

Submission to Board of Taxation on draft *Charities Bill 2003*

Following is our submission to the Board of Taxation on the proposed Charities Bill 2003.

1 Our concerns

In our view, the Bill has 2 serious problems that unreasonably impact upon charities. These are:

- Section 8, in particular s8(2)(c) which provides that a ‘disqualifying purpose’ is ‘the purpose of attempting to change the law or government policy’.
- Section 4(1)(e) which has the effect that a charity loses its charitable status if it has engaged in conduct (including an omission) which constitutes a “serious offence”, which is defined in s3 to be an “indictable offence”.

2 Our recommendations

We recommend:

- Section 8 be removed.
- Section 4(1)(d) be removed.
- Section 4(1)(e) be removed.
- Consequential changes to implement the above.

3 Who we are

International Fund for Animal Welfare (Australia) Pty Limited (now known as **IFAW Asia Pacific**) is a member of the International Fund for Animal Welfare worldwide group (**IFAW**). IFAW has entities and operations in Australia, Canada, China, Africa, Europe, the United Kingdom and the United States.

IFAW is committed to good conservation outcomes that benefit both people and wildlife.

IFAW works to improve the welfare of wild and domestic animals throughout the world by reducing commercial exploitation of animals, protecting wildlife habitats and assisting animals in distress. IFAW seeks to motivate the public to prevent cruelty to animals and to promote animal welfare and conservation policies that advance the well-being of both animals and people.

IFAW was founded in Canada in 1969. Since that time, IFAW has grown to become one of the largest international animal welfare organisations in the world. IFAW has representation in 15 countries and a staff of more than 200 experienced campaigners, legal and political experts, and internationally acclaimed scientists. IFAW pursues a variety of local, national and global campaigns around the world. In each region where we work, IFAW's work is informed by local customs and culture and tailored to the particular economic and political conditions of that area. All of IFAW's efforts are rooted in the belief that a world in which animal life can survive and thrive is fundamental to human well-being. IFAW has more than two million supporters around the world - including more than 50,000 in Australia. IFAW is primarily funded by supporter donations, spending 73 cents in every dollar directly on animal welfare.

IFAW brings a unique perspective to animal welfare by having a clearly stated aim in its Mission Statement to 'promote animal welfare and conservation policies that advance the well-being of both animals and people'. IFAW is committed to achieving balanced solutions to conservation challenges - solutions that meaningfully address the needs of both wildlife and people in the world we all share.

IFAW's work is concentrated in two program areas: Wildlife and Habitat Protection, and Animals in Crisis and Distress. Our five international priority areas are Whales, Elephants, the Convention on International Trade in Endangered Species (**CITES**), Pet Rescue and Emergency Relief.

A key focus of our international work that serves as a useful example of our work in Australia is the International Whaling Commission (**IWC**). IFAW is a key NGO at the Commission's annual meetings and has a team of campaigners and scientists in six countries working on whale conservation, as well as operating the scientific research vessel *Song of the Whale*. IFAW in Australia provides a scientific adviser to the Australian Government delegation to the Scientific Commission of the IWC, and contributes to the broader IWC intercessional work of the Australian Government and to its ongoing domestic and regional commitment to improve whale conservation.

IFAW is supporting the gathering of scientific data in Australia and the South Pacific to understand the extent of the whales' recovery and help governments make science-based decisions on setting up whale sanctuaries.

IFAW was established in Australia in 1983. The Asia Pacific office in Sydney opened in July 2000, and presently has 9 full-time employees, consultants and a dedicated volunteer team. International Fund for Animal Welfare (Australia) Pty Ltd is a company registered in NSW under the Corporations Act 2001, and presently holds charitable fundraising permissions and deductible gift recipient status for the purposes of Federal and State laws.

4 Our purpose

Our purpose is reflected in the objects clause of our Constitution which is as follows:

"The objects for which the Company is established are to promote the welfare and preservation of animals throughout the world but particularly in their natural environment including but not limited to:

- (a) the conservation and protection of their natural habitat;

- (b) the support and conduct of research and the gathering, publication and communication of information concerning animals, the welfare or preservation of which is or may be threatened, endangered or otherwise at risk or which are or may be subject to injury, stress or cruelty; and
- (c) the soliciting, accepting, application and use of money, gifts and other contributions or property for such welfare and preservation.”

5 Our activities involving changes to law and government policy

We believe that for the Board of Taxation to understand the problems created by s8, it is important for the Board to appreciate the activities of charities such as IFAW Asia Pacific that involve attempting to change the law or government policy. To assist the Board in this aspect, we provide the following information on IFAW.

IFAW has been involved in the following activities aimed at attempting to change the law or government policy in various countries throughout the world:

- In 1993, IFAW investigated and discovered thousands of endangered moon bears being kept captive in unspeakable pain on Chinese bile farms. IFAW's exposure of these conditions shocked the world and changed the Chinese government's policy to close the worst farms and improve conditions for those remaining on other farms.
- Through CITES, IFAW joined with other organisations in seeking the ban of trade in elephant ivory. In this region, IFAW has contributed funding and expertise for the CITES Animals Sub-Committee Intersessional meeting, the Technical workshop on seahorses and other members of the family *Syngnathidae* in the Philippines in May 2002. IFAW provided legal advice to the Government of the Philippines on the implications of an Appendix II listing for seahorses and implementation issues leading to the successful listing of these species at the November 2002 Conference of Parties meeting. Also at this meeting, whale sharks and basking sharks were similarly listed. Both these results had been actively supported by IFAW Asia Pacific in its representations to the Government of Australia.
- Since IFAW first gained observer status at the International Whaling Commission (IWC) in 1979, it has made a major contribution to preventing the return of large-scale commercial whaling and has a team of campaigners and scientists in six countries working on whale conservation, as well as operating the scientific research vessel *Song of the Whale*. IFAW was one of the leading organisations supporting pro-conservation governments such as Australia in the establishment in the Southern Ocean Sanctuary in the waters surrounding Antarctica.
- IFAW Asia Pacific supports the Australian Government in its work to improve the conservation of whales in this region through domestic and regional programs, and internationally at the IWC such as active support for the establishment of a South Pacific Whale Sanctuary. We are supporting the gathering of scientific data in Australia and the South Pacific to understand the extent of the whales' recovery and help governments make science-based decisions on setting up whale sanctuaries.
- IFAW Asia Pacific works in partnership with *Whales Alive!* and the South Pacific Regional Environment Programme (SPREP) to support the sustainable development of whale watching nature tourism in the Kingdom of Tonga and other areas within the

south Pacific. We support the work of the Tongan Marine Awareness Centre, including training whale watch operators and guides on policy, and providing technical advice on whale watching and whaling issues. We also collaborate on research, public education and community outreach through visits to local villages and schools in the south Pacific region.

- IFAW has helped fight threats to whale, dolphin and porpoise populations from entanglement in fishing nets and habitat degradation by, for example, influencing US government policy in introducing a US government Mandatory Ship Reporting System.
- IFAW is committed to protecting natural habitat. For example, IFAW was involved in the establishment of a wildlife sanctuary around Mt Everest, the Qomolangma National Nature Preserve, which took 5 years of planning and political advocacy to create.
- Since 1981, when IFAW representatives first discovered dogs brutally hogtied and muzzled in the Philippines meat markets, IFAW has campaigned against this needless cruelty. IFAW led international efforts to secure passage of the Philippines Animal Welfare Act, which was finally passed in 1998.
- As part of IFAW's efforts to promote effective endangered species legislation in Canada, IFAW commissioned a comprehensive national poll on endangered species protection in Canada. The results showed that 97% of Canadians said laws to protect endangered species are important, and that 92% support national standards that would apply in all provinces and territories. Given such overwhelming support for a strong federal bill, IFAW, along with other organisations, and the scientific community, focused on building a consensus amongst national environmental and animal groups on the elements of effective endangered species legislation.
- During the 1990s, working with the Schad Foundation, Animal Alliance of Canada, and World Wildlife Fund Canada, IFAW's campaign targeted politicians and the public in key constituencies, and involved advertising on radio and billboards, as well as distributing informational videos about Ontario province of Canada's spring bear hunt. This unethical hunt, the largest in North America, killed some 4,000 black bears each spring and left hundreds of orphan cubs to starve. By early 1999, tens of thousands of residents contacted their representatives to demand an end to the hunt, and the Ontario government finally agreed.
- In Scotland, IFAW was involved in campaigns to stop hunting with dogs. A private members bill to stop hunting with dogs was introduced in September 1999, and IFAW supported this bill as part of the SCHAD alliance (Scottish Campaign Against Hunting with Dogs). Public opinion at the time was strong with 75% of Scots in favour of a ban. The *Protection of Wild Mammals (Scotland) Act 2002* came into effect on 1 August 2002. IFAW continues to campaign for a ban on hunting with dogs in England and Wales, with legislation currently before the Parliament.
- In the 1990s, IFAW began working with Australia's tourism industry and wildlife Authorities to promote kangaroo-based eco-tourism. This project included identifying areas of the country with the most potential for kangaroo viewing opportunities promoting kangaroos as assets worth protecting.

- To save wildlife and people from injury and death on Australian roads, IFAW, the University of New South Wales, and the Wildlife Information and Rescue Service instituted a 3 year scientific test on the effectiveness of *Swareflex* reflectors. Installed along roadsides, the devices flash when a vehicle approaches to alert wildlife and prevent collisions.

There are many, many, many other examples that can be given of activities in Australia and around the world that IFAW has been involved in that are aimed at changing law or government policy.

While IFAW Asia Pacific was not involved in most of the activities listed above (because our operations in Australia were fairly limited until recently), those activities do represent the types of activities that IFAW Asia Pacific wishes to pursue in the future – which will involve changing law or government policy.

The Report of the Inquiry into the Definition of Charities and Related Organisations (**Report**) at p209 indicates that attempting to change the law of a foreign country has also been held to be political and not charitable. We assume that s8 also refers to non-Australian law and non-Australian government policy.

IFAW does clearly provide many direct animal welfare services and funding for those services that do not amount to attempting to change the law or government policy. We do not, however, deal with those activities in this submission.

6 Why we are concerned about section 8

All of the activities described above and similar activities which involve attempting to change the law and government policy are in furtherance of our objectives extracted above. Irrespective of the extent of these activities, and irrespective of how much of IFAW's time or financial resources are devoted to them, those activities are not of themselves 'purposes'. Rather, they are a means to achieve a purpose.

Section 4(1)(d) provides that a charity must not have a 'disqualifying purpose'. Disqualifying purpose is defined in s8(2)(c) to include the purpose of attempting to change the law or government policy, if it is more than ancillary or incidental to other purposes of the entity concerned.

It is appropriate that the definition of charity contain a provision such as s4(1)(b), ie that a charity has a dominant charitable purpose. We also consider that in accordance with case law and the Report, that an entity's purpose is determined by its constitution. Provided that the activities of the organisation are consistent with its objects, then it seems to us that it is not necessary to have the additional element of a "disqualifying purpose". On this basis, we consider that s8 and s4(1)(d) should be removed.

7 Difference between 'purpose' and 'activities'

As our activities are all in furtherance of our objects, which are our purposes, s8(2)(c) should never cause us a problem. But there is a significant possibility that as the Bill is currently drafted, a relevant regulator (eg the Australian Taxation Office (**ATO**)) could consider that those activities may amount to separate purposes, and if so, that they are more than 'ancillary or incidental'.

It is clear that the ATO will consider an entity's activities in determining whether the entity is a charity (see p 102 of the Report). We consider that provided the entity's activities are consistent with its stated charitable purpose, those activities should not be seen to be separate purposes (that is, we support the 'orthodox' approach to a charity discussed at p101 of the Report).

But if the ATO were to consider those activities as being purposes, when will they be 'ancillary or incidental'?

Other countries have imposed limits on the 'political' activities of charities. For example, Canada has an 'incidental and ancillary' test that essentially requires a charity to expend no more than 10% of its resources on 'political activities' (see p216 of the Report). Also, the USA limits the lobbying expenditure of charities to 20% of their 'exempt-purpose expenditure' (see p216 of the Report).

Such approaches would not be appropriate in Australia, but s8 may lead to such approaches being adopted in Australia, even if only by ATO administrative practice.

Charities such as ours should be free to determine how they spend their limited time and financial resources, provided they are consistent with their charitable purposes.

For example, IFAW Asia Pacific is currently involved in funding and developing whale research, whale watching and whale sanctuaries to protect the South Pacific's whale populations, which are the largest in the world. This involves, in part, working with the South Pacific Regional Environmental Program (**SPREP**), which is the regional intergovernmental agency responsible for developing and promoting strategies to address conservation and environmental issues.

This activity is clearly in furtherance of our charitable objectives. If s8 were introduced, would we be required to:

- Track the time and other resources spent on what may be considered to be activities aimed at changing law or government policy?
- Determine when the ATO may consider an activity may amount to a purpose?
- Limit these activities, even if we thought those activities were the best use of our resources to achieve our charitable purposes?

If s8 were removed from the Bill, the positive requirement in s4(1)(b) that a charity have a dominant purpose that is charitable would be sufficient to achieve an appropriate government policy. It is therefore not necessary to have s8.

8 Activity that constitutes a serious offence

Section 4(1)(e) provides that an organisation will not be a charity if it engages in, or has engaged in conduct (or an omission to engage in conduct) that constitutes a serious offence. Section 3(1) defines 'serious offence' to mean an offence against a law of the Commonwealth, of a State or of a Territory, that may be dealt with as an indictable offence.

In a separate, though related aspect, s8(1) provides that the purpose of engaging in activities that are unlawful is a disqualifying purpose.

We consider that s4(1)(e) is inappropriate for a number of reasons, including the following:

- a disqualifying event is 'engaging in conduct that constitutes' a serious offence. There is no requirement that the organisation actually be convicted of an offence. The government body that will primarily be administering the definition of charity will be the ATO. Accordingly, as the Bill is drafted, it seems that an ATO officer would be able to make a decision as to whether an organisation has been involved in conduct that constitutes a serious offence, and so remove the tax exempt status of the organisation.
- A charity may infringe the law because of fraudulent or unauthorised conduct of employees, or commission of a strict liability offence, despite having in place reasonable processes to guard against that occurring. Even if a Court imposed only a nominal penalty (or no penalty) on a charity because of such circumstances, its charitable status would be lost.
- If loss of charitable status means the entity will lose its tax exempt status (which would almost invariably be the case), the entity is subject to two penalties – the tax and the penalty for the offence.
- Once an entity engages in the relevant conduct, it loses its charitable status, and so almost invariably it loses its tax exempt status, **forever**. Loss of tax exempt status does not apply to non-charitable organisations that are tax exempt and engage in conduct that constitutes a serious offence, such as local government.
- What is a serious offence (ie an indictable offence) is determined by other legislation with a different policy agenda. For example, in the Commonwealth area, an indictable offence is, generally, an offence punishable by imprisonment for a period exceeding 12 months (*s4G Crimes Act (Cth) (1914)*). It is not clear to IFAW why policy changes in those areas should potentially have significant and adverse consequences for the tax exempt status of a charity.

Section 8(1), which provides that the purpose of engaging in activities that are unlawful is a disqualifying purpose, is also an issue of concern. There is the problem of when an activity could constitute a purpose as discussed above. So, for example, we consider that if the objects of the charity are charitable, then even if it happens to engage in an activity that is unlawful, that would not be relevant.

However, if an ATO officer considered that an activity of a charity were unlawful, then if it were also considered by that ATO officer to be a purpose, the charity would lose its tax exempt status, even if that purpose were trivial. As 'unlawful' is not defined, it probably refers to non-Australian law as well. It is therefore necessary to clarify what would be the status of the activity if it were lawful (even mandatory) in Australia yet unlawful in another country.

Again we consider that s8 is not required, and the positive requirement in s4(1)(b) is sufficient.

9 Conclusions

In view of the above, we consider that s8 is not workable in that it does not provide greater clarity and transparency. It creates confusion as to when activities amount to purposes. It has the potential of requiring a charitable organisation to spend its limited resources on tracking expenditure and activities that may or may not amount to a disqualifying purpose. There is room for disputes with the relevant regulator, ie the ATO, as to whether an activity will or will not be a purpose. If it is a purpose, there will be considerable room for dispute as to what is “ancillary or incidental”.

The problems with the workability will clearly have an additional administrative burden on us, as described above.

In our assessment, s8 does not provide the flexibility to ensure the definition can adapt to the changing needs of society. In our case, our objects will often best be achieved by changing human behaviour, which will often involve changing law or government policy.

Charities such as ours should not be at risk of losing their charitable status because an ATO officer considers an activity that they may not like to be more than an ancillary or incidental purpose.

Also, charities should not suffer the double penalty of loss of their charitable status (and so their tax exempt status) and a separate penalty if for some reason they engaged in conduct that constitutes an offence.

10 Further Information

If you have any queries in relation to this submission, or you would like further information, please contact:

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