Australia

Charity formation and legal framework

Australia has a common law system which includes the legal concept of charity and charitable trusts. The federal government, state authorities and territories all have legislation enabling the creation of non-profit organizations and the most common organizational forms are Incorporated Associations, Charitable Trusts, and Companies Limited by Guarantee.

Charitable purposes

Charities must satisfy the common law test of "charity." The concept of what constitutes charitable activities draws heavily on traditional English common law. For the most part, the Australian states and territories have not defined "charity" or "charitable purposes" in legislation. However, in some jurisdictions there are statutory definitions, which slightly expand or modify the common law definition.

Governance, compliance and regulation issues

There is no central regulator of charities such as the Charity Commission of England and Wales. Incorporated associations and charitable trusts in their legal creation are regulated by states and territories. Companies limited by guarantee are regulated by federal legislation. Charities are theoretically supervised by the Attorney General in each jurisdiction, but the Australian Taxation Office (ATO) through its provisions is the most active regulator. Organisations seeking charitable exemptions from federal taxes and donation deductibility status now require endorsement by the ATO and thereafter are subject to random audit.

Taxation

The categories of tax exemption are fairly wide and cover all income (including trading) however derived. It is administered by the ATO which is the responsibility of the Federal Treasurer. Exemption should not be confused with gift deductibility as quite different tests and categories apply, as discussed below.

Donor reliefs

A feature which sets Australia apart from many other jurisdictions is that the definition of 'charity' is not used for the purposes of tax deductible donations. Tax deductibility is reserved for a select number of organizations consisting of only about a quarter of all charitable organizations. The provision is organized around thirteen general categories of deductible gift recipients under the Income Tax Assessment Act 1997. Different classes of organizations and specifically named organizations can be the recipients of tax deductible gifts, some subject to further conditions. Public Benevolent Institutions (PBI) a type of organisation in the welfare category comprise half of such organisations.

Until July 1 1999, only certain types of charitable gift were tax-deductible, including gifts of money, $2 or more in value; 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 July 1, 1999, some provisions were relaxed to permit an income tax deduction of property (eg. land, shares, cars) worth more than $5,000, regardless of when or how the property was acquired. There is generally no cap for the gift deduction, with the exception that the deduction must not cause an overall tax loss.

For a gift to be a tax-deductible donation and claimed as an income tax deduction in individual income tax returns, the gift must a) be made voluntarily; b) not provide any material benefit to the donor, and c) arise essentially from benefaction, and proceed from detached and disinterested generosity. 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.

Cross-border giving

Organisations which operate outside of Australia may still be liable for tax exemption when operating within the country if they meet the criteria for exemption, which specify that an organisation is eligible if:

- 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.

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Philanthropy Impact: www.philanthropy-impact.org

Philanthropy Impact (incorporates EAPG, Philanthropy UK and the Philanthropy Advisors Forum). It was launched on 3 December 2012.