
Trustee Corporations Association of Australia

A Definition of Charity

Submission to Treasury

December 2011

Introduction

The TCA is the peak representative body for the trustee corporations industry in Australia.

It represents 16 organisations, comprising all 8 regional Public Trustees and the great majority of the 11 private 'licensed trustee company' groups (see Attachment).

Our members provide a wide range of financial services to individual, family and corporate clients, involving the management / administration of about \$500b in assets.

Member services include:

- traditional activities, such as estate planning, wills, powers of attorney, deceased estate administration, and management of various types of personal trusts.
- superannuation fund trustees / administrators.
- responsible entities for managed investment schemes.
- other corporate activities such as debenture trusteeships, securitisation facilities and custodial services.

Within the trusts sector of their businesses, TCA members manage over 2,100 charitable trusts or foundations with assets of around \$3.2b.

In 2009/10, members distributed about \$175m to charitable causes from those trusts or directly from deceased estates they administered.

We are very pleased to have the opportunity to comment on the consultation paper *A Definition of Charity*.

Comments

We support the Government's proposal to introduce a statutory definition of 'charity' applicable across all Commonwealth laws so as to ensure greater clarity in the regulatory framework for the sector.

Moreover, we are keen to see greater harmonisation between the Commonwealth and the States / Territories as current inconsistencies between the various jurisdictions result in confusion and unnecessary administrative costs for charities.

Our responses to the specific questions raised in the consultation paper follow.

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?

We agree that the *Charities Bill 2003* should be altered to reflect the common law position that the purpose or purposes of a charity must be exclusively charitable, with clarification that any other purposes, which if viewed in isolation would not be charitable, could only be incidental or ancillary to the charitable purpose.

2. Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?

Yes.

3. Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?

We believe that clarification is needed.

Some charitable trusts and foundations have purposes which are to support groups which may be considered numerically negligible or may not be deemed of public benefit.

Most trustee corporations administer trusts where the net income supports purposes in which numerically few people "fit" or where the public benefit may not be obvious. Real examples of such purposes from existing trusts with TCC endorsement are (quoted directly from governing documents):

- *for general purposes of St Peters Church of AAA* (where AAA is a tiny rural township and congregation is likely to be small).
- *the winners of a best short story competition, a boy and a girl from the school of BBB District High School WA* (where BBB is a small rural district).
- *to St John's Church of England, CCC annually for religious purposes* (where CCC is a small country town and congregation is likely to be small).
- *the Royal DDD Hospital until all money is exhausted to endow a bed at the said Hospital* (where DDD was at the time of establishment of the trust a not-for profit entity and is now owned and operated by a state government).

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?

We suggest that the amended Bill's explanatory material could also clarify that beneficiaries with family ties (such as native title holders) are eligible to receive benefits from charities.

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?

While part of the role of the new Australian Charities and Not-for-Profits Commission will involve interpreting such terms when determining charitable and public benevolent institution status, it still would be useful to further clarify the term 'for the public benefit' in the Bill, by drawing on the guidance in TR 2011/D2.

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?

See answer to Q5.

7. What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?

A key element of the new framework will be accountability.

However, we are concerned at the potential cost for charities, including trusts and foundations, if they are required to demonstrate public benefit.

Trustee corporations administer many quite small testamentary charitable trusts which are currently deemed charitable under the first 3 of the 4 heads of charity, including numerous charitable trusts that provide scholarships for individual schools, support local churches and award prizes for activities undertaken.

A requirement to demonstrate the public benefit for these will impose unnecessary financial burden on both the trustee corporations and the trusts and foundations.

The additional compliance burden on the trustee corporations is likely to lead to the closure of many of the trusts as they will no longer be deemed viable to administer.

The burden on the trusts and foundations will reduce the net income available for the charitable purposes.

8. What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?

Providing such assistance would seem to clearly fall within one of the ACNC's functions, ie: providing information, education and guidance to the NFP sector.

9. What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?

See answer to Q7.

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

This would seem to be an appropriate approach.

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

This does not seem necessary.

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 general proposition that a charity should be able to engage in political activities, so long as those activities are in furtherance and in aid of its charitable purpose – again, this could be an area for ACNC guidelines.

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

We support a prohibition on charities engaging in party political activities, as such activities could compromise the charities' independence and erode public confidence in those entities.

14. Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?

Clarification could be provided in the amended Bill's explanatory material.

15. In the light of the Central Bayside decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?

We believe that the definition of 'government body' in the *Charities Bill 2003* lacks clarity and does not resolve the uncertainty on the issue of whether valid charitable gifts can be made to organisations that, because they are 'government connected organisations' (GCOs), may not be considered 'charitable'.

The Board of Taxation has recommended that the definition be amended to provide a clear definition of 'government body', including whether local government is included, and a clear definition of 'controlled by government', which we support.

The *Central Bayside* decision is but one of a long list of cases which have highlighted the uncertainty in this area.

Whether a particular GCO remains charitable within the general law definition of the term, despite its connection to government, is a question of fact and must be established on a case-by-case basis by reference to the applicable case authorities.

There are no clear rules or criteria which enable taxpayers to determine whether a GCO is indeed charitable, which is a significant source of uncertainty for taxpayers.

Affected taxpayers which are testamentary trusts, private ancillary funds or public ancillary funds may:

- wish to make gifts or otherwise provide financial support to GCOs but may only do so if they are charitable; or
- be required to make gifts or distributions of income or capital to a GCO as a named beneficiary of the trust with a 'fixed entitlement to part of the trust's income and/or capital.

This may present 2 problems:

- if the affected taxpayer is a trust, it must be a charitable trust for trust law purposes to overcome the limitation on perpetuities and the fact there are no actual objects of the trust - if the trust is benefitting non-charitable GCOs it may not have a charitable purpose and so will not be (and never will have been) a validly settled trust.
- for the affected taxpayer to be exempt from income tax and be eligible for a number of other tax benefits on the basis that it is an 'income tax exempt charity' or a 'tax concession charity' under the *Income Tax Assessment Act 1997*, it must have a charitable purpose - the Commissioner may deem the taxpayer to not be eligible for an exemption if it makes distributions or otherwise provides financial support to non-charitable GCOs.

Uncertainty around the charity status of GCOs and by extension the validity of trusts which, by choice or necessity, make gifts to such organisations has been addressed by state legislation.

In Victoria, for example, a solution to the trust validity issue has been sought by the introduction of s7K into the *Charities Act 1978*, which enables a charitable trust, by opting into the saving provision, to validly distribute income or capital to an 'eligible entity' which, but for its connection to government, would be a charity.

An 'eligible entity' is an entity which is approved by the Commissioner as a deductible gift recipient (DGR).

When introducing the bill, the then Attorney-General commented on ability of trust making the election to access Commonwealth government tax concessions:

"It should be noted that the [Bill] will not, of itself, allow Victorian charitable trusts to give to these government linked bodies. Further steps must be taken by Victorian charitable trusts and the commonwealth (sic) government for the bill to have full effect. Charitable trusts that 'opt in' to the legislation will only be able to exercise the legal power to make grants to government-linked bodies after they have obtained an appropriate tax endorsement from the ATO."

Our understanding is that to date the ATO has adopted an administrative response whereby entities that have opted in to the saving provision can apply for their tax concession status as a 'tax concession charity' to be converted to that of an 'income tax exempt fund'.

The practical effect is to preserve the entities' income tax exemptions, but still result in the entities only being able to make valid distributions to entities which are DGRs.

This can become problematic where particular GCOs are not 'eligible entities' for the purposes of s7K because they are not a DGR or they do not maintain a DGR fund and a particular trust elects or is required to gift funds to that particular entity. In such a case, the making of a s7K election will not overcome the trust validity problem and its tax concession status could not be converted to that of an income tax exempt fund.

Many of the testamentary trusts for which our members act as trustee have been endorsed as income tax exempt charities. Many of those trusts have

named beneficiaries with fixed entitlements to the income and capital of the trust that are GCOs and not DGRs.

In other cases, there is a mix of fixed beneficiaries which are GCOs that have DGR endorsement (or maintain DGR endorsed funds) and other named GCOs which are not DGRs (or do not have DGR funds).

Our members face significant uncertainty in the administration of such trusts.

Legal advice has confirmed that the correct position on the charitable status of particular GCOs which are named beneficiaries of the testamentary trusts is far from clear and has recommended that a *cy pres* application be made to the Supreme Court in respect of each trust to seek to modify its terms and scope of beneficiaries. However, this may not necessarily resolve the matter in all cases (particularly insofar as trust validity is concerned) and would necessitate significant costs, resources and time.

We note that in *re Cain (Deceased); The National Trustees Executors and Agency Co of Australasia Ltd v Jeffrey* [1950] VLR 382 Dean J upheld a gift under a will to the Children's Welfare Department as a valid charitable trust whereby the Department would provide extra benefits for children under its care.

If GCOs are willing to accept gifts on terms that require them to apply the gift in a manner over and above their ordinary activities it would be unnecessary for the trustees to elect under s7K.

The ATO has given 'non-binding advice' that as an interim measure it would accept that if trustees make gifts to GCOs on this basis such testamentary trusts can qualify for exemption on the basis that they are tax concession charities.

However, legal advice indicated that an invalid nomination of a non-charitable GCO cannot be converted into a valid nomination simply by having the trustee impose a charitable condition for the receipt of the benefit.

As *re Cain* shows, it must be possible to construe the actual nomination in the will as one which involves the receipt and application of benefit for charitable purposes over and above those ordinary non-charitable purposes of the GCO.

We suggest that, in order for a statutory definition of charity (in Federal legislation) to achieve the goals of greater certainty and administrative efficiency in relation to the determination of charitable purpose, it should provide the following:

- (a) A legislative basis for determining whether a GCO is a charitable organisation or pursues a charitable purpose and including such organisations within the statutory definition of a charity, eg: by including in the legislative definition of 'charity' an organisation, the objects and activities of which would satisfy the basic elements of that definition "but for" the fact that it is connected to government by virtue of it being a creature of statute, subject to government oversight or control, receiving government funding or implementing government policy.

Such rules could be supported by an administrative mechanism which allows affected taxpayers to obtain a binding opinion from the Australian Charities and Not-for-Profits Commission (ACNC) as to whether or not a particular GCO is charitable, and/or for the ACNC to prescribe a particular

government connected organisation as being charitable (eg: public hospitals).

- (b) Federal law adopting the purported policy objectives of the state legislated saving provisions, such as s7K of the *Charities Act (Vic) 1978*, such that a charitable trust will remain valid at law if it provides gifts or benefits to government connected organisations which are (under the statutory definition but, arguably, not the general law definition) charitable.
- (c) Provisions integrating the statutory inclusion of GCOs into the definition of charity and the saving provision for trust validity with the tax concessions available under the Federal tax law such that a charitable trust or institution may retain its status as a 'tax concession charity' by providing gifts or financial support to GCOs which satisfy the statutory definition of a charity (irrespective of whether they are also DGRs or have DGR funds).

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?*

See answer to Q17.

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

We believe that, with a view to achieving greater clarity, the list of charitable purposes should be as comprehensive as possible and include activities that benefit the public through the provision of preventative measures rather than the often far more expensive need to respond once issues have become entrenched.

The list should at least cover the following:

- the advancement of education
- the advancement of social or community welfare
- the advancement of medical research and health
- the advancement of religion
- the advancement of culture
- advancement of the natural environment
- the advancement of community development
- the promotion and protection of civil and human rights
- the promotion of reconciliation, mutual respect and tolerance between various groups within Australia
- the protection and safety of the general public
- the prevention and relief of suffering of animals
- the encouragement of amateur sports which promote health and wellbeing irrespective of ability
- any other purpose that is beneficial to the community.

18. What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?

We support the view put forward by Alice Macdougall from Freehills, ie: the divergence between Commonwealth and State laws creates significant problems, eg:

- charitable trusts which are not private or public ancillary funds cannot make grants to government entities (including government controlled entities) for their general operations or for infrastructure;
- charitable trusts which are not private or public ancillary funds can make grants to government entities (including government controlled entities) for charitable purposes over and above their usual operations (*Re Cain* and discussion in 279 and 280 in TR 2011/4) though this is, in practice, often difficult to ascertain;
- private or public ancillary funds which are endorsed as charitable funds cannot make grants to non-charitable item 1 DGRs;
- private or public ancillary funds in States where there is State legislation which enables them to opt in by making a declaration and changing tax status from a charitable fund to an income tax exempt fund, can make grants to tax exempt non-charitable item 1 DGRs, provided the trust makes the declaration and ceases to be charitable under *ITAA 97* (and presumably won't be charitable under the proposed legislation on the definition of charity as currently proposed?).

Some possible solutions include:

- legislating that a government department or body can be a charity in respect of purposes that would be charitable but for the connection with government (though these may then need to be exempted from registration, reporting and other requirements under the ACNC legislation);
- inserting in the proposed list of charitable purposes “providing money, property or benefits to government departments or bodies for purposes which would be charitable but for the connection with government”;
- inserting in the proposed list of charitable purposes “providing money, property or benefits to DGRs which are exempt bodies”.

The proposed legislation should also cover charitable trusts where the non-charitable purposes have been or should be severed. The ATO currently recognises these trusts as charitable and providing this recognition in the proposed legislation will bring the applicable law in line with the current practice.

19. What are the current problems and limitations with ADRFs?

We also support the view of Alice Macdougall on this issue, ie: it would be of assistance for many of the purposes listed in the December 2009 legislation as a consequences of the Victorian bushfires to be specifically deemed as charitable.

This is necessary as many of the community assets and infrastructure would normally be owned by the local government. Other assets important to the community may well be owned and operated by sporting or other recreational

clubs and therefore not come within the definition of charitable. This severely limits trusts wishing to support disaster recovery.

20. Are there any other transitional issues with enacting a statutory definition of charity?

We agree that an extensive campaign will be needed to educate the legal profession, charities and the general public about the changes, including the possible need to review Wills which provide for charitable purposes on the basis of the existing common law definition of charity (noting that some testators may have since lost capacity and thus are not able to amend their Will).

Any change in compliance obligations will require transitional activities that are an additional burden on resources for both trustee corporations and trusts and foundations. Expected costs may be associated with:

- audit of trusts and foundations, to ensure compliance.
- modification of processes and procedures.
- demonstration of public benefit.
- seeking and actioning legal advice to deal with non-complying entities.

We also support Alice Macdougall's comments:

- Care should be taken where there is a potential loss of charitable status such as if the requirement for public benefit is removed from the relief of poverty as a number of testamentary trusts and a number of trusts for necessitous circumstances may no longer be charitable. The charitable status of these existing trusts should be preserved specifically in the legislation, similar to the amendments made in 1997 preserved the status of pre-1997 testamentary trusts.
- If trusts which have had the non-charitable purposes severed as a result of State and Territory laws are not specifically recognised in the proposed legislation, these trusts may also lose tax concessions if no longer recognised by the ATO as charitable if not specifically included within the definition of charity under the proposed legislation.

Attachment

TCA Members

- ANZ Trustees Ltd
- Australian Executor Trustees Ltd
- Equity Trustees Ltd
- National Australia Trustees Ltd
- New South Wales Trustee and Guardian
- Perpetual Ltd
- Public Trustee for the ACT
- Public Trustee for the Northern Territory
- The Public Trustee of Queensland
- Public Trustee South Australia
- The Public Trustee Tasmania
- Public Trustee Western Australia
- Sandhurst Trustees Ltd
- State Trustees Ltd
- Tasmanian Perpetual Trustees Ltd
- The Trust Company Ltd