# EMIL FORD & Co - LAWYERS

DAVID FORD BA LLM (HONS)
GARRY PRITCHARD BA LLB
*Notary Public ≡ Accredited Specialist, Property Law*
NAOMI STAFFORD BA LLB A Mus A
Associate
STEVE FROST BA LLB Grad Dip Leg Prac

29 September 2003

Ms Jane Schwager
Chair, Charities Definition Working Group
The Board of Taxation
Langton Crescent
PARKES ACT 2600

Dear Ms Schwager,

## Submission on the Definition of a Charity

We act for many charitable organisations, including schools and other educational institutions, religious organisations, and groups assisting the poor and the disabled. We make this submission in a general sense on behalf of our charitable clients. We do so having sought comment from them on the draft legislation (the Charities Bill 2003) and the Explanatory Material issued by the Treasurer on 22 July 2003. However, we do not purport to write to you with specific instructions from any of them.

We begin our submission by making a number of comments on specific parts of the Charities Bill. We will then summarise our thoughts on the workability of the definition of a charity proposed in the Bill.

## Is the Bill a Code?

Section 4 begins by saying that the definition of a charity found in the Bill is to apply in any Commonwealth Act which refers to a charity. The definition then sets out positively what a charity is. Later sections amplify many of the expressions used in the initial definition. The Explanatory Material says in its opening paragraph that the definition "replaces the current interpretation of the term charity, which has been based on over 400 years of common law." This is repeated in 1.2 of the Explanatory Material. 1.4 introduces the notion of codification by saying: "The definition essentially codifies the existing common law interpretation of the meaning of a charity." 1.5 says that the definition is intended to provide clarity "by codifying the definition".

When there is a codifying statute, the courts approach it on the basis that it is to be interpreted in the light of its own language without resort to the previously existing law. Only where a provision in the code is ambiguous will the courts consider the pre-existing common law.

There are many expressions used in the Bill which are quite capable of interpretation by virtue of their natural meaning. However, as we move into the Explanatory Material, it is apparent that they are meant to be understood by reference to the existing common law. In some cases, this gives them a quite different meaning. For example:

- The definition of government body can mean a body controlled by the Commonwealth, a State or a Territory. The Explanatory Material in 1.22 says that we are to understand what control in this situation means by reference to decided cases.
- Section 7(1)(b) speaks of "practical utility". The Explanatory Material in 1.36 adds a gloss to this which comes from the common law but which would not necessarily be understood from the natural meaning of the expression.

It is therefore unclear whether the Bill is meant to be a code. We submit that it would be better if it was not. There would be greater clarity and flexibility if the Bill can work in conjunction with the common law rather than replace it. Accordingly, we submit that something like the following should be added to the Bill:

> *The rules of equity and of common law applicable to charities continue in force except so far as they are inconsistent with the express provisions of this Act.*

## Serious Offence

We submit that section 4(1)(e) should be deleted for the following reasons:

- There is no policy basis for its inclusion. We note that its inclusion was not recommended by the Report of the Inquiry into the Definition of Charities and Related Organisations.

- Even if there were some policy basis for it being included, it should not be part of the core definition of a charity because it purports to relate to some conduct that the charity has engaged in subsequent to its creation. In other words, if this provision is to be included at all, it ought to be somewhere else in the Bill. For example, there could be a separate provision identifying conduct on the part of a charity that would disqualify an entity from continuing to have charitable status.

- The provision is unclear and ambiguous. It is not clear what it means for an entity to be engaged in conduct that constitutes a serious offence. Is it enough for the governing body to engage in the relevant conduct? What if an employee or a volunteer engages in such conduct? Does there have to be a conviction or is being charged with the offence enough? Or is it enough that an officer of the Australian Taxation Office forms the view that the conduct in question might constitute the commission of a serious offence?

- The consequences of being found to have engaged in conduct that constitutes a serious offence for an entity that otherwise considers itself charitable are enormous. For that reason, any legislation must be absolutely clear and those who are to sit in judgment must be qualified to do so.

- Finally, thought ought to be given to whether engaging in the relevant conduct (whatever it means) ought to stop an entity being charitable for all time. This is equivalent to a death sentence and has no parallel in any other area of Australian law.

## A Partnership

This expression in section 4(1)(f) requires clarification. Does it mean a partnership for tax law purposes or as defined under the relevant State legislation or does it have some other meaning?

It is common for charities to partner with non-charitable organisations for various purposes. The Bill ought to make clear that such activities do not adversely affect the charitable status of the entity entering into such a partnership.

## Not-for-profit Entity

Both paragraphs of section 5 refer to "particular persons". It is unclear what this means. The normal understanding of a not-for-profit entity is that it is one which does not distribute its profits or assets to its members. However, there are exceptions which are quite usual such as payment of usual wages and other benefits to employees. The Explanatory Material recognises this at 1.27 but section 5(b) does not make this clear.

Further, a usual winding-up clause for a charitable body provides that any remaining assets are to be paid to a particular named charity or, if it no longer exists, to some other charity chosen by the members (or perhaps by the Supreme Court of a particular State). Although such a clause is common and is also sanctioned by the Australian Taxation Office, section 5(b) has the effect of preventing such a body being a not-for-profit entity for the purposes of the Bill.

We submit that section 5 should read:

*(1) An entity is a not-for-profit entity if, either while it is operating or upon winding-up, it does not:*

*(a) carry on its activities for the purposes of profit or gain to its members; and*

*(b) distribute its profits or assets to its members.*

*(2) Nothing in sub-section (1) is intended to prevent:*

*(a) the payment in good faith of remuneration to any employee of the entity or to any member or other person in return for any services actually rendered to the entity;*

*(b)* *the payment to a director or trustee of out-of-pocket expenses incurred in carrying out his or her duties;*

(c) *the payment to members of reasonable market rent for premises leased by any member to the entity.*

## Public Benefit

The core definition requires an entity to have a dominant purpose that is charitable and that is for the public benefit. We submit that, if an entity has a dominant purpose that is charitable in that it is for the advancement of education or religion, the public benefit requirement should be deleted. Otherwise, one will get caught up in arguments as to whether or not certain religious organisations are aimed at achieving a universal or common good, have practical utility and are directed to a sufficient section of the general community. Similar issues will arise in relation to educational institutions. It should be enough that they have the purpose of advancing religion or education.

If this submission is not accepted, we submit that section 7(1) needs to be clarified to ensure that, for example, it does not prevent small churches or small schools from having charitable status.

## Disqualifying Purposes

We submit that the words "or cause" should be deleted from section 8(2)(a) or, alternatively, that the word "political" be added before word "cause".

We also submit that section 8(2)(c) should be deleted. Advocacy on behalf of charitable objects, while not a charitable purpose, is a legitimate ancillary or incidental purpose. This situation is covered by section 6 and, accordingly, there is no need to include it in the disqualifying purposes section.

## Workability

In summary, the following provisions are presently unworkable:

- section 4(1)(e);
- section 5;

- section 7(1) in relation to charities whose purpose is to advance religion or education;
- section 8(2)(c).

## Altruism

We submit that it would be best not to add a requirement of altruism to the definition because:

- it is a difficult concept to define and understand;
- it could arguably knock out many newly formed charitable organisations formed by well meaning and generous spirited people who, nevertheless, have some personal interest in the cause they are serving.

In relation to the latter of these reasons, we observe that many well-established charities in Australia today were founded by groups of parents whose children suffered from some disability. In the early days, they were clearly working together for the benefit of their own children as well as the children of others. If adding altruism as a requirement allows any possibility for such bodies to be declared non-charitable, it would be best to omit the requirement.

Yours faithfully,
EMIL FORD & CO.,

Per: *David C Ford*