Freehills

SUBMISSION TO BOARD OF TAXATION

CHARITIES BILL 2003

WORKABILITY OF PROPOSED LEGISLATION

1 Introduction

Freehills acts for hundreds of charitable organisations in Australia, mostly on a pro bono basis. In the course of that work, we encounter many of the issues facing the charity sector, particularly regarding taxation issues.

The enactment of the Charities Bill in its current form will in our view have a significant adverse impact on the charity sector.

2 Codification of common law concept

(a) Paragraph 1.5 of the draft explanatory memorandum states that the Bill "is intended to provide clarity to entities within the charitable sector, by codifying the definition".

(b) We are concerned that rather than provide clarity, the code approach will raise significant and difficult issues of interpretation.

(c) In 1983, Lord Justice Sir Robert Goff expressed great caution with regard to the use of codification of common law concepts in the context of the *Sale of Goods Act*[1]:

> "For the greater part of the nineteenth century … the development of the common law was the work of the judges alone; and an admirable example of this type of development is to be found in the law of the sale of goods … If we thumb our way through the law reports of [the nineteenth century], we can watch the principles developing … Then came the Sale of Goods Act 1893, and we can see the effect of codification. **Codification is sometimes necessary: but it should only be undertaken where the good it may do is perceived to outweigh the harm it must do, and that is, generally speaking, only likely to be the case where substantial reforms are both necessary and urgent**. Where the intention is merely to restate the existing law in a codified form, the code is like a photograph: it records the law as it has developed at a particular point of time. **Moreover, it is not possible for any code to provide an absolutely accurate, still less a complete, statement of the law on any topic. The camera will, as usual, lie**."

(d) The annexure to this submission outlines various issues raised in cases and text book authorities in relation to the code issues.

[1] Maccabaean Lecture on Jurisprudence published in the *Proceedings of the British Academy* for 1983.

(e) We suggest that having regard to the issues with codes, the references to a code be removed from the explanatory memorandum and a provision similar to section 4 of the *Partnership Act 1958 (Vic)* be inserted along the lines of:

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

Recreational charities approach

(f) Alternatively, and preferably, we suggest that rather than attempting to codify the common law concept with all the attendant issues, the approach adopted in a number of Australian jurisdictions already with regard to recreational charities be adopted.[2]

Under this approach, the legislation retains the common law concept but changes it only to the precise extent desired by parliament.

(g) The recreational charities style of statutory definition:

(1) retains as a base, the common law concept (with its flexibility to develop);

(2) changes only precisely what parliament intends to be changed;

(3) if a change is made which results in unintended consequences, that consequence can be addressed by parliament in a more confined statutory environment; and

(4) avoids, except to the extent of the change, using language attempting to restate the common law concept but which may indeed result in other unintended changes to that concept.

(h) The vigorous debate and general concern in recent weeks within the charity sector in relation to the terms of the Bill could, in our view, be avoided by adopting this approach. The Bill would be limited simply to the substantive changes desired (eg, enabling open and non-discriminatory self-help groups, the provision of child care services, and closed religious orders of the type described in section 4(2) to be charities. The legislation could also remove from the common law concept, trusts for the relief of poor relatives and employees and clarify when an entity established for charitable purposes is not entitled to be a charity because it is "too governmental".[3])

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[2] See, for example, section 103(2) of the *Trusts Act* 1973 (Qld), section 69C(1) of the *Trustee Act* 1936 (SA); section 5(1) of the *Charitable Trusts Act* 1962 (WA) and section 4(1) of the *Variation of Trusts Act* 1994 (Tas).

[3] The governmental issue in practice is the most important and difficult issue we face in relation to the common law concept. The common law concept rarely otherwise results in practical administration issues. The 400 years of development of the concept has clarified almost all other issues.

In contrast, comparatively recently introduced statutory terms such as "a charitable institution whose principal activity is to promote the prevention or control of disease in human beings" (item 1.1.6 in section 30-20 of ITAA 97) and "a society, association or club established for community service purposes (except political or lobbying purposes") (item 2.1 in section 50-10 of ITAA 97) are causing considerable practical issues.

We believe the ATO would support this view expressed in this footnote.

(i) The government could not then be accused of, for example, attempting to limit the capacity of charities to seek changes to the law.

(j) Further, none of the issues referred to in paragraphs 3, 4, 5, 6, or 7 of this submission would arise and the issues referred to in paragraphs 8 and 9 would have much reduced practical impact.

It would be very unfortunate if the Bill results in extensive litigation seeking clarification of its terms.

3 Purpose versus methods of achieving the purpose.

(a) In our view, the failure of the Bill to consistently recognise the above distinction makes the interpretation of the Bill difficult.

Common law rule
Cases

(b) The common law rule is that the purposes or objectives of charities must be exclusively charitable. "There are numerous curial statements to the effect that, in order to achieve charitable status, a gift or association must be exclusively charitable."[4]

This is why all States have legislation "saving" certain trusts with non charitable purposes.[5]

(c) This requirement was explained in *McGovern v A-G* [1981] 3 All ER 493, (the *Amnesty International* case). Slade J said as follows at page 509:

> "The third requirement for a valid charitable trust is that each and every object or purpose designated must be of a charitable nature. Otherwise, there are no means of discriminating what part of the trust property is intended for charitable purposes and what part for non-charitable purposes and the uncertainty in this respect invalidates the whole trust."

Slade J the explains the difference between purposes and the methods of achieving them"

> "Nevertheless, in any case where it is asserted that a trust is non-charitable on the grounds that it introduces non-charitable as well as charitable purposes, **a distinction of critical importance** has to be drawn between (a) **the designated purposes** of the trust, (b) **the designated means of carrying out those purposes** and the consequences of carrying them out. Trust purposes of an otherwise charitable nature do not lose it merely because as an incidental consequence of the trustee's activities, there may enure to private individual's benefits of a non-charitable nature. …
>
> Similarly, trust purposes of an otherwise charitable nature do **not lose it merely because the trustees, by way of furtherance of such purposes,**

[4] Charity Law in Australia and New Zealand, Dal Pont, page 217.

[5] For example, section 131 of the *Property Law Act 1958 (Vic*)

> **have incidental powers to carry on activities which are not themselves charitable**." [6]

At page 510, Slade J said:

> "**The distinction is thus one between (a) those non-charitable activities authorised by the trust instrument which are merely subsidiary or incidental to a charitable purpose, and (b) those non-charitable activities so authorised which in themselves form part of the trust purpose. In the latter but not the former case, the reference to non-charitable activities will deprive the trust of its charitable status**".

(d) The purposes are to be established by reference to the constitution or other evidence as to the stated objectives of the charity. But if an activity can not fairly be seen to be consistent with the achievement of its constituted purposes, the courts may impute that activity as a purpose, and potentially hold the entity not to be a charity.

(e) In other cases, although the objectives purport to include non-charitable purposes, the courts have construed them as, in effect, powers.

This occurred in *Bowman v Secular Society Limited* [1917] AC 406 where a "governing object" of the respondent was identified and the other purposes stated as being "subsidiary". The governing object was what governed everything else. Lord Finlay LC at page 419:

> "I agree with what is said by the founder of the respondent society in an article from the Freethinker … which is in evidence, 'Clause [3A] [of the memorandum of association] is of the highest importance and governs everything else' … **in other words, all the other clauses in [the memorandum] are so many ways of carrying into practical application the principle enunciated in clause 3A.**"

Draft Taxation Ruling TR 1999/D21

(f) In paragraph 111 of Draft Taxation Ruling TR 1999/D21, the ATO, in our view correctly, points out that:

> (1) For "a fund to be a charitable fund it must be established for public charitable purposes. **The charitable purposes must be the only purposes for which it is established**. If a fund can be applied for purposes that are not charitable it is not a charitable fund. Any objects which, if viewed in isolation, would not be charitable, must be merely incidental to the charitable purposes."

(g) In relation to charitable institutions, the ATO states in paragraphs 103 and 104 that:

> "For an institution to be a charitable institution its sole or dominant purpose must be charitable. **If it has purposes which, when viewed in isolation, would not be charitable, they must be incidental or ancillary to the charitable purpose**.

[6] See also NSW Court of Appeal decision in MacLean Shire Council v Nungera Co-operative Society (1994) 84 LGERA 139 at 142 and 143

> **If an institution has purposes that are not part of or incidental to a charitable purpose it is not a charitable institution**. This is the case even if those purposes are secondary. For example, an association set up to be a social club and to look after injured animals would not be a charitable institution even if it mainly cared for animals, with lesser attention given to the social club."

(h) In paragraph 105, the ATO states that "finding an institution's sole or dominant purpose involves an objective weighing of in all of its features. They include its constitutive or governing documents, its activities, policies and plans, administration, finances, history and control, and any legislation governing its operation."

(i) So, while the ATO uses the concept of "sole or dominant" purposes in relation to charitable institutions, on our reading the ATO is saying in fact that the sole purpose of a charitable institution must be charitable, as it states specifically in relation to charitable funds.

(j) We believe these paragraphs in the Draft Ruling correctly reflect the position of the courts but are not consistently reflected in the Draft Bill.

Suggested approach.

(k) The problem arises, in our view, because the Bill uses the term "dominant purpose". We submit that while this can be an appropriate test in relation to, whether or not an entity is a club for the promotion of a game or sport[7], it is inappropriate with the requirement that charities must have exclusively charitable purposes.

(l) We suggest that section 4(1)(b) should read:

> "has exclusively charitable purposes that, unless subsection (2) applies – are for the public benefit."

In turn, section 6(1) would read along the lines of:

> "An entity exclusively charitable purposes only if:
>
> (a) all of its purpose or purposes are charitable; and
>
> (b) its powers and activities further, or are in aid, of its charitable purpose."

Of course, consequential drafting changes would be required elsewhere.

4 "purposes of engaging in activities that are unlawful" – section 8(1)

(a) Section 8(1) is one example of the issues that can be associated with the current approach of the Bill in not always distinguishing "purposes" from "activities". It reads that:

> "[T]he purpose of engaging in activities that are unlawful is a disqualifying purpose".

[7] Eg, Cronulla Sutherland Leagues Club v FCT 90 ATC 4215

In turn, section 4(1) provides, in effect, that an entity can not be a charity if it has a disqualifying purpose.

(b) Does this mean that engaging in activities that are unlawful where that is not a strict "purpose" will not be a disqualifying purpose? If so, the section will have in our view an appropriate effect as it reflects the common law concept.

(c) But if sections 8(1) and 4(1)(d) mean that an entity can not be a charity if it engages in unlawful activities that are not a "purpose", then:

(1) section 4(1)(e) seems to be redundant; and

(2) it can also be confidently predicted that large numbers of charities would be exposed to revocation (even retrospectively) of their income tax exempt charity endorsement.[8]

5 "disqualifying purpose" – section 8(2)

(a) In paragraph 4, we refer to issues associated with section 8(1) which states that the purpose of engaging in activities that are unlawful is a disqualifying purpose.

(b) Section 8(2) outlines three further types of disqualifying purposes, namely:

(1) the purpose of advocating a political party or cause;

(2) the purpose of supporting a candidate for political office; and

(3) the purpose of attempting to change the law or government policy,

if it is, either on its own or when taken together with one or both of the other of those purposes, more than ancillary or incidental to the other purposes of the entity.

(c) Again, as outlined in paragraph 4(b), at common law if in fact the "purpose" of an entity is to do one or more of those things, then it will probably not be charitable.

(d) While not denying that section 8(2) probably reflects the common law concept[9], we query whether the enactment of the legislation is not an opportunity for the government to recognise the important role of organisations established to seek changes to the law or government policy.

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[8] The revocation of income tax exempt charity endorsement in the case of entities such as public benevolent institutions is likely to also result in the revocation of deductible gift recipient endorsement. One apparent characteristic of a public benevolent institution is that it be a charitable institution – see paragraph 127 of Taxation Ruling TR 2003/5 and footnote 14 below.

[9] In the *Amnesty International* case, *McGovern v A-G*, at page 511, Slade J said:

> "From all these authorities, I think that two propositions follow in the present case. First, if any one of the main objects of the trust declared by the trust deed is to be regarded as "political" in the relevant sense, then, subject to the effect of the proviso to clause 2, the trusts of the trust deed can not qualify as being charitable. Second, however, if all the main objects of the trust are exclusively charitable, the mere fact that the trustees may have incidental powers to employ political means for their furtherance will not deprive them of their charitable status."

We understand that government in fact funds organisations of this type and it recognises their worth by so doing.

(e) Some of our most respected charities were founded by individuals passionately seeking social law reform:

> "While women weep, as they do now, I'll fight; while little children go hungry, as they do now, I'll fight; while men go to prison, in and out, in and out, as they do now, I'll fight; while there is a drunkard left, while there is a poor lost girl upon the streets, while there remains one dark soul without the light of God, I'll fight - I'll fight to the very end!"[10]

(f) While the purpose of many peak bodies is to assist their members, some peak bodies are established by their members primarily to provide a central voice for consulting with government. And, of course, government typically prefers to consult with peak bodies rather than numerous individual organisations.

(g) We therefore suggest that consideration be given to permitting certain types of entities that attempt to change the law or government policy. Presumably, these types organisations would be required act in a rational, restrained and lawful way.

6 "serious offence" – section 4(1)(e)

(a) The effect of this provision would be that an entity would not be entitled to be a charity if it engages in, or has ever engaged in, "conduct (or an omission to engage in conduct) that constitutes a serious offence".

(b) "Serious offence" is defined in section 3(1) as meaning an offence against a law or the Commonwealth, or of a State or of a Territory, that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as an summary offence)".

(c) An indictable offence is described in Butterworths Australian Legal Dictionary as meaning an offence that can be prosecuted on indictment. "What comprises an indictable offence differs between the various jurisdictions, for example, in the Federal jurisdiction it includes all offences punishable by more than 12 months imprisonment[11] . . . , in Queensland it includes all crimes and misdemeanours[12], and in Victoria it depends upon the penalty prescribed for any offence[13]. . . "

(d) Many offences are punishable by more than 12 months imprisonment or, in the case of Queensland, are misdemeanours.

(e) And so, if the provision is enacted, we will have the situation where charities will be exposed to losing their income tax exempt charity status

[10] Attributed to General William Booth, founder of The Salvation Army.

[11] *Crimes Act 1914 (C'th)* section 4G.

[12] *Criminal Code (Q'ld)* section 3.

[13] *Sentencing Act 1991 (Vic)* section 112.

(even retrospectively) as from the date the offence was committed and even if no conviction has been made.

For example, it would be possible for a tax audit of a national public benevolent institution to occur establishing that in 1960 it committed a misdemeanour in Queensland. The ATO would then be justified in deciding that at no time after 1960 was it a charity or, probably, a public benevolent institution[14]:

This would have the effect of denying deductibility for gifts (thereby penalising past donors) and FBT exemption retrospectively and exposing the entity to income taxation etc, together with attendant penalties.

(f) The provision may well make fundraising even more challenging as potential donors, particularly those considering making large gifts, will be apprehensive that as a result of committing, say a misdemeanour, the deductible gift recipient status of the public benevolent institution will be removed retrospectively so that the donor would be exposed to amended assessments denying past deductions for gifts.

(g) Further, removing the charitable status is likely to penalise the community rather than the individuals who have carried on or pursued the unlawful activity.

The common law position is that an unlawful purpose can not be charitable. There is, of course, a great distinction between the legal principle requiring that a charity not have an unlawful purpose and a law requiring that a charity never have committed a serious offence. The commitment of a serious offence is a matter of "means" or "activity" rather than a purpose.

(h) At common law, a charity engaging in a serious offence is subject to the same sanctions as other members of the community. We suggest the Bill should also adopt this approach.

7 Drafting suggestions

7.1 "charitable body" in section 4(1)

The use of the term "charitable **body**" is probably inapplicable to a reference to a charitable trust or charitable fund. We accordingly suggest it be changed to a

[14] We believe that a necessary attribute of a public benevolent institution is that it be a charitable institution. See paragraph 127 of TR 2003/5.

The history of the judicial interpretation of the term "public benevolent institution" in Australia suggests that it is one type of charitable institution. – see, for example, *Swinburne v FCT* (1920) 27 CLR 377 at 384 and *Perpetual Trustee Company v FCT* (1931) 45 CLR 224 at 233 – per Dixon J:

> "I agree with the suggestion of my brother *Starke* that the history of the provision in section 8(5) of the *Estate Duty Assessment Act 1914-28* is enough to show the word "benevolent" does not there possess its general descriptive meaning; because if it were given such an interpretation, its application would extend in some ways far beyond the legal meaning of the word "charitable" (see also *Ambulance Service of NSW v FCT* 2003 ATC 4674 at 4678).

reference to "charitable **entity**".[15]

7.2 "body controlled by the government" – sections 3(1) and 4(1)(f)

As mentioned in footnote 3, the government control issue in practice is the most important and difficult issue we face in relation to the common law concept. We suggest that consideration be given to a definition of control based on that used in section 50AA of the Corporations Act.

7.3 "disqualifying purpose" – sections 4(d) and 8(2)

For the reasons outlined in paragraph 3, we suggest that this term be changed to "disqualifying activity". Consequential changes would also be necessary elsewhere in the Bill.

7.4 "particular persons" – section 5

We suggest the use of this term is unhelpful. For example, it has long been established that a trust established by a community to support a single family in necessitous circumstances resulting from, say, the loss of a house property through fire, is charitable (see Taxation Ruling TR 2000/9 – paragraphs 51 and Example 2, paragraphs 75 and 76).

7.5 "practical utility" – section 7(1)(b)

(a) We query the use of the words "practical utility". Would this include religious teachings or cultural benefits?

(b) The words are one requirement for "public benefit".

We note that paragraph 1.36 of the explanatory memorandum states that the requirement that a benefit must have a practical utility does **not** require benefits to be restricted to material benefits, but they include "social, mental and spiritual benefits".

But we query whether a court would conclude that the words "practical utility" are "ambiguous or obscure"[16] so as to permit reference to be had to the explanatory memorandum.[17]

(c) The Macquarie Dictionary defines:

(1) practical as: "*adjective* **1.** relating to practice or action: *practical mathematics.* **2.** consisting of, involving, or resulting from practice or action: *a practical application of a rule.* **3.** relating to or connected with the ordinary activities, business, or work of the world: *practical affairs.* **4.** adapted for actual use: *a practical method.* **5.** engaged or experienced in actual practice or work: *a practical politician.* **6.** inclined towards or fitted for actual work or useful activities: *a practical person.* **7.** mindful of the results,

[15] Unincorporated associations and trusts are included within the definition of "entity" in section 960-100 of ITAA 97.

[16] Section 15AB(1)(b)(i) of *The Acts Interpretation Act* 1901 (C'wealth).

[17] Many provisions of the Bill seem to assume that the explanatory memorandum can be referred to for guidance. This may not necessarily be the case.

usefulness, advantages or disadvantages, etc., of action or procedure. **8.** matter-of-fact; prosaic. **9.** being such in practice or effect; virtual: *a practical certainty.* **10.** of or relating to a practicum."

(2) utility as: "*noun* **1.** the state or character of being useful. **2.** something useful; a useful thing. **3.** a public service, as a bus or railway service, gas or electricity supply, or the like."

(d) The phrase seems to add a requirement of "practical usefulness" as distinct from benefit, value or merit.

The Macquarie Dictionary defines:

(1) benefit as: "*noun* **1.** an act of kindness. **2.** anything that is for the good of a person or thing."

(2) good as: "--*noun* **23.** profit; worth; advantage; benefit: *to work for the common good.* **24.** excellence or merit; righteousness; kindness; virtue. **25.** (*sometimes capital*) the force which governs and brings about righteousness and virtue: *to be a power for good.* **26.** a good, commendable, or desirable thing.**"**

(3) value as: "**1.** that property of a thing because of which it is esteemed, desirable, or useful, or the degree of this property possessed; worth, merit, or importance: *the value of education".*

(e) Benefit requires there to be some advantage or good resulting, which includes social, mental, moral and spiritual benefits.

(f) Usefulness is just one of a number of matters that may be included in the meaning of benefit or value and section 7(1)(b) is therefore potentially restricting the meaning of public benefit in the common law.

7.6 "numerically negligible" – section 7(2)

This section provides that a purpose is not directed to the benefit of a sufficient section of the general community if the people to whose benefit it is directed are numerically negligible.

We suggest that this is an inappropriate requirement. For example, if there is an outbreak of the Ebola virus in a small remote indigenous community, surely an institution established to treat and care for the sufferers should be charitable, even though in the particular circumstances there is no risk of transmission of the disease to others.

7.7 "open and non-discriminatory self help groups" – section 9

We suggest that the word "affliction" be added after "disadvantage" in section 9(b).

We also suggest that the words "or by a need that is not being met" be omitted from section 9(b). This suggestion is made to avoid, say, book or theatre discussion groups, claiming to being charitable on the argument that individuals in the group feel they have a "need" to discuss the latest releases of novels or films.

8 Commencement date of Act – section 2

(a) It is, we submit, essential that the legislation not apply to charities established before the actual date of commencement of the legislation (foreshadowed to be 1 July 2004).

(b) If it does, it will be necessary for most existing charities to change their constitutions to enable them to fall within the new legislation. In many cases, this will not be possible.

(c) While it has been reasonably common in recent years for charitable trusts established by a deed of trust to contain a power of amendment, this has by no means been a universal practice. And it is very rare for a will establishing a charitable trust to permit the terms of the trust to be changed.

(d) This type if difficulty is recognised in section 50-5 of ITAA 97 which grandfathers wills made before 1 July 1997 from certain of the provisions in Division 50.

(e) Similarly, statutes establishing charities typically do not permit the purposes of the charity to be changed - (this issue was identified in the Treasurer's press release of 29 August 2002 where he referred to the difficulties faced by some deductible gift recipients established by Commonwealth Act in including a gift fund clause as required by section 30-125 of ITAA 97).

(f) A charity unable to change its constitution to comply with the new definition may not be able to successfully apply to the court for an order to change its terms. Cy près orders are available, where, for example, it is impossible or impractical to carry the original purposes or where the original purposes cannot be carried out according to the spirit of the gift. Here, it is well arguable that the difficulty will not result from carrying out the original purposes but rather from an additional tax burden imposed because of the statutory definition.

(g) In any event, the costs of amending the constitutions establishing charities or applying to the courts for cy près orders would impose a very significant burden on the charity sector.

9 State and Territory matching legislation

(a) We note the Treasurer has stated that the State and Territories Attorneys-General will be approached with a view to introducing matching legislation.

(b) We agree that this approach should be made but point out that if it is not accepted, the constitutions and activities of charities will have to accommodate both the:

(1) the Commonwealth definition; and

(2) the applicable State or Territory common law concept.

(c) Complex issues still exist resulting from the different requirements for Commonwealth estate duty and State probate duty exemptions or

deductions until the abolition of death duties in Australia in the early 1980s. For so long a dual system of death duties was imposed, it was necessary for wills to be drafted to accommodate both Commonwealth and State laws.

(d) Unless the commencement of the Commonwealth legislation is deferred until all of the States and Territories enact matching legislation, charities will be faced with the potential of two "regimes".

10 Altruism

(a) To introduce the requirement for the dominant purpose of a charity to be altruistic is to suggest that this aspect is not already covered by the requirement for public benefit.

(b) The Report (at page 125) states that emphasising the concept of altruism will clarify public benefit, but we suggest that to introduce it as an additional concept is likely to cause significant uncertainty and is in any event unnecessary.

(c) The examples in the Report of those organisations providing a benefit to the public without being altruistic (at page 124) would not in any event come within the current requirements for a charitable entity. No additional requirement is in our view required.

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Annexure

Should the Charities Act 2003 be a code?
Case and text authorities
(paragraph 2(d) above)

Case authorities

Bank of England v Vagliano Brothers [1891] AC 107 (House of Lords)

This is the "classic' authority in this area. Lord Herschell commented upon "the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments." He said at 144 and 145:

> "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.
>
> If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

R v Barlow (1996) 188 CLR 1 (High Court)

In relation to the Queensland Criminal Code, McHugh J said as follows at pages 18 and 19:

> "**Interpretation of the Code**
>
> It is well settled that the Code must be interpreted according to its terms without resort to any presumption that its provisions reflect the common law either at the time of the Code's enactment or subsequently. In *Brennan v R*, for example, Dixon and Evatt JJ said of the Western Australian equivalent of s 8 that it:

'forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.'

This does not mean that a court cannot resort to the common law in interpreting the Code. In *Stuart v R,* 37 Gibbs J pointed out that:

'it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning, or on some such special ground … If the Code is to be thought of as "written on a palimpsest, with the old writing still discernible behind" (to use the expressive metaphor of Windeyer J in *Vallance v R*), it should be remembered that the first duty of the interpreter of its provisions is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance.'

When the language and structure of the Code compel a particular interpretation, that interpretation must prevail regardless of whether a similar result would have occurred in common law jurisdictions."

At pages 31 and 32, Kirby J stated:

"**Construction of a code**

Before considering the conflicting authorities on the meaning to be given to this and like provisions in other codes and legislation, it is useful to recall some of the rules which have been established for the construction of provisions of a code:

1. A code is enacted by an Act of Parliament. Like any other enactment, the imputed will of parliament must be derived from the language of the enactment, understood in its context and, so far as possible, in order to give effect to its apparent purposes. Courts must give the language of a code, like any legislation, its natural meaning. If that meaning is clear and unambiguous, it must be given effect. The court will only look externally to other sources where the meaning is doubtful either because of the inherent ambiguity of the language used or because the words used have previously acquired a technical or special meaning.

2. As a species of legislation, a code, such as the Code in question, is subject to a paramount rule. Its meaning is to be ascertained:

'by interpreting its language without reference to the pre-existing law, although reference may be made to that law where the Code contains provisions of doubtful import or uses language which has acquired a technical meaning: *Robinson v Canadian Pacific Railway Co.*

It is erroneous to approach the Code with the presumption that it was intended to do no more than restate the existing law (*Brennan v R*).

but when the Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law (*Mamote-Kulang v R*)

including decisions subsequent to the Code's enactment: *Murray v R* 86; *R v Rau.* '

> Thus the first loyalty is to the code. But in the stated circumstances, regard may be had eo the pre-existing common law and to parallel developments in non-code jurisdictions."

Re Minister; Ex P Miah (2001) 206 CLR 57 (High Court)

At page 95, McHugh J said:

> "[**131**] The respondents contend that the statutory provisions demonstrate an intention to provide a "code" of procedures for determining applications for refugee status. By necessary implication, they argue, the 'code' excludes any separate or additional incidents of procedural fairness that are not prescribed within it. They point to the wording of the heading of subdiv AB – *'Code* of procedure for dealing fairly, efficiently and quickly with visa applications'. (Emphasis added.) But the use of the term 'code' is too weak a reason to conclude that Parliament intended to limit the requirements of natural justice to what is provided in subdiv AB. It is hardly to be supposed, for example, that the Parliament of this nation intended to exclude the common law rules concerning actual bias or corruption of the decision-making process. Indeed, the use of the word 'fairly' makes it difficult to extrapolate a manifestly clear intention to exclude rules of natural justice from applying to the procedures set out in the subdivision.
>
> [**132**] In addition, the respondents point to the Explanatory Memorandum which states that subdiv AB aims to 'replace the uncodified principles of natural justice with clear and fixed procedures which are drawn from those principles'. However, even when a Minister, in introducing legislation, has expressed a view as to the meaning of that legislation, the court will not give the enactment that meaning if such a reading is not justified. The need to act on the text of the enactment and not the Minister's statements is particularly important when the Minister's meaning has serious consequences for an individual.'

Text authorities

The issues associated with codes are commented upon in a number of Australian texts.

Statutory Interpretation in Australia Third Edition, *Pearce and Geddes* 1988, the following extracts appear on pages 160, 161, and 162:

> "A codifying Act gathers together all the relevant statute and case law on a given topic and restates it in such a way that it becomes the complete statement of the law on that topic. Unlike the civil law countries, codification is not an activity that is engaged in at all commonly in common law countries. There was a burst of activity at around the turn of the century that saw the enactment of codes relating to sale of goods and bills of exchange. Criminal Codes have been made in Queensland, Tasmania and Western Australia. There has been discussion from time to time of the desirability of codifying the common law – contract being the area most frequently mentioned: see particularly Aubrey L. Diamond, 'Codification of the Law of Contract" (1968) 31 MLR 361. Discussion of the general issue has resulted in a voluminous literature. A sample of the more recent contributions giving a flavour of the debate are: Dennis Lloyd, 'Codifying English Law' [1949] *Current Legal Problems* 155; H R Hahlo, 'Here Lies the Common Law: Rest in Peace' (1967) 30 MLR 241; M R Topping and J P M Vandenlinden, 'Ibi Renascit Jus Commune' (1970) 33 MLR 170; S J Stoljar (ed), *Problems of Codification* (1977) Bibliorech, Canberra; Bruce Donald, 'Codification in the Common Law System' (1973) 47 ALJ 160. It would appear that there is little likelihood of the adoption of new codes in Australia in the foreseeable future. However, it is relevant to consider issues relating to the interpretation of those that do exist.

…

The main issue relating to he interpretation of codifying statutes is whether or not it is possible to have regard to either the case law or the prior statutes that have been superseded by the code. The theoretical idea of a code is that it replaces all existing law and becomes the sole source of the law on the particular topic. This theory assumes that the code is in no way ambiguous. It also fails to contemplate the notion that expressions may be used that have an accepted legal meaning and that meaning may not be specifically set out in the code. Finally, it fails to take into account the fact that the code will be interpreted by persons who in the English system of law are steeped in the notion of precedent and find it virtually impossible to reason from a statute without having regard to its prior interpretations. These problems of interpretation have been reflected in the cases which demonstrate a division in approach to the question whether or not earlier cases may be referred to.

…

The orthodox position of declining to take into account the law prior to the code is stated in the joint judgment of Dixon and Evatt JJ in *Brennan v R* (1936) 55 CLR 253. Following the very similar approach that was espoused in *Bank of England v Vagliano Bros* [1891] AC 107, their Honours said at 263:

> [the Criminal Code of Western Australia] **forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law**. **It is not the proper course to begin by finding how the law stood before the Code**, and then to see if the Code will bear an interpretation which will leave the law unaltered.

The alternative approach is demonstrated by the judgment of Windeyer J in *Vallance v R* (1961) 108 CLR 56 at 74-6. In referring to the Tasmanian Criminal Code his Honour pointed out that in some places the code stated common law principles in words that had long been familiar; other parts of it were an assemblage of old statute law, re-enacted in such a way as to fit in with the language of the code; other parts modified the former statute law. There were also sections that were concerned with matters that were formerly dealt with by the common law, but which used words that seemed to alter earlier doctrine and did not simply declare it. Finally, the code used many words and phrases that, when it was enacted, had well-established meanings and in his Honour's view, **such words had to be read in their established legal sense unless the contrary intention appeared**. He then summarised the effect of all this as follows:

> **The Code is to be read without any preconception that any particular provision has or has not altered the law.** It is to be read as an enactment of the Tasmanian Parliament. And, interesting though it is to compare it with other codes, such as that of Queensland from which it is derived, or with projected codes such as *Stephen's* Code, they cannot govern its interpretation. But it was enacted when it could be said of the criminal law that it was 'governed by established principles of criminal responsibility.' And for that reason we cannot interpret its general provisions concerning such basic principles as if they were written on a *tabula rasa*, with all that used to be there removed and forgotten. Rather is ch iv of the Code written on a palimpsest, with the old writing still discernible behind.

…

Mason J in *Sungravure Pty Ltd v Middle East Airlines Airliban Sal* (1975) 5 ALR 147 at 164 seemed to pursue something of a middle course between these views. His Honour said of the code under consideration in that case:

> Its meaning, therefore, is to be ascertained in the first instance from its language and the natural meaning of that language is not to be qualified by considerations deriving from the antecedent law (*Bank of England v Vagliano Bros* [1891] AC 107 at 144-5; [1891-4] All ER Rep 93). An appeal to earlier decisions can only be justified if the language of the statute is itself doubtful or if some other special ground is made out, eg if words used have previously acquired a technical meaning.
>
> Here the ordinary meaning of the words is clear and it is not suggested that they previously acquired a technical meaning. Accordingly, it is not to be presumed that the section was intended to reiterate the antecedent law or to conform as closely as possible to that law.

…

The passages from *Brennan's* case and from *Vallance's* case are usually referred to by courts dealing with the question of interpretation of codes. But there is considerable variation in the approach adopted by the judges as to whether the principles set out in those cases permit the consultation of prior authorities. One can in fact see different approaches being consistently taken by different judges."

The Law of Partnership in Australia and New Zealand, *Fletcher, Sixth Edition*

The effects of a provision such as that suggested in paragraph 2(d) is noted in the introduction to this text book

It states at pages 22 and 23 as follows:

> "Although the Partnership Acts are stated to be Acts to declare and amend the law of partnership, **they do not pretend to be a codification of every aspect of the law relating to partnership**. With regard to those aspects of partnership which are not expressly dealt with in the Acts, such as formalities of the contract of partnership and bankruptcy, the law must be sought in relevant decisions of the courts and in statutes, such as the *Statute of Frauds* and the Bankruptcy Acts. However, notwithstanding its drafting obscurities, the *Partnership Act* was intended to declare the common law, evolved by the courts, which recognised the manner in which business associations of a commercial nation had been conducted for centuries. It has been stated that the Acts, and not the decisions previous to them, must be regarded as the guide on all points specifically dealt with by them. That view was given strong support by the Privy Council in *Cameron v. Murdoch*, one of its last pronouncements on Australian law, where it declared:
>
> > The [Western Australian] Act is described in its title as 'An Act to consolidate and amend the Law of Partnership'. **The purpose and effect of the Act were largely to codify the law of partnership as at the date of its passing. Their Lordships use the expression 'largely to codify' because the inclusion in the Act of s. 6. That section is in the nature of a sweeping-up provision designed to ensure that the rules of equity and common law applicable to partnership, which were in existence at the time when the Act was passed, should remain in force except in so far as they might be inconsistent with the express provisions of the Act.** It is to be stressed that the rules of equity and common law so preserved are the rules of equity and common law relating to partnership, and to partnership

only. The result of these matters is, in their Lordship's view, that, when a question of partnership law arises, it is the express provisions of the Act to which regard should first be had, and that is only after such regard has been had that consideration should be given to the effect, if any, if the sweeping-up provision in s. 6.

However, 'words, and particularly general words, cannot be read in isolation: their colour and their content are derived from their context.' In a declaratory statute, such as the Partnership Acts, cases decided before enactment must be given due consideration when determining what the legislature intended to accomplish by the enactment. [Footnote - In *Powell v. Powell* (1932) 32 S.R (N.S.W.) 407 at 413, Long Innes J. said:

> In considering those sections it is material to bear in mind that the *Partnership Act* was a declaratory and codifying Act, and that – as it pointed out by Sir Frederick Pollock, who was largely responsible for the Act in question, in the *Preface to his Digest of the Law of Partnership*: 'Unless the Law has been purposely altered, which in a codifying Act is a rate exception, the decisions are still the material from which the rule of law has been generalised.'"]

Summary

We suggest that the issues raised in the above cases and texts lead to the conclusion that if the Bill proceeds in a comprehensive form, it should contain a provision similar to section 4 of the *Partnership Act 1958 (Vic)* (see paragraph 2(d) above) so as to ensure that reference can still be had to the common law concept. The explanatory memorandum should also make this clear.

However, for the reasons outlined in paragraphs 2(f) to 2(j) above, we suggest the safest and most effective approach is to adopt the recreational charities style approach.