



Response to Treasury Consultation Paper

A Definition of Charity

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?

In principle, O group is not against the notion that a charity has a purpose or purposes that are ‘exclusively’ charitable, so long as there is a clear and commonly accepted distinction between an entity’s ‘purpose’ and its ‘activities’.

It needs to be clear under which conditions the activities of an entity essentially render its purpose or purposes to no longer be considered charitable.

O group maintains that so long as a charity’s *purpose or purposes* (whether primary or non-primary) are charitable, and its activities or businesses are ‘... *carried on only in order to effectuate its charitable purposes*¹, then whether or not an activity or business of a charity is intrinsically commercial in nature should not be a factor that precludes charitable status. That is to say, O group supports the principle inherent in the *Word Investments* decision by the High Court that conducting commercial operations solely for the purpose of generating funds for charitable purposes is in itself a charitable object.

Indeed, as Murray points out, the ATO itself has previously considered commercial activities that directly realise an entity’s charitable purpose as furthering that charitable purpose². ATO Draft Ruling TR2011/D2 bears this principle out.

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?

O group supports the principles relating to ‘public benefit’ outlined in ruling TR 2011/D2 and considers that their inclusion in the definition of ‘public benefit’ would be beneficial.

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?

The NFP sector and the broader community require certainty as to what is a ‘charitable purpose’ and what is ‘for the public benefit’. Leaving definitions subject to common law does not provide this certainty. Similarly, a definition subject to guidance by a commission or similar body allows it

to be altered without legislative review and consultation. For these reasons, O group has a preference for a legislated definition of 'for the public benefit'.

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

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

O group supports the principle that the activities of a charity be in furtherance or in aid of its charitable purpose or purposes.

O group, however, recognises that there are 'degrees' of relatedness between an entity's activities and its charitable purposes. O group's definition for a related business (or activity) is that it is:

- a. *Subordinate* to an entity's charitable purpose or purposes;
- b. *Naturally associated* with one or more of those charitable purposes;
- c. Carried out in *direct furtherance* of one or more of those charitable purposes;
- d. Has the support of one or more of those charitable purposes *at the heart of its mission and decision making*; and
- e. *Integrates* with the charity's systems and operations

In light of the degrees of relatedness, O group recognises that not all of these conditions will be present in all related businesses (or activities). However, as a minimum, O group maintains that a related business (or activity) must comply with points c and d in order to maintain the integrity of an entity's charitable purpose or purposes.

In accordance with the principle outlined at point 1, O group maintains that an activity or business need not be intrinsically charitable in and of itself.

In interpreting the above conditions, the following definitions are used:

- *Subordinate*: regarded as secondary to an entity's charitable purpose or purposes (i.e., not an end in itself).
- *Naturally associated*: instinctively or logically allied with or supportive of the entity's charitable purpose or purposes.
- *Direct furtherance*: the direct and deliberate advancement or progression, either operationally or financially, of the entity's charitable purpose or purposes.

Whether a business (or activity) directly furthers a charitable purpose *operationally* must be determined by how its resources, capabilities, outputs, outcomes and impacts are directed toward the positive benefit of the entity's charitable purpose or purposes. For example:

- Do the related business' outputs, outcomes and impacts positively assist the charity to achieve operational targets related to its charitable purpose or purposes?
- Do the related business' resources and strategic capabilities assist the entity to perform and achieve its charitable purpose or purposes?

If the resources, capabilities, outputs, outcomes and impacts of the activity do not help achieve such objectives then the activity is unlikely to be considered a related business (or activity).

Whether a business (or activity) directly furthers a charitable purpose *financially* must be determined by how any surplus funds are utilised.

If surpluses are retained in the activity for the future growth of that activity and for the subsequent benefit of the charity, or if surpluses are redirected to the charity for the purposes of augmenting available funds for the pursuit of the entity's charitable purpose or purposes, then it can be reasonably determined that the activity is intended to directly further the entity's charitable purpose or purposes. If surplus funds are redirected to any other purpose then the activity cannot be considered a related business (or activity).

- *Have the support of the entity's charitable purpose or purposes at the heart of its mission:* the related business (or activity) must have the direct furtherance of the entity's charitable purpose or purposes as its *raison d'être*. That is, the fundamental reason for carrying on the related business (or activity) is the achievement of the entity's charitable purpose or purposes.
- *Have the support of the entity's charitable purpose or purposes at the heart of its decision making:* the related business (or activity) must actively consider the impact of its decisions on the operational and/or financial support which it provides the entity's charitable purpose or purposes.

Further, it is likely that the needs of, and the decisions made by, the charity would influence business decisions made by the related business (or activity).

- *Integrate with the charity's systems and operations:* in particular, a related business (or activity) would be highly integrated with the charity's operational and financial performance management and reporting frameworks and would leverage the charity's business processes in order to control costs and resources, improve efficiency and quality, and increase customer and employee satisfaction.

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?

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

O group continues to support the fundamental principle that charitable entities which benefit from the receipt of taxpayer funds must remain at all times apolitical. There is a difference however between a charity in receipt of such funds and those who are not, but who do raise funds through direct public fundraising. In no way should the administration of the charities regime be used to prohibit the engagement of those directly funded charities in the pursuit of their chosen political cause.

One cautionary point relates to whether a charity funded, whether in whole or in part, by taxpayer funds should be seen or not to support a particular party's policy in and of itself or indeed in preference to that of another political party. This is particularly pertinent where there is an accord between a party's policy and the policy or philosophy championed by that charity.

16. Is the list of charitable purposes in the Charities Bill 2003 and the *Extension of Charitable Purposes Act 2004* an appropriate list of charitable purposes?

17. If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?

O group supports the list of charitable purposes in the Charities Bill 2003 and the *Extension of Charitable Purposes Act 2004* but would seek to add an additional charitable purpose which it believes has strong public recognition as charitable. That being:

- the advancement of labour force participation and employment growth.

1. Murray, I. 2009 'Case Note: Charity Means Business – Commissioner of Taxation v Word Investments Ltd', Sydney Law Review Vol 31: 309, p.316 citing *Word Investments* (2008) 236 CLR 204 at [27].
2. Murray, I. 2009 'Case Note: Charity Means Business – Commissioner of Taxation v Word Investments Ltd', Sydney Law Review Vol 31: 309, p.316

3. _____, May 2011, '*Draft Taxation Ruling TR2011/D2, Income tax and fringe benefits tax: charities*', Australian Taxation Office, Canberra ACT 2600, Australia.