

EXPOSURE DRAFT

CHARITIES BILL 2003

EXPLANATORY MATERIAL

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Treasurer, the Hon Peter Costello, MP)

General outline and financial impact

Definition of a charity

The Charities Bill 2003 introduces a legislative definition of both a charity and a charitable purpose. The legislative definition replaces the current interpretation of the term charity, which has been based on over 400 years of common law. The legislative definition is intended to provide clarity to entities within the charitable sector.

Date of effect: The new definition will apply from 1 July 2004.

Proposal announced: The intention to introduce a definition was announced in Treasurer's Press Release No 49 of 29 August 2002, as part of the Government's response to the *Report of the Inquiry into the Definition of Charities and Related Organisations*.

Financial impact: The estimated cost to revenue of the legislative definition of a charity is \$3 million per year from 2005-2006.

Compliance cost impact: Compliance costs should be reduced as the new definition of a charity should clarify issues for the charitable sector and remove uncertainties and inconsistencies.

Chapter 1

Definition of a charity

Outline of chapter

1.1 The Charities Bill 2003 introduces a legislative definition of both a charity and a charitable purpose. The intention to introduce a legislative definition was announced in Treasurer's Press Release No 49 of 29 August 2002, as part of the Government's response to the *Report of the Inquiry into the Definition of Charities and Related Organisations*.

1.2 The definition will apply to all Commonwealth legislation, replacing the previous common law interpretation. In particular, the definition will apply to taxation law, providing a clear framework within which to assess the eligibility of entities for certain tax concessions.

Context of amendments

1.3 The definition of a charity has been developed as part of the Government's response to the *Report of the Inquiry into the Definition of Charities and Related Organisations*.

1.4 The definition essentially codifies the existing common law interpretation of the meaning of a charity. The common law interpretation has been based on over 400 years of common law, largely based upon the *Preamble to the Statute of Charitable Uses*, enacted by the English Parliament in 1601 (the Statute has since been repealed).

1.5 The legislative definition is intended to provide clarity to entities within the charitable sector, by codifying the definition.

Summary of new law

1.6 The legislative definition of a charity is largely similar to the previous common law interpretation. The definition is, however, somewhat broader, explicitly including:

- not-for-profit child care available to the public;

- self-help bodies with open and non-discriminatory membership; and
- closed or contemplative religious orders that offer prayerful intervention for the public,

subject to the additional requirements of the definition.

1.7 These additional inclusions resolve ambiguities and inconsistencies within the current common law definition.

1.8 With the exception of the above extensions, the definition is based upon the previous common law definition. The definition requires that an entity must be not-for-profit, have a dominant purpose or purposes that are charitable and for the public benefit.

1.9 In addition, this bill includes a definition of a charitable purpose, also to apply to all Commonwealth legislation.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
This bill contains a legislative definition for both a charity and a charitable purpose. This definition will apply to all Commonwealth legislation and is broadly consistent with the previous common law interpretation.	No legislative definition for a charity currently exists. Instead, the common law interpretation of a charity is used.

Detailed explanation of new law

1.10 The Charities Bill 2003 contains definitions of both a charity, and a charitable purpose.

Definition of a charity, charitable institution or other charitable body

What is a charity?

1.11 Part 2 of this bill consists of the core definition, followed by more detailed explanations of the requirements to satisfy the definition of a charity. *[Part 2, section 4]*

1.12 The core definition identifies a charity, a charitable institution or any other kind of charitable body, and requires that the entity be not-for-profit, with a dominant charitable purpose that is, with some exceptions, for the public benefit. The entity must not have a disqualifying purpose.

1.13 The term ‘entity’ has the meaning given by section 960-100 of the *Income Tax Assessment Act 1997*. [*Part 1, subsection 3(1)*]

1.14 The concepts of not-for-profit, dominant purpose, charitable purpose, public benefit and disqualifying purpose are discussed in further detail in paragraphs 1.25 to 1.84.

1.15 In addition, any activities in which the charity engages must further, or be in aid of, its charitable purpose. This requirement ensures that the entity must give effect to its charitable purpose. The activities of the entity, when considered with the dominant purpose of the entity, form an overall picture as to the charitable character of the entity. Activities are not considered in order to determine the best way for the entity to achieve its purpose; but simply that the entity gives effect to that purpose by furthering it.

1.16 The activities of the charity must also be legal. An entity will not be a charity if it engages in, or has engaged in, conduct (or omitting to engage in conduct) constituting a serious offence. For these purposes, a serious offence is an offence against the law of the Commonwealth, of a State or of a Territory that may be dealt with as an indictable offence, even if it may also be dealt with as a summary offence. [*Part 1, subsection 3(1)*]

What type of entity can be a charity?

1.17 There is some restriction on the type of entity that will be considered a charity. Individuals, partnerships, political parties, superannuation funds and government bodies will not meet the definition. Entities that will meet the definition include, without restriction, a body corporate, a corporation sole, an association or body of persons whether incorporated or not and a trust.

What is a Government body?

1.18 The term ‘Government body’ has been defined to include a body controlled by the Commonwealth, a State or a Territory, as well as a body controlled by the government of a foreign country [*Part 1, subsection 3(1)*]. The issue of what establishes government control has been the subject of much case law.

1.19 Government funding and/or government regulation will not generally, of itself, be considered sufficient to establish that an entity is controlled by the government. In the normal course of events, many charitable entities are funded as a means of government support for the work of that entity. Charitable entities are also regulated, usually to ensure that the services they provide meet a minimum standard. In the absence of other relevant factors, neither of these circumstances will necessarily indicate that the body is controlled by government.

1.20 In certain circumstances, however, both government funding and government regulation may be considered to be factors that are relevant in determining the existence of government control. For example, if the entity is funded through a government-imposed levy or tax of some kind, or if the entity is regulated to the extent that it is merely carrying on its activities at the government’s instruction or on the government’s behalf it may be considered to be a government body.

1.21 More usually, government control involves the ability of the government (often a Minister) to exercise control over the operations and activities of the entity.

1.22 The following indications of government control of an entity can be extrapolated from recent cases, including *Metropolitan Fire Brigades Board v FC of T* 91 ATC 4052 and *Mines Rescue Board of New South Wales v Commissioner of Taxation* 2000 FCA 1162:

- powers invested in a Minister to approve appointments to a management board;
- powers invested in a Minister to remove appointments from the management board (or to dissolve the board);
- powers invested in a Minister to overturn decisions of the management board, or to instruct the management board;
- powers invested in a Minister to approve the work program of the entity; and

- the ability of a management board to exercise the powers of government, such as the power to make by-laws and to impose penalties for breaches of those by-laws.

1.23 While the idea of ‘Government function’ has previously been held to be a relevant factor in determining that a body was a government body, this is no longer necessarily the case. Should the function of an entity be considered to be a government function, this may assist in reaching a conclusion that the entity is a government entity.

1.24 In *Metropolitan Fire Brigades Board v FC of T* 91 ATC 4052, it was held that the provision of metropolitan fire brigades was a government function. In *Mines Rescue Board of New South Wales v Commissioner of Taxation* 2000 FCA 1162, however, while the mines rescue function was not found to be a government function, it was held that this did not differentiate the two cases.

What is a not-for-profit entity?

1.25 An entity is a not-for-profit entity if it is not carried on for the purpose of profit or gain to its individual members and does not distribute its profits or assets to its owners or members, or to any other person, either while it is operating or upon winding up. *[Part 2, section 5]*

1.26 The term not-for-profit does not imply that a charitable entity will not generate a profit. Activities, such as commercial activities, may be undertaken with the purpose of generating a profit, without this effecting the charitable status of the entity, provided that the profits are directed towards the charitable purpose of the entity. In this circumstance, however, any purposes that are not charitable and for the public benefit would need to further or be in aid of, and be ancillary or incidental to the dominant purpose, as discussed in paragraph 1.30.

1.27 The reasonable payment of wages or allowances to employees, the reimbursement of expenses, payment for services and similar payments would not normally be considered the distribution of profits or assets.

How is the dominant purpose determined?

1.28 For the dominant purpose of an entity to be charitable, the entity must have a purpose or purposes that are charitable. *[Part 2, section 6]*

1.29 Similarly, for the dominant purpose of an entity to be for the public benefit, the entity must have a purpose or purposes that are for the public benefit.

1.30 Further, for the purpose or purposes of an entity to be dominant, any other purposes of the entity must further or be in aid of, and be ancillary or incidental to the dominant purpose.

1.31 It may be that multiple charitable purposes for the public benefit, when taken together, form a dominant charitable purpose for the public benefit. Therefore, it is not necessary for an entity to show that a single purpose is their dominant purpose.

1.32 In determining the dominant purpose of an entity, items that may be considered include, but are not limited to:

- the constituent documents of the entity, if the entity has such documents; and
- the activities of the entity.

Example 1.1

An organisation operates a community centre providing care for the homeless. The centre provides food, accommodation and health care. In addition, the centre organises sporting activities for recreational purposes on an occasional basis for their clients. This organisation is funded through the sale of donated clothing.

This organisation would be considered to have a dominant charitable purpose. The dominant purpose includes both the advancement of social and community welfare, and the advancement of health. Both the sporting activities and the fundraising activities of the organisation would not be considered charitable when viewed in isolation. They are, however, both incidental and in aid of the dominant purpose as they are conducted on a small scale to assist with the wider purpose of the entity.

What is the public benefit

1.33 With some exceptions [*Part 2, subsection 4(2)*], the dominant purpose of an entity must be for the public benefit if that entity is to fulfil the definition of a charity.

1.34 An entity has a purpose for the public benefit if it:

- is aimed at achieving a universal or common good;
- has practical utility; and
- is directed to the benefit of the general community or to a sufficient section of the general community.

[Part 2, subsection 7(1)]

- 1.35 A purpose is aimed at achieving a universal or common good where it is beneficial. A purpose that is harmful cannot, therefore, be aimed at achieving a universal or common good.
- 1.36 A benefit must have a practical utility. Benefits are not restricted to material benefits, but include social, mental and spiritual benefits.
- 1.37 A purpose directed to the benefit of the general community or to a sufficient section of the general community will not have a numerically negligible group as its potential beneficiaries. *[Part 2, subsection 7(2)]*
- 1.38 Any private benefits to the members of the charitable entity must be incidental to carrying out the charitable purpose. This does not preclude the provision of private benefits to members, but restricts this provision to the point where it is incidental to the overall purpose of the entity.
- 1.39 Further to this, the public benefit does not exist where there is a relationship between the donor and the beneficiaries (including either a family or an employment relationship).

Example 1.2

A company establishes a program whereby the employees are given regular health checks and health care advice. The company established the program for the benevolent purpose of improving the health and wellbeing of employees.

While the program has a dominant charitable purpose of the advancement of health, it would not meet the public benefit test, as there is a relationship between the donor (the company) and the beneficiaries (the employees).

Exclusion from the public benefit test

- 1.40 Open and non-discriminatory self-help groups and closed or contemplative religious orders that regularly undertake prayerful intervention at the request of members of the public are specifically excluded from the requirement to be for the public benefit. *[Part 2, subsection 4(2)]*
- 1.41 Open and non-discriminatory self-help groups are often organised and managed by the same group of people that benefit from the group. Where the self-help group meets the requirements of openness and non-discrimination, the benefit accruing to members would not exclude the group from meeting the definition of a charity on the basis that the

private benefit to members would not meet the public benefit test. They would, however, need to meet the remaining criteria of the definition, including being not-for-profit with a dominant charitable purpose.

Example 1.3

An asthma sufferer forms a support group for asthma sufferers in her geographical area. The group is formed to provide a forum for discussing the difficulties in being an asthma sufferer and to share experiences and ideas related to being an asthma sufferer. In order to join the group, a person must be an asthma sufferer. Aside from this requirement, there is no other membership criteria.

This group would be considered an open and non-discriminatory self-help group.

1.42 Closed or contemplative religious orders are excluded from the public benefit test as they differ from churches, which seek to spread their religious belief. Where the religious order keeps their observances to themselves, but does undertake prayer at the request of the members of the public, it is not necessary to meet the public benefit test.

Open and non-discriminatory self-help groups

1.43 A self-help group is an association of individuals that is established for the purpose of assisting individuals affected by a particular disadvantage or discrimination, or by a need that is not being met. Purpose for which a group may be established include providing support to victims of crime, to those effected by a particular illness, or to those who have been discriminated against for a particular reason. *[Part 2, section 9]*

1.44 Open and non-discriminatory self-help groups are not required to meet the public benefit test. This is because the benefits from these groups are usually aimed at the members of the group, thereby suggesting that the private benefit derived by members is greater than would be considered appropriate under the public benefit test.

1.45 The exemption of these groups from the public benefit test recognises the valuable role of self-empowerment in addressing disadvantage, discrimination and need, as well as the role of members in these groups in assisting other persons suffering from the same problem. Self-help groups harness the experience of members to assist the group as a whole in dealing with the relevant disadvantage, discrimination and need.

1.46 In order to determine if a self-help group is open and non-discriminatory, the membership criteria of the group are of great

importance. The members of the group, including those who control the group, should be individuals who are affected by the disadvantage, discrimination or need that the group is established to address.

1.47 The criteria for membership will relate to the purpose of the group, with membership open to any individuals who satisfy those criteria. Membership should not, therefore, be based upon any additional criteria, such as election by existing members.

1.48 It is, therefore, the model of management of these groups that sets them apart from other charitable groups. The membership criteria ensures that the benefits provided by the group are open to the public or to a class of the public. The benefits of the group, however, are provided through the involvement of members, who help not only themselves, but the group generally.

What is a disqualifying purpose?

1.49 There are some purposes that are not considered to be consistent with the overall charitable character of an entity. These purposes are called disqualifying purposes. *[Part 2, section 8]*

1.50 The following are disqualifying purposes:

- illegal activities;
- advocating a political party or cause;
- supporting a candidate for political office; and
- attempting to change the law or government policy.

With the exception of illegal activities, the purpose will be a disqualifying purpose if it, either by itself, or when taken together with one or both of the other of these purposes, is more than ancillary or incidental to the other purposes of the entity concerned.

1.51 Any purpose of engaging in illegal activities is a disqualifying purpose.

1.52 The disqualifying purpose of engaging in illegal activities parallels the requirement that a charity does not engage in activities constituting a serious offence.

1.53 Purposes, as shown in paragraph 1.50, with the exception of illegal purposes, are only disqualifying purposes where they are more than ancillary or incidental to the other purposes of the entity concerned. It is

possible, therefore, for the entity to have purposes of these types, though they must further or be in aid of, and be ancillary or incidental to the dominant purpose of the entity.

1.54 Ordinarily, representing to Government, from time to time, the interests of those the entity seeks to benefit would be seen as incidental and in aid of the dominant purpose of the charity.

1.55 However, the independence of charities from Government and from political processes is an important component of their role in serving the public benefit.

Definition of a charitable purpose

1.56 Part 3 of this bill defines a charitable purpose. The requirement of a dominant charitable purpose is a key feature of the core definition of a charity in Part 2 of this bill. *[Part 3, section 10]*

1.57 In addition, the definition of a charitable purpose stands alone, applying to all Commonwealth legislation, in the same manner as the definition of a charity.

Advancement

1.58 The term ‘advancement’ includes protection, maintenance, support, research and improvement. *[Part 3, subsection 10(2)]*

Advancement of health

1.59 The advancement of health has previously been accepted by the courts as a charitable purpose. The advancement of health is accepted as being charitable, without the restriction of health services being provided to the poor. *[Part 3, paragraph 10(1)(a)]*

1.60 The advancement of health includes both curative and preventative purposes and, without limitation, includes the following activities:

- the care, treatment and rehabilitation of sickness, disease and suffering in humans, including the care provided by acute care hospitals, acute care institutions such as alcohol and drug treatment centres, mental health institutions and community health services such as home nursing, alcohol and drug rehabilitation and patient transport services;

- the provision of public health services aimed at advancing the health of the general community or sections of the general community, including health promotion, nutrition services, immunisation and screening for diseases; and
- research related to the nature, prevention, diagnosis treatment and incidence of disease and other health problems, research into health services, nutritional problems, pharmacology and so on.

Advancement of education

1.61 The advancement of education has also been accepted by the courts as a charitable purpose and the Government considers that this interpretation should continue to apply. *[Part 3, paragraph 10(1)(b)]*

1.62 The advancement of education can occur irrespective of the age of the beneficiaries.

1.63 The advancement of education includes, without limitation, the following activities:

- the provision of formal education through preschools, schools and tertiary education institutions, including the provision of building and related educational facilities;
- research directed towards expanding human knowledge;
- informal education aimed at the development of citizenship and life skills;
- the support of education, such as through the provision of prizes and scholarships; and
- the provision and support of facilities and services integrally associated with the operation of education institutions, such as sporting facilities, student unions and parent organisations.

Advancement of social and community welfare

1.64 The relief of poverty has always been considered a significant area of charitable activity. The advancement of social and community welfare, while encompassing the relief of poverty, recognises that the services and benefits provided by charities in this area are far more broad. *[Part 3, paragraph 10(1)(c) and section 11]*

1.65 The advancement of social and community welfare includes material, psychological, social and relational needs, and recognises relief, prevention and intervention.

1.66 While assistance to individuals is well recognised as charitable, 'community' has been specifically included in the title to recognise the role of charities in promoting the welfare of whole communities. Included here is promotion of social cohesion, inclusiveness, diversity, the productive functioning of groups within the broader community and the fostering of community capacity building.

1.67 The advancement of social and community welfare includes, without limitation:

- the prevention and relief of poverty, distress or disadvantage of individuals or families;
- the care, support and protection of the aged and people with a disability, including the provision of residential and non-residential care;
- the care, support and protection of children and young people and, in particular, the provision of child care services;
- the provisions of services to support families;
- the provisions of assistance and support for indigenous people, refugees and immigrants and prisoners and their relatives;
- the provisions of assistance and support for people who are disadvantaged in the labour market;
- the relief of distress caused by natural disasters and sudden catastrophes;
- the promotion of community development to enhance social and economic participation;
- the care and support of members or former members of the armed forces and their families; and
- the care and support of members of the civil defence forces and their families during a time of emergency (civil defence forces includes emergency service and crews of merchant

ships or other private vessels or aircraft used in times of emergency).

Advancement of religion

1.68 The advancement of religion has been considered a charitable purpose throughout the history of charity law. [*Part 3, paragraph 10(1)(d) and section 12*]

1.69 In the major High Court case regarding the meaning of religion, *The Church of New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120, Wilson and Deane JJ. held that the following principles could be used as indications in determining whether a collection of ideas and practices constitute a religion.

- The ideas and practices involve belief in the supernatural.
- The ideas relate to people's nature and place in the universe and their relation to things supernatural.
- The ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance.
- However loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups.
- The adherents themselves see the collection of ideas and practices as constituting a religion.

1.70 In the same case, Mason ACJ. and Brennan J. held, similarly, that a religion involves:

- belief in a supernatural Being, Thing or Principle; and
- the acceptance of canons of conduct in order to give effect to that belief.

1.71 In addition, the courts have also found¹ that organisations working against religions or the idea of religion cannot in itself be a religion.

¹ *Bowman v Secular Society Ltd* 1917 AC 406 and *Re Jones* 1907 SALR 1990 (Incorporated Body of Freethinkers of Australia).

1.72 The current interpretation demonstrates the current broad understanding of what constitutes a religion. As this understanding of religion continues to develop, so will the meaning of the charitable purpose of the advancement of religion. The courts will continue to be the best guide as to the current meaning.

Advancement of culture

1.73 The advancement of culture has not previously been recognised as a distinct area of charitable endeavour. Instead, the purposes that might have been considered for the advancement of culture were required to fit within the advancement of education.

1.74 As such, the courts have, in the past, accepted that purposes directed towards increasing the public appreciation of art, music or literature were charitable. This demonstrates the general understanding of the educational purpose of culture. It did, however, require that for a cultural purpose to be considered charitable, it must have had demonstrable educational merit.

1.75 A separate category specifically for the advancement of culture will overcome this, with cultural purposes assessed only on their cultural merit. *[Part 3, paragraph 10(1)(e)]*

1.76 The establishment of a separate cultural category recognises the important role of culture in determining a national identity and in enriching the lives of individuals and of society as a whole.

1.77 The advancement of culture includes, without limitation:

- the promotion of and participation in the arts, including literature, music, the performing arts and visual arts (including the various art forms currently recognised on the Register of Cultural Organisations under Subdivision 30-F of the *Income Tax Assessment Act 1997*);
- the establishment and maintenance of public museums, libraries and art galleries, and moveable cultural heritage;
- the promotion of Australian indigenous culture and customs;
- the promotion of the culture and customs of various language and ethnic groups; and
- the protection and preservation of national monuments, areas of national interest and national heritage sites and buildings.

Advancement of the natural environment

1.78 The establishment of a specific category for the advancement of the natural environment recognises the increased value society places on the natural environment. In particular, this category recognises the unique value of Australia's native natural environment. *[Part 3, paragraph 10(1)(f)]*

1.79 In the case of many environmental purposes, the public benefit is clearly demonstrated. Given the status of many environmental assets as public goods, any benefit to one, is a benefit freely available to all.

Other purposes beneficial to the community

1.80 Of key importance in the legislation of a definition of a charity is the need for flexibility, to allow the meaning of a charity and a charitable purpose to adapt to the ongoing changes in society.

1.81 This flexibility is provided by the inclusion of an 'other' category in the definition of a charitable purpose. *[Part 3, paragraph 10(1)(g)]*

1.82 In addition, the category also includes a number of charitable purposes that do not readily lend themselves to being grouped. Two examples of these types of purposes are the advancement of animal welfare and of public safety – both purposes clearly understood both by the courts and by the community to be important charitable purposes.

1.83 In determining the purposes that will fall under this category, the term 'beneficial to the community' is given prime importance. The other six categories of charitable purposes have been included on the basis that they represent a significant benefit to the community. Consistent with that, should any other purposes be considered to similarly have a significant benefit to the community, then they should be included within this category.

1.84 The following are examples of some of the types of purposes that will fall under 'other purposes beneficial to the community':

- the promotion and protection of civil and human rights;
- the promotion of reconciliation, mutual respect and tolerance between various groups of people within Australia;
- the protection and safety of the general public; and
- the prevention and relief of suffering of animals.

Application and transitional provisions

1.85 The definition will apply from 1 July 2004. *[Part 1, section 2]*

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