements the transfer of trustee company regulation from the States and Territories to the Commonwealth. The amendments came into effect on 6 May 2010.

Company Limited by Guarantee

A company limited by guarantee can be incorporated for any lawful purpose. There are no restrictions in the Corporations Act 2001 against such a company distributing income to its members. However, traditionally there are few such distributions, as the company's constitution usually prohibits them.

B. Proprietary Interest

Incorporated Association

Although the legislation in each Australian jurisdiction is slightly different, an association is prohibited from having capital of the association divided into stock or shares held by members. In addition, associations are prohibited from holding property in which members have a disposable interest, directly or otherwise. [[Association Incorporation Act 1991 \(ACT\) §14](#), [Association Incorporation Act 1984 \(NSW\) §7](#), [Association Incorporation Act 1981 \(Qld\) §5\(1\)\(e\)](#)]

Company Limited by Guarantee

The corporate entity is the legal owner of the corporate property. A tax-deductible gift is absolute without conditions, and donors cannot under ordinary circumstances receive their gift back. Australian tax law does not permit donors to claim a tax deduction for a so-called "gift" in which they retain special rights or benefits. They could conceivably give property to an NPO and retain some interest or benefit, but they would not receive a tax break.

[Section 30-220 of the ITAA 1997](#) (inserted by Act No. 121 of 1997, and amended by Act No. 176 of 1999), in conjunction with Subsection [78A\(5\) of the ITAA 1936](#), allows a donor a reduced tax deduction in cases where the donee does not, under the terms and conditions of the gift, have full title, custody, or control of the property.

Charitable Trust

The trustees of a charitable trust hold legal title to any trust property strictly for the purposes of the trust. Moreover, it would generally be a breach of fiduciary duty for a trustee to have any other interest in trust property. Trust property must be owned and fully conveyed to the trustees.

C. Dissolution

Incorporated Association

There are various rules governing the distribution of assets upon dissolution of an incorporated association. For example, distribution of assets to members upon dissolution is clearly prohibited in the Australian Capital Territory [[Association Incorporation Act 1991 \(ACT\) §92](#)], New South Wales [[Association Incorporation Act 1984 \(NSW\) §53](#)], and South Australia [[Associations Incorporation Act 1985 \(SA\) §43](#)]. Queensland, however, is not clear on the prohibition of distribution of assets upon dissolution, stating that distribution is subject to agreement or in accordance with the association's governing documents without restrictions. [[Associations Incorporation Act 1981 \(Qld\) §92](#)] However, in most cases where associations are exempt from income tax, the taxation authorities insist on a clause in the association's constitution that requires that the assets be distributed *cy pres* (i.e., to another entity with the same or similar objectives) to an entity of the same tax classification.

Company Limited by Guarantee

If a company limited by guarantee is wound up with surplus assets, the constitutional provisions of the individual company determine the distribution of the surplus. However, in most cases where such companies are income tax exempt, the taxation authorities insist on a clause in their constitutions which directs the assets *cy pres* to another entity of the same taxation classification.

Charitable Trust

A charitable trust exists in perpetuity. If it has surplus assets or cannot achieve its purposes, then the court will apply the distribution of surplus assets *cy pres*. [[Charitable Trusts Act 1993 \(NSW\) §9](#), [Charitable Trusts Act 1962 \(WA\) §7](#)]

D. Activities

1. General Activities

Incorporated Association

The purposes of the association must be lawful. Some jurisdictions require associations to be formed for certain purposes relating to community and sporting objectives. Other jurisdictions focus on whether the association is "not for pecuniary gain of its members" as the distinguishing feature.

Company Limited by Guarantee

There is broad discretion for a company limited by guarantee to pursue any lawful purpose.

Charitable Trust

A charitable trust must be formed for the purposes regarded as charitable in the narrow English tradition of advancement of religion, relief of poverty, advancement of education, or other purposes beneficial to the community (but always for the public benefit). [See Section III (B) above, [Charitable Trusts Act 1962 \(WA\) §5\(4\)](#)]

2. Public Benefit Activities

Only charitable trusts are subject to a strict public benefit test discussed in the previous section. [See also [Charitable Trusts Act 1962 \(WA\) §5\(4\)](#)] That being said, all organizational forms are permitted to engage in public benefit activities.

3. Economic Activities

In May 2011, the federal government [announced](#) that it would reform tax concessions provided for the unrelated commercial activities of NPOs. [\[9\]](#) The new reforms commenced on 1 July 2011, and initially affected only unrelated commercial activities that commenced after 10 May 2011. In December 2012, however, the responsible Minister announced that an extended start date of 1 July 2012 would apply to new, unrelated commercial activities that commenced after 7:30 pm (AEST) on 10 May 2011. Existing unrelated commercial activities that commenced prior to that date will continue to be covered by transitional arrangements as announced in the 2011-12 Budget. However, with a change of federal government in September 2013, the bill lapsed and there has been no indication that the new government will revive the bill.

Incorporated Association

State jurisdictions differ on the amount of commercial and/or unrelated business an incorporated association may conduct. In practice, however, governing legislation is construed to mean that associations are prohibited from having economic activities as their primary purpose.

Company Limited by Guarantee

There are no specific restrictions on a company limited by guarantee's business or economic activities.

Charitable Trust

The trustees of a charity trust must only conduct commercial transactions that are within the scope of the charitable purposes of the particular trust. For example, a charitable school or hospital could charge tuition fees or surgery fees.

E. Political Activities

Under state and federal legislation, bodies that seek to be political parties are required to register under special legislation. The expression of views by not-for-profit organizations on what are considered to be political or electoral matters may trigger legal obligations under the Commonwealth Electoral Act 1918. From the 2006-07 financial year and after, third parties, such as not-for-profit organizations, that engage in political expression have three basic compliance obligations under the Electoral Act, as amended:

- ☐ Inclusion of authorization statements on certain publications that contain "electoral matter" [[Sections 328 & 328A](#)];
- ☐ Annual disclosure of "political expenditure," if such expenditure exceeds AUD \$10,000 [[Section 314AEB](#)]; and
- ☐ Annual disclosure of gifts of AUD \$10,000 or more that are used to enable such "political expenditure" [[Section 314AEC](#)].

For further information, please refer to [The Australian Nonprofit Legal Almanac](#) at page 102.

A clear indication of the ability of organizations with charitable status to lobby or advocate was provided by a decision of the High Court in the case of AID/WATCH Incorporated v Commissioner of Taxation [2010]. [\[10\]](#) AID/WATCH is an incorporated association that researches, monitors, and campaigns about the delivery of overseas aid. It is concerned with promoting the effectiveness of Australian and multinational aid, including investment programs, projects, and policies. AID/WATCH does not deliver aid directly; rather, it produces research reports about Australian aid effectiveness and performs publicity events (such as sending derisory 60th birthday gifts to the World Bank suggesting it was time for the bank to retire).

In the decision, the High Court determined that AID/WATCH was not disqualified from charitable status by virtue of its main purposes, which included generating public debate about the effectiveness of foreign aid. Moreover, there is no general doctrine in Australia to exclude political objects from charitable purposes.

The court decided that the English case of *McGovern v Attorney-General* [1982] Ch 321 does not apply in Australia, and thus there is no general doctrine that excludes "political objects" from charitable purposes (§48). The majority decision did issue a note of warning that disqualification of charitable purpose may still occur where a purpose does not contribute to the public welfare, probably by reason of the particular ends and means involved (§49).

The Australian Tax Office (ATO) [impact statement](#) on the case and the released ATO draft tax ruling which outlines the Tax Commissioner's view on the definition of charity (Taxation Ruling TR 2011/4, [Income tax and Fringe Benefits Tax: Charities](#)) includes a section on political purposes from paragraphs 70-73. It is understood that the ACNC will follow this ruling.

F. Discrimination

Although there is no federal law prohibiting racial and ethnic discrimination in private schools, schools are clearly and expressly covered by applicable state anti-discrimination legislation. For example, in Queensland, [The Anti-Discrimination Act, Part 4, Division 3, §37](#) provides that educational authorities must not discriminate with respect to admission of students (§38) or in terms of ongoing enrollment or exclusion of students (§39), though private discrimination is allowable for religious schools solely on the basis of religion. Generally non-state schools, such as independent schools that are accredited or provisionally accredited under the [Accreditation of Non-State Schools Act, 2001](#), may discriminate on any grounds other than race or disability.

Put more succinctly, private schools cannot discriminate in accepting students or the terms by which they provide education to them, on the grounds of race or disability.

G. Control of Organization

Australian charities may be established by natural or legal persons, both domestic and foreign. Therefore, it is possible that an Australian NPO may be controlled by a for-profit entity or an American grantor charity.

V. Tax Laws

A. Tax Exemption

Division 50 of The Income Tax Assessment Act 1997 (ITAA) exempts certain classes of NPOs from income tax. It is administered by the Australian Taxation Office (ATO), which is the responsibility of the Federal Treasurer. The ATO has moved to a self-assessment regime, and NPOs are required annually to self-assess whether they fall within the exempt categories.

A new body, The Australian Charities and Not-for-profits Commission (ACNC), commenced operations on 3 December 2012. The ACNC is responsible for determining the legal status of groups seeking charitable, public benevolent institution, and other not-for-profit benefits on behalf of all Commonwealth agencies. Once the ATO receives notice of charitable status of an organization from the ACNC, it then proceeds to examine the organization's specific conditions for tax exemption. (As noted above, the Commonwealth government has expressed a desire to abolish the ACNC and it is not yet clear what may be intended to replace it.)

The categories of exemptions are fairly broad and the exemption covers all income however derived. Exemption should not be confused with gift deductibility, as quite different tests and categories apply.

The categories of exempt organizations include:

- ☐ religious, scientific, charitable or public educational institutions;
- ☐ public and non-profit hospitals;
- ☐ hospital and medical benefits organizations;
- ☐ the Thalidomide Foundation;
- ☐ trade unions and associations of employers;
- ☐ friendly societies;
- ☐ associations for musical purposes, art, science or literature;
- ☐ encouragement and promotion of games or sport and animal races;
- ☐ community service associations;
- ☐ associations for the development of aviation, agriculture, pastoral, horticultural, viticultural, manufacturing or industrial resources of Australia; and

- ☐ a fund established by a will or trust for public charitable purposes or scientific research through a public university or hospital.

There are some special exemption conditions for charitable institutions. A charitable institution can be entitled to exempt status if it satisfies at least one of three tests:

- ☐ it has a physical presence in Australia and, to the extent it has a physical presence in Australia, it pursues its objectives and incurs its expenditures principally in Australia; and it is a deductible gift recipient; or
- ☐ it is prescribed by law in the income tax regulations, and it is located outside Australia and is exempt from income tax in its country of residence; or
- ☐ it has a physical presence in Australia but incurs its expenditures and pursues its objectives principally outside Australia. [See [ITAA Division 50.](#)]

After the Australian High Court Case of Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd [2008] HCA 55, the government announced amendments to the 'in Australia' requirements in Division 50 of the ITAA, to ensure that Parliament retains the ability to fully scrutinize organizations seeking to pass money to overseas charities and other entities. However, the amending bill lapsed when elections were called in 2013, and the new government has begun a fresh round of consultation on the measures (A consultation paper, "Restating and Centralising the Special Conditions for Tax Concession Entities," is available [here](#)). .

To numerous exemption provisions in the ITAA, Schedule 11 of Tax Laws Amendment (2013 Measures No. 2) Act 2013 further added that:

The entity must:

- (a) comply with all the substantive requirements in its governing rules; and**
- (b) apply its income and assets solely for the purpose for which the entity is established.**

(The "Restating and Centralising the Special Conditions for Tax Concession Entities" consultation paper referred to above seeks to further harmonize these provisions into the taxation legislation.)

There are some special exemption conditions for charitable funds. To be entitled to endorsement, all charitable funds must be applied to the purposes for which they were established. Some funds will also need to satisfy further tests; this depends on whether the charitable fund was:

- ☐ established by will before 1 July 1997, and if so, what assets it has received since that date, or
- ☐ established in Australia after 1 July 1997.

These further tests are very complex and beyond the scope of this Note.

Further information in "plain English" can be found on the [ATO web site](#). Particular note should be taken of a publication available on the site, the [Income Tax Guide for Nonprofit Organizations](#), which deals extensively with income tax exemption. The exempt charitable status of an Australian organization for federal income tax purposes can be quickly determined by searching on the ACNC [website](#).

B. Deductibility of Charitable Contributions

Classes of organizations and specifically named organizations described in Division 30 of the Income Tax Assessment Act 1997 (ITAA) 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.

Recipients

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

- ☐ health;
- ☐ education;
- ☐ research;
- ☐ welfare and rights;
- ☐ defense;
- ☐ environment;
- ☐ industry, trade and design;
- ☐ the family;
- ☐ international affairs;
- ☐ sports and recreation;
- ☐ philanthropic trusts;
- ☐ cultural organizations; and
- ☐ other recipients.

Under each general category the tax statute lists specific organizations or specific classes of organizations that are eligible to receive tax deductible donations. [\[11\]](#)

The classes of organizations eligible to be deductible gift recipients are either:

- ☐ institutions;
- ☐ public funds; or
- ☐ public authorities. [\[12\]](#)

These terms are not defined in the legislation and have been interpreted by the courts. An institution has been defined as "an establishment, organization, or association, instituted for the promotion of some object, especially one of public utility, religious, charitable, educational etc." [\[ATO website, Section on "Definitions - Income Tax Guide for Non-Profit Organisations"\]](#)

Funds are solely grantmaking bodies, and authorities are usually controlled by government. [\[13\]](#)

Type of Gift

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

- ☐ monetary gifts of AUD \$2 or more;
- ☐ property 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 AUD \$5,000, regardless of when or how the property was acquired, as is discussed in the next section.

For a gift to be a tax-deductible donation and claimed as an income tax deduction in individual income tax returns, the gift must usually have the following characteristics:

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

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.

Gifts with conditions may be disallowed as deductions when 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.

Recent amendments have made limited provisions for "contributions" where some minor value is received by the contributor, such as for political memberships to a capped limit and minor benefits involving fundraising dinners and auctions.

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 AUD \$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 AUD \$5,000 as valued by the Commissioner of Taxation. Gifts of shares traded on a public stock exchange are now deductible even if under AUD \$5,000 in value.

There is generally no cap for the gift deduction, with the exception that the deduction must not cause an overall tax loss. The exceptions to this statement are discussed below under special gift situations. Where there is a gift of joint property, the taxpayer can deduct so much of the gift as is reasonable having regard to the taxpayer's interest in the property.

As a further incentive to encourage philanthropy, beginning on 1 July 1999, donors have been permitted to spread their deductions over a five-year period for cultural, environmental and heritage gifts. All deductions can be spread over a five-year period from 1 July 2002.

[Section 30-220 of the ITAA 1997](#) (inserted by Act No. 121 of 1997, and amended by Act No. 176 of 1999), in conjunction with subsection [78A\(5\) of the ITAA 1936](#), allows a donor a reduced tax deduction in cases where the donee does not, under the terms and conditions of the gift, have full title, custody, or control of the property.

Special Conditions

Most categories of deductible gift recipients have additional conditions, such as that the fund, authority, institution, or organization must: be endorsed as a gift-deductible recipient by the Commissioner of Taxation; issue appropriate receipts for donations; conduct self-reviews of its 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 organization.

Further information in plain English can be found on [the ATO web site](#). Particular note should be taken of a publication available on the site, the [GiftPack](#), that deals extensively with gifts, donors, and donees. It also includes checklists. The gift-deductible status of an Australian organization can be quickly determined by searching on the [Australian Business Number database](#).

Finally, most companies claim "gifts" or "sponsorships" as a cost of doing business – which is tax deductible – rather than claiming a deduction as a gift. The reason is that it is significantly easier under the Australian system to claim these transfers as business expenses (a business can provide funds to a much wider range of organizations) than to prove that they are gifts (which must flow to a restricted class of organizations).

C. Goods and Services Tax

A Goods and Services Tax (GST) was introduced into Australia for the first time on 1 July 2000, as part of [A New Tax System \(Goods and Services Tax\) Act](#). Key features affecting NPOs are summarized below:

- ☐ GST is a broad-based tax of 10% on the supply of most goods and services consumed in Australia.
- ☐ Non-commercial supplies by charities such as charitable activities are not subject to GST.
- ☐ Charities *must* register for GST if their annual turnover is AUD \$100,000 or more and they *may choose* to register if their annual turnover is lower.
- ☐ Registered charities can claim credits for the GST included in the price of goods and services they buy during the process of providing their GST-free supplies.
- ☐ Foreign grants to an Australian organization may be subject to GST, depending on the nature of the grant or gift and where any services are to be performed as a result of the grant or gift.

Further information about GST and gifts/grants and supply of goods and services from outside Australia can be found on the [ATO web site](#).

D. Import Duties

Imported goods are subject to duty and/or GST. In general, goods donated or bequeathed by a person, company, or organization domiciled or established outside of Australia to an organization established in Australia for the purpose of performing "work of a philanthropic nature" are exempt from customs duties. [Customs Tariff Schedule 4 - Items 23A and 23B] In addition, as prescribed by law, goods that have been "donated or bequeathed to the public" or to a public institution, are exempt from customs duties. There is some ambiguity about the scope of these exemptions, however, because the terms "work of a philanthropic nature" and "donated or bequeathed to the public" are not well-defined. Customs duty rates vary and depend on a number of factors such as type of goods and country of origin. General inquiries can be directed to information@customs.gov.au.

There are no customs concerns on monetary transfers via the banking system. However, persons carrying cash amounts of AUD \$10,000 or more (or the foreign equivalent) must be declared to the Customs Service.

E. Foreign Organizations and Grants

Registration and Regulation

Foreign incorporated organizations that carry on business in Australia may be required to register with the [Australian Securities and Investment Commission](#). This process involves a simple identification form, the payment of a fee, and the filing of a constitution and foreign incorporation papers.

Foreign bodies that earn income in Australian may be required to register under taxation regulations.

Foreign Grants

The flow of funds from overseas is generally free from regulation apart from required reporting for large foreign currency transactions.

F. Double Tax Treaties

A [double taxation treaty](#) exists between the United States and Australia.

VI. Knowledgeable Contact

Prof. Myles McGregor-Lowndes: m.mcgregor@qut.edu.au
Director
The Australian Centre for Philanthropy and Nonprofit Studies
Queensland University of Technology
GPO Box 2434
Brisbane Qld 4001
Tel (07) 381382936 Fax (07) 381389131

Footnotes

[1] As of May 2014, USD \$1 is approximately AUD 93 cents.

[2] The Australian Charities and Not-for-profit Commission (Repeal) (No. 1) Bill 2014 (the “No. 1 Bill”) introduced into Parliament on 19 March 2014, initiated an unusual process intended to occur in two stages to repeal the ACNC Act and associated legislation. Reference is made in the No. 1 Bill to an Australian Charities and Not-for-profits Commission (Repeal) (No.2) Bill 2014 (“the No. 2 Bill”) to be introduced at some later date. Part 1, Schedule 1 to the No. 1 Bill repeals the ACNC Act, but will not come into effect until Schedule 1 to the No. 2 Bill commences. As of May 2014 the No. 2 Bill has not been introduced, and thus the timing of the repeal is uncertain. Updates on the progress of the legislation can be found at <http://www.aph.gov.au/>.

[3] For more information, please see: [The Australian Nonprofit Sector Legal and Accounting Almanac \(2012\)](#); [Not-for-profit Public Consultations](#); and [Australian Charities and Not-for-Profits Commission website](#).

[4] See Sections 4 and 15, Associations Incorporation Act 1991 (ACT); Subsection 7(2), Associations Incorporation Act 1984 (NSW); Section 5, Associations Incorporation Act 1981 (Qld); Section 18(5), Associations Incorporation Act 1985 (SA); Section 2, Associations Incorporation Act 1964 (Tas); Section 4, Associations Incorporation Act 1987 (WA); Section 3, Associations Incorporation Act 1981 (Vic).

[5] The commencement of the ACNC Act in 2012 and its governance regulations eliminate many of the governance provisions of the Corporations Act 2001 when a charitable company limited by guarantee registers with the ACNC as a charity. Further information about this is available from the ACNC [website](#).

[6] The Charities Act 2013, effective 1 January 2014, modernizes and provides greater clarity and certainty about the meaning of charity and charitable purpose. The Act is available [here](#).

[7] In relation to Paragraph (a), public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public, and national security. However, activities are not contrary to public policy merely because they are contrary to government policy.

Paragraph (b) does not apply to the purpose of distributing information or advancing debate about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies).

[8] "Misconduct and mismanagement" includes the remuneration of persons acting in the affairs of the charitable trust concerned, or for administrative purposes, by payments that are excessive in relation to the duties of the persons so acting. [[Charitable Trusts Act 1993 \(NSW\) §7\(5\)](#)]

[9] The Assistant Treasurer released a consultation paper on the issue, "[Better targeting of not-for-profit tax concessions](#)," and a bill on the matter is pending submission to Parliament.

[10] AID/WATCH Incorporated v Commissioner of Taxation [2010] HCA 42 (High Court of Australia, 1 December 2010).

[11] Specific organizations have found their way into the statute by persuading Parliament that they deserve the status of deductible gift recipient. There are about 130 such organizations.

[12] There are also named classes of organizations such as public benevolent institutions, higher educational institutions, public authorities for research, and ancillary funds. Although the concept of charitable institution and funds is used to determine income tax exemption, a different classification system is used to determine ability to receive tax-deductible donations.

[13] An organization will not be an institution if it is in the form of a trust that merely manages or holds trust property, or if it is an organization that is established and controlled by family members and friends. A 'public authority' is an agent of the government exercising power or command for the public advantage, such as railway and transport authorities, local governments, and water supply boards. A 'public fund' is a fund that is opened for subscription to the public and to which the public does in fact contribute. In fact, the most notable and common class of organizations is the public benevolent institution. The term 'public benevolent institution' entered the taxation legislation after the English Privy Council overruled the High Court of Australia on the definition of 'charity' in an estate duty case. In *Perpetual Trustee Co. Ltd v Federal Commissioner of Taxation* [1942] 45 CLR 224 the High Court defined the phrase as a non-profit institution organized for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community. Reference to Income Tax Ruling TR 2003/5 available [here](#).