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Extension of Charitable Purpose Bill 2004

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Extension of Charitable Purpose Bill 2004

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Law and Bills Digest Section
17 June 2004

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Extension of Charitable Purpose Bill 2004

Date Introduced: 27 May 2004

House: House of Representatives

Portfolio: Treasury

Commencement: 1 July 2004

Purpose

The Extension of Charitable Purpose Bill 2004 ('the Bill') is intended to extend the common law meaning of charitable purpose to include non-profit child-care providers, certain self-help groups and certain closed and contemplative religious orders.

Background

Charities are important aspects of modern societies and they often provide essential services to the community such as looking after those in need.¹ By assuming roles that have been Government responsibility, charities provide financial relief to governments. By providing various tax exemptions for charities as a form of subsidy, the Government has acknowledged this particular function charities assume.²

Charities: a legal framework from 1601

In order to be eligible for the tax exemptions referred to above, a fund or institution (hereinafter: 'entity') must fulfil all common law requirements for a charity. At common law, an entity qualifies as a 'charity' if it:

- has a charitable purpose, and
- is for a public benefit (which includes that the entity is not for profit).

The charitable purpose

It was said to be 'probably impossible to define...' what constitutes 'charitable' or a 'charitable purpose'.³ The *Statute of Charitable Uses Act 1601*, also called the *Statute of*

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Elizabeth, lists 21 examples of charitable purposes in its preamble.⁴ Whilst these examples still form the foundation for the current Law of Charities, they have been subsequently condensed by the courts to four acknowledged ‘heads of charity’:

- relief of the poor, aged and impotent
- advancement of education
- advancement of religion, and
- other purposes beneficial to the community.

An entity with a purpose falling into one of these heads will be considered to be an entity for a charitable purpose.⁵ However, to be considered a charity, an entity has to fulfil a further requirement: the charitable purpose must be for a public benefit.⁶

The public benefit

It is long established that there is an ‘incongruity between charity and private benefit.’⁷ Accordingly, courts have been concerned with preventing a certain person or a group of persons to profit from the entity, for example by becoming eligible for tax concessions.

The 2002 *Inquiry Into Definitional Issues Relating To Charitable, Religious And Community Service Not-For-Profit Organisations* (‘the Charities Definition Inquiry’) extrapolated the relevant principles and summarised them as follows:

- The object or purpose must be beneficial in itself, that is, it must be aimed at achieving a universal or common good; by definition, a purpose cannot be beneficial if it is harmful to the public.
- ‘Benefit’ is not limited to the delivery of material benefits, but can extend to include social, mental and spiritual benefits. However, it has been held by the courts that a basic requirement of a charitable gift is that it must be seen to have practical utility.
- The ‘public’ is taken to mean the general community or a ‘sufficient section of it’. This has been given clearer meaning through what has become known as the Compton/Oppenheim test, which indicates that the number of potential beneficiaries of a charity must not be numerically negligible, and there must be no personal relationship between the beneficiaries and any named person or persons.⁸

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The Law of Charities: Codifying the Impossible?

Charitable purpose: legal meaning v public perception.

There can be a significant difference between the legal meaning and the popular understanding of ‘charitable purpose’ and ultimately of ‘charity’. In fact, the relationship between legal and popular meaning was described as being:

[S]o far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning.⁹

In Australia, Fullagar J of the High Court couched this difference in the following terms:

There is a subjective element in the term as used non-technically, which is absent when it is used technically. The characteristic of a charitable act or purpose in this sense is that it possesses a certain moral quality. This is so although that quality is extremely vague and difficult to define, and even if it be true that common usage has narrowed the scope of the term by reference to relief of poverty. On the other hand, when we ask whether an act or purpose is charitable in the technical sense, the test to be applied is wholly objective. The whole question is whether the act or purpose itself falls within a particular class which we say is to be defined by reference to the statute of Elizabeth.¹⁰

As the legal standard for ‘charitable purpose’ is still based on the principles stipulated in the Statute of Elizabeth, entities that are perceived as ‘charitable’ by the public often fail to obtain recognition as charity on the basis of the legal meaning.

This difference was acknowledged by the Prime Minister:

We need to ensure that the legislative and administrative framework in which [charities] operate is appropriate to the modern social and economic environment. Yet the common law definition of a charity, which is based on a legal concept dating back to 1601, has resulted in a number of legal definitions and often gives rise to legal disputes.¹¹

The Charities Definition Inquiry: how to define a modern charity?

To overhaul and modernise the Law of Charities, the Prime Minister announced the Charities Definition Inquiry which was, according to the Democrats, a direct result of an agreement between the Democrats and the Federal Treasurer.¹² The Australian Labor Party supported the inquiry, but pointed out that:

[T]hat the Labor opposition would have preferred a broader inquiry into the impact of fringe benefits tax on the charitable sector. Nevertheless, the definition of charity and not-for-profit organisations and the taxation treatment of them are important issues.

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There is no doubt that the government have gradually drawn the charitable and not-for-profit sector into the taxation net.¹³

The Charities Bill 2003: making the impossible possible.

In response to the recommendations made by the Charities Definition Inquiry, the Treasurer, the Hon. Peter Costello, announced on 29 August 2002 that the majority of recommendations made by the Charities Definition Inquiry would be adopted. To achieve this, the Government planned to introduce a statutory definition of charity, replacing the common law definition.¹⁴ In relation to the statutory definition, the Treasurer said that:

The legislative definition of a charity will closely follow the definition that has been determined by over four centuries of common law, but will provide greater clarity and transparency for charities. [...] It will provide certainty to those organisations operating in the sector while still providing the flexibility required to ensure the definition can adapt to the changing needs of society.¹⁵

The Board of Taxation: consultations with the charitable sector.

Subsequent to the Charities Definition Inquiry, the Treasurer asked the Board of Taxation ('the Board')

[T]o consult with the charitable sector and to prepare a report advising the on the workability of the draft Charities Bill 2003 [...] and the accompanying Explanatory Material [...].¹⁶

After conducting the consultation, the Board made a number of recommendations to improve the workability of the proposed legislation. The recommendations focussed on three dominant issues:

- disqualifying purpose and advocacy
- core definition of charity, and
- Serious offences effecting charities' charitable status.¹⁷

These issues primarily reflected two major concerns: first, several provisions in the Charities Bill 2003 constituted a substantial departure from the current common law and second, the Charities Bill 2003 fell short of providing the requisite clarity and certainty.

The end of the Charities Bill 2003: And now?

Based on the Board of Taxation's report, the proposed statutory definition of charity was ultimately abandoned. In a press release, the Treasurer announced the draft legislation

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would not continue as it did ‘not achieve the level of clarity and certainty that was intended to be brought to the charitable sector’.¹⁸

Instead, the Government decided to continue to rely upon the common law meaning of ‘charity’ and to include some entities that had in the past difficulties in ‘satisfying the common law requirements, to be charities for the purposes of all Commonwealth legislation’ by ‘extending the common law meaning of charity’.¹⁹

Adopting some of the recommendations made by the Charities Definition Inquiry, the ‘extension’ applies to:

- non-profit organisations providing child-care services (**Recommendation 16** of the Charities Definition Inquiry)
- self-help bodies with open and non-discriminatory membership (**Recommendation 8** of the Charities Definition Inquiry), and
- closed or contemplative religious orders that offer prayerful intervention to the public (**Recommendation 9** of the Charities Definition Inquiry).²⁰

Main Provisions

Child care organisations

The problem

According to the Explanatory Memorandum, entities providing non-profit childcare services have failed in the past to be recognised as charities because it was not clear whether the services they provided were for a charitable purpose.²¹ In its Report, the Charities Definition Inquiry made the following recommendation:

The Committee recommends that not-for-profit entities with a dominant purpose of providing for the care, support and protection of children, including the provision of child care services, should be regarded as charitable.²²

The recommendation’s implementation in the Bill

Section 4 of the Bill implements this recommendation by stipulating expressly that ‘charitable purpose includes the provision of child care services on a non-profit basis.’ [**subsection 4(1)**]. In essence, the provision promulgates the Government’s acceptance that child care is to fall within one of the acknowledged ‘heads of charity’.

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However, although the provision of non-profit child care receives statutory recognition as being a charitable purpose, the proposed legislation does not elevate an entity providing non-profit child care to charity status. As **subsection 4(3)** reiterates, the entity will still have to satisfy the public benefit test, including the requirement that it is a non-profit entity.

Self help bodies with open and non-discriminatory membership

The problem

The Explanatory Memorandum notes that self help bodies failed to be recognised as charities because it was uncertain whether their purpose was for a public benefit.²³ This uncertainty is founded in the very structures of those entities – they are organised and managed by the same people that benefit from the group. In relation to these bodies, the Charities Definition Inquiry recommended:

That self-help groups which have open and non-discriminatory membership be regarded as having met the public benefit test.²⁴

The recommendation's implementation in the Bill

Section 5, subsection (1)(a) of the Bill creates a deeming provision, stipulating that self help groups, as long as they are open and non-discriminatory, fulfil the public benefit test. The open and non-discriminatory self-help group is, for the purposes of this Bill, further defined in **section 5, subsection (2)**. This subsection contains a catalogue of criteria all of which must be met before a self-help group will be deemed to fulfil the public purpose test.

However, although those self-help groups are deemed to fulfil the public benefit test, the Bill does not deem them to be 'charities' with access to possible tax concessions under Commonwealth legislation. The respective entity still will have to fulfil the remaining common law requirements, especially that the entity fulfils a charitable purpose.

Closed or contemplative religious orders that offer prayerful intervention to the public

The problem

According to the Explanatory Memorandum, closed and contemplative religious orders have difficulties to fulfil the public purpose criterion.²⁵ The Charities Definition Inquiry chose a 'public interface' criterion to distinguish between those orders that should be considered to fulfil the public purpose test and those which should not. It stated:

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On this basis, it is possible to distinguish closed or contemplative orders that have a public interface from those that undertake meditation or contemplation on their own behalf. Those orders with a public interface offer prayerful intervention to any members of the faith community who seek it.²⁶

Where those orders provide this service unrestrictedly to the members of public, the Charities Definition Inquiry recommended:

That [...] their purposes be held to have met the public benefit test.

The recommendation's implementation in the Bill

Section 5, subsection (1)(b) translates this recommendation into legislation. It provides that orders that meet the public interface criteria as set out in the recommendation are deemed fulfil the public benefit test.

However, like the open and non-discriminatory self-help groups, the proposed legislation will not deem those religious orders to be charities. Religious orders will still be required to fulfil the charitable purpose requirement as understood pursuant to common law.

Concluding Comments

The relevance of the Law of Charities was recently again highlighted when a bitter row erupted between the Wilderness Society and Greenpeace on the one side and the National Association of Forrest Industries on the other side.²⁷ It was argued that the use of tax deductible contributions as available to charities should not be used for the pursuit of political lobbying. In a nutshell, this argument revives the discussion surrounding those provisions in the Charities Bill 2003 which aimed at curtailing the amount of lobbying a charity can undertake without losing its charitable status.²⁸

The current approach by the government, implemented after abandoning the Charities Bill 2003, closely resembles an approach

which received strong support from a small number of carefully considered submissions. They argued that the Government should consider retaining the common law approach, and legislate only for those changes to the common law position that the Government expressly intends to make.²⁹

This approach, involving only minor changes to the Law of Charities by creating new, or confirming existing, charities, keeps the Government in the driver's seat but creates certainty and transparency for those who receive legislative acknowledgement.

Plainly, the Bill will provide some certainty to those entities that come within the scope of the Bill. However, three specific issues the Bill raises deserve more attention.

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Charity or charitable purpose? What will the Bill achieve...

Statements made about the Bill may be interpreted as giving the Bill an effect it does not have. This includes statements made, for example, in:

- the Explanatory Memorandum, stating that

The Extension of Charitable Purpose Bill 2004 provides a statutory extension to the common law meaning of ‘charity’ for the purposes of all Commonwealth legislation.

The statutory extension allows:

- organisations providing child care to the public on a non-profit basis,
- self-help bodies with open and non-discriminatory membership; and
- closed or contemplative religious orders that offer prayerful intervention to the public,

to be *treated as charities* for the purposes of all Commonwealth legislation.³⁰ [emphasis added]

- the Treasurer’s press release according to which

The Government will ... introduce a statutory extension to the common law meaning of a *charity to include* non-profit child care available to the public, self-help groups with open and non-discriminatory membership, and closed or contemplative religious orders that offer prayerful intervention to the public.³¹ [emphasis added]

- the Second Reading Speech in which Ross Cameron, Parliamentary Secretary to the Treasurer, suggested that

By extending the common law meaning of charity in this way, the *concessions* embodied in Commonwealth legislation *that are available to charities will also become available to these organisations*.

These statements may be interpreted as elevating certain entities to charitable status. However, this is not the actual effect of the provisions contained in the Bill. The Bill does not automatically award charity status to any entity to which this Bill applies. The Bill merely provides a clarification in relation to one aspect of the question whether an entity may qualify as a ‘charity’ – that is whether the relevant entity has a charitable purpose or provides a public benefit, as the case may be.

As pointed out above, entities will still be required to fulfil all remaining common law requirements before they can qualify as charities and become entitled to the tax concessions.

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Just charitable purpose? The Bill is not that limited.

The title of the Bill suggests that the effect of the proposed legislation is to extend the scope of one of the two limbs of the common law test for ‘charity’, i.e. the ‘charitable purpose’ limb. However, the Bill is not that limited and the title of the Bill is imprecise for two reasons:

- it also deals with the ‘public benefit’ limb, and
- the Bill is most likely not an extension of the common law but, at best, it provides a clarification of the limbs ‘charitable purpose’ and ‘public benefit’.

The legislative gap

By clarifying the limbs ‘charitable purpose’ and ‘public benefit’ by way of Commonwealth legislation, the provisions contained in the Bill will only assist in determining the charity status in relation to Commonwealth legislation. It will not assist charities in relation to State legislation. As the Commonwealth has no legislative power to legislate aspects of charities that fall within State competence, this proposed legislation has the potential to open up a legislative gap between Commonwealth and State law which can lead to added legal uncertainty.

This problem has already been recognised by the Treasurer in relation to the Charities Bill 2003 when he announced that he:

[W]ill be writing to each of the State and Territory Treasurers to gauge their interest in achieving harmonisation of laws defining charity.³²

For a comprehensive application of the effects of the Bill throughout Australia, State legislation would need to be amended in a similar way.

Endnotes

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- 1 G Dal Pont, *Charity Law in Australia and New Zealand*, Oxford Press, 2000, at p. 3; The Board of Taxation, *Consultation on the definition of a Charity, a Report to the Treasurer*, 2002, available at <http://www.taxboard.gov.au/content/charities.asp>, accessed 3 June 2004.
 - 2 This so called ‘subsidy theory’ is not the only justification for the charities’ eligibility for tax exemptions. For other theories see G Dal Pont, *Charity Law in Australia and New Zealand*, Oxford Press, 2000, at pp. 446–448.
 - 3 *Re Nottage* [1895] 2 Ch 649 at p. 656.

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- 4 *Statute of Charitable Uses Act 1601*, 43 Eliz. I, c. 2.
- 5 G Dal Pont, *Charity Law in Australia and New Zealand*, Oxford Press, 2000, at p. 6.
- 6 There is one exception to this principle. Where the charitable purpose is the relief of poverty, the public benefit test is not a prerequisite for considering the entity to be a charity. G Dal Pont, *Charity Law in Australia and New Zealand*, Oxford Press, 2000, at p. 121.
- 7 G Dal Pont, *Charity Law in Australia and New Zealand*, Oxford Press, 2000, at p. 13.
- 8 *Report of the Inquiry Into Definitional Issues Relating To Charitable, Religious And Community Service Not-For-Profit Organisations, Chapter 13*, available at http://www.edi.gov.au/report/pdf/23_chap13.pdf, accessed 3 June 2004.
- 9 *Verge v Somerville* [1924] AC 496 at p. 502.
- 10 *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 at p. 184.
- 11 The Hon. J Howard, Prime Minister, *Inquiry Into Charitable And Related Organisations*, media release, 18 September 2000, available at http://www.pm.gov.au/news/media_releases/2000/media_release456.htm, accessed on 2 June 2004.
- 12 Senator Natasha Stott Despoja, then Australian Democrats spokesperson for Treasury, *Democrat-initiated Inquiry calls for broadening of charities' concessions*, media release, 24 August 2001, available at http://www.democrats.org.au/news/index.htm?press_id=1462&display=1, accessed on 2 June 2004.
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- 14 The Hon. P Costello, Treasurer, *Government Response To Charities Definition Inquiry*, media release, 29 August 2002, available at <http://www.treasurer.gov.au/tsr/content/pressreleases/2002/049.asp>, accessed on 2 June 2004.
- 15 The Hon. P Costello, Treasurer, *Government Response To Charities Definition Inquiry*, media release, 29 August 2002, available at <http://www.treasurer.gov.au/tsr/content/pressreleases/2002/049.asp>, accessed on 2 June 2004.
- 16 The Board of Taxation, *Consultation on the Definition of Charity, A report to the Treasurer*, Terms of Reference, at paragraph 2.1, available at http://www.taxboard.gov.au/content/Charity_consultation/Chapter_2.asp, accessed 3 June 2004.
- 17 The Board of Taxation, *Consultation on the definition of a Charity, a Report to the Treasurer*, Chapter 2: Overview, 2002, available at http://www.taxboard.gov.au/content/Charity_consultation/Chapter_2.asp, accessed 3 June 2004.

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- 18 The Hon. P Costello, Treasurer, *Final response to the charities definition inquiry*, media release, 11 May 2004, available at <http://www.treasurer.gov.au/tsr/content/pressreleases/2004/031.asp>, accessed on 3 June 2004.
- 19 R Cameron, 'Second Reading Speech: Extension of Charitable Purpose Bill 2004' House of Representatives, Debates, 27 May 2004, at p. 29136.
- 20 The Hon. P Costello, Treasurer, *Government Response To Charities Definition Inquiry*, media release, 29 August 2002, available at <http://www.treasurer.gov.au/tsr/content/pressreleases/2002/049.asp>, accessed on 2 June 2004.
- 21 Explanatory Memorandum to the Bill, at p. 5, paragraph 1.9, available at <http://parlinfoweb.parl.net/parlinfo/Repository/Legis/ems/Linked/27050405.pdf>, accessed on 2 June 2004.
- 22 *Report of the Inquiry Into Definitional Issues Relating To Charitable, Religious And Community Service Not-For-Profit Organisations, Chapter 25*, available at http://www.cdi.gov.au/report/cdi_chap25.htm, accessed 3 June 2004.
- 23 Explanatory Memorandum to the Bill, at p. 6, paragraph 1.15, available at <http://parlinfoweb.parl.net/parlinfo/Repository/Legis/ems/Linked/27050405.pdf>, accessed on 2 June 2004.
- 24 *Report of the Inquiry Into Definitional Issues Relating To Charitable, Religious And Community Service Not-For-Profit Organisations, Chapter 13*, available at http://www.cdi.gov.au/report/cdi_chap13.htm, accessed 3 June 2004.
- 25 Explanatory Memorandum to the Bill, at p. 6, paragraph 1.20, available at <http://parlinfoweb.parl.net/parlinfo/Repository/Legis/ems/Linked/27050405.pdf>, accessed on 2 June 2004.
- 26 *Report of the Inquiry Into Definitional Issues Relating To Charitable, Religious And Community Service Not-For-Profit Organisations, Chapter 13*, available at http://www.cdi.gov.au/report/cdi_chap13.htm, accessed 3 June 2004.
- 27 R Peake, 'Tax break for greenies sparks row', The Canberra Times, 9 June 2004, at p. 2.
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- 30 Explanatory Memorandum to the Bill, at p. 3, paragraph 1.1 and 1.2, available at <http://parlinfoweb.parl.net/parlinfo/Repository/Legis/ems/Linked/27050405.pdf>, accessed on 2 June 2004.

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- 31 The Hon. P Costello, Treasurer, *Final response to the charities definition inquiry*, media release, 11 May 2004, available at <http://www.treasurer.gov.au/tsr/content/pressreleases/2004/031.asp>, accessed on 3 June 2004.
- 32 The Hon. P Costello, Treasurer, *Government Response To Charities Definition Inquiry*, media release, 29 August 2002, available at <http://www.treasurer.gov.au/tsr/content/pressreleases/2002/049.asp>, accessed on 2 June 2004.

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