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**SUBMISSION ON THE CONSULTATION PAPER
"A DEFINITION OF CHARITY"**

This submission is made by The Ian Potter Foundation. It addresses the following Consultation Questions:

15. In the light of the *Central Bayside* decision is the existing definition of 'governmental body' in the *Charities Bill 2003* adequate?
18. What changes are required in the *Charities Bill 2003* and other Commonwealth, State and Territory laws to achieve a harmonized definition of charity?

The Ian Potter Foundation is a public ancillary fund established under Victorian law. In making grants to government-controlled or government-influenced bodies, the Foundation found that grants to art galleries, botanical gardens, museums, hospitals and the like were prevented by the High Court's decision in the *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*. It therefore sought the assistance of the Victorian Government to amend the law to overcome this problem. The Victorian Government agreed, and the *Charities Act 1978* was amended by the insertion of Part 1B to empower the trustees of charitable trusts to make gifts to DGRs where the recipient would have been a charity but for a connection with government. As the Consultation Paper mentions in Example 1 of paragraph 44, Victoria's lead in re-enabling gifts to be made to entities with a government nexus has been followed in other jurisdictions.

The Foundation submits that, broadly speaking, the Victorian pattern should be followed in the proposed Commonwealth legislation.

It has not been practical for a full submission on this matter to be made before the deadline set for submissions. Accordingly we would ask you to permit us to follow up with the full submission shortly.

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CEO

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9 March 2012

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By email: NFPReform@treasury.gov.au

Dear Mr Leggett

**ADDENDUM TO SUBMISSION BY THE IAN POTTER FOUNDATION
ON THE CONSULTATION PAPER "A DEFINITION OF CHARITY"**

This is the supplementary material foreshadowed in the submission made by The Ian Potter Foundation on 8 December 2011. We apologise for the delay in furnishing this material, but, as you will appreciate, it has been necessary to research the matter very thoroughly and to obtain the views of a number of people before submitting it to you.

For ease of reference, the material in our original submission is restated in this document.

At the outset we would say that, in general, we endorse the very comprehensive submission by Philanthropy Australia. Accordingly, this submission addresses only a limited number of the Consultation Questions.

Instead of merely describing our proposed reforms in general terms, in most instances we have found it more meaningful to formulate specific changes to the wording, and even to the structure, of the 2003 bill. The new statutory language that we are proposing will be found in Attachments 1 and 2, and also within text boxes throughout the body of this submission.

If you would like to discuss any aspect of this submission, please do not hesitate to ring me directly on (03) 5975 2662 or email fnel6313@bigpond.net.au

Yours sincerely

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PART A – GOVERNMENT-CONNECTED BODIES

This Part of the submission responds to Consultation Question 15:

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

The answer to this question is definitely negative.

1. BACKGROUND

The Ian Potter Foundation is a public ancillary fund established under Victorian law. We have made grants amounting to many millions of dollars to government-controlled or government-influenced bodies, both Commonwealth and State, and our prime concern is that nothing in the new Commonwealth legislation should impede the making of grants to such government-connected bodies.

The Foundation found that some grants to art galleries, botanical gardens, museums, hospitals and the like were being prevented by the legal principles applied by the High Court in *Central Bayside General Practice Association Ltd v. Commissioner of State Revenue* ("Central Bayside") by reason of the grant applicant's connection with government. It was, of course, in everyone's interests that charitable grants to major public facilities should not be inhibited by the rule that prevented some government-connected bodies from being classed as charities, however charitable in nature their purposes may be. We therefore sought the assistance of the Victorian Government to overcome this obstacle by amending Victorian law, under which our own philanthropic trust is constituted. The Victorian Government agreed, and the *Charities Act 1978* was amended by the insertion of sections 7J and 7K to empower trustees of charitable trusts to make grants to recipient bodies which would have been classed as charities but for having a connection with government.

The Victorian model was the pioneer for legislation in this field. It deliberately adopted a minimalist approach in order to achieve its objective politically and enabling charitable trusts (including ancillary funds, whether public or private) to make grants to bodies with a government connection, even though the grantee was deprived of charitable status because of its government connection. As the Consultation Paper notes in Example 1 under paragraph 44, Victoria's lead has been followed in other jurisdictions, but the ambit has been widened so as to deem charitable grants by charitable trusts to any deductible gift recipient.

However, neither the Victorian nor the NSW model alters the legal classification of the government-connected donee of the grant as a non-charitable body. We completely agree with Philanthropy Australia's concerns that there are no clear rules or criteria to determine whether a government-connected organization is indeed charitable, and that this obscurity is a significant source of uncertainty. These problems are elaborated below.

2. WHAT IS THE OBJECTIVE OF THE NEW STATUTORY DEFINITION OF CHARITY?

The Consultation Paper does not make it clear whether the objective of providing a statutory definition is merely to restate, perhaps more clearly, the existing Australian common law, or whether the intention is to change the law.

In *Central Bayside* Kirby J. said: "I will call attention, as others have done in the past, to unsatisfactory features of the general law on charities". As we understand, the basic purpose of the proposed legislation is to reform the law of charities by removing uncertainties and to formulate a new test that will enable the ACNC to apply simpler and clearer rules to determine whether bodies are or are not charitable.

If, as a matter of policy, a State or Territory government cannot accept the consequence of the Commonwealth's reform, then it can amend its own taxation legislation to achieve the desired fiscal result as part of the "harmonization" process foreshadowed.

We therefore proceed on the basis that a limited measure of reform in the law is highly desirable, particularly in the light of what happened to Central Bayside.

3. WHAT DID CENTRAL BAYSIDE DECIDE?

One must first determine what it was that the High Court really did decide, and, more particularly, what it did not decide, in the *Central Bayside* case. While the High Court judges were unanimous in finding that the Central Bayside company was a charitable body, and, as such, was exempt from State payroll tax, the majority based their decision on the precise facts of *Central Bayside's* situation rather than on the principles of law that should be applied to those facts.

The Commissioner claimed that the Central Bayside company's purposes were not charitable because its services were provided in substance at the expense of the Federal Government and, most importantly, were provided as an integrated part of a scheme of national health management presided over by the Commonwealth. The Commissioner claimed that the company was too close to being an arm of government or a part of the bureaucracy to be charitable.

Unfortunately in *Central Bayside* the High Court did not reopen, as it could well have done, the question whether or not being a part of a government is a circumstance that debars an entity from being classed as a charitable body. The judgement of the majority dismisses this basic legal issue in a mere footnote:

15 No counsel advanced argument to suggest that Dean J had been wrong in holding in In re Cain (decd); The National Trustees Executors and Agency Co of Australasia Ltd v Jeffrey [1950] VLR 382 at 387 that "a gift for carrying on the ordinary activities of a Government department pursuant to a statute ... is not a gift for charitable purposes, even if the activities are such that if carried on by private persons they would be charitable".

Further, the High Court did not review the dubious question of principle whether a body which is not part of government and whose objects are of a charitable character can have a connection with government that would deprive the body of its charitable status. In para. 48 of the majority judgement, the High Court expressly refused to rule on Central Bayside's contention that a body that has purposes of a charitable nature will be a charitable body "even if it is subject to substantial or complete government control". The majority judgement states that it was "undesirable and unnecessary" for the Court to decide this question. With due respect, a decision on that subject was in fact highly desirable in order to clarify this obscure and highly contentious aspect of the law. As Kirby J pointed out in paragraphs 135-142 of his judgement, the concept of government connection defeating charitable status is not widely applied in other common law jurisdictions.

Reform is necessary to enable those Australian charities that have some governmental nexus to know whether they are liable to lose their charitable status because of that nexus. If nothing were to be done, it is by no means inconceivable that some other body with charitable objects might have to follow Central Bayside through another set of five expensive and time-consuming appeal processes to establish that it has charitable status. Fortunately the creation of a suitable statutory definition in the proposed *Charities Act* could avoid, or at least materially reduce, uncertainty in relation to Commonwealth legislation, and if effectively made applicable to States and Territories, could reduce uncertainty nationally.

In the result, the High Court held that the Court of Appeal had erred. However the majority judgement of the High Court makes it clear in paras. 42 – 44, that the errors that caused the High Court to overturn the Court of Appeal's decision that Central Bayside was not a charity were not the Court of Appeal's findings as to the proper legal test to be applied to determine whether charitable status is negated by a governmental nexus, but, rather, whether the particular facts in the Central Bayside company's situation brought about that result. Accordingly, the current state of the law is the test formulated in the judgement of Chernov AJA in the Court of Appeal, the legal basis for which the High Court declined to examine, and, apart from Justices Kirby and Callinan, did not even criticize.

4. CATEGORIES OF CONNECTION WITH GOVERNMENT

In *Central Bayside* Chernov AJA said that the test to be applied to determine the charitable or non-charitable status of government-connected bodies is:

"whether the activities of the appellant...are in reality the work or function of government such as to deny it the status of a charity."

He held that the primary factors to decide whether the body was performing a function of government include the following

- (a) *"the degree of government control over the appointment of the body's board or directors;*
- (b) *whether it was created by statute or otherwise under the aegis of government;*
- (c) *the extent to which government provides funding for the organization and controls its expenditure;*
- (d) *the extent to which government can prescribe effectively the level or standard of performance that the organization is required to achieve;*
- (e) *whether government has effectively assumed the responsibility for the services in question."*

[alphabetical paragraph identification has been inserted for ease of reference]

It is evident that all of the factors that Chernov AJA said have to be taken into account are vague and imprecise, and therefore incapable of leading to an obviously right answer.

Accordingly, under the present Australian common law which culminated in the decisions in the *Central Bayside* case, there are three basic categories of bodies with a connection to Australian governments that may defeat a charitable body's charitable status:

- Category 1 - a government;
- Category 2 - a government-controlled body, i.e. a body that does not form part of government but is controlled by government; and
- Category 3 - a government-connected body, i.e. a body that does not form part of government and is not controlled by government, but which performs the work or function of government or is required to implement government policy.

Category 3, being a body that performs a function of government although not part of the government, is the category that was the subject of dispute in *Central Bayside*. The Central Bayside company had to go through the laborious and expensive process of appeals, firstly to the ATO, secondly to VCAT, thirdly to a single judge of the Victorian Supreme Court, fourthly to the Victorian Court of Appeal, and fifthly to the High Court, with three of the tribunals finding the company to be non-charitable and one finding it to be charitable. This laborious, time consuming and expensive process of dispute resolution is sufficient to indicate the difficulty and complexity of applying Category 3, and the unreality of such a vague concept being set up as the touchstone to determine whether a not-for-profit body with charitable objectives should be deprived of its charitable status.

5. THE SOLUTION

Like Philanthropy Australia we believe that now is the time for the Government to do what the High Court failed to do, namely to cut the Gordian knot and provide a clear line of demarcation between those government-connected bodies that have charitable status and those that do not. This line has in fact already been established by the Commonwealth in the definition of "government entity" in section 995-1 of the *Income Tax Assessment Act 1997*, which in turn refers over to the definition of "government entities" in section 41 of *A New Tax System (Australian Business Number) Act 1999*. Government entities under those definitions are the "real" government bodies. Category 2 bodies, and the companies, incorporated associations, unincorporated associations and trusts in Category 3 would all fall outside that definition of "government entity", and only "real" government bodies would be deprived of charity status because of their governmental nature. If this test had been adopted before the *Central Bayside* case arose, then there would have been no question of the company's charitable status and no litigation.

The ACNC's obligation to determine charitable status for the purpose of registering not-for-profit bodies would be simplified, and therefore expedited, by eliminating the need for exhaustive factual inquiries into the degrees of government control and governmental function. The ambit for appeals from the ACNC's decision on registrations of Category 3 bodies should be greatly reduced.

This reform would also, as mentioned, bring Australian law more into line with that of other common law jurisdictions in relation to government connection.

6. DGR-ENDORSED GOVERNMENT BODIES

Before leaving our consideration of government bodies, there is one further anomaly to be addressed, namely, that of "real" government bodies that the government itself treats as being of a charitable nature. For example, the National Portrait Gallery has no separate legal existence. It is a function of a Commonwealth Government Department. The function is of a charitable character. It collects donations from the public to augment its collection.

The test to distinguish such anomalies from "real" non-charitable government functions does not have to be worked out – it is already in place. For example, in the case of the National Portrait Gallery, firstly it is a departmental function of the kind described in para. (e) of the definition of "government entity" in section 41 of *A New Tax System (Australian Business Number) Act 1999* - see Annexure 3. This means that it is an organisation that can be separately identified by reference to the nature of its functions. Secondly, the National Portrait Gallery has been endorsed by the ATO as a deductible gift recipient. These two factors are set out in our proposed definition of DGR-endorsed government body in Annexure 1 to this submission and its purposes would therefore be charitable purposes under paragraph 5(1)(q) of Annexure 2.

7. IMPLEMENTATION OF THE REFORMS RE GOVERNMENT CONNECTED BODIES

The above treatment of government-connected bodies would be implemented as follows:

- There would be new and amended definitions as shown in Annexure 1 to this submission.
- "Real" government bodies other than DGR-endorsed government bodies would be made non-charitable in an amended paragraph 4(1)(f) of the bill:

Para. 4(1)(f)

Amend to read:

(f) is not an individual, a partnership, a political party, a superannuation fund or a government body unless it is a DGR-endorsed government body.

- Category 2 (government controlled bodies) and category 3 companies, incorporated associations, unincorporated associations and trusts would come within the new definition of government-connected body. The rule that government connection negates charitable status would be negated for Category 2 and 3 bodies by paragraph 5(1)(p) as reformulated in Annexure 2 to this submission.
- DGR-endorsed government bodies would be made charitable under paragraph 5(1)(q) in Annexure 2.

8. THE LIMITED OPERATION OF THE REFORMS

Unless and until the State and Territory definitions of charity are "harmonized" with those of the Commonwealth, some confusion is likely to occur among persons unfamiliar with the Constitutional issues and, in particular, the fact that the charitable or non-charitable status of operational charities and grant-making charitable trusts will continue to be governed by the law of the State or Territory under which they are constituted. Warnings by way of statutory notes in Annexure 2 address that issue.

PART B - OTHER REFORMS OF CHARITABLE PURPOSES

This Part of the submission responds to Consultation Question 16 and 17:

1. *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?*
2. *If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?*

9. THE BILL NEEDS RESTRUCTURING

Para. 4(1)(b)(i) of the 2003 Bill's "core definition" of what is charitable says that a reference to a charity &c "*is a reference to an entity that...has a dominant purpose that ...is charitable*". However it does not say what "charitable" means in this context. The reader has to turn over 4 pages to section 10 before learning that "charitable purpose" in section 4 does not have either its normal meaning or its meaning as determined by the decided cases, but, instead, has a different defined meaning. Yet the list of charitable purposes is really part of the "core definition" of what is a charity.

We suggest that it would be much more helpful to readers if what the bill describes as the "core definition" of charity, charitable institution and charitable body in section 4 were followed immediately by a new section 5 which defines "charitable purpose" substantially in the terms of Philanthropy Australia's submission, as altered in Annexure 2 to this submission.

Consistently with this new layout, it would also be helpful for para. 4(1)(b)(i) of the 2003 bill to be amended to read:

"(i) is a charitable purpose within the meaning of section 5"

The heading "Part 3 – Charitable purpose" on page 6 and the present section 10 of the 2003 bill could then be deleted altogether.

10. "INCLUDING (WITHOUT LIMITATION)"

In paras. (c), (d), (e) and (j) we have replaced the words "which includes" with the words "including (without limitation)" to make it clear that the dot points are only examples and are not a closed list.

11. PARA. 5(1)(d) – ADVANCEMENT OF SOCIAL OR COMMUNITY WELFARE & PARA. 5(1)(o) – EMERGENCY SERVICES

Para. (d)'s third dot point and para. (o) have both been amended to provide consistent descriptions of the same concept.

12. PARA. 5(1)(e) – OPEN AND NON-DISCRIMINATORY SELF-HELP GROUPS

The amendment to this paragraph utilises the expression "open and non-discriminatory self-help groups" which is defined in section 9 of the 2003 bill.

13. PARA. 5(1)(f) THE ADVANCEMENT OF ABORIGINALS AND TORRES STRAIT ISLANDERS

There is currently a movement to have Aboriginals and Torres Strait Islanders recognised in the Constitution. We suggest that indigenous Australians would benefit considerably more from receiving recognition in the charities legislation. Dal Port states in *Law of Charities* para. [11.11], "Australian Aboriginals...have been described as 'notoriously in this community a class which, generally speaking, is in need of protection and assistance....the case law supports the view that if land is used for the purpose of improving the economic position, social condition and traditional ties of an Aboriginal community, that will generally be a charitable use of the land.....A similar approach has been adopted in respect of indigenous communities in Canada and New Zealand, and to African-Americans in the United States. **In each case, though, the court must be convinced that the objects in question are exclusively charitable; if there is a non-incident and non-ancillary non-charitable object, there is no charity even if the ultimate beneficiaries are Indigenous persons.**" (emphasis added). In the latter respect he cites *Shire of Derby-West Kimberley v Yungngora Association Inc.* (2007) WASCA 233. In that case an aboriginal non-profit incorporated association controlled by the Aboriginal elders developed a community of 350 local Aboriginals with a primary school, a high school, a community store, facilities for a TAFE programme and a diabetic care clinic. Through a company controlled by the elders, the association ran a cattle grazing enterprise (carried on at a loss) which employed and trained 10-20 members of the community and devoted some meat and the income produced for charitable purposes within the community. The association was granted tax exemption and DGR status by the ATO, but the WA Court of Appeal held that the grazing land was not exempt from land tax as land used exclusively for charitable purposes, on the following grounds:

"The fact that the activities on the Land are a source of funds or other resources used by the Association for charitable purposes, or that the object of the pastoral business is to provide the resources by which those purposes might be achieved, does not, in my view, alter the nature of the use to which the Land is currently put. The Land is not, except to a small degree, used for charitable purposes; rather it is used essentially for the non-charitable purpose of operating a pastoral business, albeit with the object of providing resources which may be used for charitable purposes. Indeed, even if that non-charitable purpose were not the main purpose for which the Land were used, it would nevertheless be a distinct purpose so that, at the least, the Land would be used for a dual purpose."

In *Commissioner of Taxation v Word Investments* (2008) 236 CLR 204; HC (2008) HCA 55, the High Court decided that, where the purposes of a body that carries on a commercial enterprise and gives its profits to a charitable institution pursuant to its charitable purposes, the commercial body is charitable. This is contrary to the decision in the Yungngora Association's case, which was not addressed by the High Court. The High Court decision would of course prevail, but we believe that the charity of the community's circumstances in the Yungngora Association's case needs to be clearly put beyond doubt, because the Yungngora Association appears to be a model of an Aboriginal self-help charitable organization which, in Prof. Dal Port's words, held *land ... used for the purpose of improving the economic position, social condition and traditional ties of an Aboriginal community*. We suggest that this is a model that the law should be at pains to encourage. The Ian Potter Foundation has in fact for many years been a supporter of another aboriginal

community, mainly because that community had the objective of developing the community as an overall entity for the advancement of the community. Accordingly, in order to ensure that public benefit need not be proved in a Yungngora situation and that economic benefit to an indigenous community is recognised as charitable we suggest the following amendments:

Sub-section 4(2)

Add:

- (c) an indigenous community self-help entity.

Insert a new section following section 9:

Indigenous community self-help entities

(1) An *indigenous community* –

- (a) is a community of Aboriginals or Torres Strait Islanders, and
- (b) does not cease to be an indigenous community by reason of non-indigenous persons living in the area of the indigenous community or incidentally benefiting from an indigenous community self-help entity improving the amenity of the community area or the conditions of community members, but the non-indigenous persons are not members of the indigenous community.

(2) An entity is an *indigenous community self-help entity* if:

- (a) the entity is a not-for-profit entity (and to avoid doubt, nothing in section [insert new number of section 5 of 2003] deprives the entity of its status as a not-for-profit entity because it makes grants to particular persons who are members of the entity or of the indigenous community); and
- (b) the dominant purpose of the entity is the advancement of members of an indigenous community by improving, protecting and fostering their economic position, social condition, traditional ties and best interests, and
- (c) the entity is controlled by some or all members of the indigenous community, and
- (d) either -
 - (i) the entity itself carries on an enterprise in accordance with paragraph (e), or
 - (ii) the entity causes an enterprise to be carried on by another not-for-profit entity controlled by the firstmentioned entity or by some or all members of the firstmentioned entity,

and, in either case, the dominant purpose of the secondmentioned entity is to fund or otherwise support the charitable purposes of the firstmentioned entity, and

- (e) the enterprise referred to in paragraph (d) is an enterprise of primary production or other form of industry or commerce, and the dominant purpose of the enterprise is the raising of funds to be applied for the charitable purposes of the firstmentioned entity or to provide training, employment, produce or other benefits to the indigenous community in furtherance of the firstmentioned entity's charitable purposes.

If it should be decided to adopt the foregoing amendments, we would advise that a lawyer experienced in indigenous affairs should be consulted to ensure that the approach that we have suggested is appropriate. The writer would be happy to discuss the matter with the lawyer if that would be helpful.

14. PARA. 5(1)(i) THE ADVANCEMENT OF AMATEUR SPORT

In this case we have deleted Philanthropy Australia's use of the words "which includes" because the intention here should be that amateur sport can only be treated as a charitable activity if, as in the UK Act, the persons concerned have a special need. If this were not so, then Royal Melbourne Golf Club and Royal South Yarra Tennis Club could qualify as charities under the general words of the paragraph.

15. PARA. 5(1)(k) THE ADVANCEMENT OF ANIMAL WELFARE

This follows the UK Act. In any event, it is desirable to specify this category because, although the courts have managed to justify most animal benefit organizations as charities, this could only be done on the rationale that they uplifted the moral tone of the community and that, therefore, humans benefitted. However, the courts have not always found it possible to identify any moral benefit to mankind in particular benefits to animals, so it is desirable to insert this express category of advancement of animal welfare.

Some qualification is needed in order to prevent a donor's bequest of a fortune for the upkeep of a pet to be treated as charitable. We suggest that a provision to the following effect would need to be inserted in some appropriate place:

For the purposes of paragraph 5(1)(k), the purpose of advancement of animal welfare does not include a donor's or testator's purpose of maintaining or advancing the welfare of a pet or pets of the donor or testator or their family, unless that purpose is immaterial in the context of the overall charitable operations of the donee.

16. PARA. 5(1)(p) GOVERNMENT-CONNECTED BODIES

This matter has already been addressed in Part A of this submission.

17. PARA. 5(1)(q) ANCILLARY FUNDS

It seems appropriate to include Ancillary Funds in the list because they are undoubtedly charitable.

PART C – PUBLIC BENEFIT

18. FORMULATION OF PUBLIC BENEFIT

This responds to the following Consultation Questions

- 5 *Could the term "for the public benefit" be further clarified, for example, by including additional principles outlined in 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?*
- 6 *Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?*

We fully agree with Philanthropy Australia that the most efficient way of administering the concept of public benefit is to rely on the established procedure of the regulator issuing rulings that explain the regulator's view of what the law is, as the ATO does with its Taxation Rulings, especially the excellent and comprehensive TR 2011/4 on charities. This is of course consistent with the ACNC's information function. The UK system would simply add another layer of bureaucracy.

19. WHAT IS A SUFFICIENT SECTION OF THE PUBLIC?

This section responds to the following Consultation Questions:

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

Addressing Philanthropy Australia's third bullet point, which is actually located in its answer to Consultation Question 7, we note that it is concerned that the awarding of a scholarship to one person may be eroded by a public benefit test when only one person can receive the benefit. We believe this to be a groundless fear and that the public element is in fact present. In a normal scholarship arrangement, members of the public generally receive the benefit of being able to apply for the scholarship and have the opportunity to be awarded it, even though only the best qualified applicant actually receives the award. The concept was expressed in Jacobs' *Law of Trusts in Australia*:

"A trust to build a bridge is a good charitable trust under the fourth class, providing the bridge is intended for all members of the public who, having regard to the situation of the bridge, are capable of enjoying its use. In fact, such members may be very few."

Philanthropy Australia's fourth dot point questions the issue addressed in TR 2011/4's paragraph [140], namely:

- *Placing limits on who can benefit is generally incompatible with the intention of benefiting the public if the limits are by reference to a personal connection that is not available to the public generally, such as:*
- *being members of a family or a group which is based on personal relationships to particular persons;*

- *contractual relationships (for example, the employees of a particular employer), and*
- *membership of bodies that can admit or exclude members of the public.*

In these situations, benefits are usually intended for people in their capacity as relatives, employees or members rather than a section of the public."

We think that the TR gives a correct statement of the common law, and also that the common law has achieved an appropriate result from a fairness and tax avoidance point of view and should largely be left alone in this respect. We also think that section 7 of the bill adequately reflects the case law.

However there are two exceptions:

1. as Philanthropy Australia recommends, entities that have been recognised as charities by the ATO should be grandfathered; and
2. the special situation of indigenous communities should be given special treatment as proposed in paragraph 19 above.

20. ONUS OF PROOF OF PUBLIC BENEFIT

This responds to Consultation Question 7:

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

This question is about the onus of proof. The question of whether there is to be a rebuttable presumption of charity in particular appears to have been blown out of proportion.

To start with, the public benefit test is not being "adopted" in the bill. The bill is merely expressing a fundamental element of the common law. As TR 2011/4 says at [129]: "An essential characteristic of a charitable purpose is that it is of recognised public benefit".

Further, the so-called rebuttable presumption of charity is limited to charities for the relief of poverty, the advancement of education and the advancement of religion. It is by no means across the whole spectrum of charities.

It seems to us self-evident that if, as the 2003 bill provides in sub-paragraph 4(1)(b)(ii) (reflecting the common law), public benefit of the entity's dominant purpose is a "core" requirement of charity, then, the new registration system can have no reliability unless the applicant for registration first satisfies the ACNC that it is a charity and therefore entitled to all the fiscal benefits that such a status confers. In the case of a start-up charity that has no track record, this seems to mean little more than that it must show that its dominant purpose is one of the listed charitable purposes and that it has a reasonable business plan to enable it to achieve that purpose. The form of Application for Registration as a Charity that was put out in the ACNC consultation document covers the sort of matters that we would expect a charity to be asked for, and does not appear to be unduly taxing. If the applicant is not competent to complete the form, then is it competent to handle charitable funds? In essence the form requires the sort of information that a charitable trust would require grant applicants to provide when making application for grants. So we

believe that it is not unreasonable, and not an unfair imposition, to require an applicant to provide this information to establish its right to registration. To put the matter in legal terms, it is not unreasonable to require the applicant to discharge the onus of proving that it is entitled to be registered, rather than to have the applicant presumed to be charitable unless the registrar can prove otherwise. This is particularly so because it would be virtually impossible for the registrar to prove that there is no public benefit in the case of an organization that has no track record, unless the defect were obvious on the face of the document.

As to the registration of existing charities, since they will be registered automatically, the presumption of charity is irrelevant.

However, the presumption of charity does become a real issue in relation to deregistration. Charities are graduated into three tiers according to size, and the annual return forms for the higher ones require information about eligibility factors, including public benefit. If public benefit or some other requirement for registration has ceased, then the processes of the ACNC Act might result in deregistration. The sections relating to the appeal process were not included in the draft ACNC bill, and will have to be addressed when they are drafted. No doubt they will provide for an ultimate appeal to a court. In deregistration proceedings, the onus of proof must certainly be placed on the Commission by the ACNC Act. We await the statutory wording for this.

PART D – DISQUALIFYING PURPOSES

21. POLITICAL ACTIVITIES

This responds to the following Consultation Questions:

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

The section is far too draconian. We agree with Philanthropy Australia that section 8 should be removed.

If sub-section (1) is retained, it should at least be restricted to committing a "serious offence" as defined in section 3.

We heartily endorse Philanthropy Australia's paragraph (h) in Annexure 2, particularly because of its application to Philanthropy Australia itself. PA provides an important role for the support and development of philanthropy in Australia. It does not really have political objectives but has a general role of advocacy for the increase of philanthropy. Similar bodies in the UK and Canada are recognised as charities and with consequent tax benefits. We hope that paragraph (h), in conjunction with paragraph 8(2)(c) of the 2003 bill if that is retained, will at last make it possible for PA to receive endorsement for tax exemption and DGR status

PART E - HARMONISATION

This Part E responds to Consultation Question 18:

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

22. THE PROCESS OF HARMONISATION WITH STATE AND TERRITORY LAWS

In conclusion we would like to address the "harmonization" of the new definition of charity with State and Territory laws.

We are of course in favour of a modernized nationally-recognised definition of what is charitable being put in place.

However, we are concerned that Para. 137 of the Consultation Paper says: "*In formulating a definition of charity, it is therefore necessary to take into account **the longer term goal** that the statutory definition of charity be harmonized across the Commonwealth and the States and Territories.*" (Emphasis added.) We hope that this goal will be met in the very near future. If this is not done, then the new Commonwealth Act will multiply the present confusion as to the meaning of charity. The law of charity in the States and Territories, while confused, is nevertheless at least close to uniform. If the Commonwealth now introduces a materially different definition for Commonwealth purposes, that uniformity of concept will be lost.

23. PRESERVATION OF APPROVED SCHEMES FOR CHARITABLE BEQUESTS

Whatever form a redefined concept of charity may finally take in the new Commonwealth *Charities Bill*, the drafter should ensure that the creation of a statutory definition of what is charitable does not unintentionally override the equitable procedure under which a charitable bequest that fails to take effect in terms of the testator's will may be applied in a different way to benefit the charitable purpose that the testator intended. That is the result that was actually reached in *Re Cain (Deceased)*. In that case a bequest to the Child Welfare Department was enabled to take effect, even though the Child Welfare Department was held not to be a charitable entity because it was a part of the government. The court found that the testator's bequest had a charitable intention to benefit the children under the Department's care, so that the court could approve a scheme arranged between the Attorney-General and the Department to provide benefit to children under the Department's care in a manner that was unlikely to be carried into effect in the ordinary application by the Department of its grants from consolidated revenue.

It would be unfortunate for this procedure to be lost inadvertently in the transfer of functions to the Commonwealth.

ANNEXURE 1

PROPOSED CHANGES TO DEFINITIONS IN SECTION 3(1)

Bolding in this Annexure 1 indicates a change now proposed by The Ian Potter Foundation to the language in the 2003 bill.

The symbol ^ indicates that some of the bill's wording has been removed.

For ease of reference, a copy of the section 41 referred to in the new definition of government body is contained in Annexure 3.

- **[new definition]**

DGR-endorsed government body means a government body that is:

- (a) a government entity within the meaning of paragraph (e) of the definition in section 41 of *A New Tax System (Australian Business Number) Act 1999*; and (b) endorsed as a deductible gift recipient under the *Income Tax Assessment Act 1997*.

- **[amended definition]**

government body means:

- (a) a government entity within the meaning of section 41 of *A New Tax System (Australian Business Number) Act 1999*; or
Note: Sub-paragraph (e)(i) of the definition of government entity in section 41 of *A New Tax System (Australian Business Number) Act 1999*, when read with section 37 of that Act, excludes corporations, unincorporated associations, trusts and certain other bodies from being government bodies within the meaning of paragraph (a).

^

- (b) the government of a foreign country; or
- (c) a body controlled by the government of a foreign country.

- **[new definition]**

government-connected body means a body which –

- (a) is not a government body, and
- (b) is controlled by a Commonwealth, State or Territory body, or performs the work or function of a Commonwealth, State or Territory body, or is required to implement Commonwealth, State or Territory government policy, and
- (c) has purposes which, if they were the purposes of a body unconnected to government, would have been charitable purposes as determined by the body's governing law, and
- (c) has purposes which, but for paragraph 5(1)(p) or relevant State or Territory legislation, would not have been charitable purposes under the body's governing law solely because of the body's government connection.

ANNEXURE 2

PROPOSED NEW SECTION 5

In this Annexure 2, the list of purposes in section 5(1) is the list contained in Appendix A of the submission by Philanthropy Australia.

Bolding in this list indicates a change now proposed by The Ian Potter Foundation to the language in Philanthropy Australia's submission. The symbol ^ indicates that some of Philanthropy Australia's wording has been removed by The Ian Potter Foundation.

New sub-sections (3) and (4) are The Ian Potter Foundation's proposals, and did not form part of the Philanthropy Australia submission.

The rationales for the Foundation's changes are set out in the body of this submission, unless the reason is obvious.

5. Charitable purposes

Warning Note: In a number of respects the purposes set out in sub-section (1) are wider than the purposes that have in the past been regarded as charitable purposes in the States and Territories. The purposes specified in sub-section (1) only apply to explain the meaning of references to a charity, a charitable institution or any other kind of charitable body, in Commonwealth legislation. In other respects charitable status will continue to be determined by the law of the relevant State or Territory. If ancillary funds or other charitable trusts that are governed by State or Territory law make gifts to bodies that are not treated as charitable under that State or Territory governing law, the gift will not be legitimised by this sub-section. If the gift is made in breach of trust under the governing law, liability and penalties may be attracted. The Commonwealth will seek to harmonise State and Territory law with this law. Some States and Territories have already legislated in this area.

The fact that a direction to read this warning is set out beneath some only of the paragraphs below does not mean that the warning does not apply to the other paragraphs.

- (1) A reference in **this** or any **other** Act to a charitable purpose is a reference to any of the following purposes:
 - (a) the advancement of education;
 - (b) the advancement of religion;
 - (c) the advancement of health and the saving of lives, **including (without limitation)**:
 - o the prevention and relief of sickness, disease, disability or human suffering

- (d) the advancement of social or community welfare, **including (without limitation)**:
 - the prevention and relief of poverty, distress or disadvantage of individuals or families;
 - the care, protection and support of those in need by reason of youth, age, ill health, disability, financial hardship or other disadvantage;
 - the care and support of members or former members of the armed forces of **Australia, or of the police, fire, rescue, ambulance or other emergency services of Australia or of any State or Territory of Australia** [^]and their families;
- (e) the advancement of community development, **including (without limitation)**:
 - retraining, finding employment, providing work experience, skills development, business incubation in disadvantaged areas or for people who have or are likely to experience difficulty in obtaining and maintaining employment;
 - providing facilities for meeting and holding events;
 - preservation or restoration of the natural and built environment, including community gardens, erecting statues, **and** providing historical information;
 - providing health and community services information;
 - improving community facilities and access, including community transport;
 - supporting **open and non-discriminatory self-help groups** [^], including clubs and interest groups, which help in reducing social isolation or promote a sense of community;
- (f) **the advancement of Aboriginals and Torres Strait Islanders, including (without limitation) the purposes of an indigenous community self-help entity and the purposes of an enterprise referred to in paragraph (2)(e) of section [insert number of section headed "Indigenous community self-help entities"];**
- (g) the advancement of the arts, culture, heritage or science;
- (h) the advancement of all philanthropy, which includes volunteering;
- (i) the advancement of amateur sport, [^] with the object of improving the [^] quality of life of persons **who have a need for such activities** [^] by reason of youth, age, infirmity, disability, poverty, geographic isolation, or social [^] or economic circumstances;
- (j) the advancement of human rights, **including (without limitation)**:
 - the promotion and advancement of conflict resolution or reconciliation, and the promotion of equality, diversity and religious or racial harmony;
- (k) the advancement of animal welfare;
- (l) the advancement of the natural environment, **including (without limitation)** [^]:
 - the advancement of environmental protection or improvement;
- (m) improving the efficiencies of, and supporting, charities;
- (n) the provision of finance exclusively to organisations recognised as charities;

- (o) the promotion of the efficiency of the armed forces of **^ Australia**, or of **^ the police, fire, ^ rescue, ^ ambulance or other emergency services of Australia or of any State or Territory of Australia;**
- (p) **the purposes of a government-connected body which, by reason solely of the body's connection to government, would not have been charitable purposes but for this paragraph or relevant State or Territory legislation.**

Note: Paragraph (p) is intended to negate the principle addressed in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 and *In re Cain (decd); The National Trustees Executors and Agency Co of Australasia Ltd v Jeffrey* [1950] VLR 382 at 387 (first and second full paragraphs). However, those principles will only be negated for the purposes of this Act or of any other Commonwealth Act. Please refer to the warning note at the head of sub-section (1).

- (q) the purposes for which gifts to a DGR-endorsed government body are deductible under item 1 of the table in section 30-15 of the *Income Tax Assessment Act 1997* that Act

Note: This paragraph is intended to treat as charitable for the purposes of this Act and of any other Commonwealth Act, a gift to an object that has deductible gift recipient status but which is not charitable under relevant State or Territory law. Please refer to the warning note at the head of sub-section (1).

- (r) **the purposes of a public ancillary fund or a private ancillary fund within the meaning of the *Income Tax Assessment Act 1997*; and**
- (s) any other purpose that is beneficial to the community.

(2) *Advancement* includes protection, maintenance, support, research and improvement.

(3) **The fact that a purpose which was charitable before the commencement of this Act is not listed in sub-section (1) does not imply that it has ceased to be a charitable purpose.**

(4) **The case law of charities continues to apply so far as is consistent with the provisions of this Act.**

Note: The Commonwealth will seek to harmonise State and Territory law with this law.

ANNEXURE 3

SECTION 41 OF A NEW TAX SYSTEM (AUSTRALIAN BUSINESS NUMBER) ACT 1999

This is the section referred to in the definition of government body.

"government entity" means:

- (a) a Department of State of the Commonwealth; or
- (b) a Department of the Parliament established under the Parliamentary Service Act 1999 ; or
- (c) an Executive Agency, or Statutory Agency, within the meaning of the Public Service Act 1999 ; or
- (d) a Department of State of a State or Territory; or
- (e) an organisation that:
 - (i) is not an entity; and
 - (ii) is either established by the Commonwealth, a State or a Territory (whether under a law or not) to carry on an * enterprise or established for a public purpose by an * Australian law; and
 - (iii) can be separately identified by reference to the nature of the activities carried on through the organisation or the location of the organisation;

whether or not the organisation is part of a Department or branch described in paragraph (a), (b), (c) or (d) or of another organisation of the kind described in this paragraph.