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# Delineating the fiscal borders of Australia's non-profit tax concessions

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## ***Abstract***

Since the inception of tax exemption and tax deductibility for non-profit entities, Australian governments have made policy choices about where to draw the fiscal border for such concessions. The legislation states that entities entitled to these tax concessions must be 'in Australia', however the meaning of 'in Australia' has been subject to different interpretations over time. Judicial decisions have disrupted the Australian Tax Office's (ATO) longstanding interpretation, resulting in measures to realign these decisions with government policy. Following a lapsed 'in Australia' Bill under one government and a languishing exposure draft by another, the ATO recently announced it would issue a public ruling. We examine the various interpretations of 'in Australia' to understand how the current misalignment between tax law and government policy came to be. Our findings uncover the precarious legal foundations underlying reform.

**Keywords:** Cross-border charity, deductible gift recipient, income tax exemption, non-profit tax concession, public benefit, public benevolent institution, tax deductibility

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## 1. INTRODUCTION

Australia has tightly drawn fiscal boundaries around the non-profit tax concessions of income tax exemption and gift deductibility. This is the result of government policy over the past 50 years, administered by the Australian Tax Office (ATO), concerning the 'in Australia' provisions in the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997).<sup>4</sup> Under the ITAA 1997, an income tax exempt entity must have 'a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia'.<sup>5</sup> Deductible Gift Recipients (DGRs) have traditionally been subject to a stricter 'in Australia' test. The ITAA 1997 states that DGRs must be 'in Australia',<sup>6</sup> which has been interpreted by the ATO as requiring that a DGR 'be established, controlled, maintained and operated in Australia' and have 'its benevolent purposes' in Australia.<sup>7</sup> Two important judicial decisions have disrupted the traditional interpretation of the fiscal border for these charitable tax concessions, resulting in significant policy responses from both the Australian Government and the ATO.

In *Commissioner of Taxation v Word Investments Ltd*<sup>8</sup> (*Word Investments*) the High Court dismissed the Commissioner's interpretation of an anti-avoidance provision in the ITAA 1997. The provision was motivated by the Government's concern about tax abusive behaviour conducted outside Australia involving untaxed revenue of charitable institutions.<sup>9</sup> The ATO's submission to the Court that this provision should be interpreted broadly to restrict non-profit entities from transferring funds outside Australia, in accordance with intended policy, was rejected. The majority judgment baldly concluded that:

The Commissioner's contention that the revenue authorities would have great difficulty in monitoring the use of funds generated by a body in Australia and given to another body active overseas is exaggerated.<sup>10</sup>

The Court referred the ATO to its ample powers elsewhere to achieve these policy purposes through monitoring and scrutiny, even if it involved greater administrative cost.<sup>11</sup>

The territorial boundaries of these non-profit tax concessions crumbled further with the decision of a Full Federal Court in *Federal Commissioner of Taxation v The Hunger Project Australia (Hunger Project)*<sup>12</sup>. This case involved a business model similar to the one in *Word Investments*, in which tax deductible fundraising revenue was transferred offshore from a Public Benevolent Institution (PBI) to another entity. The Court's blunt but unanimous assessment was that '[t]he Commissioner's

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<sup>4</sup> See ITAA 1997 s 30–15 (gift deductibility), s 50–50 (income tax exemption).

<sup>5</sup> ITAA 1997 s 50–50(1)(a) (registered charities). See also s 50–55(a) (scientific and educational institutions, hospitals), s 50–70(a) (societies, associations or clubs).

<sup>6</sup> The 'in Australia' requirements for DGR endorsement are set out in ITAA 1997 s 30–15 under 'Special conditions', which include that 'the fund, authority or institution must be in Australia'.

<sup>7</sup> ATO, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003 (TR 2003/5), [129].

<sup>8</sup> (2008) 236 CLR 204.

<sup>9</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) [5.24]–[5.25].

<sup>10</sup> *Word Investments* (2008) 236 CLR 204 [72].

<sup>11</sup> *Ibid.*

<sup>12</sup> (2014) 221 FCR 302.

submissions based on statutory context are in our opinion at best unpersuasive and at worst misconceived'.<sup>13</sup>

Successive recent governments have consulted widely on amendments designed to address these judicial interpretations of the 'in Australia' provisions for income tax exemption and gift deductibility in the ITAA 1997.<sup>14</sup> The Government's contention has been that the Court's interpretation in *Word Investments* 'was inconsistent with the Commissioner of Taxation's interpretation and with the policy intent underlying the ['in Australia'] special conditions'.<sup>15</sup> While the current government has indicated its intention to deal with the 'in Australia' issue, progress towards legislative amendment has stalled. Meanwhile, the ATO appears to have shifted from its traditional position, effectively reversing its former policy of a more stringent 'in Australia' requirement for DGRs as compared to income tax exempt entities. In doing so, the ATO consulted its Not-for-Profit Advisory Group and, following this consultation, announced that it is drafting a new 'in Australia' public ruling.<sup>16</sup>

As a result of these important recent developments, it is timely to review the history and development of the territorial boundaries of the non-profit tax concessions in Australia in terms of policy, law and administration. To provide context, we begin with a description of the geographic boundaries of public benefit in the common law. We then examine the 'in Australia' provisions for income tax exemption and gift deductibility in the early state and federal legislation. This review reveals the changes to the ATO's interpretation of 'in Australia' since the 1960s, culminating in the proposed public ruling on this issue. It also uncovers the shaky legal foundations underlying the Government's proposed legislative reforms. More practically, it highlights the implications different interpretations of the 'in Australia' provisions have had and continue to have on the ability of Australian non-profit organisations operating overseas to obtain tax exempt and DGR status.

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<sup>13</sup> (2014) 221 FCR 302 [40].

<sup>14</sup> Exposure Draft, Tax Laws Amendment (2011 Miscellaneous Measures) Bill (No 1) 2011 (Cth): Tax Exempt Body 'in Australia' Requirements. See also: Treasury (Cth), *'In Australia' Special Conditions for Tax Concession Entities* (4 July 2011) <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2011/In-Australia-Special-Conditions-for-Tax-Concession-Entities>>; Exposure Draft, Tax Laws Amendment (2012 Measures No 4) Bill 2012 (Cth): Tax Exempt Body 'in Australia' Requirements; Treasury (Cth), *Restating and Standardising the Special Conditions for Tax Concession Entities (Including the 'in Australia' Conditions)* (17 April 2012) <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2012/In-Australia-Special-Conditions-for-Tax-Concession-Entities-Revised>>; Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth); Treasury (Cth), *Restating and Centralising the Special Conditions for Tax Concession Entities* (12 March 2014) <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Conditions-for-tax-concession-entities>>.

<sup>15</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 2012, 9727–8 (David Bradbury).

<sup>16</sup> ATO, *Completed Matters 2015–16*, Guidance Update—Interpretation of 'in Australia' (14 January 2016) <<https://www.ato.gov.au/General/Consultation/What-we-are-consulting-about/2015-Completed-matters/#G201534>>.

## 2. GEOGRAPHIC BOUNDARIES OF PUBLIC BENEFIT IN THE COMMON LAW

From the earliest charity cases, common law judges have upheld trusts covering a range of charitable activities and purposes carried out overseas.<sup>17</sup> *Commissioners for Special Purposes of Income Tax v Pemsel (Pemsel)*,<sup>18</sup> the most iconic charity law case, involved a charitable trust established in the United Kingdom to support and advance 'missionary activities among heathen nations'.<sup>19</sup> The English common law of charity has had relatively little difficulty in finding public benefit in charitable objects performed outside the supervising jurisdiction. Issues such as lack of direct or indirect public benefit to the local jurisdiction,<sup>20</sup> or the inability of the Attorney-General to supervise such charities in a foreign jurisdiction<sup>21</sup> have been dismissed. British charity law scholar, Jonathan Garton, notes that Australian judicial authority seems to have gone further than that in England, not requiring any connection with home jurisdiction benefits.<sup>22</sup> For example, finding public benefit in the relief of distress in Europe,<sup>23</sup> advancement of education in Germany,<sup>24</sup> healthcare in Greece,<sup>25</sup> settlement of Jews in Israel,<sup>26</sup> and a musical competition in Austria.<sup>27</sup> Common law judges have drawn the line, not surprisingly, at purposes 'inimical to the interests of the local community or contrary to local public policy'.<sup>28</sup> This broad concept of public benefit developed through the common law of charity has been reflected in Australian charity legislation. The *Charities Act 2013* (Cth) now provides that 'it does not matter whether a [charitable] purpose is directed to something in Australia or overseas'.<sup>29</sup> This permissive stance on cross-border activities under Australian charity law has not been similarly adopted in the Australian tax laws applying to the charitable tax concessions of income tax exemption and gift deductibility, to which we now turn.

## 3. GEOGRAPHIC BOUNDARIES OF THE INCOME TAX EXEMPTION

### 3.1 Legislative development

The establishment of an income tax regime in Australia reflected the permissive common law approach to charities operating overseas, although over time the income tax laws have become increasingly restrictive. The first comprehensive state income

<sup>17</sup> *Armenian Patriarch of Jerusalem v Sonsino* [2002] EWHC 1304 (Ch). See also G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 75–78; Jonathan Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013) 60–73; Miranda Stewart, 'The Boundaries of Charities and Tax' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 232, 245.

<sup>18</sup> [1891] AC 531.

<sup>19</sup> *Ibid* 532.

<sup>20</sup> *Camille and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1954] Ch 672, 684; *Re Lowin (deceased)* [1967] 2 NSWLR 140.

<sup>21</sup> *Re Stone (deceased)* (1970) 91 WN (NSW) 704.

<sup>22</sup> Garton, above n 17, 71.

<sup>23</sup> *Re Piper (deceased)* [1951] VLR 42.

<sup>24</sup> *Estate of Schultz* [1961] SASR 377.

<sup>25</sup> *Kytherian Association of Queensland v Sklavos* (1958) 101 CLR 56.

<sup>26</sup> *Re Stone (deceased)* (1970) 91 WN (NSW) 704.

<sup>27</sup> *Re Lowin (deceased)* [1976] 2 NSWLR 140.

<sup>28</sup> *Re Stone (deceased)* (1970) 91 WN (NSW) 704; *Habershon v Vardon* (1851) 64 ER 916.

<sup>29</sup> *Charities Act 2013* (Cth) s 12(3).

tax legislation, introduced in South Australia in 1884,<sup>30</sup> exempted charitable organisations from income tax. The financial requirements of Australia's participation in World War I necessitated the enactment of the first Commonwealth legislation introducing personal income tax,<sup>31</sup> the *Income Tax Assessment Act 1915* (ITAA 1915).<sup>32</sup> When the Commonwealth levied income tax, the exemptions were largely preserved. The ITAA 1915 provided a tax exemption for 'the income of a religious, scientific, charitable, or public educational institution'.<sup>33</sup> However, the legislation made no specific mention of whether these entities had to be located in Australia or whether their activities or beneficiaries were to be in Australia. This language on tax exemption was replicated in the *Income Tax Assessment Act 1922* (Cth) (ITAA 1922)<sup>34</sup> and the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936).<sup>35</sup>

In 1938, the High Court case of *The University of Birmingham and Epsom College v Federal Commissioner of Taxation*<sup>36</sup> established that the income tax exemption provisions in the ITAA 1936 were not limited to Australian organisations carrying on operations in Australia, but extended to organisations operating outside Australia. In that case, the two taxpayers were corporate bodies established in Great Britain for charitable purposes. They carried on no activities in Australia, but derived income from Australia through distributions from a testamentary trust fund. The Commissioner argued that the benefit of the exemption was limited by the ITAA 1936 to such institutions which are 'in Australia', or at least to such institutions which carry on some form of activity or operate in some way in Australia. The Court found that the income tax exemption provisions 'are general and do not in themselves contain any local limitation'<sup>37</sup> and that 'the natural reading of the provision is that it extends to all taxpayers, independently of their place of residence or activity, who fall under the description it contains'.<sup>38</sup> Apart from this case, the law in relation to income tax exemption for cross-border charitable activities remained undisturbed until the late 1990s when legislative amendments were enacted.

The genesis of the legislative amendments in the late 1990s was a 1987 House of Representatives Standing Committee on Finance and Public Administration (the Committee) investigating tax avoidance through international profit shifting and abuse of the withholding tax provisions. The Committee published three reports from its deliberations, releasing the final report, *Follow the Yellow Brick Road*, in 1991.<sup>39</sup> The Committee received evidence from a member of the public that tax exempt charities were making distributions to overseas charitable trusts, which found their way back to the donor through a deposit to the donor's international bank account or international

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<sup>30</sup> *Taxation Act 1884* (SA); the Commonwealth's income tax provisions in s 23 of the *Income Tax Assessment Act 1936* (Cth) closely followed the State's exemption provision.

<sup>31</sup> The power to levy taxes is a power concurrent with the States, pursuant to *Australian Constitution* s 51(ii).

<sup>32</sup> See Robin Woellner, *Australian Taxation Law* (CCH, 22<sup>nd</sup> edition, 2012) 8 [1-060].

<sup>33</sup> ITAA 1915 s 11(d).

<sup>34</sup> ITAA 1922 s 14(1)(d).

<sup>35</sup> ITAA 1936 s 23(e).

<sup>36</sup> (1938) 60 CLR 572.

<sup>37</sup> *Ibid* 575 (Latham CJ).

<sup>38</sup> *Ibid* 578–9 (Rich J).

<sup>39</sup> See House of Representatives Standing Committee on Finance and Public Administration, Parliament of Australia, *Follow the Yellow Brick Road – The Final Report on an Efficiency Audit of the Australian Taxation Office: International Profit Shifting* (1991).

credit card.<sup>40</sup> The ATO told the Committee that it had no evidence of significant abuse involving charities, citing extensive inquiries into two overseas charitable bodies that had received significant income from Australian trusts, where no evidence was found that these were anything but genuine gifts.<sup>41</sup> The Taxation Institute of Australia also appeared before the Committee and confirmed that it was not aware of such schemes.<sup>42</sup> Despite this evidence, in its final report the Committee recommended legislative controls:

The introduction of this measure would signal to those who consider that such tax avoidance arrangements are still effective the clear intention of the Parliament to eradicate the potential for tax avoidance hidden within the guise of donations to overseas charities.<sup>43</sup>

Following this inquiry and immediately prior to the federal election in November 1995, the ATO drew to the Government's attention certain tax avoidance strategies which enabled wealthy individuals to enjoy lavish lifestyles, while paying little or no tax.<sup>44</sup> In February 1996, the Treasurer forecast changes to the taxation regime to prevent the abuse of Australian charitable trusts and overseas organisations to disguise benefits provided by family trusts to family members. However, the Government stated:

[T]hese are not techniques which are practised by the overwhelming majority of trusts operated by and for Australians. Trusts provide an appropriate structure to meet a range of legitimate needs as for charities, educational and non-profit organisations, deceased estates, a variety of family purposes, and for solicitors and other professionals. The Government will not interfere with these arrangements. The Government undertakes that the measures it will adopt will ensure that activities not involving tax avoidance are not adversely affected.<sup>45</sup>

On Budget night in 1996, the newly-elected Treasurer announced not only the taxation reform of trusts, but the removal of 'the tax exempt status for certain organisations located overseas, irrespective of whether they are subject to tax in their home country'.<sup>46</sup> The Treasurer further stated that '[t]he measure will not impact on any entity which is a resident for Australian tax purposes' and the Government would consult widely to 'ensure that *bona fide* charitable organisations are not detrimentally affected'.<sup>47</sup> This culminated in a 1997 Bill introducing amendments to provisions in the ITAA 1936 concerning the geographic boundaries of income tax exemption for charitable organisations.<sup>48</sup>

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<sup>40</sup> Ibid 51 [4.3].

<sup>41</sup> Ibid 53 [4.9].

<sup>42</sup> Ibid 53 [4.10].

<sup>43</sup> Ibid 54–55 [4.16]–[4.17], Recommendation 15.

<sup>44</sup> Myles McGregor-Lowndes, 'Does Charity Begin and End at Home for Tax Exemptions?' (1998) 5 *Canberra Law Review* 221, 224.

<sup>45</sup> Ralph Willis, 'High Wealth Individuals—Taxation of Trusts' (Press Release, No 1, 11 February 1996).

<sup>46</sup> Peter Costello, 'Election Commitment: Measures to Address Tax Avoidance Through Tax Exempt Entities Distributing Funds Offshore' (Press Release, No 74, 20 August 1996) <<http://www.budget.gov.au/1996-97/pressreleases/budgetp2.pdf>>.

<sup>47</sup> Ibid.

<sup>48</sup> Taxation Laws Amendment Bill (No 4) 1997 (Cth).



The *Taxation Laws Amendment Act (No 4) 1997* (Cth) amended s°23(e) of the ITAA 1936 (religious, scientific, charitable and public educational institutions), s°23(ea) (hospitals)<sup>49</sup>, s°23(g) (certain clubs and community organisations), and s°23(j)(ii) (a fund established by will or instrument of trust for public charitable purposes).<sup>50</sup> These amendments provided that in order to be exempt from income tax, the relevant entity (in the case of charitable institutions and organisations) must have ‘a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia’.<sup>51</sup> The entity also had to be ‘an institution to which a gift by a taxpayer is an allowable deduction’, linking income tax exemption to the gift deductibility provisions.<sup>52</sup> For charitable trusts, the amendments provided that to be income tax exempt the trust ‘incurs ... its expenditure principally in Australia and pursues ... its charitable purpose solely in Australia’. These trusts must also ‘[distribute] solely ... to a charitable fund, foundation or institution which, to the best of the trustee’s knowledge, is located in Australia and [incur] its expenditure principally in Australia and [pursue] its objects solely in Australia’.<sup>53</sup> The Explanatory Memorandum gave no reason for the new geographic restrictions on tax exemption, other than potential tax avoidance by charitable trusts.<sup>54</sup> However, these restrictions were not just confined to charitable trusts—they applied to all charities.<sup>55</sup>

The result of these amendments was to remove income tax exemption for certain organisations located offshore and for those organisations not incurring their expenditure and pursuing their objectives principally in Australia. Until this time there had been no geographic restrictions on the activities of income tax exempt entities. There were limited exceptions to this new ‘in Australia’ provision. These were for institutions specifically prescribed by the income tax assessment regulations to be tax-exempt, which were located outside Australia and exempt from income tax in their resident country, or which had a physical presence in Australia but incurred their expenditure and pursued their objects principally outside Australia.<sup>56</sup> The Explanatory Memorandum stated that these exceptions were permitted because the process of being prescribed in the tax regulations ‘allow[s] Parliament the opportunity to fully scrutinise the [non-resident] organisation to determine whether it should

<sup>49</sup> Specifically, the income of a public hospital, or of a hospital which is carried on by a society or association otherwise than for the purposes of profit or gain to the individual members of that society or association.

<sup>50</sup> Specifically, the income of a society, association or club which is not carried on for the purposes of profit or gain to its individual members and is:

- (i) a friendly society, not being a friendly society dispensary;
- (ii) a society, association or club established for musical purposes, or for the encouragement of music, art, science or literature;
- (iii) a society, association or club established for the encouragement or promotion of a game or sport;
- (iv) a society, association or club established for the encouragement or promotion of animal races; or
- (v) a society, association or club established for community service purposes (not being political purposes or lobbying purposes); ...

<sup>51</sup> *Taxation Laws Amendment Act (No 4) 1997* (Cth) Schedule 5. See ITAA 1936 s 23(e)(i).

<sup>52</sup> ITAA 1936 s 23(e)(ii). This meant that the institution was listed in the table in ITAA 1936 s 78(4).

<sup>53</sup> *Taxation Laws Amendment Act (No 4) 1997* (Cth) Schedule 5.

<sup>54</sup> Explanatory Memorandum, *Taxation Laws Amendment Bill (No 4) 1997* (Cth) [5.2].

<sup>55</sup> Parliamentary Library (Cth) *Bills Digest*, No 54 of 1997–98, 3 October 1997  
<[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/BD9798/98bd054](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/BD9798/98bd054)>.

<sup>56</sup> ITAA 1936 s 23(e)(iii), (iv).

receive the benefit of the exemption'<sup>57</sup> and thereby satisfy itself that the institution was not likely to engage in tax avoidance. The Explanatory Memorandum also clarified that distributions received by an institution as a gift or government grant are to be 'disregarded when determining whether an organisation incurs its expenditure and pursues its objectives principally in Australia and, therefore, can be applied overseas without affecting an organisation's income tax exempt status.'<sup>58</sup>

The Explanatory Memorandum briefly addressed the meaning of the phrase 'in Australia',<sup>59</sup> focusing on the definition of the terms 'physical presence' and 'located', rather than the extent to which expenditure must be incurred and objectives pursued principally in Australia. The Explanatory Memorandum stated that because these terms were not defined in the legislation, their ordinary or everyday meaning should be used.<sup>60</sup> It also provided a detailed description for each:

In the case of "physical presence" a broad interpretation is to be adopted—all that is required is for an organisation to operate through a division, sub-division or the like in Australia. The structure of the organisation is immaterial as is whether it has its central management and control or principal place of residence in Australia. On the other hand, the term would not apply where an organisation merely operates through an agent based in Australia. A much narrower meaning is intended in relation to the term "located". A mere physical presence will not be sufficient to satisfy this requirement although it will not be necessary for an organisation to be a resident for income tax purposes. A separate centre of operations such as a branch would fall within the meaning of this term.<sup>61</sup>

The broad definition of 'physical presence' requires minimal Australian operations, in accordance with its ordinary meaning. The narrower definition of 'located' still does not require that the central operations or control of the entity be in Australia, so long as the entity sets up a branch in Australia, again, in keeping with the everyday meaning of the term. These definitions clearly do not place any limitations on the geographical scope of the Australian entity's operations, activities or beneficiaries and thereby confirm that the meaning of 'in Australia' is to be taken from its ordinary meaning—being physically located in Australia, nothing more. A subsequent Explanatory Memorandum explained the meaning of the term 'principally' in Australia: 'The dictionary meaning of the word "principally" is mainly or chiefly. Accordingly, it is not possible to specify a particular percentage but less than 50 per cent would not be considered to meet the "principally" requirement.'<sup>62</sup> The ATO later issued a public ruling, which clarified the 'in Australia' requirement in s 50–50(a), consistent with these definitions.<sup>63</sup>

In 1993, the Joint Committee of Public Accounts recommended that Australia's income tax law be rewritten. This led to the Tax Law Improvement Project, resulting

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<sup>57</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) [5.40].

<sup>58</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) [5.44].

<sup>59</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) [5.28]–[5.30].

<sup>60</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) [5.28].

<sup>61</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) [5.29]–[5.30].

<sup>62</sup> See Explanatory Memorandum, Taxation Laws Amendment Bill (No 3) 1998 (Cth) [3.14].

<sup>63</sup> ATO, *Income Tax: Endorsement of Income Tax Exempt Charities*, TR 2000/11, 28 June 2000.

in the ITAA 1997.<sup>64</sup> The 'in Australia' provisions for income tax exemption were migrated to s 50–50 of the ITAA 1997, with no effective amendments.

### 3.2 Judicial decisions

The Australian courts dealt with this legislation some time later, with the landmark High Court case, *Word Investments*,<sup>65</sup> which enshrined the destination of profits test for income tax exemption. The applicant (Word), which operated a series of businesses as a fundraising arm, distributed funds to an Australian charity (Wycliffe) conducting missionary work overseas. Word applied for income tax exemption under the ITAA 1997. This was refused. The Commissioner argued that there were four issues precluding Word from receiving tax exempt status, one of which was that it did not meet the 'in Australia' requirement of s 50–50(a) ITAA 1997 that an entity have a physical presence in Australia and, to that extent, incur its expenditure and pursue its objectives principally in Australia.<sup>66</sup> While the initial tribunal decision did not consider the 'in Australia' issue,<sup>67</sup> on appeal the Federal Court addressed this issue and found that Word satisfied the requirements of s 50–50(a). It was conceptualised as being a 'nexus' question. Word passed money to another organisation to achieve its purposes in Australia.<sup>68</sup> Word had a physical presence in Australia, and the fact that it knew that this other organisation operated outside Australia was not fatal, as s 50–50(a) was not a provision involving an assessment of motive such as that involved in a finding of a charitable nature. On appeal, the Full Court of the Federal Court upheld this narrow view noting that: '[I]f the Parliament desires the place of expenditure of funds by the donee to be analysed before the donor can fall within the section, it can say so'.<sup>69</sup>

The majority of the High Court<sup>70</sup> confirmed the Full Court decision that Word met the 'in Australia' requirement of ITAA 1997 s 50–50(a) for income tax exemption: it had a physical presence in Australia, incurred its expenditure and pursued its objectives principally in Australia, the decisions to pay were made in Australia, and the payments were made in Australia to Australian organisations.<sup>71</sup> In reaching this conclusion the majority examined Word's role as a giving intermediary, finding:

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<sup>64</sup> See Explanatory Material, Tax Laws Amendment (Transfer of Provisions) Bill 2009 (Cth) [1.2]. The ITAA 1997 will be progressively amended and added to, as instalments of the rewrite are enacted. The parts of the ITAA 1936 which have not been rewritten are adopted directly into the ITAA 1997 by Schedule 1, 52 of the *Income Tax (Consequential Amendments) Act 1997* (Cth).

<sup>65</sup> (2008) 236 CLR 204.

<sup>66</sup> The other three issues were: (1) Word's objects were not confined to charitable purposes; (2) Word was an entity which did not engage in any significant charitable activities but rather was established to engage in commercial activities for profit and therefore could not be a charitable institution; and (3) the recipients of Word's profits were not confined, as to the use to which the funds distributed to them could be put.

<sup>67</sup> *Re Applicant and Federal Commissioner of Taxation; subnom Case 11/2005* [2005] AATA 941 (Administrative Appeals Tribunal, 27 September 2005). Subsequent litigation history: *Commissioner of Taxation (Cth) v Word Investments Ltd* (2006) 64 ATR 483 (Federal Court, Sundberg J, 3 November 2006); *Federal Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 194 (Federal Court of Australia, Full Court, 14 November 2007).

<sup>68</sup> *Commissioner of Taxation (Cth) v Word Investments Ltd* (2006) 64 ATR 483 [52].

<sup>69</sup> *Federal Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 194 [57].

<sup>70</sup> Gummow, Hayne, Heyson and Crennan JJ.

<sup>71</sup> *Word Investments* (2008) 236 CLR 204 [73].

Section 50–50(a) does not impose a prohibition on distributing to other charitable institutions. Nor does it require the money, when ultimately expended by Wycliffe and the other institutions, to be expended in Australia. Section 50–50(a) could have imposed a requirement of that latter kind, but it did not. It only imposed a requirement that Word incur its expenditure and pursue its objectives principally in Australia—not that Wycliffe and the other institutions do so. No doubt the ultimate benefit to charity which Word causes is effected by Wycliffe indirectly and to some extent outside Australia, not directly and in Australia: but s 50–50(a) draws no distinction between direct and indirect effects.<sup>72</sup>

The majority concluded that the ‘in Australia’ requirement in s 50–50(a) is confined to ‘the place where the relevant conduct occurs, not to that where the ultimate purpose of that conduct is given effect, or its objective realised, by a donee’s actual use of the money it receives’.<sup>73</sup> This conclusion is consistent with a decision of the English Court of Appeal in *Inland Revenue Commissioners v Helen Slater Charitable Trust Ltd*<sup>74</sup> that charitable objects could be fulfilled by one charity, by applying income to another similar charity, in effect acting as a conduit or intermediary for charitable funds.

In his dissenting opinion, Kirby J found this to be an ‘erroneous reading’ of the ‘in Australia’ requirement for income tax exemption.<sup>75</sup> While His Honour agreed with the majority that Word had a physical presence in Australia, he believed that the majority took ‘a narrow view of what is involved in Word’s incurring its expenditure and pursuing its objectives *within* Australia’, noting that the majority’s approach ‘sees no difficulty in the fact that the destination of the income that is subject to the tax exemption is (and always was intended to be) principally *outside* Australia’.<sup>76</sup> Kirby J’s conclusion, that he deemed ‘fatal to Word’s case’, was that in so far as Word pursued any charitable objectives, the fact that it did so principally outside Australia meant that it was not entitled to exemption.<sup>77</sup>

The finding of the majority in *Word Investments* that sending funds abroad through a suitably qualified organisation meets the ‘in Australia’ test under s 50–50(a) of the ITAA 1997 was confirmed in the recent Full Federal Court of Australia decision in *Hunger Project*.<sup>78</sup> That case turned on the question of whether Hunger Project Australia (HPA), which operated primarily as a fundraising arm for a global network of entities that provided hunger relief in developing countries, qualified as an Australian public benevolent institution (PBI).<sup>79</sup> The Federal Court determined that HPA was a PBI even though it sent funds to entities overseas. While the Court did not consider the ‘in Australia’ issue, it found that:

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<sup>72</sup> Ibid.

<sup>73</sup> Dal Pont, above n 17, 145.

<sup>74</sup> [1982] Ch 49.

<sup>75</sup> *Word Investments* (2008) 236 CLR 204 [131].

<sup>76</sup> (2008) 236 CLR 204 [130].

<sup>77</sup> (2008) 236 CLR 204 [158].

<sup>78</sup> (2014) 221 FCR 302.

<sup>79</sup> PBIs are charities that provide direct services to those in need of benevolent relief, or raise funds for the purpose of providing benevolent relief. See *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 25–5(5) column 2, item 6.

[t]he ordinary contemporary meaning or understanding of a public benevolent institution is broad enough to encompass an institution, like HPA, which raises funds for provision to associated entities for use in programs for the relief of hunger in the developing world.<sup>80</sup>

By interpreting the meaning of 'in Australia' for income tax exemption such that the ultimate purposes or beneficiaries were not required to be 'in Australia', *Word Investments* and *Hunger Project* are consistent with the ordinary meaning of 'in Australia' as stated in the Explanatory Memorandum introducing the 'in Australia' amendments for income tax exemption.

### 3.3 Proposed legislative reforms

In the 2009–2010 Budget, the Australian Government announced amendments to the 'in Australia' requirements in div 50 of the ITAA 1997 in response to the *Word Investments* decision 'that charities may be pursuing their objectives *principally* "in Australia" even where they merely pass funds within Australia to another charitable institution that conducts its activities overseas'.<sup>81</sup> This strikes directly at conduit arrangements—what is known as 'auspicing' or 'channelling'—in Australia. The ATO has explained 'channelling' as occurring where:

A deductible gift recipient is approached by an organisation that is seeking to raise funds. The organisation has potential donors but they will not give unless they claim tax deductions for their gifts. The organisation arranges with the deductible gift recipient for the gifts to be made to it. The deductible gift recipient gives gift receipts to the donors. It then passes on the donations substantially to the organisation.<sup>82</sup>

The Government stated that these amendments to the 'in Australia' provisions would serve to 'reverse the decision that charities and other income tax exempt entities can direct funds to overseas projects outside the current restrictions'.<sup>83</sup>

After two exposure drafts,<sup>84</sup> a Bill was proposed to reform the tax laws applying to the geographic boundaries of both income tax exemption and gift deductibility.<sup>85</sup> While the Bill lapsed when Parliament was dissolved ahead of a federal election, the

<sup>80</sup> *Hunger Project* (2014) 221 FCR 302, 314 [66]–[67].

<sup>81</sup> See Wayne Swan and Lindsay Tanner, 'Budget Measures 2009–10' (Budget Paper No 2, Australian Government, 12 May 2009) 29 [emphasis added].

<sup>82</sup> Senate Economics Legislation Committee, Parliament of Australia, *Report on Taxation Laws Amendment Bill (No. 8) 1999*, Appendix 3; Letter from ATO to Senator Brian Gibson, 23 November 1999.

<sup>83</sup> *Ibid.*

<sup>84</sup> Exposure Draft, Tax Laws Amendment (2011 Miscellaneous Measures) Bill (No 1) 2011: Tax Exempt Body 'in Australia' Requirements; Treasury (Cth), *'In Australia' Special Conditions for Tax Concession Entities* (4 July 2011) <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2011/In-Australia-Special-Conditions-for-Tax-Concession-Entities>>; Exposure Draft, Tax Laws Amendment (2012 Measures No 4) Bill 2012 (Cth): Tax Exempt Body 'in Australia' Requirements; Treasury (Cth), *Restating and Standardising the Special Conditions for Tax Concession Entities (Including the 'in Australia' Conditions)* (17 April 2012) <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2012/In-Australia-Special-Conditions-for-Tax-Concession-Entities-Revised>>.

<sup>85</sup> Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth).

incoming government announced it would continue with the 'in Australia' measures,<sup>86</sup> releasing its own draft Bill with 'in Australia' language for income tax exempt entities and DGRs mirroring the language in the lapsed Bill.<sup>87</sup>

The draft Bill amended s 50–50(a), changing the requirement from incurring expenditure and pursuing objectives principally in Australia, to requiring organisations to 'operate principally in Australia and pursue [their] purposes principally in Australia'.<sup>88</sup> The Explanatory Materials suggested that this would allow a wider range of circumstances to be considered such as:

where the entity incurs its expenditure; where it undertakes its activities; where the entity's property is located; where the entity is managed from; where the entity is resident or located; where its employees or volunteers are located; and who is directly and indirectly benefiting from its activities.<sup>89</sup>

None of the above indicators is determinative, but a weighing up of all indicators is proposed.<sup>90</sup> Examples used in the Explanatory Materials show that although an Australian tax-exempt organisation may be centrally controlled and managed from outside Australia, if a certain amount of expenditure, operations and beneficiaries are located in Australia, it could still satisfy the special conditions.<sup>91</sup> None of these considerations are included in the actual words of the draft Bill and a court may well be persuaded to adopt a different interpretation of 'operate', as it is not a legal term. The ordinary sense of the word in the context of the provision may suggest itself to a court called on to determine its meaning. The Macquarie Dictionary gives various meanings of 'operate', including 'to work or run, as a machine does; to keep (a machine, apparatus, factory, industrial system, etc.) working or in operation; to act effectively, exert force or influence',<sup>92</sup> which may not be as wide as that expressed in the draft Bill.

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<sup>86</sup> Arthur Sinodinos, 'Integrity Restored to Australia's Taxation System' (Media Release, 14 December 2013) item 37 <<http://axs.ministers.treasury.gov.au/files/2013/12/MR008-2013.pdf>>.

<sup>87</sup> Exposure Draft, Tax and Superannuation Laws Amendment (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions.

<sup>88</sup> Exposure Draft, Tax and Superannuation Laws Amendment (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions, 10 [31] s 50-50(2) [emphasis added]. Under s 50-51(2), organisations can be exempt from the provisions by being prescribed in the *Income Tax Assessment Regulations 1997*, or if endorsed as a DGR. Prescribed organisations must be: overseas NFP organisations exempt from foreign tax in their resident countries; or be resident in Australia and operate and pursue their objectives principally outside Australia. Prescription is only in exceptional circumstances: where the organisation is providing a broad benefit to the Australian community, and considering the national interest, tax system integrity, any risk the organisation will be used for money laundering or terrorist financing, among other relevant considerations. This power is subject to Parliamentary scrutiny, by way of disallowance. See Explanatory Materials, Exposure Draft: Tax Laws Amendment (2014 Measures No #) Bill 2014 (Cth) [1.98].

<sup>89</sup> Explanatory Materials, Exposure Draft: Tax Laws Amendment (2014 Measures No #) Bill 2014 (Cth) [1.59].

<sup>90</sup> Ibid.

<sup>91</sup> Explanatory Materials, Exposure Draft: Tax Laws Amendment (2014 Measures No #) Bill 2014 (Cth) [1.64], example 1.5: Overseas Control.

<sup>92</sup> *Macquarie Dictionary Online* (9 September 2014) <<https://www-macquariedictionary-com-au.ezp01.library.qut.edu.au/>>.

Further, the funds that an organisation provides to non-exempt organisations are to be taken into account in determining whether the requirements have been met.<sup>93</sup> An exempt donor organisation is expected to have a reasonable knowledge of the purpose or cause that it intends the donee organisation to carry out with the funds. However, the donor need only take all those steps that are reasonable to confirm or trace the use of such funds outside Australia.<sup>94</sup> The Explanatory Materials note that 'if it later transpires that the funds were spent in such a manner that would result in the loss of status of the providing entity, the entity will be able to rely on the reasonable and genuine steps it has taken to demonstrate compliance with the special conditions'.<sup>95</sup> This specifically redresses the issue in *Word Investments*.<sup>96</sup>

Submissions on the most recent exposure draft closed on 7 April 2014 and the Bill was expected to be before Parliament by early 2015. Although a number of submissions argued that a policy of stifling cross-border charity with greater regulatory controls was not in Australia's best interests, this does not appear to have swayed either of the two main political parties. The proposed legislative reforms have an even greater impact on the tax provisions relating to the geographic boundaries of gift deductibility. We now turn to these provisions.

## 4. GEOGRAPHIC BOUNDARIES OF GIFT DEDUCTIBILITY

### 4.1 Legislative development

Gift deductibility first appeared in the Australian legislation after federation in two Victorian statutes, the *Income Tax Act 1907* (Vic) and the *Administration and Probate Duties Act 1907* (Vic), which provided for tax deductions for gifts to certain institutions 'situate within Victoria'.<sup>97</sup> This geographic restriction was a last minute amendment by the Premier and was not discussed in the parliamentary debate.<sup>98</sup> While the provision required organisations to be located geographically in Victoria, they were not necessarily prohibited from operating or having beneficiaries outside Victoria. Later legislation was more explicit. The *Administrative and Probate Act 1928* (Vic),<sup>99</sup> the *Administrative and Probate Act 1953* (Vic),<sup>100</sup> and the *Probate Duty*

<sup>93</sup> If an income tax exempt entity provides money to another income tax exempt entity, the receiving entity will itself have met the 'in Australia' special conditions and be operating principally in Australia, or be expressly exempt. Therefore, an entity does not need to take account of the eventual use of these funds by the donee entity.

<sup>94</sup> Exposure Draft, Tax and Superannuation Laws Amendment (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions, 11 [31] s 50–50 (4A).

<sup>95</sup> Explanatory Materials, Exposure Draft: Tax Laws Amendment (2014 Measures No #) Bill 2014 (Cth) [1.80].

<sup>96</sup> See Ian Murray, 'Not-for-Profit Reform: Back to the Future?' (2014) 20(1) *Third Sector Review* 109, 132.

<sup>97</sup> See *Income Tax Act 1907* (Vic) s 3 and *Administration and Probate Duties Act 1907* (Vic) s 3(2). For a discussion of the parliamentary debates surrounding this legislation, see Ann O'Connell, 'Charitable Treatment? A Short History of Charities in Australia' in John Tiley (ed), *Studies in the History of Tax Law* (Hart, 2012) vol 5.

<sup>98</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 September 1907, 1277. We are indebted to John Emerson for bringing this point to our attention.

<sup>99</sup> *Administrative and Probate Act 1928* (Vic) s 160.

<sup>100</sup> *Administrative and Probate Act 1953* (Vic) s 117.

*Act 1962 (Vic)*,<sup>101</sup> are now repealed, effectively required philanthropic trust deeds to restrict the trust's location and operations to Victoria in order to be estate tax-effective. To this day, trust deeds established under this regime prohibit making grants to organisations outside the borders of Victoria by their founding documents, despite recommendations for reform by the Industry Commission in 1995.<sup>102</sup>

The ITAA 1915 contained the first federal gift deductibility provision in s 18(h), which provided tax deductibility for gifts over £20 to charitable institutions *in Australia*.<sup>103</sup>

18. In calculating the taxable income of a taxpayer the total income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted—(h) gifts exceeding Twenty pounds each to public charitable institutions *in Australia and* contributions exceeding Five pounds in the aggregate in respect of each object of contribution made during the continuance of the present war to any public fund established in any part of the King's Dominions or in any country in alliance with Great Britain for any purpose connected with the present war: Provided that payments shall not be allowable as deductions under this paragraph unless verified to the satisfaction of the Commissioner.<sup>104</sup>

Section 18(h) appears to be based on the earlier Victorian provisions requiring that the charitable institution be 'situate within Victoria',<sup>105</sup> indicating a geographic restriction based on the physical location of the institution. As well as providing a deduction for gifts to charitable institutions 'in Australia', s 18(h) of the ITAA 1915 also provided a deduction for contributions over £5 to public funds overseas, specifically connected to the British effort in World War I. The original draft of s 18(h) in the Income Tax Assessment Bill 1915 (Cth) restricted tax deductibility for contributions to public funds connected to the war effort to 'any public fund established in Australia',<sup>106</sup> but it was amended to replace Australia with the King's Dominions and Great Britain's allies in the war.<sup>107</sup> The provision as conceived by the Attorney General did not include a gift deduction for domestic gifts over £20; it only provided a deduction for international contributions. The Senate amended the Bill and returned it to the House with both the domestic gift deduction and the deduction for international contributions, and both were included in the Act.<sup>108</sup> From its inception, it is clear that there have been differences of opinion as to the geographic parameters of gift deductibility in Australia.

<sup>101</sup> *Probate Duty Act 1962 (Vic)* s 21.

<sup>102</sup> Industry Commission, 'Charitable Organisations in Australia' (Report No 45, AGPS, 1995) 253–4.

<sup>103</sup> The original Bill did not include a tax deduction for gifts to charities, but did include tax deductions in respect of contributions to the war. See O'Connell, above n 97, 108.

<sup>104</sup> ITAA 1915 s 18(h) [emphasis added].

<sup>105</sup> O'Connell, above n 97, 108, noting that the £20 threshold for tax deductibility of donations was the same as that set by the Victorian legislation and that the ITAA 1915 was likely only the second Australian income tax legislation to include this provision.

<sup>106</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 1 September 1915, 2.

<sup>107</sup> *Ibid* (William Hughes).

<sup>108</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 1915, 1. For a discussion of political manoeuvring that resulted in the gift deduction provision being included in ITAA 1915, see O'Connell, above n 97, 108–9.



The ITAA 1922 altered the gift deduction provision (s 23(1)(h)), and reduced the gift threshold to £5.<sup>109</sup> Also, given that World War I had ended, there was no longer a need to reference donations to public funds overseas for purposes connected with the war.<sup>110</sup> Instead, the ITAA 1922 specifically included contributions to the Department of Repatriation<sup>111</sup> and continued to restrict tax deductibility to gifts to public charitable institutions 'in Australia'.<sup>112</sup>

A Royal Commission on Taxation was established in 1932 in relation to deductible gifts. It was primarily concerned with the parameters of the concession, including whether it should be restricted to charitable institutions carrying on their functions within the jurisdiction of the taxing authority. In its final report in 1934, the Commission recommended 'that a deduction be allowed for gifts of one pound and upwards made during the year of income ... to charitable institutions ... which carry on their functions within the jurisdiction of the taxing authority'.<sup>113</sup> In this event, 'the Commonwealth would allow deductions to a charitable institution in Australia, and each State would allow donations to similar institutions within the State'.<sup>114</sup> This language is consistent with the legislative history that 'in Australia' is referring to the location and operations (or functions) of a charitable institution, but does not extend to its purposes.

This issue was subsequently raised at the Conference of Commonwealth and State Commissioners of Taxation to discuss recommendations of the Royal Commission.<sup>115</sup> During the Conference, the question was asked whether the words 'in the state' in the New South Wales gift deductibility provision was intended to cover contributions to 'funds raised in other countries', such as the case of an earthquake in Japan, or whether the fund must be a state fund.<sup>116</sup> The Commonwealth Commissioner for Taxation responded that 'the Federal law covered only charitable institutions in

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<sup>109</sup> Section 23(1) states:

In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources *in Australia* shall be taken as a basis, and from it there shall be deducted—(h) ... (ii) gifts exceeding Five pounds each made, during the year in which the income was derived, to public charitable institutions *in Australia*, if the gifts are verified to the satisfaction of the Commissioner. [Emphasis added].

<sup>110</sup> See Explanatory Memorandum, Income Tax Bill 1922 (Cth) 26.

<sup>111</sup> Known after 1976 as the Department of Veterans' Affairs. The most recent iteration of this defence provision is contained in ITAA 1997 s 30-50, item 5.1.2.

<sup>112</sup> Note that para 1.22 of Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) states: 'The Explanatory Memorandum to the Bill that became the *Income Tax Assessment Act 1922* notes that the amendment was for the purpose of limiting deductions to those actually incurred in Australia which is interpreted as meaning "decided upon in Australia by the controlling authority, although the actual expenditure might be made outside Australia" and also included expenditure actually made in Australia.' However, this appears to have been taken out of context, as the ITAA 1922 Explanatory Memorandum is referring to the amendment of a different provision, s 23(a), concerning deductions for 'all losses and outgoings ... including commission, discount, travelling expenses, interest and expenses actually incurred in gaining or producing the assessable income'.

<sup>113</sup> Commonwealth, Royal Commission on Taxation, *Third Report* (1934) [618].

<sup>114</sup> *Ibid* [617].

<sup>115</sup> 'Proceedings and Decisions of Conference' (Conference of Commonwealth and State Commissioners of Taxation to Discuss the Recommendations of the Royal Commission on Taxation, Melbourne, 8 August 1935).

<sup>116</sup> *Ibid* 140.

Australia'.<sup>117</sup> This limited discussion indicates that donations to a fund located overseas would not be covered by the deduction provisions, but that donations to a fund located in Australia would be. Again, this appears consistent with the existing view that it is the location of the institution receiving the funds that is important, not the final beneficiary of those funds.

The Commission's work resulted in the ITAA 1936, with s 78 containing a list of the types of organisations (not necessarily charities) that would be entitled to tax deductible donations, and specific DGRs, many of which remain today. Section 78(1) stated:

The following shall ... be allowable deductions: (a) Gifts of the value of one pound and upwards made by the taxpayer in the year of income to any of the following funds, authorities or institutions *in Australia*: (i) a public hospital; (ii) a public benevolent institution; (iii) a public fund established and maintained for the purpose of providing money for public hospitals or public benevolent institutions *in Australia*, or for the establishment of such hospitals or institutions, or for the relief of persons *in Australia* who are in necessitous circumstances; (iv) a public authority engaged in research into the causes, prevention or cure of disease in human beings, animals or plants, where the gift is for such research, or a public institution engaged solely in such research; (v) a public university or a public fund for the establishment of a public university; (vi) a residential educational institution affiliated under statutory provisions with a public university, or established by the Commonwealth; and (vii) a public fund established and maintained for providing money for the construction or maintenance of a public memorial relating to the war which commenced on the fourth day of August, One thousand nine hundred and fourteen.<sup>118</sup>

The Explanatory Memorandum said little about the 'in Australia' provisions.<sup>119</sup> Early versions of the Act defined Australia as including Papua New Guinea.<sup>120</sup> The inclusion of 'in Australia' in s 78(1) as both a general condition for gift deductibility at the outset, as well as an express limitation for certain types of funds, requires an understanding of the legislative drafting underlying these provisions. An example is 'a public fund established and maintained for the relief of persons in Australia who are in necessitous circumstances'.<sup>121</sup> This secondary 'in Australia' reference may at first glance appear duplicative and redundant. However, the application of the principle of statutory interpretation that all words have meaning and effect<sup>122</sup> suggests that the secondary qualifier refers not to the geographic location of the body, but to some other attribute, such as its beneficiaries. To give a wider meaning to the first instance of the words 'in Australia' to include not only the geographic location of the body but also

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<sup>117</sup> Ibid 141.

<sup>118</sup> ITAA 1936 s 78(1) [emphasis added].

<sup>119</sup> The phrase 'in Australia' was only mentioned in the Explanatory Memorandum to the ITAA 1936 to note its inclusion in s 78(1)(iii) for deductions for the relief of persons *in Australia* who are in necessitous circumstances 'to make the intention of the law clear': Explanatory Memorandum, Bill to Consolidate and Amend the Income Tax Assessment Act 1922–1934 (Cth) 81.

<sup>120</sup> ITAA 1936 s 78(2)(b).

<sup>121</sup> ITAA 1936 s 78(1)(a)(iii).

<sup>122</sup> Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 62.

where it conducts its activities, makes the second instance of the words redundant and infringes the principle of statutory interpretation that all words have meaning and effect.<sup>123</sup> A similar interpretative issue involving the phrase 'in Australia' in income tax legislation was presented to the High Court in 1921.<sup>124</sup> The Court confined the phrase 'in Australia' to the immediate words and not the whole section, preferring 'the natural construction of the words used'.<sup>125</sup>

Confirming this view, a 1961 Canberra Income Tax Circular from the Commissioner of Taxation noted that, in relation to PBIs, 'the words "in Australia" refer to the location of the institution and not to the persons who are to benefit from the institution's activities. If the public benevolent institution itself is in Australia, it is not essential that the granting of assistance is limited to persons in Australia'.<sup>126</sup> In a later paragraph the Circular stated that '[p]ublic funds providing relief for persons in necessitous circumstances will qualify for approval only if these persons are in Australia'.<sup>127</sup> This accords with the interpretation of the provisions above, given that necessitous circumstance funds have a secondary 'in Australia' qualification.

During this period there was an emerging global focus on international aid, led by the United Nations in 1959 declaring a 'Development Decade', with many overseas jurisdictions providing tax incentives for private donations to aid organisations. As part of this movement, in 1963 the Freedom from Hunger Campaign was supported by the Australian Government and given gift deductibility status. It raised over \$2 million.<sup>128</sup> During this time Australian aid organisations lobbied the Government for permanent gift deductibility for activities carried on outside Australia, rather than for one-off appeals. It was not until 1981, however, that the Overseas Aid Gift Deduction Scheme (OAGDS) was legislated through an amendment to s 78 of the ITAA 1936.<sup>129</sup>

In 1967 another memorandum from the First Assistant Commissioner of Taxation was sent to all Deputy Commissioners on the meaning of 'in Australia'.<sup>130</sup> This memorandum completely reversed the ATO's prior position by baldly stating: 'It is the clear intention of the income tax legislation that deductions should be limited in general to gifts made to organisations which render aid to needy residents of Australia'.<sup>131</sup> The explanation for this about-face was not based on any legal interpretation of s 78 of the ITAA 1936. Instead, the memorandum explained that the comments were based on the ATO's specific approval of the Australian Red Cross Society for PBI status.<sup>132</sup> The memorandum pointed out that the approval of that

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<sup>123</sup> Ibid.

<sup>124</sup> *The Alliance Assurance Company Limited v The Federal Commissioner of Taxation* [1921] 29 CLR 424.

<sup>125</sup> [1921] 29 CLR 424, 430.

<sup>126</sup> Commissioner of Taxation, 'Gifts to Public Hospitals, Public Benevolent Institutions, Etc' (Canberra Income Tax Circular Memorandum No 806, 10 November 1961) 7 [26].

<sup>127</sup> Ibid 9 [36].

<sup>128</sup> Patrick Kilby, *NGOs and Political Change – A History of the Australian Council for International Development* (ANU Press, 2015) 30, 32, 35.

<sup>129</sup> Income Tax Law Amendment Bill 1981 (Cth), cl 10.

<sup>130</sup> First Assistant Commissioner of Taxation, 'Organisations Concerned with Overseas Relief' (J106/82/2 Pt 26, 13 January 1967).

<sup>131</sup> Ibid 1 [2].

<sup>132</sup> Ibid 1 [4].

organisation was granted because the funds applied outside Australia were insignificant. In doing so, it emphasised that an organisation concerned with the provision of relief overseas 'should not be treated as a PBI in Australia if its benevolent work is carried out mainly overseas'.<sup>133</sup> The memorandum then instructed that any organisation that had been awarded PBI status on the basis of the previous 1961 Canberra Income Tax Circular was to be contacted and advised that the status was to be withdrawn apart from where activities were confined to Australia.<sup>134</sup>

In reversing its earlier position, the 1967 memorandum resulted in a far stricter interpretation of 'in Australia' by the ATO, requiring not only that the organisation be physically located in Australia, but also that its activities and beneficiaries must be in Australia. In a 1987 taxation ruling, the Commissioner of Taxation, noting the precedential value of the 1967 memorandum, determined that a PBI whose purpose was to provide financial assistance to people in necessitous circumstances in a country overseas should be denied the ability to receive tax deductible gifts pursuant to s 78 of the ITAA 1936 because its purposes and beneficiaries were located overseas.<sup>135</sup>

The revised, stricter ATO interpretation of 'in Australia' was also adopted by the first monograph on charities and deductible gifts, published by the Taxation Institute of Australia in 1977. In this monograph, Professor Colditz did not reference the 1961 tax circular, but illustrated the effect of s 78(1)(a) claiming, 'a gift to a public hospital in Australia is *prima facie* allowable, a gift to a public hospital catering to the needs of the sick in a nearby country is not'.<sup>136</sup> The legislative listing of public hospitals at the time did not have a secondary 'in Australia' qualifier. Professor Colditz went on to remark, 'there has been no case or guidance on whether a hospital located in Australia could allocate part of its funds to overseas activities',<sup>137</sup> and further that it was 'open to considerable doubt' whether there was any scrutiny by the ATO of this practice.<sup>138</sup>

The introduction of the international aid exception to s 78 in 1981, created greater uncertainty about the meaning of 'in Australia' under the ATO's strict interpretation. Specifically, it raised the question of how allowing gift deductibility under the exception, for donations to aid organisations with overseas purposes and beneficiaries could be consistent with the ATO's interpretation that an organisation's purposes and beneficiaries must be in Australia. It was simply not possible for an overseas aid fund maintained for the relief of people in developing countries to be in Australia. The only way to reconcile these conflicting provisions was if 'in Australia' referred to physical location only, which would enable the overseas aid provision to allow a deduction for gifts to funds established in Australia for the purpose of providing relief to people outside Australia.

The international aid exception was not the only inconsistency in s 78 arising from the ATO's strict interpretation of 'in Australia'. With the expansion of s 78 over the years

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<sup>133</sup> Ibid 2.

<sup>134</sup> Ibid 2 [10].

<sup>135</sup> Commissioner of Taxation, *Income Tax: Gifts to Public Benevolent Institutions*, TR 2386, 19 March 1987.

<sup>136</sup> Bernard Colditz, 'Income Tax Aspects of the Income of Charities and of Gifts to Charities' (Taxation Institute of Australia Research and Education Trust, 1977) 30.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

reflecting the growth of the charity sector and the perception of its importance,<sup>139</sup> the number of sub-paragraphs containing express 'in Australia' limitations grew to encompass not only necessitous circumstances funds and public hospital funds, but also public funds providing religious instruction in government schools, Australian disaster relief funds, Australian war memorial funds, public funds for family counselling or family dispute resolution, and marriage guidance funds. The express inclusion of a geographic limitation in these sub-paragraphs appears to make the 'in Australia' general condition at the beginning of s 78 redundant. Like the overseas aid exception, the only way these conflicting 'in Australia' provisions can be reconciled according to the principles of statutory interpretation is if 'in Australia' in the general condition at the beginning of the section refers only to an organisation's physical location, with the specific limitations in the sub-paragraphs extending to an organisation's purposes and beneficiaries.

With the enactment of the ITAA 1997, the listed deductible purposes and organisations were categorised into subject areas placed into div 30.<sup>140</sup> Under div 30, the gift deductibility provisions are extensive and detailed. The 'in Australia' requirement for DGR endorsement is set out in s 30-15 under 'Special Conditions', which states that 'the fund, authority or institution must be *in Australia*'.<sup>141</sup> Following its predecessor, div 30 also contains express 'in Australia' limitations for certain categories of funds, including public funds providing religious instruction or ethics in government schools,<sup>142</sup> Australian disaster relief funds,<sup>143</sup> necessitous circumstances funds,<sup>144</sup> Australian war memorial funds,<sup>145</sup> public funds for family counselling or family dispute resolution,<sup>146</sup> and marriage guidance funds.<sup>147</sup> The result is that the inconsistencies contained in s 78 of the ITAA 1936 arising from the ATO's strict interpretation of 'in Australia' remain today, creating uncertainty both for organisations seeking to engage in cross-border charitable activities and for their donors.

In 2000, the ATO produced a guide, known as GiftPack, for DGRs and donors.<sup>148</sup> Unlike public information documents in the mid-1990s which did not mention the geographic qualification at all,<sup>149</sup> the GiftPack noted that 'in Australia' generally requires 'establishment and operation in Australia, and purposes and beneficiaries in

<sup>139</sup> O'Connell, above n 97, 118–120, noting in particular the growth in the Australian arts and scientific communities as reflected in the legislation.

<sup>140</sup> Other than s 78A of the ITAA 1936. Div 30 of the ITAA 1997 applies to gifts made in 1997–98 and subsequent years of income. See *Income Tax (Transitional Provisions) Act 1997* (Cth) s 30–1.

<sup>141</sup> ITAA 1997 s 30–15 [emphasis added].

<sup>142</sup> ITAA 1997 s 30–25 items 2.1.8, 2.1.9 (religious instruction), item 2.1.9A (ethics).

<sup>143</sup> ITAA 1997 ss 30–45A, 30–46 and 30–45, item 4.1.5.

<sup>144</sup> ITAA 1997 s 30–45 item 4.1.3.

<sup>145</sup> ITAA 1997 s 30–50 item 5.1.3.

<sup>146</sup> ITAA 1997 s 30–70 item 8.1.2.

<sup>147</sup> ITAA 1997 s 30–70 item 8.1.1.

<sup>148</sup> ATO, *GiftPack: A Taxation Guide for Deductible Gift Recipients and Donors* (NAT 3132-5.2000, 2000) (*GiftPack 2000*).

<sup>149</sup> ATO, 'Information for Public Benevolent Institutions', [ca 1995]; ATO, 'Public Benevolent Institutions' (Sales Tax Bulletin No 5, 1 May 1997).

Australia' apart from certain special bodies such as overseas aid funds or public environmental funds.<sup>150</sup>

In 2003 the ATO finalised its public ruling on PBIs, enshrining its strict interpretation of 'in Australia' by writing:

129. To be in Australia a public benevolent institution must be established, controlled, maintained and operated in Australia and its benevolent purposes must be in Australia. Because the purpose of public benevolent institutions is to provide direct relief to persons in need, this will mean that relief will be provided to people located in Australia.

130. However, 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.<sup>151</sup>

The consequence of this public ruling is that donations made directly by Australian taxpayers to an organisation outside Australia are never tax deductible. Donations made to an Australian DGR that uses the gift for its own programs outside Australia are also not tax deductible unless its activities outside Australia are 'merely incidental',<sup>152</sup> fall within the *Hunger Project* circumstances,<sup>153</sup> or the organisation obtained its DGR status pursuant to one of the four exceptions dispersed throughout div 30.<sup>154</sup> These exceptions are: overseas aid funds;<sup>155</sup> developed country disaster relief funds;<sup>156</sup> public funds on the Register of Environmental Organisations;<sup>157</sup> and DGRs specifically listed by name in the ITAA 1997 under the category of international affairs.<sup>158</sup>

Following its public ruling on PBIs in 2003, the ATO's strict view of 'in Australia' requiring geographical residence as well as confining activities and beneficiaries geographically appeared to be entrenched. However, more recently the ATO's position seems to be shifting. Since 2012, the GiftPack's wording has altered, stating that 'for funds, institutions and authorities to be in Australia, they must be established

<sup>150</sup> *GiftPack 2000*, above n 148, 13–14.

<sup>151</sup> TR 2003/5, above n 7, [129]–[131]. Note that the recent case of *Hunger Project* (2014) 221 FCR 302, decided that the ATO view about 'direct relief' was incorrect and that fundraising proceeds to be given to others to relieve the poor did satisfy the directness test.

<sup>152</sup> *Ibid* [130]: 'For example, if a [DGR] 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'.

<sup>153</sup> (2014) 221 FCR 302.

<sup>154</sup> For a detailed discussion of these exceptions, see Natalie Silver, Myles McGregor-Lowndes and Julie-Anne Tarr, 'Should Tax Incentives for Charitable Giving Stop at Australia's Borders' (2016) 38 *Sydney Law Review* 85, 96–103.

<sup>155</sup> ITAA 1997 s 30–85.

<sup>156</sup> ITAA 1997 s 30–86.

<sup>157</sup> ITAA 1997 s 30–55.

<sup>158</sup> ITAA 1997 s 30–80.

and operated in Australia'.<sup>159</sup> The GiftPack then lists those 'funds' for which the 'purposes or beneficiaries' must also be in Australia and those for which the purposes and beneficiaries do not have to be in Australia.<sup>160</sup> The ATO's website reflects these changes and goes one step further, stating:

The 'in Australia' condition requires all DGRs to be in Australia. This means that all DGRs must be established and operated in Australia. *The purposes and beneficiaries of a DGR do not have to be in Australia*, unless the DGR is one of the following public funds: a public fund for providing religious instruction in government schools; a Roman Catholic public fund for religious instruction in government schools; a public fund for ethics education in government schools; an Australian disaster relief fund; a necessitous circumstances fund; an Australian war memorial fund; a public fund for family counselling or family dispute resolution; a marriage guidance fund; a public fund for providing money for scholarships.<sup>161</sup>

The website then lists specific examples clarifying this new position.<sup>162</sup> An example provided for PBIs provides:

An institution is set up in Australia as a charity whose main purpose is for the relief of poverty. The institution is a registered public benevolent institution. The institution's controlling board, its donors, and most of its assets are in Australia ... [A]ll of the money provided by the institution is sent to beneficiaries overseas. The institution is established and operated in Australia. The institution is not required to have its purposes and beneficiaries in Australia. It meets the 'in Australia' condition.

The ATO recently announced its intention to issue a new public ruling on 'in Australia', which is likely to reflect the changes made to its GiftPack and website, relaxing its strict interpretation.<sup>163</sup> Despite these developments, the Australian Government's reform agenda proposes to restrict the geographic boundaries of the gift deduction even further.

## 4.2 Proposed legislative reforms

To provide greater clarity to the 'in Australia' provisions in s 30–15 of the ITAA 1997 following the decision in *Word Investments*, the Government's reform agenda contains specific policy imperatives that seek to limit further the ability of Australian organisations and their donors to engage in tax deductible cross-border charitable activities. In doing so, the reform agenda represents an effort to reinstate the stricter

<sup>159</sup> See ATO, *GiftPack: Guide for Deductible Gift Recipients and Donors* (NAT 3132, 2012) (*GiftPack 2012*); and *GiftPack: Guide for Deductible Gift Recipients and Donors* (NAT 3132, 2015) (*GiftPack 2015*).

<sup>160</sup> Emphasis added. GiftPack remains silent on this point for institutions and authorities. See *GiftPack 2012*, above n 159; *GiftPack 2015*, above n 159.

<sup>161</sup> ATO, *Can You be Endorsed as a DGR? In Australia Condition* (1 March 2016) <[https://www.ato.gov.au/Non-profit/Getting-started/Endorsement/Deductible-gift-recipient-\(DGR\)-endorsement/Can-you-be-endorsed-as-a-DGR-/#In\\_Australia](https://www.ato.gov.au/Non-profit/Getting-started/Endorsement/Deductible-gift-recipient-(DGR)-endorsement/Can-you-be-endorsed-as-a-DGR-/#In_Australia)> [emphasis added].

<sup>162</sup> *Ibid.*

<sup>163</sup> This is based on the recommendations of the ATO's Not-for-Profit Advisory Group, which met in December 2015 to consider an 'In Australia' discussion paper, to provide greater clarity on the meaning of 'in Australia' in ITAA 1997 divs 30 and 50. See ATO, *Completed Matters*, above n 16.

'in Australia' test for DGRs that was undone by *Word Investments* and *Hunger Project*.

The core principle for income tax exempt entities is applied similarly to DGRs, but with a stricter threshold test.<sup>164</sup> DGRs generally must 'be established in Australia; operate solely in Australia; and pursue their purposes solely in Australia'.<sup>165</sup> According to the Explanatory Memorandum, 'solely in Australia' is to be interpreted as requiring DGRs to be established and operated only in Australia (including control, activities and assets) and to have their purposes and beneficiaries only in Australia. However, overseas activities that are merely incidental to a DGR's purposes in Australia will not be caught. Further, if overseas activities are minor in extent and importance when considered with reference to the operations and pursuit of the organisation's Australian activities, again, it will not be caught. The Explanatory Memorandum states that 'the overall quantum of an entity's overseas expenditure should also be considered by reference to current public expectations about what is considered minor'.<sup>166</sup> This is likely to produce an interesting contest between the tax authorities and the sector about what are 'current public expectations' and how these are to be interpreted. Just as for tax exemption, functioning as a mere conduit DGR for another organisation that operates overseas will not be permitted, and if funds are passed to another organisation that is not a DGR, the funds will be subject to tracing.<sup>167</sup>

There are a number of carve outs from these tests which have grown with each exposure draft of the Bill. Organisations that are DGRs under the overseas aid category or are specifically listed in the ITAA 1997 under the international affairs category are exempt from the 'in Australia' special conditions for DGRs.<sup>168</sup> The Explanatory Memorandum gives the reason 'that they nonetheless further Australia's overseas aid objectives and therefore contribute to the broad public benefit of the Australia[n] community'.<sup>169</sup> The Explanatory Memorandum goes on to note that further regulatory measures are already in place for these organisations under the scrutiny of the OAGDS.<sup>170</sup> Entities on the Register of Environmental Organisations can seek the approval of the Environment Minister to be exempt from the 'in Australia' special conditions. They will need to convince the Minister that they have to engage in cross-border activities 'in order to effect change that will be of benefit to the Australian public'.<sup>171</sup> The draft Bill also makes provision for exceptions of

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<sup>164</sup> Exposure Draft, Tax and Superannuation Laws Amendment (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions, ss 30–15(2), 30–18, 31–10(2)(a).

<sup>165</sup> Exposure Draft, Tax and Superannuation Laws Amendment, (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions, s 30–18(1).

<sup>166</sup> Explanatory Materials, Exposure Draft: Tax Laws Amendment (2014 Measures No #) Bill 2014 (Cth) [1.110], s 30–18(2).

<sup>167</sup> Exposure Draft, Tax and Superannuation, (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions, s 30–18(4).

<sup>168</sup> Exposure Draft, Tax and Superannuation, (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions, s 30–18(5).

<sup>169</sup> Explanatory Materials, Exposure Draft: Tax Laws Amendment (2014 Measures No #) Bill 2014 (Cth), [1.113].

<sup>170</sup> Explanatory Materials, Exposure Draft: Tax Laws Amendment (2014 Measures No #) Bill 2014 (Cth), [1.115].

<sup>171</sup> Explanatory Materials, Exposure Draft: Tax Laws Amendment (2014 Measures No #) Bill 2014 (Cth), [1.116].



scholarship, bursary or prize funds,<sup>172</sup> some touring arts organisations<sup>173</sup> and a new category of medical research institutions that operate outside Australia.<sup>174</sup> Even with these carve outs, the Government's reform agenda, if implemented, will have a significant and lasting effect on the ability of Australian organisations and their donors to engage in tax effective cross-border philanthropy.

## 5. CONCLUSION

Since its inception, the common law notion of the public who should benefit from charity has not been confined to national borders, pointing to a broad conception of public benefit that supports charitable purposes being carried out overseas. This permissive stance on cross-border activities has been reflected in Australian charity legislation. However, as the legislative history of the tax exemption and gift deductibility provisions reveals, it has not been adopted in the Australian tax laws applying to these charitable tax concessions.

For income tax exempt entities, there were no geographic restrictions on charitable activities until 1997, in response to concerns (largely unfounded) that that these entities were being used for tax avoidance purposes. While the 'in Australia' requirement in div 50 of the *ITAA 1997* provides some scope for income tax exempt entities to pursue their objectives outside Australia, its parameters remain uncertain, particularly since the decision in *Word Investments*. What has been clearer, is that the geographic boundaries of income tax exemption have historically been less restrictive than those for gift deductibility.

For gift deductibility, the requirement to be 'in Australia' was introduced in the first federal income tax legislation. While the meaning of 'in Australia' was never clearly stated in the legislation, its origins and early development suggest that the requirement to be 'in Australia' referred to an organisation's physical location only. However, the ATO ultimately adopted a stricter interpretation of 'in Australia', requiring that an organisation have its benevolent purposes in Australia and provide relief to people located in Australia. This interpretation was revealed to be fundamentally flawed based on the operation of the law, resulting in legal inconsistencies that have rendered the 'in Australia' provisions in div 30 incoherent. Remarkably, this flawed interpretation remained unchallenged for almost 50 years, indicating either that the incredible complexity of div 30 made it impossible to decipher, or that there has been resistance to mounting a legal challenge. Either way, the implications of this longstanding interpretation for many Australian organisations with purposes and beneficiaries overseas have been considerable.

It is only recently that the ATO has indicated a shift away from its strict interpretation of 'in Australia' for PBIs, reverting to its pre-1967 position that 'in Australia' requires only that an organisation be established and operated in Australia. This interpretation enables certain organisations with DGR status to have their purposes and beneficiaries

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<sup>172</sup> Exposure Draft, Tax and Superannuation Laws Amendment (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions, s 30–18(5).

<sup>173</sup> Exposure Draft, Tax and Superannuation Laws Amendment (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions, ss 30–18(9), 30–19(2)–(3), 30–305(1).

<sup>174</sup> Exposure Draft, Tax and Superannuation Laws Amendment (2014 Measures No 3) Bill 2014 (Cth): In Australia Special Conditions, s 30–80(1).

overseas. This more relaxed position is reflected in changes to the ATO's taxation guide and website. The ATO has announced it will issue a new public ruling on the meaning of 'in Australia'. This public ruling is likely to further cement the ATO's more permissive approach to cross-border philanthropy, while also redressing the inconsistencies in div 30. Until that happens the ATO's existing public ruling remains valid, albeit inconsistent with its website and taxation guide.

The resulting legal vacuum provides an opportunity for PBIs with purposes and beneficiaries overseas to seek DGR status. A number of law firms have already informed their clients of the ATO's shift in approach and the implications for cross-border charity and philanthropy.<sup>175</sup> As organisations act on this changed position by establishing PBIs for their overseas charitable activities, regulators will need to ensure appropriate oversight and monitoring of these cross-border charitable funds and activities. There are several regulatory measures that can be implemented for charities operating overseas to preserve the integrity of both the tax system and the not-for-profit sector. These range from inquiries during the initial registration process with the Australian Charities and Not-for-profits Commission (ACNC), which is required for charities to access tax concessions from the ATO, through to specific ongoing reporting requirements utilising the ACNC's annual information statement and the introduction of external conduct standards (ECSs) provided for in the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).<sup>176</sup> Ironically, allowing charitable organisations with overseas purposes and beneficiaries to engage in cross-border transactions may result in greater transparency and accountability than has previously been the case, when many organisations resorted to workarounds by sending funds overseas through third party intermediaries.

The opportunity to establish a PBI for overseas charitable activities may also have the effect of making organisations less reliant on the OAGDS, particularly those engaged in 'benevolent relief' abroad.<sup>177</sup> The other 'in Australia' exceptions may also become less attractive for organisations that qualify for PBI status. This raises the question of whether an amendment to the ITAA 1997 is necessary to remove some or all of the categories of exceptions and to clarify the 'in Australia' language in div 30.<sup>178</sup> It

<sup>175</sup> See, for example, email from Mark Fowler, Neumann & Turnour Lawyers, to clients, 'ATO says DGRs can be Active Overseas', 4 March 2016 (on file with authors); John Vaughan-Williams, *Can Public Benevolent Institutions Operate Overseas?* (March 2016) Mills Oakley, <<http://www.millsoakley.com.au/can-public-benevolent-institutions-operate-overseas/>>; Paxton-Hall Lawyers, *Not-for-Profit Bulletin* (March 2016) 1–2, <<http://www.paxton-hall.com.au/Open-Attachment/131/March%202016.pdf>>. See also Krystian Seibert, 'Recent Developments Make it Easier to do International Giving Differently', *Generosity* (online), 7 April 2016 <<http://www.generositymag.com.au/recent-developments-make-it-easier-to-do-international-giving-differently/>>.

<sup>176</sup> See Silver, McGregor-Lowndes and Tarr, above n 154, 117–8, for specific recommendations on establishing an appropriate supervisory framework for monitoring cross-border giving.

<sup>177</sup> Relief organisations have been distinguished from organisations engaged in '[p]revention ... directed at the community at large' by the ACNC in its recent draft interpretation statement on the definition of a PBI. See ACNC, *Commissioner's Interpretation Statement: Public Benevolent Institutions* (Public Exposure Draft, CIS 2016/03) <[http://www.acnc.gov.au/ACNC/Contact\\_us/Pub\\_consult\\_comment/Exposure\\_CIS\\_PBI/ACNC/Edu/Consultation\\_CIS\\_PBI.aspx?hkey=835cebae-55c6-44fc-b564-f3ea652a38ef](http://www.acnc.gov.au/ACNC/Contact_us/Pub_consult_comment/Exposure_CIS_PBI/ACNC/Edu/Consultation_CIS_PBI.aspx?hkey=835cebae-55c6-44fc-b564-f3ea652a38ef)>. As a result, organisations primarily engaged in community development work overseas will not qualify as PBIs, and those engaged in both relief and development work will likely maintain a separate fund under the OAGDS for their non-PBI 'prevention' activities.

<sup>178</sup> See Silver, McGregor-Lowndes and Tarr, above n 154, 118–9, for specific recommendations.

seems likely that an amendment will be required for div 50 to ensure that the 'in Australia' provisions are consistent for income tax exemption and gift deductibility. That is, 'principally' in Australia in s 50-50(a) will need to be removed so that the 'in Australia' requirement for tax exemption is not stricter than that for DGR status, which has never been the intention. Only a legislative amendment can rectify this inconsistency.

What the Australian Government will now do with its 'in Australia' reform agenda remains uncertain. It may prove extremely difficult for the Government to reverse its course and implement its reform agenda once PBIs with overseas charitable activities obtain DGR status. A critical juncture exists at present for the Government to clarify the law applying to the geographic parameters of income tax exemption and gift deductibility. The question is which path it will take in delineating the fiscal borders of Australia's non-profit tax concessions.