

CHAPTER TWENTY EIGHT: PHILANTHROPY¹

1. Introduction

While a significant proportion of cultural funding in Australia comes from government sources, the current climate is one of encouraging private giving for cultural purposes. One way that organisations can obtain private support is through sponsorships and strategic partnerships. An alternative is to seek donations.

The differences between sponsorships and donations are significant: an organisation's relationship with a donor is different in nature, dynamic and expectation. The relationships are also based on completely different tax principles:

A sponsor gets its tax deduction because the promotion and marketing of its business is a 'business expense' and therefore deductible. For a sponsor, the tax status of the recipient is irrelevant. The only relevant factor is the purpose of the expenditure.

By contrast, for a donor to get a tax deduction the tax status of the recipient is crucial. It must be an endorsed Deductible Gift Recipient (DGR).

There are no restrictions as to what can be donated. It might be money, but it is often collection material. Each species of gift attracts particular administrative requirements intended to promote fairness and transparency in the valuation and tax deduction process.

In this chapter, we look first at the fountainhead of philanthropy – DGR status generally, then describe the Cultural Gifts Program for public collecting institutions and finally briefly look at how organisations that support collecting institutions – but do not themselves come within the definition of a public library, museum or art gallery – can get the benefit of DGR status.

2. Deductible Gift Recipient Status

If a gift is to be tax deductible, the recipient organisation must be endorsed as a DGR. The rules that govern eligibility are set out in the income tax legislation and it is not the purpose of this chapter to be a comprehensive guide on DGR status – the legislation lists over thirty categories. Simply understand that there are various ways that you can seek endorsement depending on the nature and objects of the organisation.

In the collections world, it is helpful to simplify matters by dividing the world into two distinct types of organisation, each with its own DGR endorsement procedures:

- public museums, art galleries and libraries; and

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- cultural support organisations.²

2.1 Public Libraries, Museums and Art Galleries

If you work for a library, public museum or art gallery that gets (or is trying to get) donations, you must read Tax Ruling TR 2000/10. This tax ruling articulates the Australian Tax Office (ATO) interpretation of the phrases “*public library*”, “*public museum*” and “*public art gallery*”.³ This is fundamentally important if your organisation wants to be a DGR⁴ or to accept gifts under the Cultural Gifts Program.⁵

The ruling acknowledges that there is no definition of these terms in the *Income Tax Assessment Act 1997* (Cth). While the words are to be understood in their ordinary or everyday meaning, the ATO will expect a public library, public museum or public art gallery to have the following features:

- its collection is made available to the public;
- it must be in Australia;
- it is owned or controlled by a government or quasi-government authority, or by persons or an institution having a degree of responsibility to the public;
- it is constituted as a library, museum or art gallery, other people recognise it as such, and it conducts itself in ways that are consistent with such a character; and
- it is an institution.

We discuss these considerations in further detail below.

(a) Available to the public

The ruling accepts that the collection of a library, museum or art gallery as being available to the public where it is for use by the public or a section of the public. If such access is minor, the institution is not public. On the other hand, it is not necessary that a collection be made indiscriminately available. Limitations on access can be consistent with availability to the public where they are to protect the collection, ensure orderly access and efficient operation.⁶

In the ruling the ATO accepts “*that students attending a public educational institution are a section of the public, in this context*”.⁷ This is important for all libraries, museums and galleries that form part of universities for whilst some of these are open to the general, non-student public, others certainly are not. Indeed this has interesting consequences for it means that even if a collection is made available only to a particular section of the public,⁸ it can still be treated as a public collection.

Where a library, museum or art gallery is carried on by an organisation and operated for the profit or gain of its owners or members, the facility is not public. However, the charging of appropriate fees is not, in itself, inconsistent with being a public library, museum or art gallery.⁹ This is highly significant: it means that charging for entry to the collection does not, of itself, destroy the public nature of the collection and thus, its beneficial tax status. The real question to be asked is purposive: what is the purpose of operating the collection? Is it for “*profit or gain of its owners or members*”?

² See sections 30–100 of the *Income Tax Assessment Act 1997* (Cth).

³ TR 2000/10 replaces earlier the guidelines dealing with such gifts, (Taxation Rulings IT 290, IT 2020, IT 2032 and IT 2676).

⁴ Under division 30 of the *Income Tax Assessment Act 1997* (Cth).

⁵ See item 4 of the table in section 30–15 of the Act (gifts under the Cultural Gifts Program), and sub-division 30-B items 12.1.2 – 12.1.5 in s 30–100.

⁶ TR 2000/10, para 6. (For example, a library can operate as a reference collection only.)

⁷ *ibid*, para 7.

⁸ For example, medical collections available only to medical students and health professionals.

⁹ TR 2000/10, para 9.

(b) In Australia

To be eligible to receive deductible gifts under Division 30 of the Act, the public library, public museum or public art gallery must be in Australia. If a facility, recognised as a library, museum and gallery, is established in Australia and makes its collection permanently available to the public in Australia, the ATO accepts that it is in Australia.¹⁰

Borrowing from and temporarily lending exhibits to overseas public libraries, museums and galleries, do not, in themselves, prevent an institution from being described as being in Australia.¹¹

(c) Structure of the institution

It does not matter whether the organisation is a company, association, trust or government body – but it must have a formal structure. It cannot be an individual or a partnership.

(d) Management

The institution must be recognised and managed as a public resource. If it is not a government or quasi-government institution, it must be controlled by people that have a responsibility to the community arising from their position within the community.¹²

(e) Purpose of the institution

Where the purpose and activities of the entity are wholly those of a library, museum or gallery, there is little difficulty.

But what is the effect of running, say, the gallery shop? This activity is clearly commercial and while associated with the collection and exhibition purposes of the collection, is distinct from it. This issue is cautiously recognised by the ATO. The ruling states: “*Where other purposes and activities are evident, we only accept the entity as a public library, public museum, or public art gallery if they are minor and consistent with the purposes and activities of a public library, museum, or art gallery*”.¹³

Even more complicated is the situation where the principal entity is not a public library, museum, or art gallery, but is an organisation that operates such a collection as a minor part of its larger commercial purposes. A ready example might be a museum operated by and within a large mining company. Clearly the principal purpose of the organisation is commercial and is not that of operating a public museum, gallery or library. Yet one might well argue that as the collection is not operated for commercial profit and is open to the general public, it should attract the tax advantages accorded to ‘public’ collections. To deal with this conundrum the ATO ruling has provided the following guidelines:¹⁴

A part of the entity may be accepted as a public library, museum, or art gallery provided:

- *the affairs of the library, museum, or art gallery are separate from the general affairs of the entity;*
- *the public can readily distinguish the library, museum, or art gallery from the rest of the entity;*
- *the collection is readily identifiable to the public as the public collection of a library, museum, or art gallery;*
- *the accounts of the library, museum, or art gallery are separate from those of the rest of the entity; and*
- *any gifts made to the library, museum or art gallery are used only for library, museum or art gallery purposes.*

¹⁰ *ibid*, para 12.

¹¹ *ibid*, para 13.

¹² These are referred to as “*responsible persons*” and include doctors, JPs, judges and other members of the legal profession, councillors, clergy and church authorities, directors and senior executives of large companies, accountants, medical practitioners (and other persons who belong to a professional body that has a professional code of ethics and rules of conduct), senior members of the teaching profession, persons who have been awarded an honour, persons who hold (or have held) public positions (for example, appointed by Government ministers), and persons who hold public or elected office such as town clerks, councillors, mayors and MPs.

¹³ TR 2000/10, para 6 para 10.

¹⁴ *ibid*, para 11.

3. The Cultural Gifts Program

Although it is sad for an author to admit, the starting point for finding information in the Cultural Gift Program is the Commonwealth government website.¹⁵ It is excellent: simple, informative and practical. However, for those readers who just want a general overview, read on.

3.1 *Purpose and administration*

The purpose of the **Cultural Gifts Program** is to encourage the making of gifts of significant cultural material to public museums, galleries and libraries. It crosses the boundaries of two federal departments: the ATO and the department responsible for the arts. There are three distinct but related parts to the structure:

Formal responsibility: The Minister responsible for the arts is responsible for the day-to-day administration of the program up to the stage where a donor claims a deduction, and then the process becomes the formal responsibility of the ATO.

Administration: The Cultural Gifts Program is administered by a secretariat within the Department of the Prime Minister and Cabinet (PM&C), Office for the Arts, Canberra;¹⁶

External advice: The Minister responsible for the arts appoints an expert committee, (the Committee on Taxation Incentives for the Arts), which advises the Minister, the Departmental Secretary and the Commissioner of Taxation on the operation of the program.¹⁷

This is an efficient division of powers and responsibilities, permitting the ATO to ensure the integrity of the tax components, PM&C to supervise and administer the cultural purpose (the encouragement of gifts to public museums, galleries and libraries), and an outside body of expert knowledge to provide advice to both.

How organisations apply to participate in the program

To participate in the CGP, a collecting institution must apply to the secretariat. It must:

- show that it is endorsed by the ATO under the *Income Tax Assessment Act 1997* (Cth) as a DGR on the basis that it is a public art gallery, museum or library (including archives)¹⁸ by providing a copy of the notification from the ATO advising of its DGR status; and
- provide a copy of its authorised collection policy, including a mission statement, acquisition policy, collection care, deaccessioning and disposal policy, loans policy and the mechanism for review.¹⁹

3.2 *The Cultural Gifts Program from the donor's view*

Where a gift is made under the Cultural Gifts Program the donor not only obtains a tax deduction to the approved market value of the gift but also obtains a capital gains tax exemption in relation to the donation.²⁰ The tax deduction can be spread over five years.²¹

To obtain the taxation benefits under the Cultural Gifts Program, the gift must be made to a public collecting institution with DGR status and the collecting institution must be willing to accept the gift. Accordingly, the first step for any donor is to find a collecting institution that wants the gift. The would-be donor and the management negotiate the terms of the gift. The institution then arranges the material to be valued.

¹⁵ http://www.arts.gov.au/tax_incentives/cgp.

¹⁶ A comprehensive *Cultural Gifts Program Guide* is available at http://www.arts.gov.au/tax_incentives/cgp. It is essential that reference be made to this document when considering application for participation in the Cultural Gifts Program. Much of the information in this section is derived from that official document.

¹⁷ The Committee on Taxation Incentives for the Arts reviews the valuations of gifts to ensure that they reflect current GST market value; certifies that the gift complies with the guidelines; and advises the Commissioner of Taxation on aspects of gifts which may assist the Commissioner to exercise discretionary powers: *ibid* at 13.

¹⁸ Endorsement is pursuant to sub-section 30–15(1).

¹⁹ *ibid* at 3.

²⁰ In other words, the donor does not pay capital gains tax on the difference in value between the purchase price and the assessed market value at the time of the donation.

²¹ For information on spreading and apportionment, see *Cultural Gifts Program Guide* at 11.

These valuations must be:

- current;²²
- in writing; and
- for the GST inclusive value.

3.3 Limitations on deductions

There are a number of limitations built into the system:

- if the property is acquired by the donor with the purpose of giving it away and the amount paid for the gift was below market value, the valuation for the purposes of tax deductibility is the lesser of the average of the market valuation and the amount paid;
- testamentary gifts do not qualify for a tax deduction;²³
- if the donor puts conditions on the gift, this can affect the value of the gift and thus the value of the deduction that will be approved;²⁴
- the deduction may be disallowed if the donor receives 'advantage of a material nature as a result of the gift';²⁵
- if an artist or dealer makes a gift which is part of their trading stock, the deduction will be restricted to the cost of acquiring or producing the item(s).²⁶

3.4 Further information

Detailed information about the Cultural Gifts Program is available on the Department's website:

http://www.arts.gov.au/tax_incentives/cgp .

3.5 Cultural Organisations that are not collecting organisations

One way of becoming a DGR is to be registered on the Register of Cultural Organisations (**ROCO**). The Register is maintained and administered by the Department of Communications and the Arts within the Commonwealth government.²⁷

Cultural bodies eligible for listing on the Register are those whose principal purpose is the promotion of one or more of the cultural activities specified in sub-division 30-F, sub-section 30-300(2) of the *Income Tax Assessment Act 1997* (Cth) (**the Act**): literature; visual, community, performing or Aboriginal and Torres Strait Islander arts; music; crafts; design; television; video; radio; film; or movable cultural heritage.

ROCO is not the appropriate avenue for collecting institutions to attain DGR status. However there are many organisations that are related to collecting institutions that are listed on, or may be eligible for, ROCO. For example, the Art Gallery of NSW attracts tax-deductible status because it is a "public art gallery" within the Cultural Gifts Program, but the Art Gallery Society of NSW attains its tax-deductible status through its registration on ROCO. In

²² The gift must be valued to give its market value either on the day of the gift or a date within ninety days before or after the gift was made.

²³ This includes gifts bequeathed under a will; gifts made by the executors from the corpus of the will; and gifts by trustees acting on the instructions under a will.

²⁴ For example, if conditions are attached to the gift that prevent the institution having full custody, control and clear title, the ATO may reduce the amount of the deduction (s30-220)

²⁵ Such as free or discounted entry or membership.

²⁶ If an artist or dealer donates from their personal collection, the donor must demonstrate to the satisfaction of the Commissioner of Taxation that the item(s) were not held for commercial gain. In order to qualify for a deduction of the current market value, the donor must have held the item(s) in their personal collection for a period of at least twelve months. See p 19 of the Cultural Gifts Program Guide.

²⁷ See more detailed information on ROCO at http://www.arts.gov.au/tax_incentives/register_of_cultural_organisations. The procedure for seeking endorsement as a DGR is set out at <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/34490.htm&page=2&H2>.

brief, the collecting organisation gets its DGR status under the Cultural Gifts Program while related professional bodies and support organisations may be eligible for ROCO.

To qualify for endorsement as a DGR the cultural organisation must:

- have as its principal purpose, the promotion of cultural activities in accordance with sub-section 30-300(2) of the Act;
- be a company, incorporated association, trust or statutory body;
- have an Australian Business Number;
- maintain a separate public fund;
- issue receipts;
- be based in and operate in Australia (and its causes and beneficiaries must also be in Australia).²⁸

There are a number of important restrictions placed on organisations on ROCO, for example, bequests under a will are not tax deductible; and registered organisations or funds cannot accept donations on behalf of another non-registered organisation or individual.

3.6 What is a "Gift"?²⁹

Gifts have the following characteristics:

- *There is a transfer of money or property:* The key word is "transfer". The legal ownership of the asset must change hands. Title must pass. It cannot be some form of loan.
- *The transfer is made voluntarily:* you cannot be forced to make a gift. If it is a true gift, the owner must choose to transfer ownership. For example, a requisition cannot be a gift.
- *The transfer arises by way of benefaction:* This one is a little hard to test. Who can possibly tell what a donor's true motives may be? However, one can say that this is one factor that distinguishes a donation from a sponsorship; and
- *The donor must not receive any other benefit from the donation,* other than the tax-deductibility of their donation.

This last point creates much confusion. How can the DGR reinforce the generous behaviour and thank its donors, without endangering the tax deductibility of the benefaction? An acknowledgment that a recipient makes in appreciation of a payment can be consistent with the payment being a gift. Other acceptable forms of acknowledgment include stickers, mention in a newsletter or periodical, and plaques if they are of small cost and prominence. However, enlarging the acknowledgment into forms of advertising would prevent the payment from being a gift.

Many forms of fundraising are not "gifts" for tax purposes. For example, the following payments are not gifts, as the person paying is receiving something in return (albeit, in the case of the first we've listed, just a chance at winning something):

- purchases of raffle or art union tickets;
- purchases of chocolates, pens and so on;
- the cost of attending fundraising dinners, even if the cost exceeds the value of the dinner;

²⁸ The Australian National Maritime Museum has an interesting twist on this. Donors who are US citizens can get a tax deduction in the US by donating to a company established in Delaware that has been given tax-deductible status by the US Government. Of course, that does not mean that the US company is itself a DGR: it gets the US donations and transfers them to the Australian parent body.

²⁹ This information was taken from the Gift Pack Guide, published in 2005 by the Australian Taxation Office.

- membership fees;
- payments where the person has an understanding with the recipient that the payments will be used to provide a benefit for the 'donor';
- the gift of a service, as no money or property is transferred to the DGR;
- volunteers' expenses in carrying out the voluntary work, and the value of unpaid work.

3.7 Gift types

To be tax deductible, a gift must fall within one or more of the following gift types. For each gift type, this section explains the types of gifts covered, the types of DGRs that can receive the gifts, and valuation issues.

(a) Money

To be deductible, the gift must be over \$2. It can be in Australian or foreign currency and can be made in cash, cheque, credit card or electronic transfer. (It does not cover gifts made under a will.) Gifts of money can be made to any DGR.³⁰

(b) Property valued by the Tax Office at more than \$5 000

Apart from money, any kind of property may be gifted. To be deductible, however, the property must be valued by the ATO at over \$5 000. There are particular rules that apply, depending on whether the property was purchased more or less than 12 months prior to the gift.

This gift type applies to all types of DGR (except for gifts to the Commonwealth for the purposes of Artbank).

In general, if the purchase occurred fewer than twelve months prior to the gift, the amount of the deduction will be the lesser of:

- the market value of the property on the day the gift is made; and
- the amount paid by the donor for the property.

If the purchase occurred more than twelve months from the date of the gift, the amount of the deduction will be the value of the property as determined by the ATO at the time of the gift.

For donors who are registered for GST, or are required to be registered, the amount paid is reduced by the amount of the GST credit (if any). This is because the donor effectively receives a refund of the GST paid on purchasing the gifted property.

If GST was not included in the price of the property purchased by the donor, no adjustment would be made. Examples are purchases from businesses that are not registered for GST and not required to be registered.

For donors who are not registered for GST, and not required to be registered, the amount paid is not adjusted to exclude GST.

(c) Listed shares valued at \$5 000 or less, and acquired at least twelve months before the gift was made

This gift type covers the gift of shares, but only if four conditions are met:

- the shares were acquired in a listed public company;
- when the shares were gifted, they were listed for quotation on the official list of an Australian stock exchange;
- the shares were acquired at least twelve months before they were gifted; and
- the market value of the shares was \$5 000 or less on the day they were gifted.

³⁰ Except gifts to the Commonwealth for the purposes of Artbank.

It does not cover gifts made under a will.

This gift type applies to all types of DGR (except for gifts to the Commonwealth for the purposes of Artbank).

Similar to property donations, there are rules that apply to the valuation of the shares depending on whether they were purchased more or less than twelve months from the date of the donation.³¹

(d) Trading stock disposed of outside the ordinary course of business

This gift type covers the trading stock of a business, but only if the gift is a disposal of the trading stock outside the ordinary course of the donor's business. In other words a furniture shop owner can give a bookcase to the DGR because the shop owner's ordinary course of business is 'selling' not 'giving' furniture.

This gift type applies to all types of DGR (except for gifts to the Commonwealth for the purposes of Artbank).

The value of the gift is the market value of the trading stock on the day the gift was made.

(e) Gifts made under the Cultural Gifts Program

This gift type covers gifts of culturally significant property (except property that is an estate or interest in land or in a building or part of a building) made under the Cultural Gifts Program.

This gift type applies to the following DGRs:

- DGRs that are public libraries, public museums, public art galleries or institutions consisting of two or more of these;
- DGRs endorsed as DGRs for the operation of a public library, public museum, public art gallery or an institution consisting of two or more of these;
- the Australiana Fund; and
- the Commonwealth for the purposes of Artbank.

The property must be accepted by the DGR for inclusion in a collection it is maintaining or establishing. For Artbank, the property must be accepted by the Commonwealth for inclusion in a collection maintained or being established for the purposes of Artbank.

Intending donors should contact the DGR, then they or the DGR should seek more information from the Cultural Gifts Program Secretariat in the Department of Communications and the Arts.

The general rule is that the amount of the deduction is the average of two or more written valuations made by valuers approved by the Department of Communications and the Arts.

However, if the property was:

- acquired for the purpose of giving it away;
- acquired subject to an arrangement that it would be given away; or
- acquired (otherwise than by inheritance) less than one year before making the gift

then the valuation of the gift is the lesser of the amount the donor paid for the property and the average of the written valuations.

Where the written valuations for the property do not fairly represent the GST-inclusive market value of the property, the deduction is adjusted to the GST-inclusive market value on the day the gift was made.³²

³¹ For information on gifts of shares valued at \$5 000 or less, see [https://www.ato.gov.au/non-profit/gifts-and-fundraising/claiming-tax-deductions/gift-types,-requirements-and-valuation-rules/shares-valued-at-\\$5,000-or-less/](https://www.ato.gov.au/non-profit/gifts-and-fundraising/claiming-tax-deductions/gift-types,-requirements-and-valuation-rules/shares-valued-at-$5,000-or-less/).

³² If the Committee is not satisfied that the average of the valuations represents the GST-inclusive market value of the donation on the day it was made, the Committee will refer the donation to the Commissioner of

Written valuations are not required if no amount is included in the donor's assessable income in relation to the gift, and an amount would have been included if the property had been sold rather than gifted. An example could be property purchased with a profit-making intention that is later disposed of by gift. The valuation of the gift is the amount paid for the property, or if the property had been manufactured or created, the amount allowable as a tax deduction if it had been sold by the donor.

If the donor is registered for GST, or required to be registered, these amounts may need to be adjusted.

For this gift type, donors can make an election to spread the deduction over a period of up to five years.

A gift deduction is reduced by a reasonable amount if property is donated subject to conditions on the ownership, custody and control of the property.

Gifts of property made under the Cultural Gifts Program are exempt from capital gains tax. Any capital gain or loss made from such gifts is disregarded.

This rule does not apply if the donor or an associate of the donor later acquires the gift for less than market value.

(f) Gifts made under the Cultural Bequests Program

This program has been suspended. Gifts made in a deceased's will are not tax deductible.

(g) Places included in the National Heritage List, the Commonwealth Heritage List or the Register of the National Estate

This gift type covers gifts of places included in:

- the National Heritage List, or the Commonwealth Heritage List, under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, or
- the Register of the National Estate under the *Australian Heritage Council Act 2003 (Cth)*.

Places included in these lists are:

- places of outstanding natural, Indigenous or historic heritage value to the nation
- places of significant natural, Indigenous or historic heritage value owned or leased by the Commonwealth, and
- places of significant natural, Indigenous or historic heritage value throughout Australia.

This gift type does not cover gifts made under a will, but does apply to DGRs that are National Trust bodies, provided the gift is accepted by the relevant National Trust body for the purpose of preserving it for the benefit of the public.

The general rule is that the valuation of a gift is the average of the written valuations provided by valuers approved by the Department of the Communications and the Arts.

SUMMARY OF CULTURAL ORGANISATIONS AND GIFTS

Cultural organisations

DGR table – general categories	Other conditions	Type of gift
<p><i>Public fund on the Register of Cultural Organisations</i></p> <p><i>(Gift condition: the public fund must be listed on the Register of Cultural Organisations when the gift is made.)</i></p>	<ul style="list-style-type: none"> • in Australia • endorsement • receipts • self-review 	<ul style="list-style-type: none"> • \$2 or more • property > \$5,000 • property < 12 months • shares ≤ \$5,000 • trading stock
<i>Public library</i>	<ul style="list-style-type: none"> • in Australia • endorsement • receipts • self-review 	<ul style="list-style-type: none"> • \$2 or more • property > \$5000 • property < 12 months • shares ≤ \$5000 • trading stock • cultural gifts • cultural bequests
<i>Public museum.</i>	<ul style="list-style-type: none"> • in Australia • endorsement • receipts • self-review 	<ul style="list-style-type: none"> • \$2 or more • property > \$5000 • property < 12 months • shares ≤ \$5000 • trading stock • cultural gifts • cultural bequests
<i>Public art gallery</i>	<ul style="list-style-type: none"> • in Australia • endorsement • receipts • self-review 	<ul style="list-style-type: none"> • \$2 or more • property > \$5000 • property < 12 months • shares ≤ \$5000 • trading stock • cultural gifts • cultural bequests
<i>Institution consisting of a public library, public museum and public art gallery or of any two of them</i>	<ul style="list-style-type: none"> • in Australia • endorsement • receipts • self-review 	<ul style="list-style-type: none"> • \$2 or more • property > \$5000 • property < 12 months • shares ≤ \$5000 • trading stock • cultural gifts • cultural bequests