



Private and Confidential

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3 May 2013

Dear Sir or Madam

**Chamber of Commerce and Industry of Western Australia (Inc)**

**Submission: Exposure Draft Legislation, the Charities Bill 2013 and the Charities (Consequential Amendments and Transitional Provisions) Bill 2013**

We are writing to your office on behalf of our client, the Chamber of Commerce and Industry of Western Australia (Inc) (“**CCIWA**”), to make a submission with respect to the *Charities Bill 2013* (“**the proposed Act**”) and the *Charities (Consequential Amendments and Transitional Provisions) Bill 2013* which propose to introduce a definition of “charity” and “charitable purpose” for the purposes of all Commonwealth legislation. The meanings of these words are presently determined by reference to common law.

**Overview of CCIWA**

CCIWA is a not-for-profit association incorporated under the *Associations Incorporation Act 1987 (WA)* and was established on 1 January 1992 through an amalgamation of the Confederation of Western Australian Industry and the Western Australian Chamber of Commerce and Industry. CCIWA’s main purpose is the promotion of trade, industry and commerce by “making it easier to do business” in Western Australia. This is achieved through its policy and advocacy teams, each one of which are focused on core business issues such as industrial relations, occupational health and safety and workers compensation, economics, business policy, health and community, and education and training. CCIWA undertakes its activities to advance the interests of the business community of Western Australia and the broader Western Australian community.

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## Intention of the proposed Act

The intention of introducing a statutory definition of “charity” and “charitable purpose” is to provide greater clarity and certainty about the meaning of “charity” and “charitable purpose” for charities, the public and regulators, by preserving the common law principles with minor modifications. This is outlined at paragraphs 1.3 and 1.11 of the Explanatory Memorandum to the proposed Act (“**the EM**”).

The EM states the intention of the statutory definition is to retain:

*“the flexibility inherent in the common law that enables the courts, as well as Parliament, to continue to develop the definition and extend the definition to other charitable purposes beneficial to contemporary Australia. This will ensure that the definition remains appropriate and reflects modern society and community needs as they evolve.”<sup>1</sup>*

Paragraphs 11(1)(a) to 11(1)(j) of the proposed Act outline a non-exhaustive list of categories of charitable purposes that have “*significant recognition*”<sup>2</sup> at common law (“**the defined charitable purposes**”). The proposed Act also incorporates a mechanism in paragraph 11(1)(k) to ensure the meaning of charitable purpose encompasses any other purpose beneficial to the general public which is not listed in the defined charitable purposes (“**the catch-all provision**”).

## Summary of key submissions and recommendations

In our view, the defined charitable purposes provide an unduly narrow list of categories that fall within the meaning of “charitable purpose” and the drafting of the catch-all provision is unclear and ambiguous.

Accordingly, our key submissions regarding the proposed Act are as follows:

1. The proposed Act provides an unduly narrow list of categories of charitable purpose that fall within the meaning of charitable purpose. In the interest of clarity and certainty in the drafting of the proposed Act it is inappropriate that charitable purposes specifically mentioned in the EM are not also explicitly mentioned in the provisions; and
2. The catch-all provision within the proposed Act which is intended to broaden the meaning of “charitable purpose” to other purposes that are “beneficial to the general public” is ambiguous in its application and does not accord with the intentions outlined in the EM in particular preserving the common law principles.

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<sup>1</sup> Refer to paragraph 1.12 of the EM.

<sup>2</sup> Refer to paragraph 1.82 of the EM.



Our recommendations are summarised as follows:

Subsection 11(1) of the proposed Act should be amended to include “*scientific and scholarly research*” and “*promoting industry, commerce and agriculture*” as charitable purposes in addition to those outlined in paragraphs 11(1)(a) to 11(1)(j) (i.e. the defined charitable purposes).

2. Subsection 11(1) should be amended to read “...charitable purpose **includes** any of the following...” so that the definition is non-exhaustive as intended.

3. Paragraph 11(1)(k) of the proposed Act should be amended to include an explicit reference to any purpose beneficial to the general public as determined by the common law. The words “*that may reasonable regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j)*” should be removed.

Our detailed submissions and recommendations are set out in Appendix A.

We thank you for the opportunity to make submissions with respect to the exposure draft legislation and we look forward to working with you to resolve the identified issues.

\* \* \* \* \*

Please feel free to contact me on (08) 9238 3117 or Sophia Varelas on (03) 8603 3247 if you have any questions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Thorpe', written in a cursive style.

Ross Thorpe  
Partner

## **Appendix A**

### **1 The proposed Act provides an unduly narrow list of categories of charitable purposes that fall within the meaning of “charitable purpose”**

In the interest of clarity and certainty in the drafting of the proposed Act it is inappropriate that charitable purposes specifically mentioned in the EM are not also explicitly mentioned in the provisions.

In our view the categories of charitable purposes outlined in paragraphs 11(1)(a) to (j) of the proposed Act (i.e. the defined charitable purposes) should be broadened to encompass other purposes that are specifically mentioned in the EM, or that common law has expressly stated as fitting within the definition of “charitable purpose”.

Paragraph 1.82 of the EM states that the defined charitable purposes are a “non-exhaustive” list of purposes which will be treated as charitable purposes:

*“1.82 The Bill includes a **non-exhaustive list of categories of charitable purposes** that have **significant recognition in the common law**. The cases have been grouped into broad categories of purposes **found charitable in the courts**. Each case must depend on its own facts. The list is **not intended to exclude other charitable purposes** that the courts have **found to be beneficial to the general public** that do not readily lend themselves to grouping.”* [Emphasis added].

It is evident from the passage above that the defined charitable purposes are categories of charitable purposes that have “*significant recognition*” at common law.

However, it is clear from the list contained in paragraphs 11(1) (a) to (j) of the proposed Act that not all categories of charitable purposes specifically recognised at common law are listed. According to paragraph 1.82 of the EM as quoted above the intention is that the list is non-exhaustive. If this is the intention section 11 (1) should be amended to read “....charitable purpose includes any of the following....”

In reference to paragraph 11 (1)(k), paragraphs 1.60 and 1.106 of the EM specifically outline “*scientific and scholarly research*” and “*promoting industry, commerce and agriculture*” as purposes found to be charitable purposes by the courts<sup>3</sup>:

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<sup>3</sup> *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at [38]; *FC of T v The Triton Foundation* 2005 ATC 4891 at [32]; *Crystal Palace Trustees v Minister of Town and Country Planning* [1950] 2 Ch D 857 at 859; *Commissioners of Inland Revenue v White* (1980) 55 TC 651 at 656B, 659F; *Construction Industry Training Board v Attorney-General* [1971] 3 All ER 449 at 452; *Commissioners*

*“1.106 This provision **encompasses other purposes which the courts have found to be charitable**, including for **scientific and scholarly research, promoting industry, commerce and agriculture** in certain circumstances (see paragraphs 1.55 to 1.62 about private benefit), and for a locality or neighbourhood, such as the beautification of a township.” [Emphasis added]*

Considering that “*scientific and scholarly research*” and “*promoting industry, commerce and agriculture*” purposes are not outlined within the defined charitable purposes, it follows that these purposes can only be considered charitable purposes within the ambit of the Act if they are captured by the catch-all provision.

However, as outlined in more detail below, we consider the catch-all provision is somewhat ambiguous and unclear in its application and therefore requires the use of extrinsic materials, such as the EM, to aid in the interpretation of the provision. Accordingly, there is a risk that the proposed Act will be interpreted as excluding such recognised charitable purposes from the statutory definition. This outcome is not within the intention of the proposed Act to enact a statutory definition that “preserves the common law principles with minor modifications to provide greater clarity and certainty about the meaning of “charity” and “charitable purpose.””<sup>4</sup> In fact this would create further uncertainty and confusion as to how the long established common law principles of the meaning of “charity” and “charitable” apply to certain not for profit organisations.

### ***Recommendations***

Subsection 11(1) of the proposed Act should be amended to include “*scientific and scholarly research*” and “*promoting industry, commerce and agriculture*” as charitable purposes in addition to those outlined in paragraphs 11(1)(a) to 11(1)(j) (i.e. the defined charitable purposes).

Further, section 11 (1) should be amended to read “...charitable purpose includes any of the following...” so that the definition is non-exhaustive as per the intention.

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*of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611 at 623; *Royal Australasian College of Surgeons v FC of T* (1943) 68 CLR 436 at 447; *Barclay & Ors v Treasurer of Queensland* 95 ATC 4496 at 4500; *Bicycle Victoria Inc v Commissioner of Taxation* [2011] AATA 444 at [62]; Dal Pont, *Law of Charity*, 1st edition, 2010, LexisNexis Butterworths, [11.47].

<sup>4</sup> Paragraph 1.3 of the EM.

**2 The catch-all provision within the proposed Act which is intended to broaden the meaning of “charitable purpose” to other purposes that are “beneficial to the general public” is ambiguous in its application and does not accord with the intentions outlined in the EM in particular preserving the common law principles**

Further and in the alternative to our recommendation outlined in part 1 of this submission, in our view, the catch-all provision should make reference to other purposes as determined by the common law to be beneficial to the general public or community, rather than a reference to “*any purpose that may reasonably be regarded as **analogous to, or within the spirit of, any purposes mentioned in paragraphs (a) to (j) [of subsection 11(1)].***”

In our view, the current drafting of the catch-all provision, and in particular, the use of the phrase “*analogous to, or within the spirit of*” any of the defined charitable purposes, makes the scope of this provision unclear and ambiguous. This is contrary to the intention “to provide greater clarity and certainty for charities, the public and regulators in determining whether an entity is charitable and consequently reduce the need for costly litigation.”<sup>5</sup> Furthermore, the current drafting does not capture the intention of the catch-all provision, as outlined in paragraph 1.3 of the EM to *preserve* the common law.

It is very clear from the EM that the legislature intends that the proposed Act will encompass the meaning of charitable purpose as determined at common law.

Paragraph 1.106 of the EM outlines the purposes of the catch-all provision, as follows:

***“This provision encompasses other purposes which the courts have found to be charitable, including for scientific and scholarly research, promoting industry, commerce and agriculture in certain circumstances...”*** [Emphasis added]

And further, paragraph 1.107 states the following:

***“The [catch-all] provision also allows for the meaning of charitable purpose to develop through court decisions or by Parliament, in accordance with contemporary Australian society’s needs and expectations.”*** [Emphasis added]

It is evident from these passages that the catch-all provision is *intended* to encompass the meaning of charitable purpose as determined at common law and that this meaning will continue to be developed by the common law.

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<sup>5</sup> Paragraph 1.11 of the EM.



In our view the end result is that one must rely on the EM to achieve this intention rather than relying on the words of the statute itself. As explained further below this causes greater uncertainty and ambiguity for charities and is contrary to the objective of the proposed Act “to provide greater clarity and certainty about the meaning of “charity” and “charitable purpose.””<sup>6</sup>

The catch all provision in paragraph 11(1)(k) states that in addition to the purposes specifically outlined in subsection 11(1), a “charitable purpose” in any Commonwealth legislation also includes:

*“any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j).”*

Common law and statutory rules determine how the meaning of legislative provisions ought to be interpreted. The statutory rules are contained in the *Acts Interpretation Act 1901 (Cth)* (“**the Interpretation Act**”). Section 15AA of the Interpretation Act provides:

*“In the interpretation of a provision of an Act a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.”*

Further to this, the use of extrinsic materials in statutory interpretation is also dealt with in the Interpretation Act. The Interpretation Act provides at section 15AB that:

- “(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:*
  - (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or*
  - (b) to determine the meaning of the provision when:*
    - (i) the provision is ambiguous or obscure; or*
    - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or*

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<sup>6</sup> Paragraph 1.3 of the EM.

*object underlying the Act leads to a result that is manifestly absurd or is unreasonable*

(2) *Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:*

...

(e) *any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;*

...

(3) *In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:*

(a) *the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and*

(b) *the need to avoid prolonging legal or other proceedings without compensating advantage.”*

Although there may be scope for the EM to be taken into account in interpreting paragraph 11(1)(k) of the proposed Act under the methods provided for in the Interpretation Act outlined above, the courts begin by looking at the ordinary language of a provision which may not necessarily consider the EM.

Accordingly, there is a risk the courts may decide not to rely on the EM to aid in the interpretation of the catch-all provision. It follows that it is unclear whether or not purposes determined to be charitable purposes at common law, such as *promoting industry, commerce and agriculture*, fall within the ambit of the definition of “charitable purpose” in the proposed Act.

Recent cases have emphasised the need to rely on the words of the statute when interpreting a provision. In the recent High Court decision of *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] 239 CLR 27* French CJ noted at that at 47:

*“...the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied upon to displace the*





*clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is trying to remedy.”*

In *Cooper-Brookes (Wollongong) Pty Ltd v FCT* [1981] 147 CLR 297, their Honours said at 321:

*”...the propriety of departing from the literal interpretation...extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.”*

In our view, the ordinary language used in the catch all provision, requires that a particular purpose will be charitable if all of the following apply:

- (a) the purpose is beneficial to the general public; and
- (b) the purpose is “analogous” to any of the purposes in paragraphs 11(1)(a) to (j); or
- (c) the purpose is within the ‘spirit’ of any of the purposes in paragraphs 11(1)(a) to (j).

The New Shorter Oxford English Dictionary definition of “*analogous*” is:

*“Having analogy; similar in certain attributes, circumstances, relations, or uses; parallel.”*

“*Similar*” is defined as:

*“1. Of the same substance or structure throughout; homogenous. 2. Having a resemblance or likeness; of the same nature or kind.”*

“*Parallel*” is defined as:

*“ Having the same or a like course, tendency, or purport; running on the same or similar lines; resembling something else, or each other, throughout the whole extent; precisely similar, analogous, or corresponding.”*



Finally, “*spirit*” is defined as:

“6a. A particular (specified) character or attitude existing in or animating a person or set of people; a person with a specified kind of character or attitude. b. The attitude or feeling with which something is done or viewed. 7a. The essential character of a thing, esp. a place, regarded as exerting an influence.”

Accordingly, a purpose that is for the benefit of the general public that is similar to or has the essential character of any purpose in paragraphs 11(1)(a) to (j) will be charitable within paragraph 11(1)(k). For example, purposes to promote industry or commerce or to promote agriculture have long been held to be charitable purposes.<sup>7</sup> The promotion of industry and commerce was more recently affirmed as charitable by the Federal Court in *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at [38]. However, as both of these are not specifically listed in subsection 11(1), they will only fall within the statutory definition of “charitable purpose” if they are within the ambit of paragraph 11(1)(k).

Applying the definitions referred to above, it is not readily apparent from the ordinary words of section 11 what the similarities are between a purpose of promotion of industry or commerce or a purpose of the promotion of agriculture and any of the purposes listed in paragraphs 11(1)(a) to (j). It is also not readily apparent that they have the essential character or “spirit” of any of the listed purposes.

In fact, a conclusion could be drawn that the examples of promotion of industry and commerce and the promotion of agriculture are “analogous” or similar to and within the “spirit” or have the essential character of any one of or all of the listed purposes in paragraphs (a) to (j) because they are purposes that are beneficial to the general public and have been held to be charitable at common law.

On this basis, the use of the words “*analogous*” and “*within the spirit of*” are somewhat redundant and create unnecessary confusion in the interpretation of the catch all provision as well as not reflecting the intention of the legislature as stated in the EM to preserve the common law.

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<sup>7</sup> *Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611; *In re Pleasants* (1923) 39 TLR 675; *Royal Agricultural Society of England v Wilson* (1924) 9 Tax Cases. 62; *Re Tennant* [1996] 2 NZLR 633; *Crystal Palace Trustees v Minister of Town and Country Planning* [1950] 2 All ER 857 at 859 per Danckwerts J.



Furthermore, in our view, the wording used in the catch-all provision adopts terminology from the common law. For example, the words “*beneficial to the general public*” and “*within the spirit of*” are phrases and terminology adopted from common law.<sup>8</sup>

The common law has created two main considerations to determine if an organisation is charitable. Firstly, outside the relief of poverty, the organisation must have an essentially public character and be beneficial to the community as a whole or to an appreciable important section of it<sup>9</sup>. Secondly, the purposes of the charity must fall within the “spirit and intendment” of the *Statute of Charitable Uses 1601* enacted during the reign of Queen Elizabeth I and commonly referred to as the “*Statute of Elizabeth*.”

In *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (“**the Pemsel Case**”), Lord MacNaughten distilled the preamble to the Statute of Elizabeth into four separate heads of charity:

the relief of poverty;

the advancement of education;

the advancement of religion; and

other purposes beneficial to the community not falling under any of the preceding heads.

The four heads have now become the standard classification of charitable purposes and are used as the basis for deciding whether a body qualifies as a charity at common law. We note that they have recently been encapsulated in the current formulation of charity in paragraph 25-5(5) of the *Australian Charities and Not-for-Profits Commission Act 2012*.

This sentiment is also evident in paragraph 1.9 of the EM to the proposed Act which states that the common law meaning of charitable purpose is a purpose which is within the ‘*spirit and intendment*’ of the *Statute of Elizabeth*, and *for the benefit of the general public*:

“1.9 For a purpose to be charitable within the technical legal meaning of charitable under the common law (which overlaps but does not fully coincide with the popular or

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<sup>8</sup> *FC of T v The Triton Foundation* 2005 ATC 4891 at [21], [22], [32]; *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at [53]; *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) 69 TC 231 at 250-251.

<sup>9</sup> See *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.



*dictionary meaning), the purpose must be within the ‘spirit and intentment’ of the Statute of Elizabeth, and for the public benefit.” [Emphasis added]*

It is evident that the words “*other purposes beneficial to the general public*” and “*in the spirit of*” in the catch-all provision is a reference to principles established by the Court in the *Pemsel Case* and developed over time by common law.<sup>10</sup>

It follows that the catch-all provision attempts to mimic the principles developed in the *Pemsel Case* and by the courts in subsequent decisions. However, it fails in achieving this objective by referring to the listed purposes contained in paragraphs 11(1)(a) to (j) as the basis for determining whether a purpose is charitable.

Accordingly, in our view, the catch-all provision should simply make an explicit reference to any purpose beneficial to the general public as determined to be a charitable purpose at common law.

### ***Recommendation***

Paragraph 11(1)(k) of the proposed Act should be amended to include an explicit reference to any purpose beneficial to the general public as determined by the common law.

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<sup>10</sup> Refer to *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439; *FC of T v The Triton Foundation* 2005 ATC 4891; *Crystal Palace Trustees v Minister of Town and Country Planning* [1950] 2 Ch D 857; *Commissioners of Inland Revenue v White* (1980) 55 TC 651; *Construction Industry Training Board v Attorney-General* [1971] 3 All ER 449; *Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611; *Royal Australasian College of Surgeons v FC of T* (1943) 68 CLR 436; *Barclay & Ors v Treasurer of Queensland* 95 ATC 4496.