

5.1 FEDERAL TAXATION

Federal taxation

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Essential resources

- ✓ Division 30 of the ITAA97
- ✓ ATO publication *GiftPack: Guide for Deductible Gift Recipients and Donors* (NAT 3132) (GiftPack)

[5.1.604] Unsuccessful DGR endorsement applications and loss of endorsement

Four of the main reasons why organisations fail to obtain DGR endorsement are:

- (1) the application form and any required schedule to the form are not completed or not completed properly;
- (2) the governing rules (such as a constitution, trust deed or stand-alone public fund rules) do not include all the required provisions;
- (3) the organisation's purposes and activities do not properly fit the criteria of DGR endorsement that is being sought or else they have not been properly articulated in the founding documents, in the application for endorsement, within promotional materials or on its website; and
- (4) an organisation's objects and activities are broad and cover two or more DGR categories, often meaning that it is ineligible for DGR endorsement at all. This situation arises because many of the DGR categories require the organisation to have a "sole", "exclusive" or "primary purpose" and it is not possible to have more than one exclusive, sole or primary purpose.

It is natural for an organisation that has been refused DGR endorsement to look at other organisations that have been successfully endorsed and to draw comparisons. In doing so, it is sometimes very difficult to work out why this might be the case. For instance, it is not unheard of for an organisation that is based in one state to be granted endorsement while its sister organisation established in another state is not, despite the fact that the applicant organisation has identical purposes and a similar structure.

Reasons why one organisation may be granted DGR endorsement while another, apparently similar, organisation is not, include:

- the endorsed organisation was endorsed some time ago and may, over time, have changed such that it is no longer entitled to be endorsed and this fact has not been identified through either self assessment or ATO audit;
- there has been a change to the relevant endorsement laws or ATO policies and again, a self review or ATO audit has not revealed this fact;
- the endorsed organisation obtained its DGR endorsement by being specifically listed in the ITAA97 because it too was not eligible for endorsement under a pre-existing category (see [5.1.607] for more on special listing);
- the endorsed organisation, having been refused endorsement in the first instance, appealed the decision and was eventually successful (see [5.1.606] for more on the review and appeal of decisions);
- the actual facts of the matter, if known, would reveal that the two organisations are not as similar as may be apparent on the surface; and
- the endorsed organisation was able to prepare a more compelling argument or provide more convincing material in support of its application for endorsement.

The most common reasons for loss of endorsement include:

- the organisation was endorsed some time ago and has, over time, changed its purposes and activities and as a result it no longer satisfies the endorsement criteria;
- there has been a change to the relevant endorsement laws or ATO policies and as a result the organisation no longer satisfies the endorsement criteria; and
- where the organisation acts as a conduit by doing nothing more than transferring deductible gifts it receives through to one or more organisations that do not have DGR endorsement.

[5.1.605] Pursuing multiple purposes

While the current DGR endorsement requirements, for the most part, run contrary to the provision of a holistic approach, for service delivery to a particular disadvantaged community for instance, it is what it is and will remain so until the law is amended to remedy this situation.

Organisations that wish to obtain DGR endorsement for multiple purposes falling under multiple DGR categories can create a structure containing multiple entities and/or funds, each of which has its own specific purposes and activities, and can then seek DGR status for each component. However, creating and implementing such a structure can be a lengthy, resource-intensive and expensive exercise and even then DGR endorsement is not guaranteed for all or any component of the organisation. Structures of this nature often run into difficulties from both administration and DGR compliance perspectives.

[5.1.606] Review and appeal of decisions

Alert

At the time of writing it is unclear as to what role the ACNC will have in handling applications for DGR endorsement and whether it will act as the interface between the applicant and the ATO. As such, the below section is based on the assumption that the applicant and the ATO will interact with each other directly and not through the ACNC.

When refusing an organisation's application for DGR endorsement, the ATO will provide an explanation for its decision. The organisation then has a number of review options:

Informal: An organisation can simply ask the person at the ATO responsible for assessing the application to reconsider the decision. The ATO will then try to resolve the issues quickly and informally.

Formal: An organisation can also take a more formal approach, either at the time the application is refused or after the informal approach described above has been exhausted. To initiate the formal review process, an organisation needs to lodge a written objection with the ATO within 60 days of the date of the notice of decision. The written objection should be addressed to the ATO and explain the grounds for the objection. The ATO will provide the organisation with its decision in response to the objection and reasons for that decision in writing.

Formal review by deemed refusal: If an organisation forms the view that the application assessment is taking too long, it can give the ATO written notice of its wish to have the application treated as if it had been refused and thereby trigger formal review rights.

Note however that the earliest an organisation can trigger a formal review in this way is the later of:

- the end of the 60th day after the initial application for endorsement was made; and

- the end of the 28th day after the last time information was given to the ATO in a response to its request.

Subject to the above time periods, an application will be deemed to be refused on the day the written notice is given.

Review by tribunal or court: If, having been formally reviewed by the ATO, the application for endorsement is still refused, the organisation may:

- seek a review of the decision by the Administrative Appeals Tribunal; or
- appeal the decision to the Federal Court of Australia.

The ATO will, when notifying an organisation of its refusal, provide information explaining the steps it needs to follow to exercise its review and appeal rights.

[5.1.607] Special listing

If an organisation is not eligible for endorsement as a DGR under one of the pre-existing categories, it can pursue special listing (also referred to as specific listing) through submissions to the Commonwealth Treasury. Special listing requires the ITAA97 to be amended to specifically list the organisation. This is often more of a political, than a legal, process and commonly takes in excess of 12 to 18 months. Even then, success is far from guaranteed.

The support of the Commonwealth Government minister responsible, through his or her respective portfolio, for the type of activities and purposes of the organisation seeking listing is almost always required for a successful special listing application. For example, an environmental organisation that has explored and exhausted all other DGR endorsement options and believes that, despite there being no DGR category relevant to its purposes, should be eligible for endorsement, is likely to need the support of the Commonwealth Government minister responsible for the environment. For more on specific listing, including links to lists of organisations currently listed in the income tax law go to the ATO website at www.ato.gov.au/nonprofit/content/31654.htm.

[5.1.608] Review and revocation of DGR endorsement

Alert

At the time of writing it is unclear as to what role the ACNC will have in reviewing organisations with respect to DGR endorsement. That is, will it be responsible for reviewing, will it be the interface between the organisation and the ATO or will it sit outside of the process altogether? As such, the below section is based on the assumption that the applicant and the ATO will interact with each other directly and not through the ACNC.

The ATO reviews endorsed charities to see if they are still eligible for endorsement as part of its general administration of taxation laws. As part of the review, the ATO will almost certainly request information and documents that are relevant to the organisations' entitlement to endorsement. For example, financial accounts, bank account statements, annual reports, grant eligibility criteria, project documentation and funding agreements. At least 28 days will be given for the organisation to provide the requested information and materials.

The ATO can revoke an organisation's DGR endorsement if the organisation:

- is no longer entitled to be endorsed;
- has not provided the ATO with the requested information or documents within the specified time after a request; or

- has failed to comply with the DGR receipting requirements (see [5.1.1005]).

Notification of revocation of endorsement will be given in writing. The revocation will have effect from the date specified in the notice which may be retrospective.

Organisations that have had their endorsement revoked can lodge an objection against the revocation. The objection must be in writing and should clearly set out the reasons for the objection.

It is not uncommon for an organisation's focus, governing body, employees, structure, activities and even purpose to change over time. As such, the ATO recommends that each endorsed organisation carry out a yearly self-review to assess whether it is still entitled to be endorsed. A review is also recommended when there is a major change in the organisation's structure or operations.

If the self-review process reveals that the organisation is no longer entitled to endorsement, it must notify the ATO. Failure to do so may result in prosecution.

The ATO provides a worksheet to assist organisations with the self-assessment process which can be downloaded from the ATO website.

DGR endorsement for whole of organisation

[5.1.701] Public benevolent institutions

A public benevolent institution (PBI) is a non-profit institution established and run for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability as arouses compassion in the community.

It is worth noting here that while PBI is a category of DGR endorsement, it is also a specific type of institution for the purposes of fringe benefits tax concessions (see [5.1.1401] – [5.1.1403]) and is sufficient to demonstrate that it is a charitable institution for the purposes of income tax exemption as it falls under the head of charity relating to the relief of poverty. In other words, an organisation that can demonstrate that it is a PBI will often meet the eligibility criteria for endorsement as both a charitable institution and a DGR. As such, organisations will commonly apply for both these endorsements at the same time. The assessment of whether an organisation is a PBI is, up until 10 December 2012, the responsibility of the ATO after which it will become the responsibility of the soon to be established Australian Charities and Not-for-profit Commission. However, please note that being registered as a PBI by the ACNC will not lead to automatic endorsement as a DGR under this category. The organisation will still need to meet the DGR endorsement criteria administered by the ATO.

The elements of a PBI, each of which must be satisfied when applying for endorsement, can be expressed as follows:

- it is operated for the primary purpose of meeting needs requiring benevolent relief (benevolent needs);
- it relieves the benevolent needs by directly providing services to people in need;
- it is carried on for the public benefit;
- it is a not-for-profit institution; and
- it meets the in Australia test.

Organisations that may be PBIs include:

- hostels and soup kitchens for the homeless;

- disability support services;
- hospitals and medical clinics;
- domestic violence support services; and
- refugee relief centres.

Applying for endorsement as a PBI

For an organisation that is a PBI to receive income tax and FBT exemption, it must apply for endorsement using the TCC Application Form. Then, for DGR endorsement, it must complete and lodge a separate DGR Application Form together with the PBI Schedule (see below).

All these forms, together with any accompanying submissions, can be lodged at the same time. While some applicants will neatly meet the PBI criteria and may obtain endorsement based on the forms and required documents alone, it is often advisable to provide additional submissions.

See [5.1.602] for more detail on applying for DGR endorsement.

Alert

The *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012*, if passed into law, will amend the ITAA97 to introduce an explicit in Australia Test for DGR endorsement and will add additional conditions.

For more on the in Australia test for DGR purposes, see [5.1.505].

The ATO interprets the in Australia requirement for DGR endorsement under the category of PBI to mean not only that the organisation must be physically located in Australia but also that it must perform its activities and pursue its purposes in Australia (PBI DGR in Australia Test). The ATO's GiftPack publication provides the following example:

A public benevolent institution for the homeless is set up in Australia. It provides services in Australia and Thailand.

ATO assessment: It is not "in Australia". It cannot be endorsed as a DGR.

While the ATO acknowledges that certain activities are exempt from the in Australia requirement, such activities must be merely ancillary to the Australian operations or minor in extent and importance. Paragraph 130 of Taxation Ruling TR 2003/5 summarises the ATO's position as follows:

130. We accept that where a public benevolent institution conducts an activity outside Australia that is merely incidental to providing relief in Australia, or is insignificant, it will not disqualify the institution from endorsement. For example, if a public benevolent institution provides medical assistance to children in Australia with a particular disability but, to a minor extent, it also brings children from other countries to receive treatment in Australia, it still meets this condition for endorsement.

The ATO's GiftPack publication provides the following example:

A public benevolent institution is set up in Australia. Part of the treatment it provides involves travel to Canada.

ATO assessment: The institution will be "in Australia" if the Canadian travel is merely incidental to its treatment of Australians.

PBI activities test

- A PBI is a non-profit institution organised for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community: Taxation Ruling TR 2003/5 at para 7. One of the key

components of this definition is the concept of “direct”. That is, a PBI is an organisation that provides its aid and services directly to people in need of benevolent relief: Taxation Ruling TR 2003/5 at paras 17 and 61.

- While the organisation must be at least predominantly for the direct relief of poverty, sickness, destitution or helplessness etc, there is some scope for a PBI to do some non-PBI activities so long as such activities are incidental to the public benevolence or of minor extent and importance: Taxation Ruling TR 2003/5 at para 22.
- Activities that are of an educational or training nature receive specific mention. Taxation Ruling TR 2003/5 states at para 34:

34. Needs that are to be met by education or training will not normally be such as to arouse compassion. This includes vocational training and apprenticeship schemes. However, there will be circumstances where education or training may be among the services provided to alleviate the effects of poverty or misfortune. For example some organisations will be public benevolent institutions where they exist to assist long-term unemployed young people cope with the problems caused by not being able to obtain employment. Such organisations encourage them to take on community service and casual employment and also offer a range of activities and training aimed at developing employment and related skills. In contrast, a training or skills organisation that does not specifically target its assistance for those suffering poverty or misfortune (eg through its selection processes, the types of courses it offers, the types of special assistance it provides, the targets of its advertising and promotion, and so on) would be unlikely to be a public benevolent institution.

Essential resources

- ✓ Item 4.1.1 of the table at ss 30-45 and 30-125 of the ITAA97
- ✓ ATO publication *GiftPack: Guide for Deductible Gift Recipients and Donors* (NAT 3132) (GiftPack)
- ✓ Taxation Ruling TR 2003/5 Income tax and fringe benefits tax: public benevolent institutions
- ✓ ATO Application Form “Application for endorsement as a tax concession charity or income tax exempt fund (NAT 10651)” (TCC Application Form)
- ✓ ATO Application Form “Application for endorsement as a deductible gift recipient (NAT 2948)” (DGR Application Form)
- ✓ The schedule to the DGR Application Form entitled “Public benevolent institution – schedule for deductible gift recipient applicants JS 18481” (PBI Schedule)

[5.1.702] Health promotion charities

The provisions relating to health promotion charities were introduced into the tax law in 2001 by the *Taxation Laws Amendment Act (No 2) 2001*. These provisions are designed to provide organisations qualifying as health promotion charities with the same concessions as are available to PBIs.

To qualify for the tax concessions available to a health promotion charity, the organisation must:

- be a charitable institution (see [5.1.403] for more on charitable purpose, [5.1.501] for more on not-for-profit and [5.1.506] for more on “institution”); and
- have as its principle activity the promotion of the prevention or the control of diseases in human beings (see below).

Organisations that promote the prevention or control of disease in animals or plants cannot qualify as a health promotion charity, as health promotion charities must be about disease in humans.

Applying for endorsement as a health promotion charity

For an organisation that is a health promotion charity, to receive income tax and FBT exemption, it must apply for endorsement using the TCC Application Form. Then, for DGR endorsement, it must complete and lodge a separate DGR Application Form. There is no additional DGR Application Form schedule to complete.

These forms, together with any accompanying submissions, can be lodged at the same time. While some applicants will neatly meet the health promotion charity criteria and may obtain endorsement based on the forms and the required documents alone, it is often advisable to provide additional submissions.

See [5.1.602] for more detail on applying for DGR endorsement.

Prevention or control as principal activity

The principal activity of the organisation need not be both the prevention and the control of disease in humans (either prevention or control is sufficient), though both is also fine. What is important is that this activity is the main activity of the organisation; that is, it outweighs the organisation's other activities.

Paragraph 24 of Taxation Ruling TR 2004/8 provides, in summary, that

- the provisions of the ITAA97 dealing with health promotion charities are also directed to charitable institutions that promote the control of disease;
- control, like prevention, extends to activities that are directed to limiting the incidence and spread of disease;
- control can also include alleviating suffering and distress associated with the disease without necessarily being directed to the prevention of the disease itself. Although note that such activities could be more akin to those performed by a PBI (see [5.1.701] in relation to PBIs and see further below for the difference between a health promotion charity and a PBI); and
- control of disease extends to the management and treatment of disease and can include activities which control the spread and incidence of disease within and between people and activities which control the severity of the disease.

What is meant by “disease”?

The term “disease” is defined at s 34.20(3) of the ITAA97 (the same definition is used in the *Fringe Benefits Tax Assessment Act 1986*: see s 136(1)). The definition from the ITAA97 is as follows:

Disease includes any mental or physical ailment, disorder, defect or morbid condition, whether of sudden onset or gradual development and whether of genetic or other origin.

See also Taxation Ruling TR 2004/8 para 8 (definition of disease).

Paragraph 5.12 of the Explanatory Memorandum to the *Taxation Laws Amendment Bill (No 2) 2001* provides that health promotion charities are medical or health organisations that “typically focus on particular types of ailments or health issues, for example, asthma, cancer, acquired immune deficiency syndrome (AIDS), arthritis, heart conditions, brain conditions, paraplegia and kidney conditions”.

Also see para 20 of Taxation Ruling TR 2004/8 which presents further examples of dementia, autism, cerebral palsy, mental illness and multiple sclerosis. The same paragraph goes on to

state that:

Recognition by medical authorities will no doubt assist in concluding whether newly identified conditions fall within the term.

So, what types of disease and what types of conditions may be covered by the term “disease” may very well change over time.

Paragraph 23 of Taxation Ruling TR 2004/8 states that injury is not disease, drawing upon the fact that “injury” and “disease” are dealt with separately under s 34.20 of the ITAA97. However, this is not to say that disease cannot result from injury. Paragraph 23 states that “disease can include the adverse health consequences that follow from such things as burns, lacerations and broken bones. However, the burns, lacerations and broken bones themselves are not diseases”.

So, with the above in mind, organisations focusing on the reduction of injury (eg accident prevention bodies) are not contemplated by Div 30 of the ITAA97 and are not considered as health promotion charities.

However, although stroke resulting from progressive heart disease or the rupture of an aneurysm has been found to constitute “injuries” for the purposes of workers compensation legislation, even a judicial finding that such an event is an injury for workers compensation purposes does not necessarily mean that the underlying cause is not a disease for the purposes of the taxation health promotion legislation (Taxation Ruling TR 2004/8 at para 23).

What activities are health promotion activities?

The types of activities performed by health promotion charities are, due to the broad definition of disease and the nature of health and medical organisations, themselves broad. Paragraph 28 of Taxation Ruling TR 2004/8 provides some examples as follows:

- providing information about prevention or control to sufferers of disease, health professionals, carers and to the public;
- researching how to detect, prevent or treat diseases;
- developing or providing relevant aids and equipment;
- evaluating health programs and processes to prevent or control disease;
- training carers and health professionals in ways of controlling diseases;
- treating and caring for persons suffering from diseases;
- developing and implementing co-operative and cross-disciplinary approaches to treatment and prevention of diseases in human beings; and
- coordinating health promotion activities of charitable institutions that principally promote the prevention or the control of diseases.

Refer to paras 29 to 36 of Taxation Ruling TR 2004/8 for examples of organisations that are health promotion charities and paras 37 to 43 of Taxation Ruling TR 2004/8 for examples of what are not health promotion charities.

Difference between a PBI and a health promotion charity

At times there can be a fine line between whether an organisation is best described as a public benevolent institution (PBI) (see [5.1.701]) or as a health promotion charity. This is because certain activities such as the provision of medical services to the needy or the suffering, engaging in research and engaging in the promotion and control of certain diseases could be readily and legitimately performed by either type of organisation.

So, what is the difference? The distinction is to be found in the focus of the organisation.

Basically, to be a PBI, an organisation's primary purpose must be aimed at relieving the suffering caused by a disease. While on the other hand, if an organisation's primary purpose is more focused on the prevention or control of disease, then it is more likely to be a health promotion charity.

However, it should be remembered that a PBI is permitted to conduct some activities which are associated with a health promotion charity and that a health promotion charity can conduct activities that are associated with a PBI so long as in each case the relevant activities are minor in scale and are ancillary to the organisation's main purpose.

Essential resources

- ✓ Item 1.1.6 of the table at ss 30-10 and 30-125 of the ITAA97
- ✓ ATO publication *GiftPack: Guide for Deductible Gift Recipients and Donors* (NAT 3132) (GiftPack)
- ✓ Taxation Ruling TR 2004/8 Income tax and fringe benefits tax: health promotion charities
- ✓ *Taxation Laws Amendment Act (No 2) 2001* and the accompanying Explanatory Memorandum
- ✓ Treasurer's Press Release No 55 of 22 June 2000
- ✓ ATO Application Form "Application for endorsement as a tax concession charity or income tax exempt fund (NAT 10651)" (TCC Application Form)
- ✓ ATO Application Form "Application for endorsement as a deductible gift recipient (NAT 2948)" (DGR Application Form)

[5.1.703] Charitable services institution

The concept of a charitable services institution (CSI) was introduced into tax law in 2006. A CSI is a charitable institution that would be a public benevolent institution (PBI) but for the fact that it:

- also promotes the prevention or the control of diseases in human beings (but not as a principal activity) (see [5.1.702] for more on health promotion charities); and/or
- also promotes the prevention or the control of behaviour that is harmful or abusive to human beings (but not as a principal activity) (see [5.1.870] for more on harm prevention charities).

Basically, a CSI is a charitable institution that cannot be endorsed as a PBI because it also undertakes some health promotion and/or harm prevention activities.

Applying for endorsement as a CSI

For a CSI to receive income tax and FBT exemption it must:

- apply for endorsement using the TCC Application Form; then
- for DGR endorsement, it must complete and lodge a separate DGR Application Form together with a completed CSI Schedule (see below).

TIP 

These forms, together with any accompanying submissions, can be lodged at the same time. While some applicants will neatly meet the CSI criteria and may obtain endorsement based on the forms and the required documents alone, it is often advisable to provide additional

submissions. See [5.1.602] for more detail on applying for DGR endorsement.

A CSI must undertake health promotion activities and/or harm prevention activities but not as its principal activity.

- “Health promotion activities” are activities that promote the prevention or the control of diseases in human beings. If an organisation’s principal activity is health promotion, it may qualify for DGR endorsement under the health promotion charity category (see [5.1.702]).
- “Harm prevention activities” are activities that promote the prevention or control of behaviour that is harmful or abusive to human beings. If an organisation’s principal activity is harm prevention, it may qualify for DGR endorsement under the harm prevention charity category (see [5.1.870]).

To establish whether an organisation meets the requirements for endorsement as a CSI, ignore any of the organisation’s health promotion and harm prevention activities. Then, considering the organisation’s remaining purpose and activities, it must now qualify for endorsement as a PBI.

Examples from the GiftPack

Eligible as CSI

Caring Charities is a charitable institution whose objects are relieving poverty and improving health in relation to a particular disease. It carries out its objects by providing hostel accommodation for the homeless and by providing health information about the disease to health professionals, carers and the public. The providing of health information accounts for 45% of its activities. It also prepares and publishes research papers about poverty, but these activities are minor in extent and importance. Caring Charities would qualify as a public benevolent institution except that it provides health information about the disease. Because this is not its principal activity, Caring Charities is eligible for endorsement under the category of CSI.

Ineligible as CSI

Nalla Care is a charitable institution whose objects and activities are operating a homeless shelter, running community health activities and operating a kindergarten. Running the community health program amounts to 20% of Nalla Care’s activities. Nalla Care is equally engaged in the other two operations – the homeless shelter and the kindergarten.

Nalla Care’s health promotion activities are not its principal activity and its homeless shelter is consistent with being a PBI. However, its kindergarten is not providing direct benevolent relief and is not minor in extent and importance. This means Nalla Care would not be a PBI once the health promotion activities were disregarded. Therefore, Nalla Care is not a CSI.

Essential resources

- ✓ Item 4.1.7 of the table at ss 30-45 and 30-125 of the ITAA97

- ✓ ATO publication *GiftPack: Guide for Deductible Gift Recipients and Donors* (NAT 3132) (GiftPack)
- ✓ ATO Application Form entitled “Application for endorsement as a tax concession charity or income tax exempt fund” (NAT 10651) (TCC Application Form)
- ✓ ATO Application Form entitled “Application for endorsement as a deductible gift recipient” (NAT 2948) (DGR Application Form)
- ✓ “Charitable services institution – schedule for deductible gift recipient applicants (NAT 15608)” (CSI Schedule)

DGR endorsement for the operation of a fund, authority or institution

School/college building funds

[5.1.801] Introduction

There is no category of DGR endorsement that enables a school or college to be endorsed as a whole. However, there are a number of specific funds relevant to schools and colleges that can be established. One such fund is a school building fund.

While schools and colleges, or the entities that operate them, most commonly establish school building funds, other entities are also permitted to establish a school building fund so long as all the requirements are met. Outside of schools and colleges themselves, it is organisations that have a connection with a school that are most likely to establish and maintain a school building fund (eg school foundations and parents associations).

In general terms, a school building fund is used to provide money for the acquisition, construction or maintenance of a building that is used (or to be used) as a school building by a school.

More specifically, the DGR category of school building fund covers funds with the following characteristics:

- the fund is a public fund (see [5.1.1001] – [5.1.1011]);
- the public fund is established and maintained solely for providing money for the acquisition, construction or maintenance of a building;
- the building is used, or to be used, as a school or college; and
- the building is used as a school by a government, a public authority or an NFP.

The requirements of and restrictions upon a school building fund are rather extensive and, without the correct knowledge and processes in place, can lead to difficulties. As a result, it does not take too much at all for things to get really complicated. For instance, it is not uncommon for one or more, or even all, of the following factors to also be present:

- a single school operates several school building funds itself;
- one or more organisations separate from the school, such as a related school foundation, operate a school building fund for the benefit of that school in addition to a fund that the school itself operates;
- there are multiple school building funds with one or more of them being operated under a trust deed and others under a set of stand-alone rules;
- there are multiple school building funds, one or more of them being endorsed as a DGR in its own right and with particular entities being endorsed for the operation of others;
- there are multiple school building funds, all of which have similar names;

- there are multiple school building funds, all of which have similar, but varying, stated purposes;
- over time the reason for the establishment of one or more school building funds have become irrelevant or have been forgotten;
- trust deeds and other founding documents have been lost;
- the school principal and other stakeholders have different ideas about how school building fund monies should be applied; and
- the school also operates other funds such as scholarship funds, public library funds and public ancillary funds.

On 5 December 2011, the ATO released Draft Taxation Ruling TR 2011/D5 – Income tax: school or college building funds for public comment. The new draft ruling will replace Taxation Ruling TR 96/8 of the same name.

The main change between draft ruling TR 2011/D5 and TR 96/8 is that the “more than 50% rule” provided as an administrative rule of thumb has been removed. This rule of thumb has been removed because the ATO no longer considers it correct in law.

Draft Taxation Ruling TR 2011/D5 also contains expanded discussion and more practical examples on:

- what is a building, what is a school and what is use of a building as a school; and
- the use of funds held by a school building fund to cover reasonable expenditure incurred in administering the fund.

Essential resources

- ✓ Item 2.1.10 of the table at section 30-25 of the ITAA97
- ✓ ATO publication *GiftPack: Guide for Deductible Gift Recipients and Donors* (NAT 3132) (GiftPack)
- ✓ Draft Taxation Ruling TR 2011/D5 Income tax: school or college building funds which is to replace Taxation Ruling TR 96/8 of the same name
- ✓ ATO Fact Sheet “Fact sheet on school building funds” (NAT 5393) (School Building Fact Sheet)
- ✓ ATO Taxation Ruling TR 95/27 Income tax: public funds
- ✓ ATO Application Form “Application for endorsement as a deductible gift recipient (NAT 2948)” (DGR Application Form)

[5.1.802] Applying for endorsement for a school building fund

To apply for DGR endorsement as, or for the operation of, a school building fund, the applicant entity must have an ABN and must lodge with the ATO:

- a completed DGR Application Form; and
- a copy of the governing rules for the school building fund. Such governing rules may be contained within a constitution, a trust deed or be stand-alone.

[5.1.803] Ways to establish a school building fund

School building funds are commonly established in one of two ways:

- (1) as a trust, with the trust deed setting out the governing rules for the fund; or
- (2) under a set of stand-alone governing rules adopted by the governing body of the applicant entity.

It is also possible, though less common, for the rules relating to a school building fund to be incorporated into the constitution of the applicant entity.

If a school building fund is being established using a trust, there are two options:

- (1) the trust, being a separate entity for tax purposes, can apply for DGR endorsement in its own right in which case the trust will need its own ABN; or
- (2) the corporate trustee of the school building trust can be endorsed as a DGR for the purpose of operating the school building fund.

If the trust itself is to be endorsed as a DGR in its own right, it will also need to be, or become, income tax exempt in its own right (see [5.1.401] – [5.1.407]). In these circumstances, the school building trust cannot benefit from or rely on the income tax exempt status of the trustee. So, looking at this from another angle, an entity that is not and cannot be exempt from paying income tax wishing to establish a school building fund would likely choose to establish such a fund under a trust structure and seek income tax exemption for the trust.

In circumstances where the trustee of the school building trust is endorsed as a DGR for the purpose of operating the school building fund:

- the trustee will, unless it also has whole of organisation DGR endorsement (see [5.1.701] – [5.1.703]), need to ensure that a gift fund is established and maintained (see [5.1.1101]); and
- the trust itself will not need to be endorsed as income tax exempt so long as the trustee is exempt.

Alternatively an entity may establish a school building fund by a resolution of the board and an acceptance of certain guidelines to be contained in a set of standalone governing rules. In these circumstances, the school building fund relies on the income tax exempt status of the entity establishing the fund.

[5.1.804] Governing rules

To be endorsed by the ATO, the founding documents of a school building fund (eg a trust deed or a set of standalone governing rules) must address particular elements. The provisions of the founding documents must demonstrate that the fund will be operated and wound up in accordance with certain requirements and cover:

- the establishment of the school building fund;
- the establishment and constitution of the committee to govern the fund;
- the purpose for which the fund is established and operated;
- the way in which the fund is to be administered;
- the way the funds are to be used and invested;
- how the funds are to be tracked and accounted for; and
- what happens to surplus assets if the fund is wound up.

[5.1.805] Qualifying bodies

The following information is taken from Draft Taxation Ruling TR 2011/D5, in particular paras 33 to 35 and 168 to 175:

- for the purposes of a school building fund, the use of a building as a school must be by a government, by a public authority or by a not-for-profit society or association, together referred to as “qualifying bodies”;

- the use of a building as a school by a government or a public authority requires identification of the government or the public authority as the user of the building as a school;
- the use of a building as a school by a not-for-profit society or association is determined by reference to its constituent and governing documentation and to its actual activities and operations; and
- because multiple trustees do not constitute a society or association, a school that is conducted by several trustees is not, by that fact alone, conducted by a society or association. However, where trustees conducting a school act for and according to the purposes of a society or association, that society or association may be regarded as conducting the school through the trustees. In these circumstances, the society or association can be regarded as using as a school a building the trustees use as the school.

[5.1.806] What can a school building fund pay for? General information

When considering what a school building fund can pay for, the GiftPack, School Building Fact Sheet and Draft Taxation Ruling TR 2011/D5 give the following guidance:

- a school building fund must be used for providing money for acquiring, constructing or maintaining school or college buildings only and not for any other purpose;
- generally speaking, disbursements related to acquiring, constructing or maintaining a building used as a school are disbursements that are related to obtaining the use of a building for the purpose of using it as a school; keeping the building fit for that purpose; and fund administration costs;
- expenditure on capital improvements and maintenance, as well as installing and maintaining fixtures, are accepted outlays of a school building fund;
- examples of land-related costs that can be payable from a school building fund include purchase of land for which there are definite plans to construct a building to be used as a school or college, construction or purchase expenses and associated financing costs and lease payments on a rented school building;
- other costs that may be met by a school building fund include general maintenance of school buildings, building insurance, expenditure on carpets that are fixed to the floor of the school building; and
- administration costs of the fund, including bank fees, accounting costs and fundraising expenses can also be met from the funds of a school building fund;
- costs that cannot be paid by a school building fund include running expenses of the school, paying teachers, buying furniture and materials and maintaining sports grounds and car parks; and
- a school building fund may invest or lend its money if it is a bona fide and temporary arrangement and is consistent with achieving the fund's objects with all reasonable speed.

[5.1.807] What can a school building fund pay for? More detail

Details are provided in Draft Taxation Ruling TR 2011/D5.

Acquisition of buildings and land

Costs associated with the acquisition of a school building that can be met by a school building fund include:

- costs incurred in negotiating, completing and financing the purchase of a building to be used as a school;

- repayment of the capital of, and interest charges on, a loan incurred in the purchase of the building;
- cost of land that is directly required for the construction of a building to be used as a school, but only if the entity purchasing the land is, at the time of acquisition of the land, committed to commencing construction within a reasonable period. What is “reasonable” depends on the circumstances. Significant delay or uncertainty may lead to the conclusion that the land is not acquired as part of the acquisition or construction of a building used as a school; and
- site preparation costs (eg the cost of demolition of an old building on the proposed building site and excavation costs).

A building need not be owned to be acquired in the context of a school building fund. The concept of “acquisition” is not limited only to purchase of a building. It can extend to buildings that are rented or leased by the organisation conducting the school and are used as a school while rented or leased. Rent or lease payments facilitate the use of the buildings as a school in the same way as payments to finance outright purchase.

With the above in mind, rent or lease payments will be acceptable expenditure as a purpose of the fund:

- where they are no more than the fair rent for the period over which the building is for use as a school; and
- where the arrangements do not provide any benefit in relation to any other use of the building.

The requirement that the fund provides money solely for the acquisition, construction or maintenance of the building will not be met where the rent or lease payments are part of arrangements that provide for use of the land or buildings other than as a school (unless that other use is integral to use as a school or no more than minor or occasional). Similarly, construction costs must not provide for use of the building other than as a school (unless that other use is integral to use as a school or no more than minor or occasional).

Money from a school building fund must not be used to purchase land for any purpose other than as the site of a building used as the school unless such other land is incidental to the site. For example, money from a school building fund cannot be used to purchase land for the purpose of providing recreational space (such as sports grounds) since these do not involve a building.

As the development of a school may require or be conditional on the availability of land for other purposes as well as land that is the site of a building used as a school, a gift deductible school building fund will rarely be able to purchase all land required for the purposes of a school development.

Maintenance costs

For the purposes of a school building fund, the word “maintenance” takes its ordinary meaning, being keeping the building in proper or good condition.

To be an acceptable maintenance disbursement from a school building fund, the disbursement must be readily perceived as relating to the maintenance of the school building.

Costs associated with maintenance of a school building that can be met by a school building fund include:

- the cost of cleaning the building, including its floor coverings and windows;
- janitors’ and cleaners’ salaries and wages to the extent they directly relate to maintaining the building in good condition;

- insurance premiums for the building (but not premiums relating to the contents of the building);
- the purchase of equipment used exclusively for maintaining the school building (eg a vacuum cleaner); and
- repairs, painting and plumbing upkeep on the building.

The maintenance of a school building does not include:

- the maintenance of sports equipment, playgrounds, sports fields, landscaping or car parks, as these are not school buildings;
- general operating costs of a school, such as water, gas, electricity, sewerage and contents insurance;
- teaching staff salaries; and
- the general upkeep costs of furnishings.

Where costs relate, in part, to the maintenance of the building used as a school, an appropriate part of those costs is an acceptable disbursement against the school building fund. For example, if a cleaner's time is devoted 50% to maintaining the building used as a school, with the balance of his or her time devoted to other work such as building security, 50% of the cleaner's salary costs would be a legitimate charge against the fund for maintenance of the building used as a school. The purpose of the fund may extend to meeting that part of the cost that is a cost of maintaining the school building.

Maintenance of a building on leased land is also acceptable expenditure unless that expenditure is directed not only to maintenance arising while the building is used as a school but to maintenance in other periods as well.

Security costs

School building funds can be used to meet the costs of installing and maintaining security alarms and lighting, and window and door security such as grilles, provided the items are part of, or a fixture to, the building that is used as a school.

However, expenditure on non-fixture items such as security guards, guard dogs, mobile communications and similar equipment are not acceptable disbursements, as it is not on the acquisition, construction or maintenance of a school building.

Fund administration

Administration costs that are an acceptable charge against a school building fund are limited to costs paid in an arm's length transaction specifically and solely to establish or maintain the fund (and for no other purpose). These include:

- direct costs of establishing or promoting the fund, such as advertising costs;
- direct costs of operating the fund, such as bank charges, stationery costs, accounting and audit fees and other professional services relating specifically to the fund;
- fees paid for professional direction of a planned giving or fundraising program specifically for the fund; and
- the remuneration of a fund administrator specifically to administer the fund so long as the fund is operated solely for the required purpose and the remuneration is no more than the amount that would be paid to a third party in an arm's length transaction specifically to establish or maintain such a fund.

Warning

In a combined fundraising appeal (or multiple purpose appeal), the school building fund can only bear the part of the fees for its share of the total amount raised in the appeal and for no other purpose.

Fund administration costs that are not acceptable and must not be disbursed from a school building fund include general administration costs that the school would incur regardless of the existence or otherwise of the fund.

Excessive fund administration costs can indicate that the sole purpose of the fund is not to acquire, construct or maintain a school building.

Investments by school building funds

A school building fund may invest or lend its funds if the fund's controllers are able to establish that:

- they are proceeding with all reasonable speed to achieve the fund's objects;
- the investments or loans from the fund represent a bona fide and temporary arrangement that is in the best interests of the fund; and
- the investment or loan will assist the fund achieve its objects within a reasonable period.

In these circumstances, investment or lending of funds may be shown to be no more than incidental to, and so a part of, the sole purpose of the fund. This will be a question of fact in the circumstances of each case.

[5.1.808] Meaning of “established and maintained solely”

A school building fund's sole purpose or object, its sole reason for establishment, must be to acquire, construct or maintain a building that is (or is to be) used as a school by a qualifying body.

TIP

Just because a school building fund's sole purpose must be to do with school buildings doesn't mean that the building or buildings themselves must be used solely as a school building. However, any other use of the building must be either integral to its use as a school or be only minor or occasional (other use). Whether other use is integral or is only minor or occasional is a question of fact.

Draft Taxation Ruling TR 2011/D5 provides the following examples:

- If a building is only used as a school for short periods of time (eg 1 day in the week) but is not used at all for any other purpose at other times, its use may still be as a school.
- Where a building is specially adapted for a necessary but infrequent use as a school, and kept for that use only, any fund to acquire, construct or maintain it has the sole purpose of acquiring, constructing or maintaining a building used as a school.

[5.1.809] What is a school or college?

When assessing whether there is a school or college, the GiftPack, School Building Fact Sheet and Taxation Ruling TR 2011/D5 give the following guidance:

- as the ITAA97 does not define the words “school” and “college” their ordinary meanings apply;

- for the purposes of a school building fund, a “school or college” is an institution that has as its primary function or essential purpose providing regular, ongoing and systematic instruction in a course of training, generally in class form. It must be a place of education – imparting knowledge and training the minds of those who attend;
- organised instruction or training includes people assembling for regular study of some area of knowledge or activity and extends to religious as well as secular instruction;
- organised instruction or training does not include recreation unless it is no more than incidental to the main instruction;
- a “school or college” must be an institution, and so have a real, separate, institutional existence, even if this existence is within or as part of another institution, school or college;
- the instruction or training provided by a school or college would generally be given by qualified persons, in accordance with a set curriculum and with some form of assessment and correction; a school or college is likely to provide instruction or training towards a qualification or result that is recognised more widely than just by the institution itself;
- bodies that have been accepted as schools or colleges include Sunday schools, adult religious education centres, bible study centres and pre-school kindergartens that are not primarily for child minding; and
- bodies that are not schools or colleges include child-care centres, yoga schools, riding schools, woodturning centres, dressmaking, ceramics and cookery workshops where the primary activity is associated with recreational pursuits.

[5.1.810] What is a building?

When considering what is a building, the GiftPack, School Building Fact Sheet and Taxation Ruling TR 2011/D5 give the following guidance:

- the word “building”: is not defined in the ITAA97 and so its ordinary meaning is to apply;
- the term “building” includes one building, a group of buildings, a part of a building or additions to a building;
- a building is a permanent structure, usually with walls, a roof and flooring, that provides protection from the elements for students, teachers, relevant equipment and services the school provides and uses in its operation;
- an example of a structure without walls that would still be considered a building is a covered outdoor learning area made of galvanised steel with colour bond roofing, guttering and downpipes that is fixed to the land by posts embedded in a concrete floor. A structure of this type is a building for the purposes of a school building fund because it is in the nature of a building: it is a structure with the function of a building used as a school, it is fixed to the ground, it has a roof and its size and method of construction indicate that it is not intended to be in place on an interim or short-term basis or for a temporary purpose;
- items that are not buildings include tennis courts, playing fields, covered play areas, car parks and landscaping. This is because these structures/items do not form an enclosure and do not provide protection from the elements;
- fixtures, being things that are affixed to a building and are unable to be detached without substantial damage to the item itself or that to which it is attached, are accepted as part of a building and can therefore be funded by a school building fund;
- fixtures include items such as ducted heating systems, fixed air conditioning systems and fixed carpets; and

- fixtures do not generally include items such as furniture, training equipment and computers.

[5.1.811] What is use as a school?

When considering whether a building is being used as a school, the GiftPack, School Building Fact Sheet and Taxation Ruling TR 2011/D5 give the following guidance:

- the building (or group of buildings) must be used for a purpose that is connected with the curriculum of the school or college;
- the building (or group of buildings) must be used as the school and not just a place used for the purposes of the school or that is beneficial to the school. For example, a local Scout hall that is hired by a nearby school for a few hours every weekday for art classes is not a building whose use is controlled by the school; and
- a building which, if looked at in isolation, would not be considered to be a building used as a school because it is not specifically used for regular and systematic instruction can still be accepted as a building used as a school if it forms an integral part of the operation of the school and it is used for school purposes;

[5.1.812] Other use that is “integral to” use as a school

Draft Taxation Ruling TR 2011/D5 provides the following guidance:

- other use of a building is integral to its use as a school if it is for activities that are part of or naturally go with the operation of the school. Activities that are part of or naturally go with the operation of a school are decided on a case by case basis in light of all the facts and circumstances of the operation of the particular school;
- in certain circumstances, a building can still form an integral part of the operation of a school even if it is used for activities that are not in themselves instructional so long as it is part of, or naturally goes with, the operation of the school. For example, a school chapel in a denominational school, a school’s administration office in the school, the residential accommodation of a boarding school or an assembly hall of the school; and
- a building used as a school can also include an element which, if it were a separate building or part of a building acquired, constructed or maintained on its own account, would not be accepted as being a building that is used as a school. For example, inclusion of a garage for staff cars as an integral part, both in terms of its use and its architecture, of a new school building would be accepted as a building being used as a school. However, a fund established solely to build a garage for staff cars, even if it is located on school grounds, would not qualify, as the building is not being used as a school.

Examples

Example 1: A stand alone toilet block adjacent to a building containing several classrooms for use by students, teachers and visitors to the school forms an integral part of the operation of the school despite not being used for instruction. As such it is a school building being used as a school and acquiring, constructing or maintaining the stand alone toilet block can be included in the purposes of a gift deductible school building fund.

Example 2: A school tuck-shop facility is operated during school time for students and teachers. Orders are taken by the tuck-shop and delivered during school time to support and not conflict with school activities. The tuck-shop, considered in isolation, is not used as a school, but it forms an integral part of the operation of

the school and is used for school purposes. Acquiring, constructing or maintaining the tuck-shop can be included in the purposes of a gift deductible school building fund.

[5.1.813] Other use that is “minor or occasional”

Draft Taxation Ruling TR 2011/D5 provides the following guidance:

for the purpose of a school building fund, other use of a building is “minor or occasional” if its use other than as a school by the qualifying body or some other entity is minor in quantitative terms (even if regular) or only occurs from time to time. This other use can be by either the qualifying body or by some other entity;

Any “minor or occasional” use other than as a school must not:

- materially limit or affect the use of the building as a school;
- materially affect the cost of acquiring, constructing or maintaining the building; or
- otherwise be a material purpose of the fund.

As a simple example, a fund may be established for a building to be used as a school where, at times when the building will not be used as a school, the building will be used as a polling centre in elections.

Where a building has been purposely adapted to allow use other than as a school, and the adaptation is materially inconsistent with or beyond what is required for its use as a school, that other use will not be “minor or occasional”.

Examples

Example 1: A school hires out some of its classrooms for one morning every weekend to a local community group that conducts a yoga class. Existing furniture is rearranged and any additional equipment required is brought in by the community group. Whilst this use is not use as a school, it is minor or occasional (though regular) and does not affect use of the building as a school building. As such, it does not affect the characterisation of the building as a building used as a school, so acquiring, constructing or maintaining the classrooms can be included in the purposes of a gift deductible school building fund.

Example 2: A school committee has decided to allow use of its newly constructed school hall outside of school hours to generate additional funds. A Rotary Club meeting is held at the facility once a week on a weekday evening. Two or three times in the year, this will need to be changed to another night or venue when a school function requires use of the facilities. In addition, a local repertory group will produce plays to be performed at the facility four times a year, with sessions each evening for a period of 2 to 3 weeks each time. A local ladies fitness group will also use the facility one evening each fortnight. Although these uses are not use as a school, they are minor or occasional (even if considered collectively) and do not affect the characterisation of the building as a building used as a school. Acquiring, constructing or maintaining the hall can be included in the purposes of a gift deductible school building fund.

See especially, paras 27 to 29, 69 and 70 of Draft Taxation Ruling TR 2011/D5.

[5.1.814] Multi-purpose buildings and complexes

When considering if, and to what extent, a multi-purpose building can be funded by a school building fund, the GiftPack, School Building Fact Sheet and Draft Taxation Ruling TR 2011/D5 give the following guidance:

- a building (or a part of a building) in a multi-purpose complex must satisfy the same requirements as any other building before it can be characterised as a building used as a school (see [5.1.810]);
- where use of an area, such as a common area in a multi-purpose complex, is shared by a school with others, the school building fund can only use its funds to contribute towards the cost of that common area if it is used as a school, ie where any other use is either integral to its use as a school, or is only minor or occasional; and
- a donation directly to a school building fund for a building (or part of a building) which is used as a school even though it is also part of a multi-purpose complex is tax deductible. However the school building fund must not be for the acquisition, construction or maintenance of any part of the multi-purpose complex that is not used as a school.

[5.1.815] Multi-purpose fundraising appeals

Draft Taxation Ruling TR 2011/D5 gives the following guidance:

- a donation to a gift deductible school building fund can only be deductible if the donation is established by the donor at or before the time the gift to the school building fund is made;
- if a donation to a school fundraising appeal is partly for a school building fund and partly for other purposes, the part that is intended as a gift to the school building fund will only be tax deductible if the donor establishes how the donation is to be allocated at or before the time the donation to the appeal is made;
- there are various ways in which a donor can establish that part of their wider donation is a deductible gift to a school building fund. For example:
 - where an organisation raises funds by using a form by which a donor allocates his or her gift – for example, a pledge form by which amounts are given to different purposes including the school building fund – the donor can indicate on that form the proportion or amount of his or her gift which is given to the school building fund. It is that part of the gift which is given to the gift deductible school building fund; or
 - the terms of the fundraising appeal, usually recorded beforehand in a printed brochure, may state the proportion (or perhaps an amount) of each contribution to the appeal which will be given to the school building fund. When a contribution is made on the basis of those terms, the amount or proportion specified in the terms of the appeal as being for the school building fund will be accepted as the amount given by the donor to the school building fund;
- a donation will not be tax deductible if an entity other than the donor determines the amount that is to be allocated to the school building fund and the donor does not approve or direct the allocation by or at the time the gift is made; for example, a donor who gifts a single amount to multiple funds cannot claim a tax deduction if the fundraisers are the ones who decide, after the time the gift is given, the amount or proportion to be allocated to the school building fund; and
- gifts to or for the general fund or funds of a school are not deductible, even if the sum given is subsequently applied towards the cost of construction, acquisition or

maintenance of a school building; similarly, gifts to the funds of a Parents and Citizens Association (or a similar organisation) are not deductible as a gift to a gift deductible school building fund, again even if they are subsequently applied towards the cost of construction or maintenance of a school building.

See especially, paras 36 to 38 and 176 to 179 of Draft Taxation Ruling TR 2011/D5.

[5.1.816] Fund administration

Draft Taxation Ruling TR 2011/D5 gives the following guidance:

- where the relevant endorsed entity is not the gift deductible school building fund itself, it must maintain a separate gift fund for donations and contributions to the school building fund (see [5.1.1101]);
- all donations to the school building fund must go into the fund. The fund may also include other amounts (such as income from interest on amounts in the fund, or earnings from minor or occasional use of the building other than as a school); and
- other money received in relation to a school – eg government grants, school fees and other donations – must be kept separate from the school building fund.

[5.1.817] Ancillary funds

Draft Taxation Ruling TR 2011/D5 gives the following guidance:

A school wanting to raise money for a range of purposes that would individually satisfy deductible gift requirements can establish an ancillary fund, gifts to which are deductible. For example, money raised by an ancillary fund can be subsequently provided to a school building fund, a scholarship fund, a public library fund etc, without the need for the original gifts to have been made partly to one and partly to the other purpose. See para 183 of the Draft Taxation Ruling TR 2011/D5 for a diagram illustrating the operation of an ancillary fund in the school building context.

For more on public ancillary funds, see [5.1.953] and Taxation Ruling TR 95/27.

STATE AND TERRITORY TAXATION, DUTIES AND IMPOSTS

State and Territory taxation, duties and imposts

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TAXATION
STATE AND TERRITORY TAXATION, DUTIES AND IMPOSTS

STATE AND TERRITORY TAXATION, DUTIES AND IMPOSTS

Introduction

[5.2.101] General information

This chapter explores the various taxes, duties and other imposts required or levied by state and territory and local governments and what concessions are available, if any, which organisations can access the concessions and how to apply for them.

This part provides a brief introduction to the types of taxes and duties covered. The remainder of the chapter is then broken down into each state and territory.

Taxes and duties that may be levied by state and territory governments include:

- stamp duty (also called “duty”);
- payroll tax; and
- land tax (which may also require an emergency services levy and/or a particular tax relating to land improvement).

These taxes are administered by the “revenue office” for each state and territory as follows:

- New South Wales – Office of State Revenue NSW
- South Australia – RevenueSA
- Queensland – Office of State Revenue
- Tasmania – State Revenue Office
- Victoria – State Revenue Office Victoria
- Western Australia – Office of State Revenue
- Australian Capital Territory – ACT Revenue Office;
- Northern Territory – Territory Revenue Office

In addition, many local governments also impose rates and other fees in connection with the services and facilities each provide. For example, council rates, water rates and services charges.

The tax and duty summaries below have been taken from the ATO publication entitled *Tax Basics for Non-profit Organisations* (NAT 7966).

[5.2.102] Stamp duty

Stamp duty is a tax on:

- written documents (often referred to as “instruments”) – for example motor vehicle registrations and transfers, insurance policies, leases, mortgages, hire purchase agreements and transfers of property; and
- certain transactions – for example, sale of businesses, real estate and certain shares.

The rate of stamp duty varies according to the type and value of the transaction involved.

Depending on the nature of the transaction, certain concessions and exemptions may be available in each state as:

- New South Wales (NSW) does not levy duty on leases, home loans to natural persons and the hire of goods;

- Queensland does not levy duty on leases, marketable securities, credit card and credit business transactions, and the hire of goods;
- South Australia does not levy stamp duty on mortgages, leases, listed securities and the hire of goods;
- Tasmania does not levy duty on unlisted securities, leases and the hire of goods;
- Victoria does not levy duty on unlisted securities, certain leases and mortgages;
- Western Australia does not levy duty on marketable securities and leases;
- the Australian Capital Territory (ACT) does not levy duty on mortgages, hiring duty, leases and marketable securities; and
- the Northern Territory does not levy stamp duty on mortgages, marketable securities and the grant and renewal of a lease.

[5.2.103] Payroll tax

Payroll tax is a tax on the wages paid by employers. Employers are liable for payroll tax when their total Australian wages exceed a certain level called the “exemption threshold”. Exemption thresholds vary between states and territories.

Payroll tax should not be confused with the pay-as-you-go (PAYG) withholding system. Payroll tax is payable to the relevant state or territory by an employer based on the total wages paid to all employees. Wages include salary, allowances, superannuation contributions, fringe benefits, shares and options and certain contractor payments. Certain organisations may be exempt from payroll tax provided that specific conditions are satisfied.

[5.2.104] Land tax

Land tax is imposed in all states and the ACT but not in the Northern Territory. It is a tax generally levied on landowners.

Landowners are generally liable for land tax when the unimproved value of taxable land exceeds certain thresholds – except in the ACT. In some states there are deductions and rebates available, depending on the use of the land. Principal places of residence are usually exempt from land tax, although this is subject to certain qualifying criteria which vary between jurisdictions.

Land owned and used by certain organisations may be exempt from land tax, such as non-profit societies, clubs and associations, religious institutions, public benevolent institutions and charitable institutions.

[5.2.701]

Western Australia

[5.2.701] Tax and duty concessions for charities and not-for-profit organisations in Western Australia

[Please see over page for table]

Duty/tax	Concession available	Eligibility criteria	Law	Form	Process
Western Australia – State Government taxes					
Duties	Full exemption	s 95 Duty is not chargeable on dutiable transactions entered into for charitable or similar public purposes.	<i>Duties Act 2008 (WA) Duties Act 2008 (WA)</i>	None	<p>An entity must submit to the Office of State Revenue, the following information with its transaction record (eg agreement):</p> <ul style="list-style-type: none"> • a written application setting out the details of the purpose, or purposes, of the transaction; • if applicable, a copy of the constitution of the charitable organisation; and • any other documents relevant to determining the nature of the transaction. <p>The Office of State Revenue will then assess the application.</p>
Definitions	s 15				

STATE AND TERRITORY TAXATION, DUTIES AND IMPOSTS
WESTERN AUSTRALIA

[5.2.701]

Duty/tax	Concession available	Eligibility criteria	Law	Form	Process
Western Australia – State Government taxes					
<p>The term “dutiabale transaction” is broadly defined and includes transfers and a range of other transactions over “dutiabale property” which includes:</p> <ul style="list-style-type: none"> • land in Western Australia; • a right; • a chattel in Western Australia; and • business assets in Western Australia. <p>As the Duties Act does not define the meaning of “charitable or similar public purpose”, it is given its meaning at common law.</p>					
Duties continued	Full exemption	As a general rule, an acquisition by a person of an interest in a landholder or a linked entity in respect of the landholder entered into a charitable or similar public purpose is also exempt from duty. ² A “landholder” includes a corporation or unit trust scheme having an entitlement to land in Western Australia, either directly or through a linked entity, with a value of \$2 million or more. ³		None	In relation to an acquisition by an entity of an interest in a landholder, the entity must also lodge an acquisition statement. Two different forms of acquisition statement are available, depending on whether the landholder is listed or unlisted. ⁴
Payroll Tax	Payroll tax is only payable if the aggregate wages paid by the employer exceed \$750,000 per year or \$62,500 per month. ⁵ Certain wages may be exempt from payroll tax under the PTAA.	The eligibility criteria for the exemptions which may be applicable to a non-profit association, charity or benevolent institution are outlined below.	<i>Pay-roll Tax Act 2002 (WA) (PTA), the Pay-roll Tax Assessment Act 2002 (PTAA) and the Taxation Administration Act 2003 (WA) (TAA) (together the Acts).</i> ⁶	There is no standard application form for an exemption from payroll tax.	An exemption from payroll tax should be applied for in writing to the Department and should include any information specified by the Department on its website. ⁷ The Department requires that exemption applications be accompanied by an entity’s constitution and details of the entity’s objectives.

Duty/tax	Concession available	Eligibility criteria	Law	Form	Process
Western Australia – State Government taxes					
	Further, a charitable body or organisation may obtain a general exemption from the payment of payroll tax. ⁸				<p>The Commissioner will review the exemption application, may request further information where necessary and will then make a decision on the application.</p> <p>An exemption may be subject to conditions imposed by the Commissioner.⁹</p>
Payroll tax exemption details					
<p>An exemption from payroll tax on wages may apply to an entity where the wages are paid by a:</p> <ul style="list-style-type: none"> “religious institution”; “public benevolent institution”; “public hospital”; “hospital carried on by a non-profit organisation”; “hospital carried on by a non-profit organisation”; “school or college ... carried on by a non-profit organisation that provides education at or below, but not above, the secondary level”; or respectively for the purpose of:¹⁰ <ul style="list-style-type: none"> “religious work”; “work of a public benevolent nature”; work “in connection with the conduct of public hospitals”; work “in connection with the conduct of hospitals”; work “in connection with the conduct of... schools or colleges”; or work “in connection with a charitable purpose for which the body or organisation is established”. <p>A general exemption is provided where the body or organisation is a charitable body or organisation.¹¹</p> <p>There is no precise criterion for this exemption other than the character of the body or organisation itself.</p>					
Payroll tax defined term					
<p>The only terms above which are specifically defined in the PTTAA are “charitable body or organisation” and “non-profit organisation”. These terms are defined in the Glossary as follows:</p>					

STATE AND TERRITORY TAXATION, DUTIES AND IMPOSTS
WESTERN AUSTRALIA

[5.2.701]

Duty/tax	Concession available	Eligibility criteria	Law	Form	Process
<p>Western Australia – State Government taxes</p>					
<p>Land Tax</p>	<p>Full exemption or part exemption</p>	<p>The land must be:</p> <ul style="list-style-type: none"> owned by, vested in or held on trust for a public charitable or benevolent institution; and used solely for the purposes for which the institution was established. <p>Further:</p> <ul style="list-style-type: none"> income generated must be used solely for charitable purposes; and the charity must be prohibited from distributing its assets to its members (including on winding-up) but may distribute its assets to another charitable or benevolent institution with similar objects.¹³ <p>Where land is held by a public charitable or benevolent institution but not used solely for the purposes for which the institution was established, the public charitable or benevolent institution will be entitled to an exemption from land tax on the proportion of the land that is being used for the purposes for which the institution was established.¹⁴</p>	<p><i>Land Tax Assessment Act 2002</i> (WA) s 37 (full exemption), s 18 (part exemption)</p>	<p>Application for Exemption Public Charitable or Benevolent Institutions¹⁵</p>	<p>A land owner must apply for an exemption or concession using the form specified by the Department of Finance¹⁶ and by lodging that form with the Commissioner.¹⁷ The form must be accompanied by any additional information specified in the Commissioner's Practice (eg a copy of the land owner's constitution is required when applying for an exemption or concession under LTAA s 37).¹⁸ The Commissioner may wish to inspect the relevant property in order to determine eligibility for any exemption.¹⁹</p>
<p>"charitable body or organisation" means a body or organisation established or carried on for a charitable purpose except – (a) a body or organisation whose sole or principal purpose is the provision of tertiary education; or (b) a college or other vocational education and training institution under the <i>Vocational Education and Training Act 1996</i>; and</p> <p>"non-profit organisation" means [sic] body corporate, society or association formed otherwise than for the purpose of profit or gain to individual members of the body, society or association.</p> <p>Further guidance on the meaning of the terms above is not provided in any payroll tax commentary on the Department of Finance (WA) (Department) website.¹² Further, there is very limited case law concerning payroll tax and no case law which considers the requirements applicable for the exemptions provided under the PTAA.</p>					

Duty/tax	Concession available	Eligibility criteria	Law	Form	Process
<p>Western Australia – State Government taxes</p> <p>Land Tax (continued)</p>	<p>Full exemption or 50% concession</p>	<ul style="list-style-type: none"> The land must be owned by, vested in or held on trust for a sports association or any other non-profit association (NPA). The land must be used as a site for providing facilities that are necessary for or conducive to the attainment of the objectives of the non-profit association. For non-sporting NPAs, the facilities on the land must only be available to members and their guests. Income generated must be used solely for NPA purposes.²⁰ The NPA must be prohibited from distributing its assets to its members (including on winding-up).²¹ <p>Land held by an NPA but not used solely for a non-profit purpose may be eligible for a 50% concession on land tax provided that the non-profit usage is 50% or greater.²⁵</p>	<p><i>Land Tax Assessment Act 2002</i> (WA) s 38</p>	<p>Application for Exemption or Concession Non-Profit Organisations²²</p>	<p>A land owner must apply for an exemption or concession using the form specified by the Department of Finance²³ and by lodging that form with the Commissioner.²⁴</p> <p>The form must be accompanied by any additional information specified in the Commissioner's Practice (eg a copy of the land owner's constitution is required when applying for an exemption or concession under s 38).²⁶</p> <p>The Commissioner may wish to inspect the relevant property in order to determine eligibility for any exemption or concession.²⁷</p>

[5.2.701]

Duty/tax	Concession available	Eligibility criteria	Law	Form	Process
<p>Western Australia – State Government taxes</p>					
<p>Definition</p>					
<p>For the purposes of s 38 of the LTAA, a “non-profit association” (NPA) is defined in the Glossary to the LTAA as “a society, club or association that is not carried on for the purpose of profit or gain to its individual members ...”</p>					
<p>Metropolitan Region Improvement Tax (MRIT)²⁸</p>	<p>Pursuant to s 200(4) of the PDA, the LTAA applies to the MRIT as far as it can be applicable.</p> <p>Accordingly, a public charitable or benevolent institution or a non-profit association may be entitled to an exemption or concession from MRIT in the same scenarios as they would be entitled to an exemption or concession from land tax²² (refer to the commentary on land tax, above, regarding the provisions under the LTAA which may provide relief).</p>	<p>On the basis that the LTAA applies to ss 37 and 38 of the LTAA may apply to reduce or exempt the MRIT payable by a “public charitable or benevolent institution” or a “non-profit association”,²⁹ See the commentary on land tax, above, regarding the specific criteria for obtaining exemptions under ss 37 and 38 of the LTAA.</p>	<p><i>Planning and Development Act 2005 (WA) (PDA), Metropolitan Region Improvement Tax Act 1959 (WA) (MRITA), Land Tax Assessment Act 2002 (WA) (LTAA) and the Taxation Administration Act 2003 (WA) (TAA) (together the Acts)</i>³⁰</p>	<p>There are no specific forms provided by the Department of Finance (Department) in order to apply for an exemption or concession from MRIT. The application forms for land tax may be relevant if an applicant makes it clear that the application is for an exemption or concession from land tax and MRIT. Alternatively, an application could be made in writing to the Department.</p>	<p>Refer to the commentary on land tax, above, for information on the process likely to be applicable in obtaining an exemption or concession from MRIT. It is expected that the Department will have the same requirements for an MRIT exemption or concession as a land tax exemption or concession on the basis that the LTAA provides the exemptions and concessions from the MRIT.³¹</p>

Duty/tax	Concession available	Eligibility criteria	Law	Form	Process
<p>Western Australia – State Government taxes</p> <p>Emergency services levy (ESL)</p>	<p>The ESL is payable yearly on all land in an “ESL category area”^{3,35} and is used to cover the cost of fire and emergency services.</p>	<p>There are no specific exemptions or concessions from the ESL granted to charities and not-for-profit entities.</p> <p>Regulations may prescribe lands which are exempt or partially exempt from the levy³⁴ and different rates for the levy may be used depending on the ESL category area or the purpose for which the land is used.³⁵</p> <p>The Minister is also entitled to waive or grant concessions in relation to the ESL.³⁶</p> <p>Exemptions and concessions may be obtainable under regulations or Ministerial determinations regarding the rates imposed however none relevant to charities and not-for-profit entities could be located.</p>	<p><i>Fire and Emergency Services Authority of Western Australia Act 1998 (WA)</i> and the <i>Emergency Services Levy Act 2002 (WA)</i></p>	<p>None</p>	

[5.2.701]

Duty/tax	Concession available	Eligibility criteria	Law	Form	Process
<p>Western Australia – State Government taxes</p>					
<p>Definition</p>					
<p>For the purposes of s 38 of the LTAA, a “non-profit association” (NPA) is defined in the Glossary to the LTAA as “a society, club or association that is not carried on for the purpose of profit or gain to its individual members ...”</p>					
<p>Metropolitan Region Improvement Tax (MRIT)²⁸</p>	<p>Pursuant to s 200(4) of the PDA, the LTAA applies to the MRIT as far as it can be applicable.</p> <p>Accordingly, a public charitable or benevolent institution or a non-profit association may be entitled to an exemption or concession from MRIT in the same scenarios as they would be entitled to an exemption or concession from land tax³² (refer to the commentary on land tax, above, regarding the provisions under the LTAA which may provide relief).</p>	<p>On the basis that the LTAA applies to ss 37 and 38 of the LTAA may apply to reduce or exempt the MRIT payable by a “public charitable or benevolent institution” or a “non-profit association”,²⁹ See the commentary on land tax, above, regarding the specific criteria for obtaining exemptions under ss 37 and 38 of the LTAA.</p>	<p><i>Planning and Development Act 2005 (WA) (PDA), Metropolitan Region Improvement Tax Act 1959 (WA) (MRITA), Land Tax Assessment Act 2002 (WA) (LTAA) and the Taxation Administration Act 2003 (WA) (TAA) (together the Acts)</i>³⁰</p>	<p>There are no specific forms provided by the Department of Finance (Department) in order to apply for an exemption or concession from MRIT. The application forms for land tax may be relevant if an applicant makes it clear that the application is for an exemption or concession from land tax and MRIT. Alternatively, an application could be made in writing to the Department.</p>	<p>Refer to the commentary on land tax, above, for information on the process likely to be applicable in obtaining an exemption or concession from MRIT. It is expected that the Department will have the same requirements for an MRIT exemption or concession as a land tax exemption or concession on the basis that the LTAA provides the exemptions and concessions from the MRIT.³¹</p>

TAXATION
STATE AND TERRITORY TAXATION, DUTIES AND IMPOSTS
