

# Incentivising Food Donations to Charitable Organisations

**KPMG submission**

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# Executive summary

As a leading professional services firm, KPMG Australia (KPMG) is committed to meeting the requirements of all our stakeholders – not only the organisations we audit and advise, but also employees, governments, regulators and the wider community.

KPMG Australia (KPMG) welcomes the opportunity to respond to the Senate Standing Committee on Economics in relation to the *Tax Laws Amendment (Incentivising Food Donations to Charitable Organisations) Bill 2024* (the Bill). We commend the introduction of this Bill and strongly support its passage through Parliament.

As noted in the Bill's Explanatory Memorandum (EM), KPMG has been an active supporter of a National Food Donation Tax Incentive (previously referred to as the National Food Waste Donation Tax Incentive) in partnership with Foodbank and has produced the following reports:

- [A National Food Waste Tax Incentive 2020](#)
- [Australian National Food Donation Tax Incentive Implementation Analysis 2023](#)

The first report provided a summary and analysis of the current tax position and incentives available in Australia's tax law regarding the donation of goods and services. The report also considered and reviewed relevant tax incentives available in key OECD countries to develop two proposed tax reform design options that provide complementary benefits to two nationally significant policy areas of food waste and food relief.

The second report then tested and analysed these findings, along with industry participation, to provide clear implementation recommendations that have largely been adopted and incorporated within this Bill.

The reports find that whilst Australia has an extensive regime for the tax deductibility of charitable donations, the introduction of a food donations tax incentive will enable an estimated \$2 billion per annum social, economic and environmental benefit and positively contribute to Australia's ambition to halve food waste by 2030.

We are supportive of the core features of the Bill, including the integrity measures, and consider that the legislative framework provides a good balance to incentivise food donations activities while also having appropriate safeguards to manage key integrity risks. As such, we consider there are no fundamental changes required prior to the Bill being enacted as law.

However, we take this opportunity to provide several recommendations below which would enhance the operation of the tax offset. In addition, we make a number of further observations in the Appendix which could be considered at this juncture or as part of the independent review process in three years.

KPMG supports the Bill and welcomes the opportunity to discuss any elements of the Bill with the Committee. Should you wish to discuss this submission further, please do not hesitate to contact us.

Yours sincerely,

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# Background

## About KPMG

KPMG is a global organisation of independent professional firms, providing a full range of services to organisations across a wide range of industries, governments and not-for-profit sectors. We operate in 140 countries and territories and have more than 270,000 people working in member firms around the world. In Australia, KPMG has a long tradition of professionalism and integrity combined with our dynamic approach to advising clients in a digital-driven world.

# KPMG Insights

# KPMG Insights

## Claimants

Under the Bill, the only type of entity that is eligible to claim the offset is a constitutional corporation. However, many small businesses, including primary producers and others in the agricultural sector, commonly operate their businesses through different structures, notably partnerships and trusts. As currently drafted, these entities will be ineligible to claim the offset.

Therefore, we recommend that the availability of the offset be extended to trusts and partnerships.<sup>1</sup>

## Donation recipient

The Bill provides that the registered charity must be registered under the [Australian Charities and Not-for-profits Commission Act 2012](#) as the subtype of an entity in column 2 of item 3 of the table in subsection 25-5(5) of that Act. Item 3 is an entity with a purpose to which paragraph (c) of the definition of charitable purpose in subsection 12(1) of the *Charities Act 2013* applies (advancing social or public welfare).

We recommend this is extended to include either entity subtype item 3 (above) or item 14, which is a public benevolent institution (PBI). There are many registered charities that play active roles in trying to reduce food waste and food hunger, and not all of these charities fall within item 3. We suggest the provision is updated as follows:

*“registered food charity means an entity that is:*

*(a) a \* registered charity; and*

*(b) registered under the Australian Charities and Not-for-profits 7 Commission Act 2012 as the subtype of entity mentioned in column 2 of item 3 or item 14 of the table in subsection 25-5(5) of that Act.”*

<sup>1</sup> Given these entities are ‘flow-through’ entities and generally not tax-paying themselves, for tax purposes the offset would not be claimable at the trust / partnership level, but rather would be passed on to the beneficiaries / partners. This is consistent with the operation of a number of other tax offsets such as franking credit offsets, foreign income tax offsets and the small business income tax offset (noting that the tax offsets that are, broadly, only available to companies include the R&D tax offset and film tax offset).

## Offset quantum

We note the quantum of the offset is limited by a \$5 million cap, and we are supportive of this in the current fiscal environment.

The offset has a three-tiered structure, providing for a 45 percent offset for a company with an aggregated turnover of less than \$20 million, a 40 percent offset for a company with an aggregated turnover of at least \$20 million and less than \$50 million, and a 30 percent offset for all other companies.

We understand that this means that the ‘incentive’ component of the offset is as follows:

- A company that can claim a 45 percent offset receives a net tax incentive of up to 20 percent (after ‘adding back’ the tax deduction foregone at 25 percent);
- A company that can claim a 40 percent offset receives a net tax incentive of up to 15 percent (after ‘adding back’ the tax deduction foregone at 25 percent); and
- A company that can claim a 30 percent offset receives no net tax incentive where the eligible expenses are already able to be claimed as tax deductions under existing tax law. However, the 30 percent offset may provide companies with the ability to claim food donations expenses for tax purposes in situations where a deduction under existing tax law is not otherwise available.<sup>2</sup>

Practically, this means that for many companies that can only claim the 30 percent offset, there may be minimal incentive to undertake food donations activities.

As such, consideration should be given to increasing the \$50 million threshold to allow for all businesses classified as medium sized businesses (defined by the ATO as turnover of between \$10 million and \$250 million<sup>3</sup>) to be eligible for the 40 percent offset rate. This is

<sup>2</sup> For example, for donations of services (such as sponsorship, food transportation, or storage services) to food relief organisations, a deduction may not be claimable by the donor unless the services are provided under an arrangement which creates a deduction for the donor under section 8 – 1 of the Income Tax Assessment Act 1997.

<sup>3</sup> [Latest estimate and trends | Australian Taxation Office \(ato.gov.au\). For 2020-21 the ATO estimated that approximately 80% of medium businesses have a turnover of less than \\$50 million.](#)

particularly the case having regard to the fact that the test looks at turnover (i.e. revenue) rather than profit. Many businesses across the food waste supply chain operate with high turnover but low profit margins, meaning they may exceed the current \$50 million threshold. However, low profitability can make it difficult for such businesses to bear the additional costs of donating excess food in the absence of an incentive.

Given the proposal is in a pilot phase, we acknowledge that providing an incentive 40 percent offset for all companies above a \$20 million threshold (as recommended in the KPMG report) may not be feasible in the current fiscal environment.

As such, we suggest a balanced approach would be to extend the 40 percent offset to those businesses with an aggregated turnover less than \$250 million, which can allow for the measure to continue to be targeted to the business community requiring the most support, without a significant increase in the cost of the measures.

## Strengthening the integrity of the measures

### Rule-making power

We recommend that the Bill include a provision for the Minister to make rules in relation to the tax offset by legislative instrument. This should ensure that any additional rules required (including in relation to the mechanics of the tax offset computation as well as integrity rules) can be incorporated efficiently and in a timely manner, with the appropriate level of parliamentary oversight. It would also allow the swift correction of any unforeseen consequences that may arise from the tax offset's implementation.

### Apportionment of costs

For integrity purposes, we recommend the Bill and EM make it clear that companies may only claim expenses on a proportionate basis to the extent of the food donations activities.

Although such an apportionment could be implied from the legislation, we recommend this be made clearer to prevent overclaiming of costs under the offset. This would provide more certainty that companies that incur costs such as production, manufacturing and harvesting of food as part of their usual business activities would need to apportion how much of the costs relate to usual business activities and how much relates to food donations activities on a reasonable basis.

To this end, we recommend an update to section 419-20 along the following lines:

*“(1) A company’s food donations expenditure is expenditure to the extent that the company incurs in, or in relation to, undertaking \* food donations activities for a \* registered food charity.”*

We suggest the EM is also updated to confirm that companies must undertake any apportionment on a reasonable basis and maintain contemporaneous evidence of the apportionment methodologies, calculations etc. An example in the EM or ATO guidance would also provide more clarity on what a reasonable basis might include (e.g. such as the weight of food donated over the weight of total food produced).

## Excluded costs

In relation to the exclusion for tax depreciation (subsection 419-20(8)), our primary position is that this should ideally be an eligible cost (see Appendix comments below). Notwithstanding, where this limitation is retained, we recommend extending it to also exclude capital works deductions (under Division 43). This would ensure that companies do not claim the cost of buildings etc used for storage in the tax offset.

## Donation receipt

The Bill provides that regulations (if any) can prescribe information to be contained in the receipt provided by the charity. For integrity purposes, we recommend that regulations registered following enactment of the legislation provide that the receipt should include the date of the donation as well as a detailed itemisation of the donated food or services received (including details relevant to an appropriate apportionment methodology, such as the weight of the food donated).

# Appendix

As mentioned above, we provide additional observations below. These could be considered at this juncture or as part of the later independent review process.

## Definition of food

The definition of food donations activities includes a requirement that the “*food is fit for human consumption*”. This is an undefined term and its ordinary meaning would apply. For greater certainty, we recommend the definition of food for GST purposes is adopted – specifically, use of the definitional inclusions in paragraphs 38-4(1)(a) to 38-4(1)(f) *A New Tax System (Goods and Services Tax) Act 1999*.<sup>4</sup> Given the collaborative supply arrangements between primary producers and food relief charities and to ensure a broad definition of food for human consumption, the exclusions in paragraphs 38-4(1)(g) to 38-4(1)(i) of the GST definition should not be picked up for the purposes of the tax offset.<sup>5</sup>

## Eligible costs

Decline in value of a depreciating asset (i.e. depreciation) is specifically excluded from being classed as food donations expenditure (subsection 419-20(8)). We recommend including depreciation as an allowable food donations expenditure, where it is in relation to undertaking food donations activities (but only to the extent that the asset is used for the purpose of food donations activities).

Several other Australian tax incentive regimes include deprecation, including the research and development tax incentive, the film tax offsets and the junior minerals tax incentive.<sup>6</sup>

The 2022 KPMG report found that one of the main barriers to many companies actively participating in food waste reduction and food relief in Australia is the costs of related services

such as transport and logistics which are often the key driver behind an unmanageable cost burden in donating. In this regard, we consider that depreciable assets represent a real cost to businesses, and so where the assets are directly used in the food donation activities, the incentive that arises from the tax offset should be available to the business.<sup>7</sup> Relevant examples could include motor vehicle depreciation where the vehicle is used to transport donated food and depreciation of storage and refrigeration facilities used to store donatable food.

## Book-to-tax treatment

We understand based on current drafting of the Bill that eligible food donations expenditure should be treated as non-deductible for tax purposes and claimable as a tax offset. To provide certainty, the EM should be updated to make this clear (e.g. through illustrative examples).

We also suggest guidance be added to make it clear that, for the companies that claim a 30 percent deduction, they can ‘choose’ not to claim a deduction under the other parts of the income tax law to which they are entitled in order to claim the expenditure under this offset.

## Other minor drafting comments

There is a duplication of terms in the rules which should be amended. We consider paragraph 419-5(a) should read as follows:

*“A company is entitled to a \*tax offset under this section (the food donations tax offset) for an \*income year if: (a) the company incurs \*food donations expenditure in the income year ~~in, or in relation to, undertaking \*food donations~~*

<sup>4</sup> Greater certainty is also provided through the existing public guidance published by the Commissioner of Taxation in relation to the GST definition of food.

<sup>5</sup> See further pages 33 – 34 of the 2022 KPMG report.

<sup>6</sup> While the digital games tax offset excludes depreciation, the purpose of this offset is to support transferrable digital and creative skills (i.e. it is focused on

costs relating to individuals). We note that the critical minerals tax offset (not yet legislated) also proposes to exclude depreciation.

<sup>7</sup> For clarity, where the depreciable asset is used partly for food donations activities and partly for other business purposes, there should be a pro-rata claim.



~~activities for a \*registered food charity;  
and...~~

This is because food donations expenditure is already defined at subsection 419-20(1) as “*expenditure that the company incurs in, or in relation to, undertaking food donations activities for a \*registered food charity*”, and hence there is no need to duplicate the “*food donations activities*” and “*registered food charity*” conditions in section 419-5.



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