

Comments on Charities Bill 2003 received from Mr W A Lee

Thank you for giving the public an opportunity to comment on the Charities Bill 2003 Exposure Draft. I am sending you this as email and hard copy.

I have interested myself in Charities law as co-author of Ford & Lee, Principles of the Law of Trusts, being the sole author of the two chapters (19 and 20) on charity law in that work.

First of all I would like to congratulate those who have brought the Charities Bill to its present state. It is an important achievement and will be a foundation of the law of charities for the foreseeable future. It shakes off an incubus of ambiguity that some of the existing case-law embodies.

I have three comments to make.

#### (1) Altruism

You ask whether the word altruistic should be included in the legislation. The primary definition of this word in the Oxford English Dictionary is abstruse - "of or to others". It goes on "devotion to the welfare of others, regard for others, as a principle of action". A secondary meaning is given as benevolent. The word welfare occurs six times in the Charities Bill. The word benevolent, surprisingly, does not appear at all! "Public benefit" appears nine times and "benefit" on its own four times.

I would suggest that the well-known words welfare and benefit cover the field without introducing a French synonym that was first used in English in the nineteenth century. To introduce that additional word might at best be tautologous and at worst confusing. For instance, one might say that it would be altruistic for a devout catholic to fund the building of a mosque, in a spirit of ecumenism; but not entirely altruistic for that same person to pay to have air-conditioning and central heating installed in the church in which he or she habitually worships. But the latter, at present, is a charitable purpose and might attract a tax concession for the donor.

Further than that, there is inconsistency between a strict concept of altruism and the important principle contained in the Bill of an open and non-discriminatory self-help group. Such a group could not be termed altruistic. It is entirely proper that these groups should be included in the law of charities.

The word altruistic appears only twice in my chapters on charity law, both in quotations. In *Barby v Perpetual Trustee Co Ltd* (1937) 58 CLR 316 Dixon J said at 324: "The gift must proceed from altruistic motives or from benevolent or philanthropic motives". This suggests that the words benevolent, or philanthropic are as arguable as altruistic. In *Sydney Homoeopathic Hospital v Turner* (1959) 102 CLR 188 Kitto J said at 221: "But if the objects of a body are limited to altruistic purposes, it is as an instrument of altruism that it is likely to attract benefactions". I would reject a proposition that charity should be limited to altruistic purposes.

To conclude, the word is not really current in charity law and I doubt what extra clarity or purpose would be achieved by its introduction.

#### (2) The definition of entity

I have a criticism of the drafting of the Bill at one point. It relates to the definition of "entity".

In 3(1) it says: "entity" has the meaning given by section 960-100 of the Income Tax Assessment Act 1997. That section starts off by saying "Entity" means any of the following: (a) an individual" and (d) "a partnership".

But s 4 of the Charities Bill says that a charitable institution is a reference to an entity that...(f) "is not an individual, a partnership"...etc.

There could be inconsistency here. Does entity sometimes include individuals and partnership but not always? You will know the answer to this. Another way of putting this question is to suggest that the definition of entity should be preceded by the words, "Subject to this Act". This would have the effect of alerting the reader to expect a modification of the ITA definition later in the Charities Bill.

The ITA definition includes: " (f) a trust"; and goes on to talk about a legal person (not an individual) having the capacity of a trustee. I suggest that it is confusing to send a reader of the Charities Bill to the ITA, which uses both individual and legal person apparently interchangeably.

There is a further difficulty. I cannot tell from the Bill whether an individual who is appointed sole trustee by will of a legacy for charitable purposes, is an entity. The definition of a not-for-profit entity does not assist. I find it difficult to believe that you are saying that an individual cannot become a trustee of a charitable trust. With respect I think that the Bill itself should be quite clear about the answer to this question, without a reference to the not entirely clear definition contained in the ITA.

Further than that, although I agree that a political party should not be a "not for profit entity" does this mean that it is disqualified from becoming the trustee of a clearly charitable trust - for example "for the relief of poverty" in an impoverished part of Australia? Perhaps the answer to this is yes. After all a political party that undertook trusteeship of a charitable trust might represent that it is the political party and not the donor of the fund that is acting to relieve the poor.

I am co-trustee with others of the Viertel Foundation, Queensland's largest charity. There are three lay trustees, who get paid nothing, and a commercial corporate trustee (a bank) that receives fees in excess of \$300,000 a year. It describes its trusteeship of charitable trusts as its "charitable services" division.

A political party and a commercial trustee might well be tempted to glorify themselves as trustees of charitable trusts; but that should not be a reason for disqualifying either of them from acting. Why should a political party be disqualified from acting as a trustee but not a commercial trustee that is motivated solely by profit?

(3) Trusts for political purposes.

May I add that I think you have got this about right.

I trust this is of assistance.

May I ask a favour of you? I am in course of completely re-writing my chapters on

Charitable Trusts for Ford & Lee and I intend to give maximum exposure of the proposed Commonwealth legislation because I believe that it throws important light on some of the difficult aspects of charity law and really brings it in to the 21st century. I should be most grateful if you would kindly email me a copy of the Act when it receives the Royal Assent. If you cannot do this could you let me know how I can get my hands on a copy very quickly? My publishers are anxious to get these revised chapters out as soon as possible after the Bill has been passed.

Yours truly

W A (Tony) Lee