

DEFINING CHARITY

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Prof. Myles McGregor-Lowndes
Director – Centre for Philanthropy and Nonprofit Studies
Queensland University of Technology
GPO Box 2434
Brisbane, Queensland, Australia
Phone: (07) 3864 2936
Fax: (07) 3864 1812
E mail m.mcgregor@qut.edu.au
<http://cpns.bus.qut.edu.au>

The Australian Definition of Charity

Overview

Australian law has received the English common law concerning charitable trusts and the Statute of Elizabeth derived definition of charity. Australian case law has not substantially departed from the English case law being part of a British Commonwealth interchange of charity case law. It is usual for Australian judges to refer heavily to Commonwealth decisions in appropriate cases. Australia does not have any administrative body such as the Charity Commission for England and Wales that administers charity regulation or other quasi judicial functions.

Charitable organisations have remained exempt from income tax in Australia since the first comprehensive state income tax legislation in 1884¹ through to the current Income Tax Assessment Act 1977.² The exemption of charitable bodies follows the English legislative pattern of charitable organizations being exempt from income tax and relying upon the common law definition of charity stemming from the Statute of Elizabeth 1601.

Australian taxation law uses the term “charitable institution” or “charitable fund”. A charitable fund is established under an instrument of trust or a will and the fund must mainly manage trust property or hold trust property to make distributions to other entities or persons. A charitable institution on the other hand is an entity (not necessarily a trust) that actually carries on charitable activities.

¹ The first Act to impose a tax on income (dividends) was Tasmania’s Real and Personal Estate Duty Act 1880. However, South Australia was the first State with the Taxation Act 1884 and the Commonwealth’s income tax provisions closely followed the State’s exemption provision in section 23 of Income Tax Assessment Act 1936 (Cth).

² The Income Tax Assessment Act 1997 (ITAA 1997) was enacted as part of the Tax Law Improvement Project (TLIP) rewrite of the Income Tax Assessment Act 1936 (ITAA 1936). The ITAA 1997 will be progressively amended and added to as instalments of the rewrite are enacted. The parts of the ITAA 1936 which have not been rewritten are adopted directly into the ITAA 1997 by Schedule 1, 52 of the Income Tax (Consequential Amendments) Act 1997.

The terms “charitable institution” and “fund” are used for the purposes of income tax exemption. A different set of classifications is used for charitable contribution deductions, unlike other jurisdictions such as Canada, the United Kingdom and the United States of America.

Charitable institutions and funds are endorsed by the Australian Taxation Office, but they are not required to file any income tax returns. There is no income tax on unrelated business income and business or commercial activities that are merely incidental to a charitable institution or fund’s purposes do not prevent it from being a charity. This is an increasingly controversial issue as sectors of the Australian economy seek competitive neutrality. Two government inquiries in the last decade have recommended that the position not be altered.

England,³ Ireland,⁴ Scotland,⁵ Canada,⁶ South Africa⁷ and New Zealand ⁸ are actively examining the definition of charity in their respective policy settings. The Australian Federal Government has announced that it intends to statutorily alter the definition of charity for all federal purposes including income tax exemption after receiving the recommendations of the Report of the Inquiry into the Definition of Charities and Related Organisations.⁹ The Federal Treasurer has announced that the present common law definition of charity will be augmented by a statutory provision that captures the general

³ Cabinet Office, Performance and Innovation Unit, PIU, Voluntary sector review, 2002. URL: <http://www.cabinet-office.gov.uk/innovation/2001/charity/charityscope.shtml>.

⁴ Law Reform Committee, Law Society of Ireland, “Charity Law: The Case for Reform”, Dublin, July 2002.

⁵ Scottish Charity Law Review Commission, The Report of the Scottish Charity Law Review Commission, May 2001. URL: <http://www.e-consultant.org.uk/charitylaw.htm>.

⁶ Final Report of the Panel on Accountability and Governance in Canada’s Voluntary Sector, “Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector”, Ottawa, February 1999 (known as the Broadbent Report).

⁷ The Law Reform Commission was mandated to study “The Legal Position of Voluntary Associations”. The issue of taxation and charities is also an ongoing subject of discussion between the South African Revenue Service and the voluntary sector.

⁸ See “Taxes and Charity” at the web site: www.taxpolicy.ird.govt.nz; and “Report by the Working Party on Registration, Reporting and Monitoring of Charities”, 28 February 2002. URL: <http://www.treasury.govt.nz/charities>.

⁹ Sheppard, I., R. Fitzgerald and D. Gonski. “Report of the Inquiry into the Definition of Charities and Related Organisations”, CanPrint Communications Pty Ltd, Canberra, June 2001 (hereinafter “Charity Definition Inquiry”).

broad categories of the common law charity definition and includes example of specific purposes. The examples extend the common law definition of charity in disputed areas such as “the care, support and protection of children and young people” and “prevention of sickness, disease or of human suffering”. The proposed definition is located in the appendix to this paper.

The Australian Taxation System: An introduction

Income tax was first imposed in Australia by state governments in the 1880s, but by 1936 a uniform federal tax system was largely achieved with the enactment of the Commonwealth *Income Tax Assessment Act 1936*. In 1942 the federal government assumed all responsibility for the imposition and collection of income tax, with revenue sharing between it and the Australian states. Since 1 July 2000, a federal Goods and Services Tax (a broadly based value added tax at the rate of 10%) has been imposed and the revenues channeled to the states. State governments also raise revenue from stamp duties, pay-roll, land and gambling taxes and business franchise licence fees imposed on tobacco, alcohol and petrol. Local governments rely on federal and state government funding and property taxes in the form of municipal rates and charges.

Both income tax and the goods and services tax is administered by the Australian Taxation Office (ATO), headed by a Commissioner of Taxation who reports to the Commonwealth Parliament. The ATO has developed a taxpayer's charter that outlines the rights of taxpayers under the law, their obligations and the standard of services the public can expect from the ATO. The tax legislation requires strict secrecy of taxpayer information to be observed by the ATO and other government departments. From 1 July 2002 the government has moved the design of tax laws and regulations from the ATO to the Department of Treasury that previously only had responsibility for providing tax policy advice.¹⁰

¹⁰ Costello, P. Reforms to community Consultation Processes and Agency Accountabilities in Tax Design, Press Release No. 022, Canberra, 2 May 2002.

The ATO has its own internal review process and independent reviews are made through tribunals and courts. There is an extensive public tax rulings system in place. Over the last decade the administration of the collection of income tax has shifted to a self-assessment regime. Every taxpayer is required to prepare an annual return of key details with an onus to keep sufficient records to enable verification of returns during a subsequent audit.

Since 1993 the federal government has been implementing a project to rewrite the tax laws. To date only the core provisions have been rewritten and are contained in the *Income Tax Assessment Act 1997*, with the *Income Tax Assessment Act 1936* still applicable to remaining provisions. The project has rewritten the gift deduction provisions (Division 30) and the income tax exemption provisions (Division 50). The project has been overshadowed by a major tax reform program of the Commonwealth government that has included the introduction of a broad based value added tax set at 10%, and other taxation administration reforms.

- (a) The tax base upon which income tax is imposed is "taxable income" which is derived from ascertaining the "assessable income" of a taxpayer and subtracting "allowable deductions".¹¹ Assessable income includes ordinary income as understood in the common law and "statutory income" such as net capital gains that are specified under the provisions of either the *Income Tax Assessment Act 1936* or *1997*.¹²

Prior to 1987 a corporate taxpayer was taxed as a separate legal entity and individual shareholders were taxed on dividends received without any recognition of the tax paid by the company on the profits out of which dividends were paid. This has been replaced by an imputation system of company taxation where the shareholder is entitled to a tax credit for the tax paid at the company level that avoids "double taxation".

¹¹ Sec 4-5(1) ITAA97

¹² Sec 6-5; 6-10 ITAA97

The general rates of income tax applicable to individual taxpayers for 2000/01 are as follows:

Residents		
Taxable Income \$	Tax Payable \$	% on excess (marginal rate)
6,000	Nil	17
20,000	2,380	30
50,000	11,380	42
60,000	15,580	47

There is a health levy for the 2001/02 year of 1.5% with an extra 1% levy surcharge applying to higher income earners who do not have private health insurance. The general rate of tax on income derived by private and public companies is 30% for 2001/02 with special rates for friendly society, life assurance and pension companies.

The Basis of Australian Charitable Institution and Fund Taxation Exemption

Australia's treatment of income tax exemption of charities owes much to its English legal heritage. This can be seen in two aspects, firstly the Australian income tax legislation took the English law as a model and included an exemption for charities, and secondly, it followed the common law definition of charity through the Statute of Elizabeth and subsequent case law.

The English church in the feudal period contributed little direct revenue to the Crown and its lands were free from feudal dues of contributing to armies and other infrastructure, assisting in creating a situation of large feudal landholdings.¹³ The first Income Tax Act of

¹³ Radford, M. F. "The Case Against the Mortmain Statute", *Georgia State University Law Review*, Vol. 8, 1992, pp.313-361, at 317; Chancellor Hardwicke in 1748 stated, "the clergy got almost half the real property of the kingdom into their hands, and indeed I wonder they did not get the rest." *Attorney-General*

1799 exempted charitable organisations.¹⁴ There was no income tax between 1816 and 1842, but when income tax was re-introduced it contained the same exemption.¹⁵ In eighteenth century England charitable trusts were liable for land tax, house tax, stamp duty, legacy duty, tithes and local rates.¹⁶ In 1806 a waiver was granted to trusts with an income of 150 pounds or less.¹⁷

In 1863 Gladstone as Chancellor of the Exchequer questioned the exemption of charities from income tax.¹⁸ Gladstone's contention was,

if we have the right to give public money, we have no right to give it in the dark. We are bound to give it with discrimination; bound to give it with supervision; bound as a constitutional Parliament, if the Hospitals are to receive a grant, to bring them with some degree of control.¹⁹

He put forward a bill that withdrew the exemption except for

the buildings occupied by hospitals, colleges and almshouses.²⁰

His attention had been drawn to a number of charities that were very wealthy, enjoyed taxation exemption and yet catered only for the very wealthy. Owen gives examples of

v. Day (1748) 1 Ves. Sen. 218, at p.223; Bomes, S. D. "The Dead Hand: The Last Grasp?", *University of Florida Law Review*, Vol. 28, 1976, p.351 at 352 notes that some estimate the landholdings by the church by the latter half of the thirteenth century as one-third to one-half of England.

¹⁴ 39 GEO.III c.13, s5.

¹⁵ 43 GEO.III c.122, s68.

¹⁶ Thompson, R. *The Charity Commission and the Age of Reform*, Routledge & Kegan Paul, London, 1979 at p.62.

¹⁷ 46 Geo. III c.116. The Report of the Commissioners for the Redemption of the Land Tax, 1814-15, XII, 525 listed 200 trusts that had been exempted from land tax.

¹⁸ 3 Hansard 170:200ff; Gladstone, W. E. *The Financial Statements of 1853, 1860-63* London, 1863, pp.330-408.

¹⁹ *Ibid* at p.458.

²⁰ *Ibid*.

many of the hospitals and University colleges of the time.²¹ The bill was withdrawn after criticism, Disraeli claiming that the exemption of charities

is not a privilege - it is a right.²²

Gladstone was defeated in Parliament, but he turned his attention to the administration of the taxation exemption. The Inland Revenue office carefully scrutinised taxation returns and recast its criteria for exemption, excluding many charities. The classic definition of Lord Macnaghten in the *Pemsel* case arose over such a dispute with the Inland Revenue and they were forced to return to the earlier more liberal policy.²³

Charitable organisations have remained exempt from income tax in Australia since the first comprehensive state income tax legislation in 1884²⁴ through to the current Income Tax Assessment Act 1997.²⁵ The initial exemption can be explained by Australia's English legal heritage and using the English tax legislation as a model for the first legislative provisions.

Before responsible government was conferred on the Australian colonies, government revenue was collected through indirect taxes such as tariffs, excises and land sales. The South Australia Parliament was the first state to legislate for a tax on income in 1884.²⁶ The Act was a desperate measure to raise revenue given the reduced income from indirect

²¹ Owen, D. *English Philanthropy 1660-1960*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1964 at p.331.

²² 3 Hansard, at 1128.

²³ *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] A.C. 531.

²⁴ The first Act to impose a tax on income (dividends) was Tasmania's Real and Personal Estate Duty Act 1880. However, South Australia was the first State with the Taxation Act 1884 and the Commonwealth's income tax provisions closely followed the State's exemption provision in section 23 of Income Tax Assessment Act 1936 (Cth).

²⁵ The Income Tax Assessment Act 1997 (ITAA 1997) was enacted as part of the Tax Law Improvement Project (TLIP) rewrite of the Income Tax Assessment Act 1936 (ITAA 1936). The ITAA 1997 will be progressively amended and added to as installments of the rewrite are enacted. The parts of the ITAA 1936 which have not been rewritten are adopted directly into the ITAA 1997 by Schedule 1, 52 of the Income Tax (Consequential Amendments) Act 1997.

²⁶ Taxation Act 1884.

taxes caused by a serious economic recession. Most states followed to overcome similar difficulties.²⁷

The first income tax acts contained exemptions for certain nonprofit organisations. For example, Queensland exempted religious, charitable, and educational institutions of a public character, trades union, friendly societies and other societies and institutions not carrying on business for purposes of profit or gain.²⁸ Similar provisions were common in the other states.²⁹ When the Commonwealth levied income tax, the exemptions were largely copied into Section 23 of the Income Tax Assessment Act 1936 (ITAA 36).³⁰

Place of Charity within the Nonprofit Exemptions

The Australian Income Tax exemption classification specifically refers to charitable “institutions” and “funds” as just one classification among a range of other exempt bodies. The specific exemptions in the Income Tax Assessment Act are not mutually exclusive and often an entity may fall within more than one category. An example is that a school may be both a “public education institution” as well as a “charitable institution”, as may be a religious institution or a scientific institution.

²⁷ Queensland was able to delay the introduction of income tax until 1902.

²⁸ *Income Tax Act*, (Qld, 1902), section 12.

²⁹ *Income Tax (Management) Act*, (NSW, 1912), section 10; *Taxation Act*, (SA, 1927) Section 18; *Land and Income Tax Assessment Act*, (WA, 1907), section 18.

³⁰ No. 88 of 1936.

The categories of income tax exemption from Division 50 Income Tax Assessment Act 1997 are reproduced below:

50-5 Charity, education, science and religion

<i>Item</i>	<i>Exempt entity</i>
1.1	*Charitable institution
1.2	Religious institution
1.3	Scientific institution
1.4	Public educational institution
1.5	*Fund established for public charitable purposes by will before 1 July 1997
1.5A	*Trust covered by paragraph <u>50-80(1)(c)</u>
1.5B	*Fund established in Australia for public charitable purposes by will or instrument of trust (and not covered by item 1.5 or 1.5A)
1.6	Fund established to enable scientific research to be conducted by or in conjunction with a public university or public hospital
1.7	Society, association or club established for the encouragement of science

*Any entity covered by item 1.1, 1.5, 1.5A and 1.5B is not exempt from income tax unless the entity is endorsed as exempt from income tax by the Australia Taxation Office.

50-10 Community service

<i>Item</i>	<i>Exempt entity</i>
2.1	Society, association or club established for community service purposes (except political or lobbying purposes)

50-15 Employees and employers

<i>Item</i>	<i>Exempt entity</i>	<i>Special conditions</i>
3.1	(a) employee association; or (b) employer association	the association: (a) is registered under an Australian Law relating to the settlement of industrial disputes; and (b) is located in Australia, and incurs its expenditure and pursues its objectives principally in Australia
3.2	Trade union	located in Australia and incurring its expenditure and pursuing its objectives principally in Australia

Note: Despite items 3.1 and 3.2, certain ordinary and statutory income of some associations of employees and some registered trade unions may be subject to income tax under Division 8A of Part III of the *Income Tax Assessment Act 1936*.

50-20 Finance

<i>Item</i>	<i>Exempt entity</i>
4.1	a friendly society (except a friendly society dispensary)

50-25 Government

<i>Item</i>	<i>Exempt entity</i>
5.1	(a) a municipal corporation; or (b) a local governing body
5.2	a public authority constituted under an Australian Law

Note: The ordinary and statutory income of a State or Territory body is exempt: see Division 1AB of Part III of the *Income Tax Assessment Act 1936*.

50-30 Health

<i>Item</i>	<i>Exempt entity</i>
6.1	Public hospital
6.2	Hospital carried on by a society or association (not carried on for the profit or gain of its individual members)
6.3	the following organisations registered for the purposes of the <i>National Health Act 1953</i> : (a) a medical benefits organisation; (b) a health benefits organisation; (c) a hospital benefits organisation (not carried on for the profit or gain of its individual members)

50-35 Mining

<i>Item</i>	<i>Exempt entity</i>
7.1	the Phosphate Mining Company of Christmas Island Limited (incorporated in the Australian Capital Territory)
7.2	The British Phosphate Commissioners Banaba Contingency Fund (established on 1 June 1981)

50-40 Primary and secondary resources, and tourism

<i>Item</i>	<i>Exempt entity</i>
8.1	A society or association established for the purpose of promoting the development of: (a) aviation; or (b) tourism

<i>Item</i>	<i>Exempt entity</i>
	(not carried on for the profit or gain of its individual members)
8.2	<p>A society or association established for the purpose of promoting the development of any of the following Australian resources:</p> <ul style="list-style-type: none"> (a) agricultural resources; (b) horticultural resources; (c) industrial resources; (d) manufacturing resources; (e) pastoral resources; (f) viticultural resources; (g) aquacultural resources; (h) fishing resources <p>(not carried on for the profit or gain of its individual members)</p>

50-45 Sports, culture, film and recreation

<i>Item</i>	<i>Exempt entity</i>
9.1	<p>a society, association or club established for the encouragement of:</p> <ul style="list-style-type: none"> (a) animal racing; or (b) art; or (c) a game or sport; or (d) literature; or (e) music
9.2	a society, association or club established for musical purposes
9.3	the Australian Film Finance Corporation Pty Limited (incorporated under the <i>Companies Act 1981</i> on 12 July 1988)

The law generally exempts from tax all income generated by these organisations provided that,

1. the organisation's main purpose or object is exempt and its actual activity is directed to these purposes;
2. the organisation is nonprofit (ie it does not distribute, and is constitutionally prohibited from distributing, its surplus to anyone or any purpose, other than its stated exempt objectives); and
3. the organisation has an appropriate dissolution clause which transfers any surplus to a similar tax exempt organisation, not its members or controllers.

Charitable bodies must also have attributes which are:

- the organisation has a physical presence in Australia and to the extent of that presence incurs its expenditure and pursues its objectives principally in Australia

OR

- the organisation is one referred to in Subdivision 30-15 ITAA 1997 (ie, a Deductible Gift Recipient)

OR

- the organisation is a prescribed institution which is located outside Australia and is exempt from income tax in its country of residence

OR

- that the organisation is a prescribed charitable or religious institution that has a physical presence in Australia, but which incurs its expenditure and pursues its objects principally outside Australia.

Gifts and government grants can be applied overseas without affecting the income status of the exempt organisation and is to be disregarded for the purpose of determining whether it incurs its expenditure and pursues its objects in Australia.

Australian taxation law also has a common law component which imports the doctrine of mutuality, which states that “a person cannot make a profit from themselves.”³¹ Income derived from trading with non-members only will be subject to taxation.

How charitable do charities have to be?

A trust expressed to be for both charitable and non-charitable purposes is invalid.³² However, the fact that a charitable institution has non-charitable purposes incidental or ancillary to its charitable purposes does not invalidate gifts to the institution.³³ This principle of trust law is also applied to determining the charity status of incorporated bodies and for taxation purposes. An institution is accepted as charitable if its dominant purpose is charitable.³⁴ Any non-charitable purposes of the institution must be no more than incidental or ancillary to this dominant purpose. Finding an institution’s sole or dominant purpose involves an objective weighing of all its features. They include its constitutive or governing documents, its activities, policies and plans, administration, finances, history and control, and any legislation governing its operation.³⁵

Neither the ATO draft taxation ruling nor *CharityPack* explain clearly what ancillary or incidental means, although an example used in *CharityPack* provides some insight.

³¹ *Bohemians Club v Acting FCT* (1918) 24 CLR 334.

³² Meagher, R. P. and W. M. C. Gummow. *Jacobs’ Law of Trusts in Australia*, 6th edition, Butterworths, Sydney, 1997, p.237. Some State legislation operates to save as charitable trusts that would otherwise be invalid because of mixed charitable and non-charitable purposes. The Acts are: *Charitable Trusts Act 1993* (NSW) s 23(1); *Property Law Act 1958* (Vic) s 131(2); *Trusts Act 1973* (Qld) s 104; *Trustee Act 1936* (SA) s 69A(1); *Trustees Act 1962* (WA) s 102(1); and *Variation of Trusts Act 1994* (Tas) s 4(3). As noted earlier, in Chapter 11 there is a question whether such legislation, dealing as it does with trusts, would apply to entities constituted as companies limited by guarantee or as associations. While the matter is not clear, the better view would seem to be that the legislation would apply.

³³ *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375; *Stratton v Simpson* (1970) 125 CLR 138.

³⁴ *Congregational Union of NSW v Thistlethwayte* (1952) 87 CLR 375 at 442 per Dixon CJ, McTiernan, Williams and Fullagar JJ and Draft Income Tax Ruling DR 1999/21.

³⁵ Australian Taxation Office (ATO) 1999, *Draft Taxation Ruling — Income tax and fringe benefits: charities*, TR 1999/D21, paras 103 and 111-112.

A religious congregation holds occasional sporting activities among its members. These activities are designed to advance and foster religion among the group. The religious congregation is a charity. The sporting activities are incidental to the religious purpose.³⁶

There has been some recent comment in Australia as to whether the decision should be made solely on the stated purposes found in the constituent documents or the activities of the organization.³⁷ The Charity Definition Inquiry recommended that the dominant purpose test should remain with incidental and ancillary purposes being permitted, provided that they are not ends in themselves or dominating the activities of a charity.³⁸ Determining the dominant purpose was to be based on the organisation's overriding purpose or objects together with a subsidiary examination of its activities.

Defining charitable class

The word “charitable” for the purposes of Australian Taxation and most other types of legislation has a restricted legal meaning, rather than its contemporary meaning of any generous or philanthropic behaviour. Australian law has closely followed the English case law, with only minor deviations. While the origins of the definition of charity date to the Statute of Elizabeth 1601 (43 Eliz. c 4), the case of *Commrs for Special Purposes of Income Tax v Pemsel* (1891) 3 TC 53 traditionally has been used as a basis for discussion of charitable purposes. This case inspired a charity classification comprising four classes:

- the relief of poverty;
- the advancement of education;
- the advancement of religion, and
- for other purposes beneficial to the community.

³⁶ ATO 2000, *CharityPack*, p.40.

³⁷ Report of the Inquiry into the Definition of Charities and Related Organisations, Chapter 12.

³⁸ Charity Definition Inquiry at p.107.

The Australian courts, like others in the British Commonwealth, have adopted two different, but complimentary approaches to deciding whether specific activities are in fact charitable. The first is to ascertain whether the purpose in question sufficiently resembles one of the original examples of charitable activities in the Statute of Elizabeth. For example, the provision of ‘sea banks’ was regarded as charitable in the Statute of Elizabeth and thus the provision of lifeboats is also considered charitable.³⁹ The second wider approach is to consider whether the particular purpose is ‘within the spirit and intendment of the statute’. This enables courts to expand the definition of charity to purposes that cannot be directly connected to one of the original matters in the Statute of Elizabeth.

Relief of poverty

The charitable class of relief of poverty will include not only relief of absolute destitution, but also the aged and impotent (physically and mentally weak, injured or temporarily or permanently incapacitated). Poor is regarded as a relative term and will stretch to being “unable to maintain a modest standard of living”.⁴⁰ The relief may take a direct form such as a gift of money or the provision of goods and services or indirectly such as the provision of accommodation for those who come from a distance to visit sick relatives in hospital or gifts to organisations having as their object to relieve the sick and the poor.⁴¹

Unlike the other heads of charity, the requirement of public benefit is not essential or greatly modified in the general law of charities which allows limited classes of beneficiaries such as poor relations or poor employees of a particular company.⁴²

³⁹ *Wison v Barnes* (1886) 38 Ch D 507; *Johnston v Swann* (1818) 3 Madd 457; *Thomas v Howell* (1874) LR 18 Eq 198.

⁴⁰ *Dingle v Turner* (1972) AC 601.

⁴¹ *Re White’s Will Trusts* [1951] 1 All ER 528.

⁴² *Re Scarisbrick* [1951] Ch 622 and *Dingle v Turner* (1972) AC 601.

Advancement of education

The definition of education for the purposes of the definition of charity has been given a wide meaning to include systematic instruction and training in knowledge beneficial to human kind. The activities of schools, universities, colleges and institutes will usually be acceptable. The definition also includes public art museums, libraries, student unions and learned societies.

Just increasing the sum of knowledge by research will not be charitable, as propagation of the knowledge through teaching or publication is required.⁴³ Frivolous subjects such as the study of football or racing form or the public exhibition of junk will generally not be regarded as educational.⁴⁴ Political propaganda masquerading as education⁴⁵ or cults or new age religions⁴⁶ will not fall within the class of education advancement.

Advancement of religion

For a purpose to be religious, there must be a body of persons whose beliefs and practices comprise:

- a belief in and worship of a supernatural Being, Thing or Principle; and
- acceptance of canons of conduct which give effect to the belief, but which do not offend against the ordinary laws.

These factors are drawn from the majority decision of the High Court in *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* 83 ATC 4652 (the Scientology case) and affirmed in Taxation Ruling 92/17. This would include the major religious Christian denominations such as Roman Catholic, Anglican and Uniting church as well as Islam,

⁴³ *Taylor v Taylor* (1910) 10 CLR 218.

⁴⁴ *Re Pinton* [1965] Ch 85.

⁴⁵ *Bonar Law Memorial Trust Ltd v IRC* (1933) 17 TC 508.

⁴⁶ *Cult Information Centre* [1992] Ch Com Rep 1-3.

Judaism and Buddhism. Neither atheist society nor freemasonry can be a charitable object, nor sects that are adverse to the very foundation of all religion and subversive of all morality.⁴⁷ A group of cloistered and contemplative nuns or monks are not charitable as they do not assist the general community, and so are not for the public benefit.⁴⁸

Religion may be advanced in a number of ways, some seemingly indirect. The building and repair of places of worship; promotion of worship (eg., provision of music, bell ringing, religious icons); education, training and support of clergy; and spread of the religion (eg, by books and missionary activities) are all considered to be advancing religion.

Purposes beneficial to the community

Not all purposes which benefit the community are regarded as charitable. For a purpose to be charitable under this head, it must be not only be of benefit to the public or a significant section of it, but it must also be within the spirit and intendment of the *Statute of Elizabeth* 1601. Specific purposes which fall within the head are:

- public works and services (eg the construction of public halls, bridges, community facilities and museums);
- protection of lives and property (eg rescue organisations, fire brigades, protection of historic buildings);
- preservation of public order (eg increased police efficiency);
- resettlement and rehabilitation (eg demobilised soldiers, refugees, disaster funds);
- care of youth (eg care of orphans, correctional youth homes);
- relief of the community from rates and taxes (eg fund for the payment of rates or taxes for the inhabitants of an area or to reduce the national debt);
- relief of prisoners; and
- protection or benefit of animals (eg animal refugees and protection societies).

⁴⁷ *Thorton v Howe* (1862) 31 Beav 14.

⁴⁸ *Gilmour v Coats* [1949] AC 426 as adopted in Australia by *Att.-Gen.(NSW) v Donnelly* (1957) 98 CLR 538.

Activities which can be characterised as political, seeking to promote a change in the existing law, reversal or maintenance of particular government policies are not charitable. An organisation with a main object and activity of abolishing vivisection of animals by legal and policy reform would not be charitable, despite protection of animals being in this head of charity.

The other area which can cause difficulty is the distinction between ‘sport’ which is not charitable and ‘the provision of public recreational facilities which improve the health of the community’. Sport played for dominantly competitive reasons or for amusement is not charitable. If sport is the vehicle for some other charitable purpose which is dominant, then the activity may be charitable. If educational, religious purposes or the promotion of general health are achieved through the vehicle of sport, then the activity may be charitable. For example, the YMCA’s dominant purpose once was the advancing of religion in young people and it used youth sport as one means of achieving this dominant object.⁴⁹

The Federal Government has recently considered the report of the Charity Definition Inquiry which was charged with examining the common law definition of charity in the light of current social expectations and providing options for enhancing the clarity and consistency of the existing definitions. The Report found that under the common law approach the meaning of charity can only be clarified or modernised through litigation and the Australian High Court had not received a case on such matters since 1974. The report suggested a legislative definition was required to provide more certainty as to the law and to bring it up to date. The Government has accepted this recommendation of legislating the definition of charity by identifying the broad headings based on the common law definition with indicative purposes under the broad headings. The Government’s press release and broad charitable headings is contained in the appendix to this paper.

⁴⁹ *YMCA of Melbourne v FCT* (1926 37 CLR 351).

Is there a requirement that charity help the needy?

There is no specific test in Australian law that requires that charitable institutions or funds help the ‘needy’, but it is a strong public perception that this is the role of charities. The closest legal requirement is that an essential condition for being a charitable institution or fund is that it is “for the public benefit”. At common law ‘public benefit’ must be:

- aimed at achieving a universal or common good, and
- must not be harmful to the public,

and,

- it is not limited to material benefits, but can include social, mental and spiritual benefits, and
- public is the general public or a significant section of it.⁵⁰ There must be there must be no personal relationship between the beneficiaries and any named person or persons.⁵¹

While the public benefit test applies across all four heads of charity, there is a general presumption that, prima facie, the element of public benefit is satisfied in the case of purposes falling under the first three heads of charity (‘relief of poverty’, ‘advancement of education’ and ‘advancement of religion’). For purposes falling under the fourth head (‘other purposes beneficial to the community’) the element of public benefit needs to be expressly demonstrated.

The charitable head of relief of poverty will include not only relief of absolute destitution, but also the aged and impotent (physically and mentally weak, injured or temporarily or

⁵⁰ Drawn from discussion in Picarda, H. *The Law and Practice Relating to Charities*, 3rd edition, Butterworths, London, 1999, pp.19-29; Ford, H. A. J., and W. A. Lee. *Principles of the Law of Trusts*, 2nd edition, The Law Book Company, Sydney, 1990, pp.829-833; and Dal Pont, G. *Charity Law in Australia and New Zealand*, Oxford University Press, Melbourne, 2000, pp.13-22.

⁵¹ A detailed discussion on this matter, including an analysis of problems associated with the application of the Compton/Oppenheim test, is provided in Chesterman, M. *Charities, Trusts and Social Welfare*, Weidenfeld and Nicolson, London, 1979, pp.155-157.

permanently incapacitated). Poor is regarded as a relative term and will stretch to being “unable to maintain a modest standard of living”⁵² or “persons who have to ‘go short’ in the ordinary acceptance of that term, due regard being had to their status in life and so forth”.⁵³

There are a number of anomalies in respect of “poor relations” and “poor employees” issues which are exempted from the public benefit test. A number of English judges have commented on the lack of underlying rationale for these provisions such as Jenkins LJ that “This exception cannot be accounted for by reference to any principle” and Harman LJ that “the poverty cases stick out like a sore thumb from the general rule”.⁵⁴

The other issue in relation to assisting the needy is that the provision of private schooling or access to medical care and facilities that are on a fee paying basis are often far above the reach of the general population let alone, the needy. Charging fees for services will not imperil charitable status unless the organization is primarily conducted for private gain.⁵⁵

The Charity Definition Inquiry affirmed that the definition of public benefit should continue, but also recommended that it be strengthened by requiring that the dominant purpose of a charitable organization should also be altruistic, include self help organizations where they had an open, non-discriminatory membership and abolish the poor relations anomaly.

How much income must a charity spend on its charitable programs (ie the payout required)?

It will be recalled that the Australian taxation legislation specifies that charitable bodies will either be “institutions or funds”. An institution is an establishment, organisation or

⁵² *Dingle v Turner* (1972) AC 601.

⁵³ *Re Coulthurst* [1951] Ch. 661 at 665.

⁵⁴ Dal Pont, p.121, citing Jenkins LJ in *Re Scarisbrick* [1951] 1 Ch 622 at 649 and Harman LJ in *Inland Revenue Commissioners v Educational Grants Association Ltd* [1967] 2 All ER 893 at 898.

⁵⁵ *Re Sutherland, Queensland Trustees Ltd v Att. Gen* [1954] QSR 99.

association advancing or promoting a charitable purpose and may include incorporated bodies. A fund is established either as a trust or under a will and mainly manages trust property and/or holds trust property to make distributions to other entities or persons. There are slightly different income distribution or expenditure requirements for each category, which will be dealt with in turn.

Charitable Institutions

An institution is accepted as charitable if its dominant purpose is charitable.⁵⁶ Any non-charitable purposes of the institution must be no more than incidental or ancillary to this dominant purpose. Finding an institution's sole or dominant purpose involves an objective weighing of all its features. They include its constitutive or governing documents, its activities, policies and plans, administration, finances, history and control, and any legislation governing its operation. This means in practice that charities earn unrelated business income and are not subjected to income tax upon it, provided that its dominant purpose is still charitable. The Industry Commission Report on Charitable Organisations in Australia concluded that,

“The Commission considers that, given the administrative complexity of trying to apply income tax to CSWOs [community service welfare organisation] and that an exemption provides little tangible assistance to them, there is no net benefit to be gained by introducing income taxation for CSWOs.”⁵⁷

For charitable institutions, there is no mandated amount of income that must be devoted to purely charitable purposes, the test being more comprehensive and income being only one feature of a number of factors to determine the dominant purpose of the organisation.

⁵⁶ *Congregational Union of NSW v Thistlethwayte* (1952) 87 CLR 375 at 442 per Dixon CJ, McTiernan, Williams and Fullagar JJ and Draft Income Tax Ruling DR 1999/21.

⁵⁷ Industry Commission, *op. cit.*, p.275.

Charitable Funds

Division 50-5 permits public charitable funds established by will or trust deed to be exempt from income tax. These funds are money or investments set aside and invested, the surplus income being capitalised, and are more commonly referred to as philanthropic trusts or foundations.⁵⁸ The income from such funds must be used solely for the ‘public charitable purposes’ for which the fund was established and are commonly referred to as ‘distributions’. The Australian Taxation Office (ATO) seeks to discourage unwarranted accumulations of income in the funds and requires an annual distribution of income annually.⁵⁹ Income Tax Ruling IT340 expresses the Commissioner of Taxation’s views on the application of the provisions and takes the position that a charitable fund must be applied for charitable purposes and excessive accumulation of capital is not for charitable purposes. Although no percentage of annual distribution is mentioned in the ruling, it is commonly recognised to be about 85% of annual income.⁶⁰ The ATO does permit some flexibility where circumstances warrant accumulation such as prevention of erosion of the capital base by inflation, need to accumulate to fund a very large project in the future or on the commencement of a charitable fund. The Industry Commission Report on Charitable Organizations⁶¹ after receiving submissions that accumulations were being restricted by ATO administration, recommended that,

The Australian Taxation Office should not impose restrictions on the accumulation of income by charitable trusts. If necessary, section 23(j) of the *Income Tax Assessment Act 1936* should be amended to allow charitable trusts to accumulate funds, provided the whole of the funds and any income derived from them are used for charitable

⁵⁸ *Associated Provident Funds Pty Ltd v Commissioner of Taxation* (Cth) 14 ATD 333.

⁵⁹ Refer Income Tax Ruling 340 and *Trustees, Executors and Agency Co Ltd v Acting FCT* (1917) 23 CLR 576.

⁶⁰ Industry Commission, op. cit., at p.250.

⁶¹ Industry Commission, op. cit., p.251.

purposes. Any specific statement in the trust deed in relation to funds accumulation should of course continue to apply.

There is a stricter approach taken by the ATO in relation to the recently legislated Prescribed Private Funds provisions. A prescribed private fund (PPF) is a fund established by will or trust instrument with:

- deductible gift recipient (**DGR**) status (that is, gifts to it are deductible to the donor);
- normally, income tax exempt status (that is, its income is exempt from income tax); and
- the ability to attract a variety of other Commonwealth, State and Territory tax and duty concessions.

There is no need for gifts to a PPF to be sought and received from the public and a PPF can be controlled by an individual, family or corporate group which is a relaxation of the more stringent public fund requirements. It is not a compulsory requirement for a PPF to only distribute to charities, but if grants can be made to recipients who are not charitable, the PPF will not be entitled to be endorsed as an Income Tax Exempt Charity and accordingly, not be exempt from tax on its income. Further, the PPF will be ineligible for other Commonwealth, State and Territory tax and duty concessions. For example, the PPF will not have an entitlement to cash refunds of franking credits attached to dividends received by it.

Generally, the income derived by a PPF in a particular year may be accumulated only to the extent necessary to maintain the real value of the capital of the PPF at the end of the previous year. The balance must be distributed.

The guidelines outline the Government policy with regard to accumulation of gifts by PPFs.⁶² While the guidelines state that the initial settled sum can be retained indefinitely,

⁶² Paragraphs 25-27.

this is unlikely to be of much practical benefit as the initial settled sums are normally of a nominal amount - they are not deductible to the donor as at the time the trust is established, the PPF is not approved as a Deductible Gift Recipient (DGR). All other accumulations of gifts, Government grants and any other voluntary transfers of property must be approved by the ATO. The ATO recognises the desirability of establishing a significant capital base and attachment C to the guidelines outlines four types of accumulation plans which have been approved by the ATO. Example 3 permits the accumulation of gifts to a \$40 million capital base. Where ongoing gifts are proposed, the ATO requires there to be some distribution of each gift that is made, normally in the year following the date of the gift. The normal requirement is a minimum of 5% or 10% of the amount of the gift on a one-off basis.

For example, if a donor proposes to give, \$100,000 to a PPF in the year the PPF is established, not less than \$5,000 must be distributed by the PPF by way of grant to DGRs on a one-off basis in the following year. The balance of \$95,000 can be retained indefinitely by the PPF.

With charitable funds there is a greater emphasis by the taxation authorities on spending income as an indication of whether it qualifies for income tax exemption as a charitable fund. The new Prescribed Public Fund provision in relation to distributions may be a signpost as to the direction of policy in this area.

The Charity Definition Inquiry recommended that commercial purposes or activities of charities that were incidental or subsidiary to a dominant charitable purpose and raised funds for the dominant purpose should be permitted.⁶³

⁶³ Charity Definition Inquiry, p.13.

How much unrelated commercial activity can a charity engage in without jeopardizing its exempt status?

Australian taxation law does not explicitly recognise the concept of ‘unrelated commercial activity’ and there is no taxation provision that would require income tax to be paid by an otherwise exempt charitable institution or fund on ‘unrelated business income’. The broad issue has been subject to a number of considerations by taxation policy review bodies over the years in cases dealing with income tax exemption for sporting bodies and has attracted popular media comment.

The Taxation Review Committee in 1975 endorsed the section 23 (predecessor to s 50-5 ITAA 1997) exemptions as appropriate but noted,

the committee considers that these institutions and funds should continue to be exempt from income tax, though it acknowledges that the exemption may have to be qualified if business activities are carried on which compete with the activities of commercial organisations.⁶⁴

The committee focussed on income tax exempt membership organisations competing with commercial operations such as sporting clubs. It was not clear as to how competition was to be defined, but it appeared not to include:

business activities directly related to the carrying out of the purpose of which the organisation was established and which gives it entitlement to exemption but not to other business income.⁶⁵

Most of the judicial comment on what is a dominant purpose of an exempt organisation and what is the role of unrelated business income in such a determination has arisen from

⁶⁴ Commonwealth of Australia, Taxation Review Committee, Full Report, 31 January 1975, The Government Printer of Australia, Canberra, 1976 at p.342.

⁶⁵ Ibid. at p.344.

sporting club cases. On the introduction of the expanded sporting income tax exemption provisions it appears that an assumption was made that a sporting club's entertainment, social activities and poker machine income would be taxed. The Treasurer stated,

Clubs, societies and associations will continue to be taxable where their activities go beyond the promotion or encouragement of sports or games, for example, where the provision of social facilities, entertainment and the like is more than incidental to sport promotion.⁶⁶

The provisions were estimated to cost less than one million dollars annually.⁶⁷ Cases after the statement have shown exempt sporting clubs that hold ten million in cash assets, generate over 4.5 million in profits a year from poker machines⁶⁸ or spend only six percent of their annual expenditure directly on their sporting activities⁶⁹ are not liable to be taxed on their income. The Commissioner was unsuccessful in a series of cases against sporting clubs with significant unrelated business income in claiming that a large percentage of unrelated business income meant that the exempt bodies' dominant purpose was no longer sport.⁷⁰

The 1995 Industry Commission Report on Charitable Organisations examined the effect of unrelated business activity by income tax exempt charitable organisations and found that many charitable organisations engaged in a number of fundraising activities that were not related to their core activities.⁷¹ They gave the examples of "general insurance, financial services, worm farms, recycled clothing, packaging, sheet metal products and

⁶⁶ Budget Statements 1989-90, op. cit., at p.4.21 and might be attributed to an incorrect application of the case of "The Waratahs" *Rugby Union Football Club v F.C.T.* 79 ATC 4337.

⁶⁷ Senator Robert Rae, Second Reading Speech of the Income Tax Laws Amendment Bill, 21 May 1990, Senate Hansard, at p.580.

⁶⁸ *Refer Tweed Heads Bowls Club v. FCT* 92 ATC 2087 and *Terranora Lakes Country Club Limited v. FCT* 93 ATC 4078.

⁶⁹ Case W114 (*Grand United Port Macquarie West Bowling Club v FCT*) 89 ATC 891.

⁷⁰ Some of the cases are *Terranora Lakes Country Club Ltd v FC of T* 93 ATC 4078; *St Marys Rugby League Club Limited v FC of T* 97 ATC 4528, Case X25, 90 ATC 251.

⁷¹ Industry Commission, op. cit., p.309.

sales of Christmas puddings.”⁷² The Commission came to the conclusion that “unrelated business income is a concept that is too difficult to define and too costly to enforce, and consequently the costs are likely to outweigh the benefits”.⁷³

The issue continues to draw popular media comment around the issue of unfair competition with for profit organisations and it appears the issue is growing with the blurring of the boundaries between sectors.

Conclusion

Australia’s definition of charity is on the brink of significant alteration, being only the second Commonwealth nation to move towards a statutory definition of charity.⁷⁴ The Federal Government has rejected the Charity Definition Inquiry’s recommendations to accompany any alteration in the definition with new administrative arrangements such as an independent administrative body or establishment of a permanent advisory panel.⁷⁵ This may be a fatal flaw in the reform of the definition of charity as the courts currently receive little opportunity to make new law on the definition because of various factors such as the expense of litigation and reluctance of donation seeking bodies to be exposed to adverse publicity through the judicial process.

Perhaps the key lies not only in the actual content and construction of the definition, but in how well the process of administering and refining the definition performs. A common law system without a stream of appropriately decided cases, a competent bar and charity definition aware populace may be no better than a statutory definition with a uninterested legislature, inept and inconsistent administration and an indifferent community sector.

⁷² Ibid.

⁷³ Industry Commission, *op. cit.*, p.316.

⁷⁴ The other country is Barbados – Charities Act 1980.

⁷⁵ Charity Definition Inquiry, p.18.

APPENDIX

Proposed Statutory Definition of Charity

The Commonwealth Treasurer - Press Release - Government Response to Charities Definition Inquiry [29/08/2002]

NO.049

GOVERNMENT RESPONSE TO CHARITIES DEFINITION INQUIRY

Today I am releasing the Government's response to the Report of the Inquiry into the Definition of Charities and Related Organisations.

As I noted when I released this Report in August 2001, the Inquiry has made a significant contribution in simplifying such a complex legal and administrative issue.

The Government has decided to enact a legislative definition of charity for the purpose of the administration of Commonwealth laws and to adopt a majority of the Inquiry's recommendations for the definition. While the Commonwealth's predominant requirement for a definition of a charity is for the purposes of deciding which organisations are eligible for tax relief, the definition will apply for all Commonwealth legislation. I will be writing to each of the State and Territory Treasurers to gauge their interest in achieving harmonisation of laws defining charity.

The legislative definition of a charity will closely follow the definition that has been determined by over four centuries of common law, but will provide greater clarity and transparency for charities. The details of the definition are attached. It will explicitly allow not-for-profit child care available to the public, self-help bodies that have open and non-discriminatory membership and closed or contemplative religious orders that offer prayerful intervention for the public, to be charities. It will provide certainty to those

organisations operating in the sector while still providing the flexibility required to ensure the definition can adapt to the changing needs of society.

I will ask the Board of Taxation to consult widely with the charitable sector on an exposure draft of the legislation. The legislation is expected to begin on 1 July 2004.

The Government has decided to establish a new category of deductible gift recipient for charities whose principal activities promote the prevention and control of harmful and abusive behaviour among humans. This will assist these charities in attracting public support for their activities. The new category will apply from 1 July 2003.

To ensure that there is no change to the taxation treatment of public hospitals as a result of these decisions, the Government has also decided that fringe benefits provided to employees whose duties are exclusively performed in, or in connection with, a public hospital will continue to be subject to the \$17,000 capped fringe benefits tax (FBT) exemption, whether or not those hospitals are public benevolent institutions.

Charities and other not-for-profit organisations are pivotal members of society. In order for them to be able to continue to contribute fully, they need to be able to participate in a wide range of activities including, at times, commercial activities. The Inquiry recommends that commercial purposes should not deny charitable status where such purposes further, or are in aid of, the dominant charitable purposes or where they are incidental or ancillary to the dominant charitable purposes. The Government agrees with this recommendation, but is concerned to ensure that the taxation concessions provided to charities are not abused. The Government has therefore decided that from 1 July 2004, charities, public benevolent institutions and health promotion charities will be required to be endorsed by the Australian Taxation Office in order to access all relevant taxation concessions. Depending on the character of the charity, these concessions are the income tax exemption as a charity, refundable imputation credits, deductible gift recipient status, the FBT rebate, the \$30,000 capped FBT exemption and GST concessions.

I am also announcing today that from 1 July 2004, an organisation endorsed to access these tax concessions will have its status attached to its Australian Business Number and be able to be publicly accessed through the Australian Business Register. This will allow greater scrutiny of the use of taxation concessions by charities and improve public confidence in the provision of taxation support to the charitable sector.

The other changes are:

- The Income Tax Assessment Act 1997 to be amended with effect from 1 July 2003, to allow future additions to the list of organisations specifically named as deductible gift recipients to be prescribed by regulation rather than requiring a legislative amendment. This will allow continued scrutiny by Parliament but will make the process less administratively costly and more timely.
- Entities established in perpetuity by the Parliament to be allowed to be endorsed as deductible gift recipients from 1 July 2003.
 - They are currently denied endorsement because they cannot meet the requirement that their constituent documents or governing rules require that any surplus assets be transferred to another deductible gift recipient if they are wound up.
- The GST law to be amended to ensure that the current GST concessions for gift deductible entities apply only to deductible gift recipients and not to any larger, non-charitable entity that operates the deductible gift recipient.
 - This will ensure that non-charitable entities are not able to access the GST charity concessions and gives effect to the original policy intent of the law.

The cost to revenue of the Government's response is \$2 million in 2004-05 and \$5 million in 2005-06 and 2006-07.

I would like to again thank the Inquiry members for their work in producing the Report. The members of the Inquiry were the Hon. Ian Sheppard AO QC (chair), Mr Robert Fitzgerald AM and Mr David Gonski.

29 August 2002

CANBERRA

Contact: Niki Savva

02 6277 7340

ATTACHMENT A

Elements of the definition of charity

(1) A charity is an entity (other than an entity excluded by paragraph 9) that is not-for-profit and has a dominant purpose or purposes that are charitable and, subject to paragraph 7, for the public benefit.

(2) In addition:

(a) where the entity has other purposes, those purposes must further, or be in aid of, the dominant purpose or purposes, or be ancillary or incidental to the dominant purpose or purposes; and

(b) the entity must have activities that further, or be in aid of, its charitable purpose or purposes; and

(c) the entity must not have purposes, or engage in activities, that are illegal; and

(d) the entity must not have a dominant purpose that is:

(i) advocating a political party or cause; or

(ii) supporting a candidate for political office; or

(iii) attempting to change the law or government policy.

Charitable purposes

(3) Charitable purposes means the following:

(a) the advancement of health;

(b) the advancement of education;

(c) the advancement of social and community welfare, including without limitation, the care, support and protection of children and young people, including the provision of child care services;

- (d) the advancement of religion;
- (e) the advancement of culture;
- (f) the advancement of the natural environment;
- (g) other purposes beneficial to the community.

(4) Advancement is taken to include protection, maintenance, support, research, improvement or enhancement.

(5) In determining whether an entity has the purpose of the advancement of religion, regard is to be had to the principles established by the High Court in *Church of New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120.

Public benefit

(6) To be for the public benefit, a purpose must:

- (a) be aimed at achieving a universal or common good; and
- (b) have practical utility; and
- (c) be directed to the benefit of the general community or a sufficient section of the community.

(7) The following entities do not have to have a dominant purpose or purposes that are for the public benefit:

- (a) open and non-discriminatory self-help groups that have open and non-discriminatory membership;
- (b) closed or contemplative religious orders that regularly undertake prayerful intervention at the request of the public.

Open and non-discriminatory self-help group

(8) An open and non-discriminatory self-help group is a group of individuals where:

- (a) the group is established for the purpose of assisting individuals affected by a particular disadvantage, discrimination or need that is not being met; and
- (b) the group is made up of, and controlled by, individuals affected by the particular disadvantage, discrimination or need that is not being met; and
- (c) any membership criteria relate to the purpose of the group; and
- (d) membership of the group is open to any individual who satisfies criteria referred to in paragraph (c).

Entities

(9) The following are excluded from being charities:

- (a) an individual;
- (b) a partnership;
- (c) a political party;
- (d) a superannuation fund;
- (e) the Commonwealth, a State or Territory or a body controlled by the Commonwealth or a State or Territory;
- (f) a foreign government or a body controlled by a foreign government.

(10) For the purposes of paragraph 1, entity includes:

- (a) a body corporate; and
- (b) a corporation sole; and
- (c) any association or body of persons whether incorporated or not; and
- (d) a trust.

Not-for-profit

(11) An entity is taken to be not-for-profit if and only if:

- (a) it is not carried on for the profit or gain of particular persons; and
- (b) it is prevented, either by its constituent documents or by operation of law, from distributing its assets for the benefit of particular persons either while it is operating or upon winding up.