FUNDRAISING INSTITUTE AUSTRALIA
SUBMISSIONS
PHILANTHROPY AND EXEMPTIONS UNIT
THE TREASURY

A DEFINITION OF CHARITY

About Fundraising Institute Australia (FIA)

Established in 1968, FIA's purpose is to make the world a better place by advancing professional fundraising through promotion of standards, professional development pathways and measurable credentials so that our members achieve best practice.

The FIA has developed the Principles & Standards of Fundraising Practice as the professional fundraiser's guide to ethical, accountable and transparent fundraising. The Principles & Standards are vital to how the fundraising profession is viewed by donors, government, the community and fundraisers.

In order to achieve its mission, FIA conducts the following activities:

- Promote and enhance education, training and professional development of fundraisers.
- Provide a resource of fundraising information.
- Advocate for fundraising practice to Government, industry and the community.
- Support and promote certification of fundraisers.
- Develop standards and codes of practice.
- Promote and enhance fundraising as a profession.
- Promote and encourage research into fundraising and philanthropic giving.

Introduction to issues in consultation paper

In this submission, FIA will answer the discussion questions with a view to considering the major issues raised in the consultation paper, which are:

- the requirement for all charities to satisfy a "public benefit" precondition;

- the removal of a presumption of public benefit under the first 3 heads of charity, ie the relief of poverty, the advancement of education and the advancement of religion;

- whether an organisation qualifies as a charity if it has a dominant charitable purpose or whether it is required to have exclusively charitable purposes; and

- consideration of disqualifying activities, such as involvement in illegal activities and engagement in political activities that are more than ancillary or incidental to the charity's purpose.

FIA expresses reservations about revisiting or legislating the definitions in the *Charities Bill 2003*, given its history as follows.

The Australian government introduced the *Charities Bill 2003* in an attempt to define charitable activities. The Bill was withdrawn, however, after advice from the Board of Taxation in December 2003 that it 'failed to achieve the level of clarity and certainty' that was intended (Board of Taxation 2003). Having failed in its attempt to introduce a legislative definition of a 'charity', the Government decided to continue to rely on the common law meaning. The only change was to extend the definition 'to include non-profit child care available to the public, self-help groups with open and non-discriminatory membership, and closed or contemplative religious orders ' (Commonwealth Treasurer, 2004).

In addition, legislation was tabled in 2004, requiring charities, public benevolent institutions and health promotion charities to be endorsed by the Tax Commissioner in order to access relevant taxation concessions. The amendments extended the endorsement processes currently undertaken by the ATO to all taxation concessions, to which charities, public benevolent institution and health promotion charities are entitled (ATO, 2004a). The changes updated the list of charities, but the same method of self-assessment — 'It is your responsibility to advise the Tax Office if you are no longer entitled to endorsement' — and hands-off regulation continue (ATO, 2004b:31).

In other words, the entire focus of reform to date has been in taxation compliance, with little regard to informing the donor of the activities and performance of charities. (G. Johns, 'Charities Reform in Australia', *Agenda*, Volume 11, Number 4, 2004, pages 293-306). The situation has not changed since 2004.

FIA's responses to questions

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

FIA supports the current legislation, in particular the exemption provisions of the *Income Tax Assessment Act 1997 (Cth).*

Treasury is referred to the *Henry Report 2010*, para B 32. Income tax concessions for NFPs are not detrimental to charities or the economy. Income tax exemption is not necessarily a concession, as implied in the Treasury paper. For example, churches, religious organisations and charities have never been subject to payment of income tax. Therefore, the tax has not been foregone or conceded; it has never been collected. Mutuality is not equivalent to tax expenditure.

As both the High Court of Australia and Full Federal Court of Australia has pointed out in several recent cases, the correct test is what is the purpose of the NFP, not what is the activity of the NFP. Both the High Court and Full Federal Court have consistently applied this test, which is not an invention of the courts, but is grounded in the exemption provisions of the *Income Tax Assessment Act 1997 (Cth).* The courts' interpretation has not extended or stretched the meaning of these exemptions, but has applied their ordinary meaning to modern methods of fundraising and activities carried out by NFPs.

It is too limiting in a rapidly and continuously changing economic environment to specify what activities an NFP is allowed to conduct in pursuit of its objects, as this may cause the NFP to miss a valuable opportunity to raise funds for its cause. It is simply common sense that an NFP may engage in practical activities to raise funds, rather than relying solely on donations or other passive forms of fundraising such as bequests. This has been emphasised in a series of decisions by the High Court of Australia and the Federal Court of Australia, (ie *Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55, *Commissioner of Taxation v Wentworth District Capital Ltd* [2011] FCAFC 42, *Commissioner of Taxation v Co-operative Bulk Handling Ltd* [2010] FCAFC 155) which are discussed below.

Commissioner of Taxation v Word Investments Ltd [2008] HCA 55. It is worth noting that the arguments of the Commissioner of Taxation were rejected at every level from the Administrative Appeals Tribunal to the High Court of Australia. The most important part of the judgment was the High Court's emphasis on purpose, ie that the goal of making a profit was not an end in itself, but was incidental to its charitable purposes. The profits were not distributed to shareholders, but to charities supported by Wycliffe Bible Translators (International).

Commissioner of Taxation v Wentworth District Capital Ltd [2011] FCAFC 42. The Full Federal Court agreed with the trial judge that a bank established in the town of Wentworth was exempt from paying income tax under ss 50-1 and 50-10 of the *Income Tax Assessment Act 1997 (Cth)* because the main or dominant purpose for which it was established was a community service, ie the facilitation of face-to-face banking services which provided a substantial benefit to the community of Wentworth that was both real and tangible. As the Commissioner agreed, "service imports delivery of some practical help, benefit or advantage", in this case, operation of a community bank on a not-for-profit basis.

Commissioner of Taxation v Co-operative Bulk Handling Ltd [2010] FCAFC 155. In effect, the Full Federal Court decided that financial success alone does not disqualify a NFP for claiming a tax exemption. The Full Federal Court acknowledged that Co-operative Bulk Handling had grown and expanded considerably since its inception in 1933, but it still remained a co-operative dedicated to the purpose of promoting the development of agricultural resources in Australia and was therefore entitled to exemption under s 50-1 of the *Income Tax Assessment Act 1997 (Cth).* By retaining its co-operative structure, it fulfilled the special condition that it was not carried on for the profit or gain of its individual members.

It is also worth noting that Treasury, at para 48 of the consultation paper, confuses the concepts of 'profit' and 'surplus.' These two concepts must be distinguished. For profit companies distribute profits to their shareholders as a reward for investment. Not for profit organisations in all jurisdictions are specifically prohibited from distributing surplus income to their members, even on winding up. They must apply their surplus for the benefit of their beneficiaries, or on winding up, give the surplus to another organisation with similar objects. Generation of a surplus should by no means be considered generation of profit in the commercial sense. The explanatory material to the *Charities Bill 2003* is flawed for this reason. It is correct that in *Word*

Investments, the company was separate to the charity and generated profits; however these were not distributed to shareholders, but applied for the charity's purpose.

The introduction of an Unrelated Business Income Tax was announced by the Assistant Treasurer in May 2011. This tax is intended to apply only to profit-making businesses that do not contribute to the altruistic purposes of the charity. Treasury has indicated that it is not intended that this tax apply to the following:

- simple activities like cake stalls and raffles;
- business ventures that contribute to the charity, such as op-shops;
- 'initially' to existing commercial activities;
- The 50,000 National Rental Affordability Scheme allocations.

It is therefore very unclear to what the tax will apply or why it is to be enacted. The tax is contrary to the Henry Review recommendations which recommended that the sector remain untaxed. This view is supported by the High Court and Federal Court decisions discussed herein.

2. Does the decision by the NSW Administrative Tribunal (ie *Social Ventures Australia Ltd v Chief Commissioner of State Revenue* [2008] NSWADT 331) provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification needed?

This decision followed the Full Court of the Federal Court decision *Federal Commissioner of Taxation v Word Investments Limited* (2006) ATC 4715, which was subsequently upheld by the High Court as discussed above.

The NSWAT found that Social Ventures provided direct assistance to organisations (being various public charities) to meet their goals and increase their sustainability. Its constitution has clear charitable purposes and carries out its activities directly with other public charities. All funds (other than those used to pay staff and other proper expenses) were used for charitable purposes. It did not carry out any commercial activities for the whole community at large or in the abstract. The NSWAT found some similarity with the *Word Investments* case; however it stated that Social Ventures had an even stronger case for exemption, as there was a direct dealing by Social Ventures with the organisations which carry out the charitable ventures. Further, Social Ventures (unlike in *Word Investments*) did not undertake any independent business activity for profit.

Since this decision was made by the NSW Administrative Tribunal in 2008 and *Word Investments* was heard by the High Court also in 2008, that no higher court in any jurisdiction has been asked to reconsider this question. This fact indicates that it is not a controversial issue and that peak organisations presently holding charitable status have been correctly designated as such.

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

The definition of 'public benefit' in the *Charities Bill 2003* conflates the concepts of 'purpose' and 'activity.' It is flawed for the following reasons:

- There is no legal, legislative or social consensus anywhere in the world on what is "universal or common good, " rendering this term meaningless;

- The requirement of "practical utility" is unrealistic. While it is noted in the explanatory memorandum that "practical utility" may include social, mental and spiritual benefits, there is a real risk that many charitable purposes, for example cultural activities, may not be perceived as having "practical utility" in the sense that the activities may be intangible or ephemeral while still having value;

- The requirement that it be "directed to the benefit of the general community or to a sufficient section of the general community" is discriminatory. It could have the (no doubt unintentional) effect of excluding charities aimed at benefiting minorities, such as sufferers of rare medical conditions. A charitable purpose should not be excluded on the basis that only a small minority may benefit from it. Many charities have been founded for just this purpose as small minorities may not be able to avail themselves of government or private services due to their lack of numbers and isolation resulting from their minority status.

The disqualifying purpose in the *Charities Bill 2003* is no longer appropriate, given the High Court decision in the *Aid/watch* case. Illegal activities should be the only disqualified purposes.

The recommendation for a public benefit by the 2010 Senate Economics Committee Inquiry is preferable, although once again it sees the insistence on "a significant section of the public" as a remedy against charities being set up to benefit "individuals with a material connection to the entity." As stated in question 4, FIA is not aware of any complaints to its Ethics Committee that any of its members are set up only to benefit such individuals and suggests that this scenario is rare in Australia. Therefore, care should be taken that regulation of charities does not unnecessarily fetter or hamper their activities or distribution of surpluses to beneficiaries through overzealous regulation.

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?

FIA cannot comment on native title holders as these do not fall within FIA's mission. No such matters involving any beneficiaries with family ties have been drawn to FIA's attention.

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?

Note that the correct reference to the ATO ruling is TR 2011/4 as it is no longer a draft. The ATO ruling applies a restrictive approach to 'public benefit' without setting out its rationale. Given the ATO's failure in a number of important cases, it

appears that its ruling is attempting to restrict charitable purpose in another way, rather than summarising the current state of the law.

For example, while social, recreational and sporting activities are traditionally non charitable, community based activities do fall within the public benefit test and can be distinguished from commercial or professional activities. There seems to be no legal or policy reasons to prevent community based social, recreational or sporting activities from being charitable, provided that the benefits are not conferred on their private members but to beneficiaries as with charities in other categories.

Similarly, in view of the *Aid/watch* case, there is no reason to prevent organisations carrying out advocacy as a primary mission from being regarded as charitable, even if the advocacy was not restricted to one particular purpose but a number of different purposes.

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 that it provides greater flexibility?

While adhering to the 19th century categories of charitable purpose, the Charity Commission for England and Wales recognises the need for flexibility to meet modern situations. This is important because the traditional definitions are limited in scope as they were devised to reflect the standards of a very different society. To date, FIA has opposed the introduction of a definition for this reason, ie that it could be used to limit the categories of charity available for tax deduction/DGR status.

http://www.charity-commission.gov.uk/Publications/RR1a.aspx

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?

Existing charities should be distinguished from entities seeking approval as they fall under separate circumstances.

Existing charities operate on the basis that they have successfully been designated as a charity. If their status as charities were to be become uncertain, this would have a detrimental effect on their activities, possibly even causing them to cease, and would not be in the public interest.

Entities seeking approval as a charity may be expected to comply with requirements set by the ACNPC when they are known.

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

FIA supports an educational role for the ACNC in providing education, both through an information portal and education programs. The New Zealand Charities

Commission information portal is an excellent example as it is both highly informative and easy to use.

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

FIA cannot answer this question as it represents fundraisers from both secular and religious charitable organisations as well as commercial organisations.

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

As discussed in questions 1 and 2, FIA supports the current status quo in the *Income Tax Assessment Act 1997 (Cth)* as interpreted by the High Court and Federal Court in *Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55, *Commissioner of Taxation v Wentworth District Capital Ltd* [2011] FCAFC 42, *Commissioner of Taxation v Co-operative Bulk Handling Ltd* [2010] FCAFC 155.

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

In 2002, the UK Government's Strategy Unit, in its report "Private Action, Public Benefit" made the following recommendations for reform to the charitable sector:

- Amend charity law to allow charities to trade within the entity of the charity, without the need for separation. The power to undertake trade would be subject to a specific duty of care.
- The duty of care to be exercised by charities is similar to the fiduciary duty of trustees under the old UK Trust Act, ie the following duties should be included:
    - Duty of care to give proper consideration to minimise the risk of trading;
    - Duty to take independent legal or financial advice.
    - Duty to consider the form of income generation and whether it is both legally and ethically acceptable for an NFP to be trading in.
    - Duty to compare the economies of the trade with the purpose of the charity.

FIA is of the view that these recommendations could be applied to Australian NFPs, in particular companies limited by guarantee and co-operatives. With the introduction of the Australian Charities and Not-for-Profit Commission, it is anticipated that the incorporated association will be developed into a structure more suitable for national use. At the time of these submissions, no further details have been forthcoming.

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?

The Charities Bill 2003 is outdated in light of the High Court's progressive decision in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 *("the Aid/Watch case")*

The High Court agreed that there is an implied right in the Australian Constitution for all Australian voters to engage in political debate. The Australian Constitution, which is the basis of the Australian political system, allows voters to communicate directly with legislators through referendums, in order to bring about changes in the Constitution. This means that the Constitution itself allows advocacy for legislative and political change and for this reason, the traditional English common law must be adapted to be consistent with the requirements of the Constitution. The outcome for charities in Australia is that there is no general doctrine which excludes political objects from charitable purposes. The decision overturns over 100 years of accepted law on the role and purpose of charities, bringing Australian law up to date with how modern charities work.

This means that charities will now be able to advocate for political change, generate public debate and lobby the government for change on issues that are relevant to the work they do. By standing up for the right for charities to engage in political debate, the High Court has ensured that Australian charities can now lead the way worldwide in advocating on matters of public benefit.

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

In 2006, the ATO revoked the charitable status of Aid/watch after it criticised Federal Government foreign aid policy. The reasoning was that political advocacy was not a traditional charitable purpose, which since 1891, covered relief of poverty; advancement of education; advancement of religion; and other purposes beneficial to the community. Under English common law, which is influential in Australia, the rationale was that political purposes could not be charitable because a Court could not ascertain whether a particular political purpose such as a change in the law would be for the public benefit. This has generally been upheld in both the UK and Australia.

Since *the Aid/watch case*, political advocacy as an assistance to achieving a charitable purpose is now permissible. There is no reason why charities should be prohibited from political advocacy, lobbying or even support for candidates or parties. Such a prohibition would put them in a disadvantaged position compared to other organisations free to do so, and which also may attract tax exemptions. As charities generally need to raise funds from the general public, it may be counter-productive for them to support particular candidates or parties. However, this is a strategic issue for each charity's Board to assess. There is no reason why there should be a blanket prohibition on any such activities and this is now recognised in the ATO ruling.

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

FIA refers to its answer to question 11.

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

The High Court's decision in *Central Bayside* is consistent with the Tax Office's

interpretation of charity as outlined in Taxation Ruling TR 2005/21 (now superseded). Its constitution and purposes brought it within the legal definition of a charity, even though, like many charities, it had a purpose shared by the Commonwealth and was funded by the Commonwealth. However, this decision is at odds with the definition of 'government body' in the *Charities Bill 2003.*

The definition of "government body" has serious implications for many community organisations. Many such organisations currently have charitable tax deductible gift status and receive at least part of their funding from government sources. Government routinely funds organisations to do charitable work not done by the State, on the understanding that the funds will be augmented by additional monies from other non governmental sources. Not only does this often result in considerable services to the community at minimal public cost, it also facilitates relationship building between the community sector and financially privileged individuals and organisations and raises awareness and understanding of social justice issues. If such community organistions are denied recognition as charities, the funds from private individuals and organisations will be less likely to be forthcoming. Consequently, the work provided by those community organisations may no longer be performed and the valuable relationships between the private sector and the community will be diminished.

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?

The *Charities Bill 2003* was never enacted because it was inadequate to meet the needs of modern charitable organisations. As the High Court has recognised in its recent decisions, the categories of charitable organisation should not be closed as they need to be flexible to take into account the needs of modern organisations and the changing needs of the public. It is preferable to consider the purpose of a charity, and the distribution of its resources, rather than its activities.

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

FIA is not aware of any research on public recognition of charitable purposes. However, research on giving patterns by Australians indicates that Australians now have an established culture of giving, notwithstanding the effects of the Global Financial Crisis, which only resulted in a small downturn. As expected, wealthier Australians donate more. As expected based on the populations of the different States and Territories in Australian, NSW leads the way with donations, donating almost 37.92% of the national total, followed by Victoria (28.75% of the national total), Queensland and West Australia (which demonstrates the effect of the mining boom in that State.) Australians also respond generously to disaster appeals, as indicated by the success of the Victorian Bushfire Appeal in 2009. These trends indicate strong public confidence in and support for Australian charities and their activities.

The most recent research on tax deductible giving was carried out by Queensland University of Technology Australian Centre for Philanthropy and Non Profit Studies (ACPNS) for the year 2008 – 2009. As this is post Global Financial Crisis, the trends identified remain current. ACPNS analysed statistics provided by the Australian Taxation Office.

http://cms.qut.edu.au/__data/assets/pdf_file/0004/87403/ACPNS-Current-Issues-Sheet-2011_2.pdf

The Review Board's Report stated that the definition "any other purpose that is beneficial to the community" (as reflected in s.10(1)(g) of the Bill) would include the "promotion and protection of civil and human rights" and the "prevention and relief of suffering of animals".

FIA is not a human rights organisation, but many of its members support human rights. FIA is of the view that human rights is an issue of such fundamental importance to humanity it should be specifically recognised in the legislative definition of charitable purposes. It is recommended that the purpose of protecting and promoting human rights be included as a charitable purpose in its own right.

As community based social, recreational and sporting activities are important in Australian life, FIA also recommends that these be included as charitable purposes and be defined so that they are distinguishable from professional and commercial activities.

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

This is a matter for the Attorney-Generals of COAG and is too wide a question for FIA to answer in detail.

Australia is governed under the Westminster system, which ensures that the three arms of government – Parliament, the Courts and the Executive – are able to exercise checks and balances on each other. While Parliament is the supreme law maker, the courts are able to review both legislation and common law, interpreting these in the light of Parliamentary intention and community expectations. In the *Aid/watch* case, the High Court recognised that 19th century rules for the operation of charities needed review to take into account the social, cultural and technological changes that have occurred to create modern society. The Executive, in the form of the ATO, was applying outdated concepts to a modern organisation. To date, Parliament has made no response, but FIA submits that it would be regressive for Parliament to reverse the *Aid/watch* decision by reverting to outmoded 19th century concepts of charitable activities.

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

Under existing law, an ADRF must be established and expend it funds only in relation to one disaster. It cannot exist to collect funds before a disaster occurring and cannot hold funds over from one disaster to another. There is also a lack of flexibility as to how donated funds can be applied.

As FIA noted in its answer to question 17, Australians respond generously to appeals by ADRFs. This level of support indicates public confidence in ADRFs and FIA suggests that it would be of public benefit to remove the limitations on ADRFs to

enable them to plan for disaster appeals, accrue funds at any time before, during and after a disaster, and apply the funds to more than one disaster.

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

Reform should facilitate charities and their activities, not hinder them. Charities are a significant contributor to the Australia economy and without them, the Commonwealth, State and Territory governments would face a significant burden of financial, administrative and economic activity to fill the gap in services to Australians. Charities should be given ample time to deal with the transition to a statutory definition and to ascertain how it may affect their organisations.