

MAKINSON & d'APICE

— L A W Y E R S —

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The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Definition of "Charity"

We are a law firm based in Sydney which has a proud history of having provided professional advice to the Charities and Not-For-Profit (NFP) sector since the firm's inception in 1859.

We act for a large number of Church bodies, community groups, welfare organisations and others involved in the NFP sector.

As you are aware, the current definition of "charity" is based on the Statute of Charitable Uses enacted in the English Parliament in 1601 and its interpretation over the ensuing 400 odd years by English and Australian courts.

Lord Macnaghten in *Pemsel's* case stated what have since commonly been accepted as the four categories of charity:

1. the relief of poverty;
2. the advancement of education;
3. the advancement of religion; and
4. other purposes beneficial to the community not falling into any of the preceding categories.

The fourth of these categories is understandably the one most difficult to interpret as it is a dynamic concept referable to matters existing at the time that the status of an organisation is being considered.

There have been a number of cases both in England and Australia over these many years which have further refined the definition of charity.

Whilst the Government is contending that there is a need for a statutory definition as the current definition is unclear and confusing, it is our view that the considerable body of law that has built up around the definition of "charity" offers sufficient clarity and any new definition will result in there being winners and losers but, more particularly, in greater uncertainty as the expressions and concepts in any new legislation will be tested in the courts, without doubt.

It is our view that the current definition is sufficiently clear and we foresee significant dispute and litigation over interpretation of any "public benefit" concept.

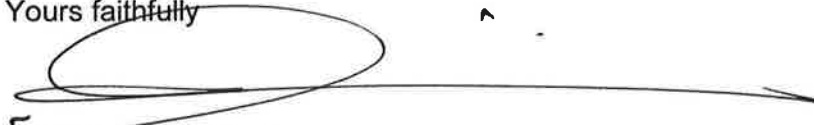
However, noting that the Government is committed to the introduction of a statutory definition, we offer the following observations and concerns:

- We are concerned that many more organisations seeking charitable status may now be required to demonstrate public benefit. This has been an issue of significant controversy and litigation in the United Kingdom where there is such a requirement. Under the current law in Australia, there is a presumption that an organisation established for the promotion of education or religion or for the relief of poverty is for the public benefit. Under the current law, the onus is on the Australian Taxation Office (or the ACNC after 1 July 2012) to rebut that presumption. This rebuttable presumption is, in our opinion, important and should be maintained.
- The proposal that the purpose of a charity must be exclusively charitable could be dangerous and it is hard to see how such a provision would sit comfortably with the proposed Unrelated Business Income Tax proposal. A dominant purpose only should be required. Activities which are incidental or ancillary or for the purposes of promoting the dominant charitable purposes of a charity should be acceptable.
- The entitlement of peak bodies (which support other charitable organisations) to be endorsed themselves as charitable organisations needs to be protected. Where their purposes and activities support charitable purposes then they should be entitled to endorsement as a charity, even though they may not deal directly with members of the public.
- The position of companies controlled by exempt entities including those which provide infrastructure support to charities need to be protected and their entitlement to endorsement as charities continued. The principles in Taxation Ruling TR2005/22 should be incorporated into the definition.
- The concept of "public benefit" should be defined, unlike in the UK situation, and it should be defined broadly. Otherwise, compliance costs in demonstrating that charities provide a public benefit may be significant.
- Suggestions that an organisation that has been approved as a charity will be at risk of losing its status if it has caused significant harm or detriment or engaged in illegal activities could have unforeseen consequences. In many charitable organisations there are unfortunately people who have been involved in illegal activities (of course, unauthorised by the charity). Such unauthorised activities should not put at risk the endorsement of the charity.



- Engagement in limited political activities should not disentitle a charity to endorsement. Consistent with the *Aid/Watch* decision, generation of public debate concerning matters arising under one of the heads of charity should be acceptable and should not disentitle an organisation to be endorsed as a charity.

Yours faithfully

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Makinson & d'Apice