

30 September 2003

Consultation on the Definition of a Charity
The Board of Taxation
C/- Treasury
Langton Crescent
PARKES ACT 2600
Att: Ms Jane Schwager

Dear Ms Schwager

Thank you for the opportunity to make a submission to the Board on the draft legislation (the Charities Bill 2003) and Explanatory Material issued by the Treasurer on 22 July 2003.

Charities Commission

The Treasurer's response to the Inquiry was a disappointment in that the recommendation 25, '*to establish an independent administrative body for charities..*' was not adopted, nor is there any indication, in the absence of accepting recommendation 25, that the government has any intention of implementing recommendation 26.

Both the Treasury and ATO have responsibilities for generation and collection of revenue, roles inimical to that of determining whether an organisation is a 'charity' or its purposes, 'charitable'. Only an independent body could adequately deal with these issues in an impartial and inexpensive manner. The Bill and Explanatory Material, in seeking merely to codify the existing common law, continue to ensure that any future development in these areas will only occur as a result of judicial decisions. To obtain such decisions relies on a course of action and at a cost that is beyond the financial capacity of all but a few larger charities. If this was the government's original intention, the cynic would say 'why bother going through the exercise at all?'

Charitable Purpose

Since the introduction of the GST and the loss of sales tax exemption for 'charitable' organisations and its replacement with 'GST free status' of activities depending on their charitable purpose, the definition of 'charitable purpose' has become extremely important to many charities.

Recommendation 12, *'that the principles enabling charitable purposes to be identified be set out in legislation'*, is not reflected in the legislation and is a significant omission.

Para 4 of the Terms of Reference of the Inquiry into the Definition of Charities and Related Organisations was to *'provide options for enhancing the clarity and consistency of the existing definitions'*. Insofar as a definition of 'charitable purpose' was required, Option 5 (the Inquiry's preferred option) achieved that purpose. However, the proposed Charities Bill, being a separate document from the Explanatory Material and requiring the reading of both documents to adequately understand the legislation, fails that test.

Combination of Bill and Explanatory Material

The Bill is only seven pages long and the Explanatory Material 19. Allowing for duplication of material in both documents, a combined document of less than 25 pages is probably possible. Removing the need for continual cross referral, such a Bill would be far simpler to read and a more useful document.

While Section 15AB(2)(e) of the Acts Interpretation Act 1901 (Clth) makes provision for the use of extrinsic material to assist in the interpretation of Commonwealth legislation and provides that the material that may be considered in the interpretation of the provision of an Act includes any explanatory memorandum relating to the Bill, it is not uncommon for the staff interpreting a Bill to ignore such material whenever it fails to support their interpretation. Such behaviour has recently occurred in a discussion paper of an ATO interpretation of a section of the *A New Tax System (Goods and Services Tax) Act 1999*.

Workability of Legislative Definition

In so far as the proposed definitions merely reflect the common law, they are as workable as the system currently in existence. However, in so far as enhancing the clarity and consistency of the existing definitions, that has not been achieved. While there may be a number of large charitable organisations and peak bodies within the country that are sophisticated enough to have permanent counsel, or ready access to legal advice, and the financial capacity to seek judicial outcomes; many charitable organisations are small organisations. These organisations would prefer to commit their resources to satisfying social or community needs rather than waste it acquiring legal advice about material that should be capable of being understood by the layman.

'Altruistic' purpose

In terms of the proposed Bill and Explanatory Material there is nothing to be gained by including a requirement that an entities purpose be 'altruistic'. The recommendation that such a test be applied by the CDI was tied up with a number of other recommendations that required a definitional framework to distinguish 'altruistic' entities from other entities and included the creation of new types of entities. Unless the government is willing to go down this path, which includes significant changes to the existing situation, the inclusion of the term 'altruistic' only engenders greater uncertainty.

Once again, thank you for the opportunity to comment on the draft legislation.
I look forward to seeing the Board's report on the consultation process.

Yours sincerely

Bob Bunney
CHIEF EXECUTIVE OFFICER