

***PUBLIC SUBMISSION  
TO THE CONSULTATION ON THE  
EXPOSURE DRAFT  
OF THE  
CHARITIES BILL 2013***

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## 1. There is already one definition of charity in Australia

In announcing its intention to introduce a statutory definition of charity, the Government said, *inter alia*:

The Government will also consult with the states and territories with the intention of **developing and introducing a definition of ‘charity’ that can be adopted by all jurisdictions. The adoption of a consistent definition across all jurisdictions would considerably assist the sector.**<sup>1</sup>

Later, the then Minister, the Hon. Bill Shorten MP, said:

...a **single national definition** will make it easier for charities to navigate state and federal regulations, allowing them to spend less time on administration and more time doing what they do best - helping people.<sup>2</sup>

In the Discussion Paper, Treasury said:

Importantly, a statutory definition of charity will provide an opportunity for greater harmonisation between the Commonwealth and the States and Territories. We are working with the State and Territory Governments to achieve this. **A single definition across all levels of Government will greatly reduce administrative costs for charities.**<sup>3</sup>

What appears to have escaped the attention of Treasury, however, is that there is already largely one definition of charity in Australia under the common law. This arises because, in Australia, the *Constitution* establishes one common law under the High Court. In *Lange v Australian Broadcasting Corporation* ("*Political Free Speech case*"), the High Court unanimously held that:

With the establishment of the Commonwealth of Australia, as with that of the United States of America, it became necessary to accommodate basic common law concepts and techniques to a federal system of government embodied in a written and rigid constitution. The outcome in Australia differs from that in the United States. **There is but one common law in Australia which is declared by this Court as the final court of appeal.** In contrast to the position in the United States, **the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.**<sup>4</sup>

The only actual differences in the definition of charity as between the various States and as between the States and the Commonwealth arise from statutory modifications; which are entirely minor.

In the States, the only statutory modifications exist in Queensland, South Australia, Western Australia, and Tasmania in relation to recreational charities.<sup>5</sup> Recreational charities are entities like community leisure centres or police and citizens youth clubs, and are deemed to be charitable despite anything contrary in the common law.

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1 The Treasury 2011-12 Budget Paper No. 2: Budget Measures p 37

2 B Shorten 'The definition of charity finally enters the 21st century' media release, 28 October 2011

3 The Treasury Consultation Paper: definition of a charity October 2011 p vi

4 *Lange v Australian Broadcasting Corporation* ("*Political Free Speech case*") (1997) 189 CLR 520

5 *Trusts Act 1973* (Qld) ss103(2), 103(4); *Trustee Act 1936* (SA) s 69C(1); *Charitable Trusts Act 1962* (WA) s5(1); *Variation of Trusts Act 1994* (Tas) s4(1).

At the Commonwealth level, the only modifications occur because of the *Extension of Charitable Purposes Act 2004*, and merely deems childcare centres, some religious orders and selfhelp groups, and—somewhat peculiarly—some participants in the National Rental Affordability Scheme to be charitable for the purpose of Commonwealth law. These modifications at the Commonwealth level do not appear to disturb the underlying body of common law that applies to the establishment of charitable trusts.

Despite there being almost no fragmentation at all in the definition of charity in Australia, it is continually asserted by Treasury that there is significant fragmentation in, and confusion surrounding, the definition of charity necessitating the implementation of a singular, national, definition of charity in Commonwealth law. The only confusion appears to arise within Treasury itself.

Overall, Treasury appears to be clueless about the very thing it is now seeking to “reform”.

## **2. The Charities Bill does not achieve any of the stated objectives**

The objective of the Government is to remove the purported confusion that arises from the current common law with respect to the definition of charity. However, the Charities Bill does not remove it, but rather adds to it.

The index to Dal Pont’s *Law of Charity*<sup>6</sup> includes 20 pages of cases; however—despite having sought to reflect 400 years’ of common law in legislation—the Explanatory Memorandum to the Charities Bill refers to only four cases. This seems to disclose a glaring absence on behalf of the drafters of any knowledge about the common law as it relates to charities in Australia. Moreover, it is unclear whether the intention is that one should refer back to the common law interpretations of the various terms used when working out what those terms mean for the purpose of the Charities Bill. How this constitutes a reform is unclear.

## **3. Nothing in the Charities Bill purports to limit its operation to the interpretation of Commonwealth legislation.**

The Explanatory Memorandum says:

The statutory definition applies to all Commonwealth legislation. It may provide a common framework which States and Territories may adopt over time, thereby further reducing complexity and compliance costs for Australian charities.

However, there is no ‘application’ or similar provision within the Charities Bill that would purport to limit the operation of the Charities Bill to the interpretation of Commonwealth laws. The Charities Bill, if enacted, would purport to apply throughout the Commonwealth via sections 5 and 109 of the *Constitution*.

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6 G. E. Dal Pont, *Law of Charity*, LexisNexis Butterworths, 2010 pp ix-xxxiv.

As there is currently effectively one common law definition of charity in Australia, were an application provision included in the Charities Bill to limit the operation of any *Charities Act* to the interpretation of Commonwealth laws, it would have the perverse effect of creating another, distinct, definition of charity; thereby adding to, not reducing, the purported confusion. That reform would be no reform at all.

Alternatively, if the intention was to override the common law and State legislative modifications—aside from rendering the Charities Bill unconstitutional (see below)—it would make the statement ‘It may provide a common framework which States and Territories may adopt over time’ somewhat confusing.

Clarity is required in relation to whether or not the Charities Bill is intended to operate solely upon the interpretation of Commonwealth laws, or throughout the entire Commonwealth.

#### **4. Unconstitutionality**

There are several ways in which the Charities Bill, if enacted, would be beyond the power of the Commonwealth, or otherwise incompatible with the *Constitution*, and therefore invalid.

##### **a) The Charities Bill, if enacted, would not be supported by any legislative head of power of the Commonwealth**

The Charities Bill, on its face, has no nexus to any enumerated or implied legislative head of power of the Commonwealth. No reference to ‘charity’ or ‘charities’ is made in Part V of the *Constitution*, or anywhere else. It is notable that no recognised head of power of the Commonwealth is referenced in the text of the Charities Bill, nor is there a ‘constitutional basis’ provision.<sup>7</sup> The Charities Bill does, however, reference the tax laws of the Commonwealth and the *Native Title Act 1993*: both of are within the legislative power of the Commonwealth.<sup>8</sup>

In *Fairfax v Federal Commissioner of Taxation*, Kitto J observed:

the question to be decided is a question of substance and not of mere form; but the danger quickly became evident that the proposition may be misunderstood as inviting a speculative inquiry as to which of the topics touched by the legislation seems most likely to have been the main preoccupation of those who enacted it. Such an inquiry has nothing to do with the question of constitutional validity under s. 51 of the Constitution. Under that section the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, "with respect to", one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?<sup>9</sup>

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<sup>7</sup> c.f. *Corporations Act 2001* s3 ‘Constitutional basis for this Act’

<sup>8</sup> *Western Australia v Commonwealth* (“*Native Title Act Case*”) (1995) 183 CLR 373, *Constitution* subs 51(ii)

<sup>9</sup> *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1

Furthermore, in *Pape v Commissioner of Taxation* the High Court examined the scope of the taxation power under section 51(ii). In *Pape*, Hayne and Kiefel JJ noted:

While it may readily be accepted that the Impugned Act seeks to single out certain taxpayers for the benefit for which it provides, that does not make the Impugned Act a law with respect to taxation.<sup>10</sup>

The long title to the Charities Bill is as follows:

A Bill for an act to define charity and charitable purpose, and for related purposes.

The long title makes no reference to a recognised legislative head of power of the Commonwealth.

While the Charities Bill refers to the tax laws and the *Native Title Act 1993*, it does so only for definitional purposes. The Charities Bill cannot be characterised, as a matter of substance, as a law “with respect to” either the taxation power<sup>11</sup> or the race power<sup>12</sup> as it does not regulate or abolish rights, duties, powers or privileges related to taxation or native title: the Charities Bill’s ‘interference [with taxation and native title is] so incidental as not in truth to affect its character’ as a law with respect to the definition of charity and charitable purpose.

Furthermore, validity cannot be asserted on the basis of any purported “legislative scheme” with respect to taxation or native title. In the *First Uniform Tax Case*, while High Court acknowledged that it might be necessary in some contexts to consider an entire legislative scheme, however, in that case it refused to consider the Acts impugned as such. Starke J held:

**But the scheme of legislation is, I think, unimportant unless the legislation is connected together and the provisions of the legislative Acts are dependent the one upon the other....<sup>13</sup>**

While it might be asserted that the Charities Bill, together with other laws, such as the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) and the tax laws will operate to establish a coherent scheme for regulating the entitlement to the various Commonwealth tax concessions currently available to charities and that would bring it within Commonwealth legislative power, that construction is patently not available. The ACNC Act speaks only of an entitlement to registration; it does not compel registration.<sup>14</sup> However, if the Charities Bill, once enacted, was a valid law of the Commonwealth, it would, via section 5 of the *Constitution*, be binding throughout the Commonwealth. That is, any *Charities Act* would apply to all charities, whether they sought registration under the ACNC Act, or not. The rights, duties, powers and privileges the Charities Bill proposes to change, regulate and abolish are those relating to all charities as hitherto recognised by the common law, irrespective of whether or not a charity has sought concessional tax treatment under

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10 *Pape v Commissioner of Taxation* [2009] HCA 23, [386]

11 *Constitution* subs 51(ii)

12 *Constitution* subs 51(xxvi)

13 *South Australia v Commonwealth* ("*First Uniform Tax case*") (1942) 65 CLR 373, 448

14 *Australian Charities and Not-for-profits Commission Act 2012*, div 25

Commonwealth laws. Alternatively, to paraphrase Hayne and Kiefel JJ: While it may readily be accepted that the Charities Bill seeks to single out certain taxpayers for the benefit for which it provides, that does not make the Charities Bill a law with respect to taxation.

As noted by Kitto J above, it is irrelevant what the main preoccupation of those in Treasury who now propose the Charities Bill might be. The only construction that is reasonably open is that the Charities Bill is a Bill for a law with respect to the definition of charity and charitable purpose throughout the Commonwealth, as stated in its long title. It cannot, therefore, be supported by any Commonwealth legislative head of power.

**b) The Charities Bill, if enacted, would purport to impermissibly vest legislative power in the federal judiciary**

The Explanatory Memorandum states:

The statutory definition provides a framework for considering charity and charitable purposes. **However, the definition retains 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.

And:

The 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.

These statements, however, expose several misconceptions regarding the nature of, and relationship between Commonwealth judicial power and Commonwealth legislative power.

While the development of the common law is permissible and within the inherent jurisdiction of State courts,<sup>15</sup> a federal court within the meaning of Chapter III of the *Constitution* cannot be vested with non-judicial power.<sup>16</sup>

In the *Native Title Act Case*,<sup>17</sup> the High Court considered the capacity of the Commonwealth to legislate to modify the common law, or to vest the further development of the common law in federal courts. Section 12 of the *Native Title Act 1993*—the impugned provision— said:

Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth.

However, the plurality decision of the High Court held section 12 to be invalid. It said:

Section 12 does not in terms make a law in the sense of creating rights or imposing obligations. It takes the common law as an entirety and purports to invest it with the force of a law of the Commonwealth. If s.12 be construed as an attempt to make the common law a law of the Commonwealth, the attempt encounters some constitutional obstacles.

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<sup>15</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

<sup>16</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia ("Boilermakers' case")* (1956) 94 CLR 254

<sup>17</sup> *Western Australia v Commonwealth ("Native Title Act Case")* (1995) 183 CLR 373

If the "common law" in s.12 is understood to be the body of law which the courts create and define, **s.12 attempts to confer legislative power upon the judicial branch of government. That attempt must fail either because the Parliament cannot exercise the powers of the Courts or because the Courts cannot exercise the powers of the Parliament.** As Dixon CJ, McTiernan, Fullagar and Kitto JJ said in *The Boilermakers' Case*:

"it has been found impossible to escape the conviction that Chap.III does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to the judicial power ... and that Chap.III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it."

**Under the Constitution, the Parliament cannot delegate to the Courts the power to make law involving, as that power does, a discretion or, at least, a choice as to what that law should be.**

...

If s.12 be construed as an attempt to make the common law a law of the Commonwealth, it is invalid ... because it purports to confer legislative power on the courts... **A "law of the Commonwealth", as that term is used in the Constitution, cannot be the unwritten law. It is necessarily statute law, for the only power to make Commonwealth law is vested in the Parliament.**<sup>18</sup>

The proposed Charities Bill also suffers same fatal flaws. Assuming for a moment that the Charities Bill was otherwise supported by a Commonwealth legislative head of power, it would nonetheless be invalid because, as confirmed by the Explanatory Memorandum, the intention of the Charities Bill is to vest the further development of the common law in federal courts. In doing so, it purports to impermissibly confer legislative power on the federal judiciary, and is, therefore, beyond the legislative power of power of the Commonwealth.

**c) The Charities Bill, if enacted, would purport to impermissibly strip State legislatures of their legislative power**

In the *Native Title Act Case*, the High Court also considered whether or not the Commonwealth could legislate to convert the common law to a law of the Commonwealth, and thereby override State legislative power with respect to the relevant area of common law via section 109 of the *Constitution*.

The High Court recognised that:

A law of the Commonwealth may exclude, wholly or partially, the operation of the common law on a subject within its legislative power or it may confirm the operation of the common law on such a subject or it may simply assume that the common law applies to the subject, as in truth it does unless excluded.<sup>19</sup>

The High Court went on, however, to declare that the Commonwealth cannot legislate to determine the content of the common law. It said:

Section 12 of the Native Title Act does not in terms enact the common law as a law of the Commonwealth. It purports to give the common law "the force of a law of the Commonwealth". Section 12 simply attempts to engage s.109 of the Constitution in order to make the common law immune from affection by a valid State law. **But it is of the nature of common law and of legislative power that the common law is subject to affection by exercise of legislative power. If s.109 could be engaged by s.12 to preclude the affection of the common law by a State law, it would have destroyed some of the legislative power of the State confirmed by s.107 of the Constitution. That is not the purpose of s.109.** When s.109 is engaged, it does not diminish the legislative power

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18 *Western Australia v Commonwealth* ("Native Title Act Case") (1995) 183 CLR 373, [146]-[151]

19 *Western Australia v Commonwealth* ("Native Title Act Case") (1995) 183 CLR 373, [151]

of the State which has enacted the inconsistent law. Rather, s.109 operates only upon State laws that have been made in exercise of the legislative powers of the States confirmed by s.107. **If s.12 of the Native Title Act were to result in the withdrawal from Parliaments of the States of an effective legislative power to override the common law, it would have diminished the legislative power confirmed by s.107 of the Constitution. And that it cannot do.**<sup>20</sup>

The Charities Bill does not seek to modify the operation of the common law on an area of Commonwealth responsibility, but rather purports to give the existing common law the force of law of the Commonwealth and/or determine its content. This would tend to destroy the legislative power of the States, rendering the Charities Bill incompatible with the *Constitution*.

**d) The Charities Bill, if enacted, may purport to impermissibly undermine the institutional integrity of State Supreme courts**

Finally, I suspect the Charities Bill might also be taken to undermine the institutional integrity of State Supreme courts<sup>21</sup> by removing one of their defining characteristics:<sup>22</sup> the development of the common law. This could be, yet another, ground for invalidity.

## **5. Conclusion**

The proposal for a Commonwealth *Charities Act* and the Exposure Draft of the Charities Bill discloses a profound miscomprehension of the existing common law with respect to charities and the entire Australian *Constitution* and system of government on behalf of Treasury. It is not clear why such a broad reform has not been done in consultation with the States (which have actual jurisdiction over charities) or by a more appropriate body such as a law reform commission (which would tend to know about the law) or the Commonwealth Attorney General's Department and State attorney's general (who could actually do something about it).

This reform appears to be another Treasury-instigated disaster waiting to happen, along the lines of the Resource Super Profits Tax and reform to the taxation of Employee Share Schemes; wherein Treasury announced the policy intention without any actual knowledge of the underlying subject matter, then crowd-sourced the basic policy design through endless rounds of consultation and remedial submissions from interested stakeholders. The end result of this latest reform is similarly guaranteed to be another debacle.

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20 *Western Australia v Commonwealth* ("Native Title Act Case") (1995) 183 CLR 373, [152]

21 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

22 *Kirk v Industrial Relations Commission* [2010] HCA 1



## **6. Recommendations**

I recommend that:

- the Charities Bill, in its current form, be abandoned;
- Treasury release all constitutional legal advice that demonstrates the Charities Bill is within Commonwealth power;
- the areas of difference in the definition of charities between the various States (if any) and the Commonwealth be elucidated, possibly through referral of this matter to a law reform commission for report;
- further work, if any, on charity law in Australia by the Commonwealth be carried out by the Commonwealth Attorney General's Department in consultation with the States.