
**SUBMISSION IN
RESPONSE TO THE
TREASURY
CONSULTATION
PAPER: A DEFINITION
OF “CHARITY”**

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Contents

1. Introduction	1
2. Issues in defining charity	2
2.1. Dominant Purpose	2
2.2. For the public benefit	3
2.3. Activities to be in furtherance of charitable purpose	5
2.4. Disqualifying activities	6
2.5. Indigenous Community Funds	7
3. Conclusions	8

1. Introduction

Why we are making a submission

Chalk & Fitzgerald Lawyers & Consultants represent Aboriginal and Torres Strait Islander people across Australia. One of our aims is to assist indigenous communities to “close the gap” through economic participation and social inclusion. We are making a submission to this consultation paper because a statutory definition of “charity” will affect how, and which, indigenous organisations receive concessional tax treatment. This will impact on the ability of these organisations to provide benefits to indigenous communities. We will only be responding to the consultation questions that we believe will have the greatest impact on indigenous organisations.

What this submission is about

Indigenous charities are working across the country to secure a strong economic, social, cultural and environmental future for Indigenous peoples. The success of these charities is often linked to their ability to facilitate self-determination and the extent to which the communities they serve are investing in the activities they are undertaking and goals they are working towards. One of the key ways in which their goals will be met will be through using funding, including native title payments, to build economic opportunities (including employment, training and indigenous enterprise development).

This consultation regarding the statutory definition of “charity” needs to be considered against the wider policy objectives in the area of indigenous economic participation and social inclusion. At present there are a number of suggested reform opportunities being considered by the Treasurer which highlight the need for long-term solutions to issues related to indigenous economic participation and social inclusion. These include proposals relating to the tax treatment of “native title payments” and concessional tax treatment for indigenous community funds, among others.

Unfortunately, the consultation paper does not identify the linkages between these proposals and the draft Charities Bill and it is therefore necessary to respond to the consultation paper somewhat in isolation from those wider issues. We urge the Government, however, to consider these proposals and the draft Charities Bill against the background of its stated commitment to “Closing the Gap” by improving Indigenous life expectancy, infant mortality, early childhood development, education and employment. Given that the outcome of the Government’s consideration of specific proposals regarding the indigenous community funds is still not known, we wish to respond to this consultation paper to ensure that any legislative definition of “charity” will encompass the appropriate range of indigenous organisations and will not unnecessarily constrain their abilities to maximise the opportunities for social improvement.

2. Issues in defining charity

2.1. Dominant Purpose

One of the common law tests for an organisation to be considered a charity is that its only or dominant purpose must be charitable and it cannot have any independent non-charitable purposes. It can have purposes which, if viewed in isolation, would be non-charitable provided that those purposes are only incidental or ancillary to its charitable purpose. The draft Charities Bill proposes to retain this test but to omit the qualification that charities must not have any independent non-charitable purposes. The Consultation Paper then asks whether the common law qualification should be retained so that charities must have an exclusively charitable purpose.

In response to this, we note that many indigenous charities, particularly those established by native title claim groups, are established for the relief of poverty. The focus of many of these organisations goes well past the individual payments and subsidies that may have been used to achieve this object in years gone by. Rather, the focus of many modern indigenous organisations is assisting communities to achieve their own economic participation and social inclusion outcomes. We strongly support this focus on self-determination.

It is important that any charities legislation does not limit the potential opportunities for innovative development, including the ability for communities to administer economically viable businesses, as this will be the means for many community-based charities to achieve charitable objects.¹

Responses to consultation questions

1. Are there any issues with amending the 2003 definition to replace the ‘dominant purpose’ requirement with the requirement that a charity have an exclusively charitable purpose?

¹ See Strelein, Lisa and Tran, Tran (2007); “*Taxation, trusts and distribution of benefits under native title agreements*”. Australian Institute of Aboriginal and Torres Strait Islander Studies, Research Report No1/2007 Page 8.

We strongly recommend that the “dominant purpose” test be retained and not be redefined as an “exclusive purpose” test as to do so could disadvantage indigenous charities and pose an appreciable risk to community development agendas in indigenous communities.

2.2. For the public benefit

There is a general common law rule that a charity must be for the benefit of the public or a section of the public. The draft Charities Bill incorporates a similar test to this and we support this.

However, the common law does not require an organisation with the object of the relief of poverty to meet this test in the same manner as other organisations with charitable purposes. Instead, at common law, such an organisation will be a charity as long as its purpose is “the relief of poverty” and not the relief of poverty *amongst particular poor persons*. One of the key reasons why this exception to the rule has developed is because of the special quality of gifts for the relief of poverty. In *Re Compton; Powell v Compton*,² Lord Greene MR considered that gifts for the relief of poverty may be of such benefit to the community that this outweighs the fact that the relief is confined to family members. Accordingly, while a public benefit test is still required, a much narrower group of persons may be considered as a section of the public. The draft Charities Bill departs from the common law by applying the public benefit test in the same manner to all charities.

As many indigenous Australians have living standards and incomes significantly lower than the average, there are a significant number of charities with the object of the relief of poverty across specific indigenous communities or geographical areas. These communities and areas are sometimes comprised of one (extended) family (defined in a way which is culturally appropriate within the relevant indigenous group) or one set of beneficiaries who are related by blood ties, noting that the indigenous concept of family often encompasses a broader range of relatives than the current western understanding of this word. In particular, many native title claim groups establish charitable organisations for the relief of poverty in their communities. It is important that these charitable organisations, which provide support to some of the most disadvantaged people in Australia, are given appropriate taxation and other concessions.

It is also important to note that many native title claim groups establish charitable organisations to provide benefits to their community. To achieve community buy-in and to further the goal of self-determination, the membership of these organisations is often open to the adult members of the community. Thus, the members and their children will be the people benefiting from the charitable work of the organisation – although they receive benefits in their capacity as members of a needy community rather than as members of the organisation. This should not prevent these organisations as being classified as charities. The fact that members of the community have the opportunity to be involved in the organisation’s charitable work, rather than expecting an ‘outside’

² [1945] 1 Ch 123, 131.

organisation to make decisions for them about how to best achieve the charitable objects for that community, should be encouraged as it supports capacity-building and self-determination within indigenous communities – something which is entirely consistent with broader government policy on ‘welfare reform’.

Responses to consultation questions

3. Are any changes required to the Charities Bill to clarify the meaning of ‘public’ or ‘sufficient section of the general community’?

Yes. We are concerned that organisations that have the object of the relief of poverty and which qualify as charities at common law may fail the test contained in the draft Charities Bill. We strongly support the Board of Taxation recommendation that ‘sufficient section’ be defined as one which is not ‘numerically negligible’.

Also, it is important that any new legislation does not restrict organisations which have a membership comprised of the members of the relevant community from being recognised as charities provided the activities of the organisation are directed to the relevant charitable object and people are able to receive benefits because they are needy members of the community rather than merely members of the organisation.

4. Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?

Yes. The draft Charities Bill should be amended to ensure that small Indigenous communities and native title claim groups are not prevented from achieving charitable status simply because all or most of the possible beneficiaries are considered to be family. Consideration needs to be given to the cultural influence on the interpretation of the word “family”.

5. Could the term ‘for the public benefit’ be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?

We do not believe this is necessary. We believe the draft provisions are adequate.

6. Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?

This would be acceptable if the legislation is amended to incorporate the common law modification of the public benefit test applicable to charities with the object of the relief of poverty. If the legislation is not amended to contain this modification, then it is important for the legislation to be amended in the manner we recommended in response to consultation questions 3 and 4 as otherwise many charities may be disadvantaged by this change to the law.

2.3. Activities to be in furtherance of charitable purpose

In *Commissioner of Taxation v Word Investments*,³ it was held that the activities undertaken by an entity need not be intrinsically charitable for the institution to be charitable. It was only necessary that the activities be in furtherance of the charity's purpose. It is our view that this decision provided the necessary clarification on this matter.

We also note the position espoused in ATO Draft Taxation Ruling TR 20011/D2: that activities that may be inconsistent with an entity's charitable purpose but that are isolated and insignificant should not affect the charitable status of the entity. We think this is a useful test to retain as it provides a reasonable and realistic limit to an entity's non-charitable activities.

Like the Board of Taxation, we are concerned about the tension between the activities test in the draft Charities Bill and the dominant purpose test. An entity will pass the dominant purpose test in section 6 if one or more of its purposes are charitable and any other purposes that it has are purposes that further, or are in aid of, and are ancillary or incidental to, its charitable purposes. However, an entity will not pass the proposed core definition test in section 4 if it engages in activities that do not further, or are not in aid of, its dominant purpose. We note two issues in relation to this. First, the definition of "dominant purpose" makes it unclear as to whether the activities test is referring to the entity's charitable purpose or all of its purposes including any ancillary non-charitable purposes. Secondly, the draft Charities Bill effectively contains two tests for assessing the same issue – is the entity really acting, behaving and working towards the goals of a charity? Rather than splitting the tests up in this way, we believe it would be far simpler to delete the activities test in section 4(1)(c) and include it in section 6, which is where it logically fits.

Any further clarification of the role of activities in determining an entity's status should take into account the comments we raised in relation to the dominant purpose test at paragraph 2.1 of this submission. In particular, the building of indigenous community businesses, whose profit would be used to support community development as a means of relieving poverty, should be recognised as a charitable activity.

Response to consultation questions

10. Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?

Requiring charities to conduct activities that are in furtherance of their charitable purpose is not in itself an issue and is an important way to assess whether an entity can legitimately claim charitable status. There will always be some difficulties, however, in considering which activities further or are in aid of that purpose. To assist in avoiding disputes in this regard, we believe that the draft Charities Bill should be amended so that a charity is not prevented from undertaking an activity that does not further its charitable purpose provided that the activity is insignificant and isolated.

³ [2008] HCA 55.

We suggest that the activities test be removed from the core definition in section 4 of the draft Charities Bill and become part of the dominant purpose test in section 6. We also suggest that the Treasury review the definition of the “dominant purpose” and how it works in the activities test.

11. Should the role of activities in determining an entity’s status as a charity be further clarified in the definition?

The test from *Word Investments* should be retained. If any further clarification is considered, it is important that a charitable activity can include the establishment of viable economic enterprises by indigenous groups for the ultimate purpose of community development. At the same time, alternate structures which provide taxation concessions and other incentives for organisations that are undertaking these kinds of community and economic development activities should be developed (see, for example, the discussion of indigenous community funds at paragraph 2.5 of this submission).

2.4. Disqualifying activities

We have concerns about section 8 of the draft Charities Bill which outlines a number of activities that, if engaged in as more than ancillary or incidental to the entity’s charitable purpose, will disqualify an entity from being considered a charity. (We note that the draft Charities Bill refers to “purposes” but the Consultation Paper indicates this will be amended to be a reference to “activities”.) The activities that section 8 refers to are activities of a political nature and encompass quite a broad spectrum of activities from attempting to change the law at one end to supporting a candidate for political office at the other end.

Generally, there will be clear benefits for charities to remain non-partisan and to engage with the government of the day on the issues that are relevant to its charitable purpose. At times, however, it may be entirely consistent with a charity’s objects to advocate a political party or cause. There is a spectrum of political activism and we believe that there are points along this spectrum where charities may reasonably sit. For example, a significant proportion of charities consistently and regularly advocate a cause or attempt to change the law or policy and, for many of these charities, this activity is entirely consistent with its charitable objects. Sometimes, in order to achieve the change of law that an entity is supporting, it may be appropriate to advocate the candidate or party that supports this change. In other instances, a charity may feel that it is appropriate to profile a particular candidate on its website – for example, an indigenous charity working to further education and employment outcomes may profile an indigenous political candidate as an inspirational figure. An organisation should not be precluded from engaging in the democratic process in this manner.

Most importantly, charities should not be restricted from engaging in advocacy. For this reason, we support the Consultation Paper’s proposal to delete section 8(2)(c). We also propose that the words “or cause” be deleted from section (8)(2)(a) due to the vagueness of this term and the risk

that it would hinder reasonable advocacy. We note that the Board of Taxation has also raised concerns regarding the use of the word “cause” in this section.

Section 8 would permit a charity to undertake disqualifying activities provided that they are no more than ancillary or incidental to the charity’s other purposes. We share the Board of Taxation’s concerns about this test. We are concerned that this test does not provide sufficient guidance to charities and that a charity who regularly advocates for a change of law or policy could be restricted from doing this even though such advocacy may be an appropriate tool for achieving its objects.

Response to consultation questions

12. Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?

We support the deletion of section 8(2)(c) from the draft Charities Bill.

13. Are there any issues with prohibiting charities from advocating a political party or supporting or opposing a candidate for political office?

Yes. While most charities will prefer to be non-partisan, from time to time it will be entirely reasonable for a charity to support a party or candidate who is championing its objects and aims or oppose a party or candidate who is pursuing an agenda that will not be in the best interests of the section of the public the charity is working to assist.

We believe that the words ‘or cause’ should be deleted from section 8(2)(a) of the draft Charities Bill.

2.5. Indigenous Community Funds

In the Consultation Paper - Native Title, Indigenous Economic Development and Tax released by the Treasury on 18 May 2010, the concept on an indigenous community fund was raised. This fund could provide taxation and other incentives for indigenous organisations that are working to establish economically viable enterprises. As the Treasury considers the draft Charities Bill, we also suggest that the Treasury recommences considering this proposal as we believe it would provide an important alternative for indigenous people in creating organisations to meet community needs. This option could provide more flexibility and encourage a greater self-reliance among community members.

This type of fund might, in appropriate cases, be more effective than continued reliance on charitable structures (formed and run on charitable rules of general application) in supporting indigenous people achieve their aspirations for greater economic participation and social inclusion and for better socio-economic standards. We urge Treasury to move forward with this proposal.

3. Conclusions

Proposals for the reform of the definition of “charity” under the draft Charities Bill must be approached with caution. We support broader tax system reforms to support indigenous Australians, such as the introduction of a new tax exempt entity – the indigenous community fund. Until such reforms are implemented, it is vitally important that the draft Charities Bill does not threaten the charitable status of indigenous organisations which operate for the benefit of some of the most disadvantaged members of Australian society.