SUBMISSION TO THE BOARD OF TAXATION

Charities Bill 2003

The Institute of Chartered Accountants in Australia

September 2003

1. GENERAL COMMENTS

The Institute of Chartered Accountants in Australia ("ICAA") welcomes the opportunity to provide comments to the Board of Taxation regarding the Exposure Draft (ED) of the *Charities Bill 2003.*

The ICAA, as the leading professional accounting organisation in Australia, represents some 38,000 members in public practice, commerce, academia, government and the investment community. Our members are advisers to businesses at all levels, from small and medium sized businesses to the largest global corporations operating in Australia.

We believe the introduction of the *Charities Bill 2003* will provide greater clarity to entities wishing to assess whether they are charities in relation to the various benefits that are available to such entities. Specifically, the ICAA believes that this Bill will allow entities to have a greater clarity when assessing whether they can register as deductible gift recipients under the Income Tax Assessment Act 1997

Further the ICAA believe that the three additions to the common law definition of a charity, being:

- entities that provide non profit child care to the public;
- open and non discriminatory self help groups; and
- closed and contemplative religious orders that provide prayerful support;

are appropriate and valuable additions to the common law definition of a charity.

1.1 ICAA's Concerns

However, the ICAA is concerned that *Charities Bill 2003* is drafted in such a way that certain organisations that currently benefit from being a charity based on the common law definition, may not fall within the definition of what is a charity under this new Bill. In these cases, we see no underlying policy behind these entities being excluded from the definition of a charity, can find no argument presented by the government as to why these entities should be excluded from the definition of a charity and believe that the Bill should be changed to accommodate these entities.

Additionally, as one of the main purposes of the *Charities Bill 2003* is to provide greater clarity as to what is a charity, we believe there are areas of the Bill that could be further expanded to provide greater clarity as to when an entity will be a charity.

Both of these issues are discussed below.

All legislative references in the submission are to the *Charities Bill 2003* unless otherwise stated.

2. SPECIFIC CONCERNS

2.1 What if there are two charitable purposes in the one entity?

Subsection 4(1)(c) states that to be a charity the entity must not "engage in activities that do not further, or are not in aid of, its dominant purpose". This will lead to inequitable consequences where an entity has two purposes that are both charitable but are in no way related.

If an entity has two charitable purposes, then based on the specific facts, one of the two charitable purposes will be the dominant purpose. If the other purpose, that is not the dominant purpose, does not further the dominant purpose and is not in aid of the dominant purpose, even though it is in itself a charitable purpose, the entity cannot be a charity pursuant to section 4.

For example:

> *Homeless Care is a non-profit organisation that operates a homeless shelter. It decides to additionally provide education services to underprivileged children. As a matter of fact, the dominant purpose is to provide support to the homeless. The provisions of the education services to underprivileged children do not further or aid this dominant purpose and so the organisation will not fall within the definition of a charity.*

Most major welfare organisations in Australia that have a range of charitable purposes provided through a series of disparate activities will fall in the same category as the example above and so will lose the charitable status they currently have.

Alternative argument

The only alternative argument is to interpret the dominant purpose of these organisations to cover all charitable activities undertaken by the entity. This would involve interpreting the dominant purpose in the example above as something as broad as "helping people". However section 6 of the Bill implies that it is possible for an entity to have more than one purpose that is a charitable purpose. Therefore such an interpretation is not possible.

2.2 Other activities that do not further or aid the dominant purpose

As mentioned above, subsection 4(1)(c) states that to be a charity the entity must not "engage in activities that do not further, or are not in aid of, its dominant purpose". This statement appears to be absolute, in that it requires all activities undertaken by the entity to relate to the dominant purpose. Further, this statement does not assist in understanding how far the concept of furthering or aiding the dominant purpose can be taken.

From the above, is it true that the smallest activity that does not further or aid the dominant purpose will disqualify an entity from being a charity? On a literal reading of the section this would be the case.

For example, will the provision of a staff Christmas party mean that the entity is not a charity as it does not further or aid the dominant purpose or will the benefit to staff morale that eventuates from the party be in aid of the dominant purpose? If an entity pays for the husband of the Chief Executive Officer to travel with her while on business, can it be said that this further or aids the dominant purpose of the entity?

The explanatory memorandum does not provide any further guidance to assist in the interpretation of this subsection. Without such guidance, entities will be left without clarity as to whether they are a charity. Further almost every charity will undertake activities of this nature and so it would be preferable if guidance were given on this matter in either the legislation or the explanatory memorandum.

If the provision is to be read in a way that these standard activities stop an entity from being a charity, then the Bill will need to be amended or it will greatly limit which entities can be charities.

2.3 Open and non-discriminatory self-help groups

The definition of what is an "open and non-discriminatory self-help group" includes at subsection 9(c) that the group must be "made up of, and controlled by, individuals who are affected by the disadvantage, discrimination or need". However, this limitation will mean that many self help groups that should be able to take advantage of the benefits of being a charity will not be able to.

What extent can the word "affected" in subsection 9(c) be taken to? Can the self-help group include family and friends of those who are disadvantaged, discriminated or in need? There will be many cases that a self-help group is open to those who are not affected by the disadvantage, discrimination or need, but have either the want to assist those who are, or have expertise that could be of help to those who are.

Further, there will be situations where it is inappropriate, based on the disadvantage, discrimination or need for the member to control the group.

For example:

A self-help group is established to allow those who have a mental incapacity to meet and understand that there are others that have the same restricted mental capacity. This group is organised and run by a group of specialists who are not related to those who have a mental incapacity. This group will not fall within the definition of a self-help group in section 9 as the group is not controlled by individuals who are affected by the disadvantage. Actually, due to the disadvantage it is not possible to expect these individuals to control the self- help group.

2.4 Activities involving civil disobedience

Subsection 4(1)(d) states that an entity is not a charity if it has a "disqualifying purpose". Subsection 8(1) states that the purpose of engaging in activities that are unlawful is a disqualifying purpose. Again the breath of the word "unlawful" and the absolute nature of the exclusion will mean that entities that are current charities may not be so under the Bill.

Does the above mean that an entity that undertakes an isolated form of civil disobedience to achieve a charitable purpose cannot be a charity? For example:

An entity wants to advance the natural environment and believes that this can be done by a series of activities including one blockading the entrance of a polluting company and putting a banner on the company's buildings encouraging greater awareness of what this company is doing without the company's permission. Both of these are unlawful acts and so this entity will have a disqualifying purpose and cannot be a charity.

Many current charities use a form of civil disobedience so it is important to understand where the term "unlawful" will apply.

This could be taken to an extreme situation. Would an organisation that organises a fund raising raffle for a charitable purpose but does not get prior permission from the appropriate authority not be able to be a charity as it has undertaken an unlawful act?

Alternative argument

The alternative argument is that section 8(1) states that purpose of engaging in activities that are unlawful is a disqualifying purpose and so it is not important what the activities are but rather what was the underlying purpose of the activity. Therefore, if an organisation attempts to stop nuclear warships from entering a harbour by placing themselves in front of it, the purpose was to protect the environment, not to undertake an unlawful act.

However this is difficult to accept as if the unlawful activities were not motivated by a charitable purpose then the entity would not be a charity under section 4(1)(c).

3. PROVIDING GREATER CLARITY

As mentioned above, the ED provides greater clarity for entities wanting to assess if they fall within the definition of a charity. However, we believe that there are areas in which the ED could easily provide further clarity, especially in areas of current concern. These are discussed below.

3.1 Charities making political comment

Section 8 states that if an entity undertakes activities for the purpose of advocating a political party or cause or attempting to change the law or government policy and this purpose is more than ancillary or incidental to the charitable purposes of the entity, the entity will not be able to be a charity. Further, the explanatory memorandum states "[ordinarily, representing to Government, from time to time, the interests of those the entity seeks to benefit would be seen as incidental and in aid of the dominant purpose of the charity."

There has been political and media comment regarding the ability of an entity to undertake political advocacy without compromising its eligibility to be a charity. While section 8 appears to be an accurate codification of the current law, there has been confusion as to its application. Therefore it may be appropriate to include examples or clarifying notes in the legislation. These could take the form of the comments in the explanatory memorandum that are quoted above. Further, an example or note on what is ancillary may be of assistance.

3.2 Public benefit where a relationship exists

The definition of what is a public benefit in section 7 could include the comments in the explanatory memorandum at paragraph 1.39 such that a public benefit does not exist where there is a relationship between the donor and the beneficiaries (including either a family or an employment relationship). This would codify a long standing principle of what is a public benefit, rather than leaving it less accessible in the explanatory memorandum and case law.

3.3 Government control

The section 3 definitions could include provisions as to what is "government control" and how it relates to whether an entity can be a charity. This has been an area of recent case law (see Mines Rescue Board of New South Wales v Commissioner of Taxation 2000 FCA 1162) and clarity in this area would be a useful addition to the Bill.

The comments in the explanatory memorandum at paragraph 1.22 could be used as a non-exclusive list of the factors that assist in deciding if an entity is controlled by the government.

3.4 Providing salary to employees

For an entity to be treated as not for profit under section 5(1), the entity cannot act for the profit or gain of any person and cannot distribute its profits or assets to its owners or members, or to any other person, either while it is operating or upon winding up. The explanatory memorandum at paragraph 1.27 explains that an entity will not breach this

section where there are “reasonable payment of wages or allowances to employees, the reimbursement of expenses, payment for services and similar payments”

Such a statement in section 5 would add to the clarity the ED provides.

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