Freedom to speak,
capacity to act.

Charity law reform project ~

Removing the barriers to advocacy.

Legal Services **BOARD**
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Report written by Esther Abram for Changemakers Australia, March 2011

Changemakers Australia

Changemakers Australia (Changemakers) is an incorporated national organisation which aims to support the growth of social change philanthropy in Australia.

Our mission is to encourage and resource people and organisations in the philanthropic world and beyond to focus on social and economic justice, equality for all, and environmental sustainability.

Social change philanthropy directs its support to activities that address the underlying causes of social ills, such as poverty, inequality, abuse of human rights and environmental degradation.

For Changemakers, real and lasting social change occurs when the activity that has been funded contributes towards, or results in, concrete and identifiable change in the policies, laws, institutions or culture in a particular area that impacts on a whole group of people who have been disadvantaged or discriminated against by the previous arrangements, structures or attitudes. That is, it achieves change more broadly than at the level of improving circumstances for an individual, although the need for change may have been identified because of the assistance that an organisation has been providing to individuals.

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Glossary of terms

Advocacy for public policy reform – this term encompasses a wide range of activities that not for profit (NFP) organisations undertake in order to influence the policy and legislative agenda in ways that promote their organisational or charitable objects.

Charity – an organisation which meets the criteria of a charity under the common law. Many different sorts of organisations are charities and philanthropic organisations are also charities.

Doing charity – those charities which either deliver services or undertake advocacy as their key activities

Deductible Gift Recipient (DGR) status – a type of tax concession which enables those eligible organisations to provide a tax deductible receipt for donations received

Funding charity – those charities which provide funding to support the activities of “doing” charities, namely philanthropic organisations

Goods and Services Tax (GST) – a Commonwealth tax applied to most goods and services

Objects – the functions for which a charity is established. These are outlined in an organisation’s constitution and can also be described as “purposes”

Party political activities – are those which involve directly supporting and/or endorsing political candidates or parties, or standing for political office

Political activity – this term encompasses a wide range of activities which the common law has considered to be related to achieving a change in the law, or policy, or retention of the law in its current form. While the common law and the Australian Taxation Office have referred to such activities in this way, this project prefers to use the language of advocacy for public policy reform.

Public Benevolent Institution (PBI) – a subset of charities which receive particular tax concessions, including DGR (see above) and the Fringe Benefit Tax exemptions

Tax concessions – generic term, covering all the different benefits available under the taxation system

Tax Concession Charity (TCC) – the most widely applied form of Commonwealth tax concession available to charities, which provides for income tax exemption, GST and fringe benefits tax concessions

1. Background to project

The Charity Law Reform project was established to investigate the impacts of legal restrictions of public policy reform advocacy on the Not for Profit (NFP) sector and to progress the development of a reform agenda. The project arises from Changemakers Australia's strong belief that NFPs must have the capacity to pursue public policy reform, if they are to effectively address the underlying causes of social ills, such as poverty, inequality, abuse of human rights and environmental degradation. It is often an important way for NFPs to fulfil their charitable goals.

Changemakers applied to the Victorian Legal Services Board for funding under the 2009/10 Project Grants Round. At that time, Changemakers understood that charity and tax laws restricted advocacy in the following ways:

- Organisations with a public policy reform agenda which were otherwise charitable may not be given charity status on the grounds that they were considered to be "political". They were then excluded from any tax concessions available to charities.
- Existing charities which pursued public policy reform risked losing their charitable status, on the grounds that they ceased to be charitable. This would have resulted in the loss of charitable tax concessions.
- Public Benevolent Institutions (PBIs), the charities which enjoyed the most beneficial treatment under the tax system, must be predominantly concerned with the provision of 'direct relief' and advocacy was not considered to meet that requirement.
- Organisations without charitable status were excluded from receiving philanthropic funding from trusts or foundations which required grant recipients to have Tax Concession Charity (TCC) status and/or Deductible Gift Recipient (DGR) status.
- Philanthropic organisations were reluctant to fund advocacy for fear of losing their own charitable status.

In August 2010, Changemakers appointed a project consultant who commenced work on the project. Then in late 2010, a significant change to charity law as it relates to advocacy occurred as a result of the High Court decision in *Aid/Watch Incorporated v Commissioner of Taxation*. In response, this report aims to:

- Describe how the law before the Aid/Watch decision restricted advocacy for public policy reform;
- Describe how the law before the Aid/Watch decision impacted upon NFPs and what they have done in response to the law;
- Describe how the law has been changed by the Aid/Watch decision and whether the limitations on advocacy as a legitimate charitable activity identified by the project have been addressed by the High Court decision;
- Clarify the situation regarding philanthropic funding of social change;
- Make recommendations about future actions required to free NFPs from impediments to advocacy and increase their capacity to focus on social change.

2. Executive Summary

For the first time, Australian charities have been asked whether charity laws restrict their ability to speak out on issues or to fund important advocacy work. The project has established that NFPs, including philanthropic organisations, have been negatively and unfairly impacted by the restrictions on advocacy under charity and taxation laws. There is support within the NFP sector for removing legal restrictions to advocacy for public policy reform, in recognition of the important role played by NFPs in today's society and the need for charities to communicate with government and the community without constraint.

The situation has been improved by the High Court decision in *Aid/Watch v Commissioner of Taxation* (or Aid/Watch decision). However, this decision needs to be reflected in the Australian Tax Office (ATO) Tax Ruling for charities. The decision also calls into question the way tax concessions are currently structured, opening the door for further legal reforms.

2.1 Key findings

2.1.1 *The Law Pre-Aid/Watch v Commissioner of Taxation*

Historically, the application of the common law in Australia has made a distinction in relation to what is "charitable" and what is "political". Charitable status has been withheld from organisations with law or policy reform objectives on the basis that they are "political". Organisations with charitable status could only engage in advocacy for public policy reform if that advocacy was incidental to their objects and ancillary in relation to their other activities. A charity could undertake advocacy if:

a. The reforms being advocated for were consistent with their charitable purpose, or were a means to that end; and

b. They didn't undertake so much advocacy that the advocacy became an end in itself; and

c. The type of activity was not party political (such as standing for office or endorsing a candidate).

The Australian Tax Office (ATO) provided guidance on the law to charities in the 2005 Tax Ruling *Income tax and fringe benefit tax: charities.* The law itself is complex and efforts to inform charities about their rights and obligations under the law, whilst welcome, had limitations. Firstly, there was a lack of bright-line distinctions of what could and could not be done and how much was too much. Secondly, philanthropic organisations were provided with no specific guidance on how they should approach the funding of advocacy, by the ATO or State Attorneys General.

2.1.2 *Influence of the common law on tax concessions*

By seeing charities as organisations which should restrict their role in policy debates and law reform, the common law upheld a perspective of charities which is out of step with the role that charities play in contemporary Australian society. This outdated image of charities has been enshrined in Australian tax laws which dictate which organisations are eligible for tax concessions and the types of concessions they may access.

The tax concession framework reinforces the pre Aid/Watch common law split between "charitable" and "political". More tax concessions are available to charities which provide direct relief to the needy, and less to charities which have a focus on advocating for public policy reform as the means of achieving their charitable objects. While most charities hold Tax Concession Charity (TCC) status and are provided with income tax exemptions, relatively few are eligible for Deductible Gift Recipient (DGR) status. This restricts the resources available to those charities from private donors who seek a tax deduction for their donations and also hampers the ability of philanthropic organisations to provide them with financial support.

The rules regarding Public Benevolent Institution (PBI) status are complex. However, to access this status, most charities must face additional restrictions on their advocacy activities.

2.1.3 *The impact of the law on policy debate*

In a democracy different voices compete to influence policies and policy ideas are subject to debate by different interests. This process functions well when all the parties with an interest in a particular policy debate are free to voice their views. However, only charities have faced limitations on their ability to advocate, due to charity law. Trade unions, industry associations and many think tanks are eligible for tax concessions, but with no limit to the type or extent of their "political" activities. This has left charities vulnerable to attack when they participate in the policy process, particularly when charities come up against powerful economic interests or policy makers themselves.

In recent history a number of charities have been attacked for their advocacy work. However, the current Government of Australia has stated its commitment to a strong and independent not for profit sector and endorsed the role of constructive advocacy in improving policies, programs and services.[1] This commitment has been expressed to date through the removal of 'gag clauses' in Commonwealth funding agreements.

2.1.4 *How the law impacts upon the work of charities*

The project interviewed people from 18 charities and undertook a follow up survey with peak welfare and rights organisations to ascertain the impacts of the law on charities undertaking their work. The project has found that the common law restrictions on "political" activity had a negative impact on both "doing" charities and "funding"

1 *Australian Government, National Compact – Working Together, 2010, p3.*

charities.[2] "Doing" charities understand that the law places restrictions on their advocacy activities, and this creates risk for those charities needing to advocate to achieve their charitable goals. None of them reported that they were **prevented** from undertaking advocacy because of the law. However, a number responded to the risk by implementing risk management and self regulation. Small charities with Public Benevolent Institution (PBI) status have felt particularly at risk of jeopardising their PBI status due to advocacy activities.

In the main, "funding" charities have been concerned that funding advocacy projects could risk both their charitable status and breach their trust deed. With little official guidance about how they should approach the funding of advocacy projects, they have adopted a range of risk management and self regulation approaches. Some will not fund projects which include any advocacy or law reform, others only fund such activities when they are part of a wider mix of activities. As in the case of "doing" charities, language plays an important role in identifying and minimising risk, so particular words may trigger a more risk adverse response and projects may need to be framed in less "political" ways, to reduce risk.

In addition to the legal restrictions, "doing" charities also reported that resources available for advocacy are constrained and that this limits the ability of charities to undertake the level of advocacy they believe is needed. This is due to the restrictive criteria for DGR and the difficulty of accessing philanthropic funding for advocacy projects.

2.1.5 December 2010 – the High Court says charities can advocate

In December 2010 the High Court brought down its decision in the Aid/Watch v Commissioner of Taxation case. The High Court found in Aid/Watch's favour, but most importantly made a decision which overturns the conventional legal view that "political" activity is not charitable.

The ATO regulates access to charitable status and tax concessions, so how it interprets the decision in the charities' Tax Ruling is crucially important. Changemakers considers that the application of the Aid/Watch decision should resolve key barriers to advocacy under charity law. For instance, Changemakers would expect that the new Tax Ruling would include the following provisions:

- Charities with public policy reform objects to be eligible for Tax Concession Charity status;
- Existing charities to be able to further their charitable objects through advocacy, with no common law restrictions;
- Philanthropic organisations to be able to fund advocacy which is consistent with their Trust deed and the funded charity's charitable purposes.

In addition, charity status may be extended to "watch dog" organisations which seek to benefit the community through monitoring government activities and generating lawful debate.

How wide the Aid/Watch decision can be interpreted is subject to debate. However, it is expected that the ATO will seek to narrow the interpretation of the decision, as a means of limiting the number of organisations eligible for charitable status (and tax concessions). Therefore it is important that the NFP sector participates in the process of updating the Tax Ruling and seeks to ensure that the Ruling does not reinstate barriers to advocacy for public policy reform.

It is unlikely that the Aid/Watch decision will automatically impact upon the following:

- The criteria for Deductible Gift Recipient status
- The additional restrictions on Public Benevolent Institutions

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2 "Doing" charities are also known as charitable institutions, or community based organisations. "Funding" charities are also known as charitable trusts or philanthropic organisations. Where the word "charities" is used in this report, it covers both "doing" and "funding" charities.

2.2 Barriers and solutions

This section aims to bring together the different aspects of the research, to identify the key barriers to advocacy and discuss possible solutions to those barriers. In summary, this project has found the following key barriers to advocacy:

- The interpretation by the ATO of the common law pre Aid/Watch which restricted the advocacy activities of charities;
- The lack of clarity in the law, which has led to different interpretations of the legal obligations of charities and different approaches to self regulation;
- The lack of fairness in the law in that its application puts higher levels of restriction on some organisations than others;
- Advocacy resource constraints, due to a combination of the design of the tax concession framework and the interpretation of the law made by philanthropic organisations;
- Policy inertia which has held back changes which could strengthen the NFP sector and increase their ability to advocate in order to achieve their charitable goals.

Barrier 1 – *The interpretation of the common law pre Aid/Watch which restricted the advocacy activities of charities.*

As described in 8, there has been a legal distinction between what is "charitable" and what is "political". This has meant that some organisations which have charitable objects but which also have "political" objects (such as a law reform), even where these related to their charitable objects, may not have been considered to be charities by the ATO. Existing charities have had restrictions on their ability to undertake advocacy for public policy reform because the law has considered such activities to be "political".

This project considers that this situation has been substantially overcome by the High Court decision on the Aid/Watch case and that we now arguably have the most advantageous legal situation of any of the common law countries, where advocacy is concerned.

However, until the ATO formally articulates its interpretation of the Aid/Watch decision through the redrafting of the Tax Ruling for charities, it is unclear whether any limitations will remain. There will need to be careful consideration of the draft ruling when it is released to ensure that it remains true to the High Court decision.

Barrier 2 - *The lack of clarity in the law, which has led to different interpretations of the legal obligations of charities and different approaches to self regulation*

The law lacks clarity because it is both very complex and also deals with an area which is highly subjective and open to different interpretations. As a result, charities which either do or fund advocacy have found it difficult to be certain that they are operating within the law. Instead of being a legitimate function of a charity, advocacy has become seen as a potentially risky activity which needs to be managed.

The application of the common law to date has involved the stipulation that charities only undertake advocacy that is incidental and ancillary to their charitable objects. When viewed narrowly, the "ancillary and incidental rule" has been seen to imply that charities should restrict the quantity of their advocacy in relation to their other activities.

For philanthropic organisations, the application of this rule has been completely undefined and resulted in a wide range of interpretations. It has been unclear whether they should avoid funding advocacy altogether, fund a small

amount of advocacy in relation to their overall funding program, or minimise the amounts of advocacy each funded project includes.

Clarity has been further eroded by the subjective nature of "political" activity. For instance, in the interviews some people saw certain activities as more "political" than others, contrary to the way the 2005 Tax Ruling describes political activities. Certain organisations were seen to be more or less "political", meaning that the level of risk involved in funding those organisations could differ, regardless of the project or the organisation's charitable status. Timing and context play an important role in determining whether an activity is political or not, making it impossible to regulate clearly with regards to such matters.

This project considers that the Aid/Watch decision should result in the abandonment of the incidental and ancillary rules. Charities should have to comply with nothing more than the responsibility to ensure that their activities are directed to furthering their objects. Public policy reform activities should not be singled out for special attention.

Barrier 3 - *The lack of fairness in the law in that its application puts higher levels of restriction on some organisations than others*

The first aspect of the issue of fairness is how the impact of the political activity restriction differs according to the size and nature of the organisation. A key advantage of bigger charities has been that their size provides them with the capacity to more easily minimise their advocacy activities. In this respect, smaller charities with few paid staff are more at risk of doing more than "ancillary" levels of advocacy at any point in time. Charities which need to pursue law reform in order to meet their objects – such as human rights or community legal organisations – are more at risk of overstepping the limits than those charities with a direct relief focus. As described above, the application of the Aid/Watch decision should overcome this particular barrier and result in a fairer legal situation.

The second aspect of fairness is how charities have faced a "political" activity restriction that is not applied to other organisations which are recipients of tax concessions. For instance, industry associations, trade unions and policy think tanks have all enjoyed tax concessions without being restricted in their ability to advocate. The Aid/Watch decision should remedy this situation also.

However, it is not envisaged that the Aid/Watch decision will impact upon other unfair aspects of the tax concession framework, in particular tax deductibility. Some peak organisations are eligible for PBI status and are not subject to the requirement to make their advocacy "minimal" whereas other peaks are only eligible for TCC status. Most PBIs are only able to do "minimal" levels of advocacy in relation to their direct relief work and this places additional pressure on small PBIs. Without a review of the tax concessions or a High Court decision changing the interpretation of PBI status, this situation will remain.

Barrier 4 - *Advocacy resource constraints*

The tax concession framework and the way philanthropic organisations have viewed their legal obligations have combined to limit the availability of resources for advocacy.

Regarding the tax concession framework, the key constraint on advocacy is the limited nature of DGR categories. There are many charities which operate in the human welfare and human rights area which cannot access DGR. In particular, those that focus on advocacy rather than direct relief have difficulties achieving DGR. Without DGR, a charity is limited in its ability to fundraise from its own membership, private donations and from most philanthropic trusts. Private Ancillary Funds and Public Ancillary Funds can only grant to organisations (predominantly charities) with DGR status, so this situation will worsen over time. The tax concession framework must be reformed to give more charities access to DGR, in line with the recommendations of the Productivity Commission[3]. This can only occur through legislative reform.

The other problem leading to resource constraints is that philanthropic organisations have concerns about funding political activities which are driven by perceptions of legal risk as well as perceptions of appropriateness.

3 *Productivity Commission, Inquiry into the Contribution of the Not for Profit Sector, recommendation 7.3, 2010*

That funding charities take many different approaches to whether and how to fund advocacy makes it very difficult for "doing" charities to know how best to approach philanthropics for advocacy funding.

With many philanthropic organisations committed to social change philanthropy, there should be high levels of collaboration between the philanthropic sector and those charities seeking to improve policy and laws. The Aid/Watch decision should remove much of the risk for philanthropics in relation to funding advocacy. It can however be anticipated that philanthropic organisational practice will be unlikely to change much prior to the release of an updated Tax Ruling and without efforts to educate Trustees.

Barrier 5 - *Policy inertia which has held back changes which could strengthen the NFP sector and increase its ability to advocate*

This research has found that the law relating to charities and advocacy is antiquated and not reflective of today's charities and their role in society. This reinforces the recommendations of a number of inquiries over the past decade. Reform of the law which governs charities has been largely left to the courts, while Government has undertaken numerous reviews but made very few statutory or policy changes.

The National Compact commits the Australian Government to recognise the value of a strong NFP sector. Advocacy is seen as a legitimate role for NFPs, which contributes to societal well being.[4] There is also Government commitment to a reform agenda including the establishment of an Office for the Non-Profit Sector and reduction in red tape for the sector. Commonwealth Treasury is currently investigating the role and design options for a national 'one-stop-shop' regulator. The establishment of such a regulator will be an important indicator that the nation is shifting away from policy inertia, towards modernising and strengthening the sector.

Most of the organisations interviewed by this project supported the notion of an independent regulator and welcomed attempts to increase sector accountability and transparency. There was also support for ensuring appropriate regulation which reflects sector diversity.

In reviewing the options to remove barriers to advocacy, this project has looked towards the Charities Commission of England and Wales as a good example of regulation that tries to accommodate common law political activity restrictions with the needs of the sector. It is this project's view that the level of regulation of advocacy undertaken by the UK regulator will not now be needed in Australia, due to the Aid/Watch decision. However, they still provide a useful model in terms of the way they interact with the sector in developing their regulatory approach and in the transparency of their decisions. Where the sector considers that there needs to be guidance on issues relating to advocacy, it would be hoped that the Australian regulator would be accommodating.

The most significant area of reform required to support advocacy by the NFP sector is in the tax concession framework. This project supports the approach described in Australia's Future Tax System, whereby the regulator is charged with overseeing a review of tax concessions.[5] Given that reforming the tax concession framework has implications for both tax revenue and charities, it will be important that the NFP sector be well informed about options for change and involved in the reform process.

The other reform option which can improve the conditions for advocacy is the creation of a statutory definition of charity. Changemakers has long supported this option, on the condition that the definition clearly includes advocacy as a legitimate activity. When a regulator is in place it may be possible to move down this path.

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4 *Australian Government, National Compact – Working Together, 2010, p3*
5 *Commonwealth of Australia, Australia's Future Tax System, Part 2 – Detailed Analysis, B3-1, 2010*

2.3 Recommendations

This report has been compiled during a time when the legal situation regarding charities and advocacy has been in a state of flux. On this basis, the project makes a number of recommendations that build on the Aid/Watch decision and further Changemakers' objectives regarding the promotion of social change philanthropy and public policy reform.

ATO response to the Aid/Watch decision

- Changemakers to encourage the NFP sector to develop a sector-wide view of how the Aid/Watch decision should be reflected in the *Income Tax and Fringe Benefit Tax: Charities* tax ruling.
- Changemakers to work with other NFPs to influence the redrafting of the *Income Tax and Fringe Benefit Tax: Charities* tax ruling, towards ensuring an expansive interpretation of the Aid/Watch decision prevails in the new draft.
- Changemakers to ensure the specific needs of philanthropic organisations are considered in the process of finalising the tax ruling.

Sector response to the Aid/Watch decision

- Changemakers to engage with Philanthropy Australia on the development of an educational campaign to ensure that the philanthropic sector understands the implications of the Aid/Watch decision on philanthropic grant making.
- Changemakers to work with key NFPs, including peak organisations, towards better educating "doing" charities on how to attract philanthropic support for social change projects.

Charity sector modernisation

- Changemakers to support the establishment of a national regulator, on the basis that the regulator can be the source of future reforms to remove barriers to advocacy.
- Changemakers to provide a submission to the current consultation process which includes information from the survey undertaken as part of this project.

Tax concessions

- Changemakers to support a review of the tax concession framework, with the objective of:
  - Extending access to DGR to a wider range of charities, in particular those that are involved in public policy reform activities;
  - Removing the remaining restrictions which limit that ability of PBIs to engage in advocacy for public policy reform.

3. Introduction

Changemakers plays a unique role in the Australian NFP sector, acting as a bridge between charities which work to improve conditions in our society and environment and charities which provide funding for such work. Changemakers was established to encourage a greater understanding and commitment to social change philanthropy and ultimately to achieve greater levels of philanthropic dollars flowing through to social change activities. However, charity and tax laws have presented a barrier to these goals as all charities (including philanthropic organisations) have been restricted in their ability to undertake or fund advocacy for public policy reform.

During 2007 and 2008 Changemakers was very active in working to highlight the barriers to advocacy and also to clarify the situation for philanthropic organisations. In 2009 Changemakers applied to the Victorian Legal Services Board for funding for the Charity Law Reform Project. This project would research the impacts of the current definition of charity on the not for profit sector and the range of views on the need for and priorities of charity law reform. It would also research approaches to modernise charity law in other countries. The research would then inform the development of a stakeholder alliance to work on a common position regarding charity law reform.

Changemakers was successful in achieving the support of the Victorian Legal Services Board for the Charity Law Reform project. For the first time, Australian charities have been asked whether charity laws restrict their ability to speak out on issues or to fund important advocacy work. This paper provides the results of the research and makes recommendations on how Changemakers should progress charity law reform.

4. Project structure and methodology

Changemakers established a steering committee to oversee the implementation of the project and the contracting of a consultant to undertake the research and compile the report. Members of the steering committee were:

- Marion Webster, Changemakers (chair)
- Trudy Wyse, Changemakers and Melbourne Community Foundation
- Julian Gardner
- Christa Momot, Reichstein Foundation
- Sue Woodward, PILCH Connect (until end of 2010)
- Philip Lynch, Human Rights Law Resource Centre

Esther Abram was appointed as the project consultant in July 2010.

Given the complexity of both the legal issue under investigation and the not for profit sector itself, a clear challenge for the project was to design a methodological approach which was both deliberative and adaptive. The project had to establish how the law functioned, how the law was perceived by both legal practitioners and organisations to which the law applied, and how organisations adapted to the law as they understood it.

An additional challenge the methodological approach had to overcome was the sensitivity of the issue. Organisations could be concerned about providing information which could be used as evidence that they were operating outside of the law, or which could lead to the ATO undertaking an audit of their activities.

In order to research the impacts of charity law upon organisations, the steering committee identified organisations which had either experienced issues relating to their charitable status and their advocacy work, or where it was known that the organisation or key individuals had a view which would be of interest. A number of experts were also identified which included academics, lawyers practising in the area and advisors to people within the sector. Semi structured interviews were conducted with those individuals willing to participate and these identified other individuals for interview or material for review.

In addition, the Victorian Council of Social Service kindly agreed to distribute an email survey to those organisations on its peak organisation distribution list. This survey focused on gathering information on the tax concessions of such organisations and their access to philanthropic funding.

The following individuals participated in interviews as part of the project:

Teresa Zolnierkawickz, ANZ Trustees

Charles Berger, Australian Conservation Foundation

Tessa Boyd-Caine, Australian Council of Social Service

Louise Doyle, Becher Foundation

Denis Fitzgerald, Catholic Family Services Victoria

Adam Smith, Education Foundation; Foundation for Young Australians

Hugh de Kretser, Federation of Community Legal Centres

Philip Lynch, Human Rights Law Resource Centre

David Knowles, JB Were

Trudy Wyse and Marion Webster, Melbourne Community Foundation

Christine Edwards, Myer Foundation and the Sydney Myer Fund

James Ensor, Oxfam Australia

Deidre Moor, Public Interest Advocacy Centre

Jill Reichstein and Christa Momot, Reichstein Foundation

Eda Ritchie and Austin Paterson, RE Ross Trust

Leslie Falkiner Rose, Ruffin Falkiner Foundation

Greg Ogle, The Wilderness Society

Cath Smith, Victorian Council of Social Service

The following legal and/or sector experts participated in either formal interviews or by providing information on request to the project:

- Joyce Kok-Won Chia
- Teresa Dyson
- John Emerson
- Matthew Harding
- Tony Lang
- Alice Macdougall
- Myles Mc Gregor-Lowndes
- Vanessa Meacher
- Sue Woodward

The following peak organisations participated in an email survey:

- ACT Council of Social Service (ACTCOSS)
- Association of Neighbourhood Houses and Learning Centres
- Carers Victoria
- Centre for Excellence in Child and Family Welfare
- Community Child Care
- Community Housing Federation of Victoria
- Ethnic Communities Council of Victoria
- Health Issues Centre
- Jesuit Social Services
- Kindergarten Parents Victoria
- MacKillop Family Services
- New South Wales Council of Social Service (NCOSS)
- No to Male Family Violence, incorporating Men's Referral Service

- Psychiatric Disability Services of Victoria (VICSERV)
- Queensland Council of Social Service (QCOSS)
- South Australia Council of Social Service (SACOSS)
- Tasmania Council of Social Service (TCOSS)
- Victorian Alcohol and Drug Association
- Victorian Community Transport Association
- Victorian Health Care Association Ltd
- Victorian Mental Illness Awareness Council (VMIAC)
- Women's Health Victoria Inc
- Youth Affairs Council of Victoria

It also should be noted that the project received extensive support from both the Melbourne Law School and its project on *Defining, Regulating and Taxing the Not for Profit Sector in Australia*. The project team generously provided access to the information generated through their project, as well as participating in aspects of Charity Law Reform Project. Special mention must be made of Dr Joyce Kok-Won Chia.

An important aspect of the project was a forum hosted by Melbourne Law School and organised in partnership with Changemakers Australia and PILCH Connect, into the impact of the High Court decision on Aid/Watch. This event was used to test the project's view of the decision with other leading legal practitioners. It was also a timely educational event, with over 100 participants, mainly from the charity sector.

Finally, staff from the Not for Profit section of the Australian Taxation Office have been very generous with their time in both describing how they administer charity and tax law and in participating in a hypothetical on philanthropic organisations.

5. Changemakers past work on Charity Law Reform

In 2007 Changemakers and Leslie Falkiner-Rose published “Funding Advocacy for Social Change”. This paper was aimed at informing philanthropic organisations about the importance of charities undertaking advocacy aimed at alleviating social problems and how philanthropic organisations could approach funding such work without risking the integrity of their trust.

In 2008 Changemakers held a workshop on Advocacy and Philanthropy which was attended by 70 people from both philanthropic organisations and “doing” charities. Changemakers and Leslie Falkiner-Rose released a comprehensive paper titled “The State of Play...Charitable Law Issues”. This paper highlighted the inadequacies of laws relating to charity and taxation and the restrictions such laws place on advocacy. It also reported on the situation of individual charities at that time whose charitable status had been queried due to their advocacy work.

The workshop was addressed by Heather Grey from the Victorian Women’s Lawyers Association and Mark Dreyfus QC, a Government member of the Australian Parliament and the Federal Member for Isaacs. Mr Dreyfus highlighted the range of ways in which advocacy can be stifled and the important role for government in giving charities their voice through welcoming debate and addressing barriers. He noted the commitment of the Commonwealth Government to a Social Inclusion agenda based on an acceptance of the need to include charities in the policy process and the abolition of gag clauses in government contracts.[6]

Later the same month, Changemakers convened a stakeholder meeting to explore opportunities for collaboration to achieve changes to charity laws. Sixteen people from key charities and representative organisations attended the stakeholder meeting, confirming the need and desire to work collaboratively for change.

6 *Mark Dreyfus, The Importance of Advocacy in Philanthropy and Current Government Directions, Changemakers Australia Advocacy and Philanthropy Workshop, 17 July 2008*

6. Historical context

While charities have been in existence for hundreds of years, the role played by charities has changed and evolved over time. In recent years the right of Australian charities to participate freely to comment on and seek change to government policy and practice through advocacy has been challenged. Certain charities have been publicly denounced for their advocacy role. At the same time, charities have been playing a more significant role in the delivery of government programs. This development strengthens the need for charities to be able to undertake advocacy for public policy reform without legal restriction.

6.1 Changing perceptions about the appropriateness of advocacy

Charities have a long and proud history of shaping society in a positive way through advocacy and political activity. Without it the world would be a starkly different place, if one considers the changes brought about by active charities in earlier times. The abolition of child labour and slavery in England were driven by campaigns led by charities and charities worked to respond to the causes of poverty, not just poverty relief.[7]

In more recent times Australian charities have worked on many fronts to address the underlying causes of social and environmental problems. For instance, charities played a crucial role in identifying and promoting the dangers of smoking. This advocacy work has been responded to by Governments which have instituted a range of regulatory and market based reforms to reduce smoking and smoking related illnesses.

Despite the positive impact such campaigns have had on society, charities have faced criticism at certain points in history, on the grounds that advocacy is not their legitimate role. This is not an ongoing phenomena, rather it is something that comes and goes, spreading fear and caution throughout the NFP sector at times when it is “on” and fading into the background when it is “off”. That charity law places certain restrictions on charities in relation to advocacy can and has been used to justify criticising vocal charities. It is also the case that critics often interpret the legal restrictions far more broadly than the law has ever justified.

Australian charities have recently experienced a number of challenges to the legitimacy of their advocacy role. Joan Staples argues that the shift towards neo liberalism and the adoption of public choice theory as the model of democracy under the Howard Government resulted in a rejection of the advocacy role of NFPs.[8] As a result, the NFP sector experienced a number of draconian changes which restricted its ability to undertake advocacy such as the de-funding of organisations with an advocacy role (in favour of other NGOs which didn’t undertake advocacy), forced amalgamations and contracting out of services through purchaser-provider agreements.[9]

Case study – *community legal centre funding under the microscope*

In 2006 the Hon Philip Ruddock MP wrote an article calling for reform of community legal centre (CLC) funding, due to his concern that CLC’s were involved in “political” activity and advocacy, when they should be focused on delivering legal services to individuals.

> *“Unfortunately, some centres devote valuable resources to running political campaigns and the promotion of ideological causes, rather than providing legal advice and assistance to Australians in need (as per their Charter).”[10]*

Given that Ruddock was the Attorney General at the time, his article no doubt created significant fears within the CLCs that their funding would be cut unless they checked their involvement in advocacy for public policy reform.

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7 O’Halloran, Charity and Public Advocacy/Political Campaigning, pp1-2

8 Staples, Joan, “NGOs out in the Cold: Howard government policy towards NGOs”, University of New South Wales Faculty of Law Research Series 8, 2007, pp 3-4

9 Staples 2007, pp 4-5

10 The Hon Philip Ruddock, Community Legal Centre Reform, The Party Room, Issue 4, Spring 2006, p4

In contrast, CLC worker Nicole Rich argues that CLCs must include policy and law reform as part of their activity mix. She argues that:

"• doing so forms a critical part of the unique history and nature of Australian CLCs and must continue if CLCs are to remain relevant as a distinct institutional form for the provision of legal services to the disadvantaged;

• it is simply more effective to engage in a mix of activities if we want to maximise the benefits we provide to our clients; and

• arguably, strong moral commitments should impel CLCs to engage in this broader work"[11]

6.2 Restrictions on advocacy in the context of a changing sector

Robert Fitzgerald recently described how the charitable sector is in a state of conundrum.[12] On the one hand, the sector has experienced significant growth in recent years and looks to be very powerful in terms of its financial situation. On the other hand, when talking to people within the sector, one gets a sense of the sector being weak and vulnerable.

Government's shift to contracting services for delivery by charities (as well as for profit companies) has resulted in profound changes. Government has lost its direct relationship with many people who use their services. The charities which deliver their services have in many cases become much more dependent upon Government funding. This in turn makes charities much more sensitive to changes in government policy and vulnerable in the event that government "punishes" them by withdrawing funding. It also increases the need for charities to engage in advocacy, to improve outcomes for people reliant upon services.

Between 2008 and 2010 the annual ACOSS survey of the community sector has included a question on the advocacy role of community organisations. Each year most organisations responded positively to the statement "our organisation was able to speak publicly about the issues facing our clients". (2008 – 74% agreed; 2009 – 82% agreed; 2010 – 73% agreed). However, a small but substantial proportion disagreed with this statement in each survey. (2008 – 13% disagreed; 2009 – 8% disagreed; 2010 – 10% disagreed). [13] Ideally, all organisations should feel free to undertake advocacy on issues faced by their clients.

A significant issue for charities receiving Government funding has been the use of clauses in funding agreements which restrict the ability of organisations to make public comment, referred to as "gag clauses". A 2009 research project into the way government contracts cast the relationship between government and NFPs concluded that advocacy is a watershed issue, and the most spoken of limitation.[14] The research highlighted instances of organisations being unable to speak publicly about projects which received Government funding, without first receiving permission or providing notification to Government. It also noted that the Australian Government had overturned the practice of gag clauses in contracts following the 2007 Federal election.[15]

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11 Nicole Rich, Reclaiming Community Legal Centres: Maximising our potential so we can help our clients realise theirs, Victoria Law Foundation Community Legal Centre Fellowship 2007-8 Final Report April 2009, p10

12 Presentation to the Australian Charity Law Conference, Sydney 11 September 2010

13 ACOSS Community Sector Survey Reports, ACOSS Paper 161 2010, p37; ACOSS Paper 157, 2009, p21, ACOSS Paper 157, 2008, p26

14 Public Interest Advocacy Centre, the Whitlam Institute within the University of Western Sydney, Social Justice and Social Change Research Centre University of Western Sydney, A Question of Balance: Principles, Contracts and the Government-not-for-profit relationship, July 2009, p19.

15 PIAC etc p20

Case study - *Advocacy helps people with psychiatric disabilities get into workforce*

In 2007 Social Firms Australia (SoFA) received a grant from the Reichstein Foundation to advocate for the support needs of people in the workplace with a mental illness. This grant allowed SoFA to build upon their important work, setting up social firms in the community to expand the provision of meaningful employment for people with disabilities. SoFA undertook research into the support needs of people with psychiatric illnesses. They found that people with a mental illness valued the opportunity to work, but wanted to make their shift into the workforce a gradual one, to enable them to adapt and reduce the stress of returning to work. SoFA also undertook research on behalf of the Department of Education, Employment and Workplace Relations, which resulted in SoFA making recommendations on how the Federal Government could provide more flexible support arrangements. The Government adopted the recommendations, resulting in a more equitable system for people with mental illnesses.[16]

6.3 The right of charities to undertake advocacy challenged

From 2004 to 2006 a number of voices were raised in Parliament and the media against charities undertaking advocacy and campaigning activities. A small number of charities, particularly environmental organisations, were publicly identified and used as examples to more widely criticise charities, on the basis that recipients of tax concessions should be required to limit their involvement in advocacy and campaigns.

In March 2004 Senator Mason raised concerns about the actions of the Wilderness Society during the 2004 Queensland State Election. These concerns were couched much more broadly in terms of the obligations of charities receiving tax benefits. He stated:

> Increasingly we are seeing many organisations which want to have all the tax benefits of charities but, at the same time, involve themselves in all sorts of uncharitable activities. Over the years we have seen a change in the way some charities operate. In the past they provided welfare for the needy and worked hands on to protect the environment; now they just lobby the government instead – or if the government does not oblige them, they lobby to change the government to a more accommodating one.
>
> There is nothing wrong with groups and organisations in the community engaging in the political process – lobbying and campaigning. The only question is why such groups and organisations should get the tax breaks to help them do so....The number of charities which are shifting from hands-on help to political advocacy is increasing across a whole range of fields, from social welfare to the environment."[17]

In June of 2004 Senator Mason used Senate Budget Estimates to pursue questions on charities and advocacy with the Commissioner of Taxation Michael Carmody. Mason queried how many charities had lost their Income Tax Exempt status due to political activities and expressed concerns that the ATO's reliance on self regulation (where charities inform the ATO when they no longer meet the criteria for charitable status) was flawed.

The following year Senate Estimates was used by Senator Mason to directly target the Wilderness Society.[18] His key objective was to gain undertakings from the ATO to undertake a tax audit of the Wilderness Society and the Rainforest Information Centre, in relation to campaigning during the Queensland State Election and allegations that charitable donations were being used to fund a political party. In addition, if the ATO confirmed that the Wilderness Society had acted improperly in Queensland, Senator Mason wanted their operations in other states to also be subjected to audits. The Tax Commissioner agreed to follow this path and also to make contact with the Australian Electoral Commission (AEC) and the Department of Environment and Heritage to resolve these concerns.

Senator Mason seemed to suggest through his questioning that there is widespread abuse of electoral and tax laws, by charities which siphon funds to political parties, avoiding the need to declare political donations to the AEC.

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16 *Adapted from Psychiatric Disability: returning to the workforce, Reichstein Foundation News, Issue 19, Winter 2010, pp3-4*
17 *Senator Mason, Senate Hansard, Monday May 1 2004, p20387*
18 *Senate Hansard – Economics Committee, Thursday 17 February 2005, pp E87 – E105*

Other wider issues raised included:

- The role of the ATO in relation to other areas of government, particularly the Australian Electoral Commission and the Department of Environment and Heritage. Who is responsible for monitoring the activities of organisations which receive tax concessions through being on a register established within another Department of government? Can the ATO cut access to tax concessions for an organisation on a register?

- Are charities monitored to ensure that their dominant activities are not political? How much political activity is allowed before it is seen as being dominant, and therefore not charitable? Can charities use donated funds for political activities?

Shortly after Senate Estimates, in February 2005, the Minister for the Environment and Heritage the Hon Ian Campbell wrote to environmental organisations on the Australian Government's Register of Environmental Organisations. His letter stated:

> "I am reminding all organisations on the Register that there are important rules that they must follow in expending their tax deductible gifts. The Act clearly states that tax-deductible gifts, made to the public fund of an organisation on the Register must only be used for the environmental purposes defined by the Act....Foremost, each organisation's principle purpose must be the protection and enhancement of the natural environment (or a significant aspect of it); or the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of it. It is mandatory that any tax-deductible donations be spent only in support of this purpose. That is, the funds should only be expended on the conservation of the natural environment and not for any other purpose, such as political activity."[19]

In May 2005 Senator Eric Abetz wrote an article for the Australian Financial Review[20] where he argued that the tax concession framework was unfairly biased towards charities and provided opportunities for tax rules to be flouted to the benefit of certain political parties. He noted that the Australian Conservation Foundation, Wilderness Society, World Wildlife Fund and the RSPCA had been actively campaigning during the Federal election and that the Wilderness Society and the RSPCA were "effectively campaigning in favour of the ALP." By describing how the rules on tax deduction favour those who donate to charities over those who donate to political parties (because political party donations are deductible after the first $100 whereas charity donations are completely deductible) he argued that the there isn't a level playing field.

In August 2006 Senator Mason again raised concerns about charities undertaking advocacy funded by tax concessions, in the context of arguing for reform of the charity sector. Again, the Wilderness Society was used as an example of a charity which exceeds the quantity of advocacy appropriate for charities. He stated:

> "The issue here is not one of whether charities can engage in advocacy but, rather, how much advocacy and lobbying charities might engage in while still retaining their taxpayer funded subsidies; that is the issue".[21]

Case Study – *Industry Groups Call for Loss of Charity Status*

The National Association of Forest Industries have repeatedly called for "radical green" charities to lose their charitable status. In 2004 they described Greenpeace and the Wilderness Society as "overt political lobby groups" and accused them of "flouting the intent of the law and achieving a fundraising advantage that other lobby groups are denied."[22] It claimed that this behaviour was endangering the tax advantages of "genuine" charities. In 2006, following the Tasmanian election, it called for the Wilderness Society and the Huon Valley Environment Centre to be stripped of their charitable status and tax concessions.

Farmer group NSW Regional Community Survival Group joined calls to strip the Wilderness Society of its charitable status, claiming that "it is disgraceful that decent, hard working farming families who are struggling to survive the worst drought in 100 years should be subjected to green political campaigns that are heavily subsidised by

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19 *Copy of letter in the authors possession*
20 *Senator Eric Abetz, Some Donors More Equal Than Others, Australian Financial Review, 24 May 2005*
21 *Senator Brett Mason, Senate Hansard, 9 August 2006, p50*
22 *Australia's National Association of Forest Industries, Media Release Green Group Fundraising Flouts the Aims of Charity Tax Laws, 5 June 2004*

taxpayers."[23] Timber Communities Australia has similarly called for the ATO to take action on the Wilderness Society on the basis that they funded Federal Court action against the assessment process for a Tasmanian pulp mill.[24]

Despite such attacks upon the Wilderness Society in the papers and in Parliament, the Wilderness Society has retained its status as a Tax Concession Charity and other tax concessions.

6.4 Australian Tax Office monitoring charity advocacy

In February 2007 it was reported that the ATO had reviewed 59 groups in relation to their political activities.[25] The report stated that the ATO found that there had been many instances of charities making donations to political parties and a smaller number who were undertaking "too much" political activity. At that time is was reported that one environmental charity had been stripped of its tax-exempt status "for what the Tax Office said was inappropriate political campaigning."

This project is aware of several instances where charities have had their charitable status challenged by the ATO due, at least in part, to their advocacy work. However, it is important to note that the ATO does not publicise its decisions in relation to the revocation of charitable status. Therefore, unless the charity itself speaks publically about issues between themself and the ATO, it is not possible to know what is going on. The following cases are ones that are known to the project and which have occurred in the last decade, but they may not be exhaustive of such cases.

The Wilderness Society

As described above, the Wilderness Society was the subject of numerous attacks by certain members of Parliament and industry associations. Pressure brought to bear on the Tax Commissioner in Senate Estimates hearings resulted in a commitment by the ATO to audit the activities of the Wilderness Society. The Wilderness Society was audited but retained its charitable status and access to DGR.

Public Interest Advocacy Centre

In February 2006 the Public Interest Advocacy Centre (PIAC) in Sydney lost its DGR status for a period of time, initially on the basis that it did not do enough direct service delivery. Its appeal to the ATO was rejected on the grounds that PIAC had the objective of law reform work in its constitution which was not a charitable objective. PIAC appealed to the Administrative Appeals Tribunal but the case was never heard as the ATO decided to overturn its ruling and pay PIAC's costs. While the case was ultimately settled in PIAC's favour, no legal precedent was set as there was no decision made by the Tribunal.[26]

Victorian Women Lawyers Association

In 2008 difficulties the Victorian Women Lawyers Association had encountered in achieving charitable status from the ATO were resolved in favour of the Association in the Federal Court. The ATO argued in the Federal Court that the Association was not charitable as it did not provide broad public benefit, and also because it had a law reform object (in addition to other objects.) Justice French found in favour of the Victorian Women Lawyers Association on the grounds that they did provide a public benefit, because their primary purpose of advancing women in the legal profession was beneficial to the community. In relation to advocacy, Justice French noted

"There were representations and public positions taken from time to time on matters affecting the position of women generally. None of these things translated into a political purpose that would disqualify the organisation from being characterised as a charitable institution."[27]

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23 NSW Regional Community Survival Group, media release Australian taxpayers bank-rolling radical greens, 6 September 2006

24 ABC Online, Wilderness Society's Legal Funding Questioned, 25 May 2007

25 ABC Online – The World Today, ATO Cracks Down on Charities, 19 February 2007, transcript downloaded from website

26 Summary of a case study provided in Leslie Falkiner-Rose, State of Play – Charitable Law Issues, Changemakers Australia, June 2008, p19

27 Victorian Women Lawyers' Association Inc v Commissioner of Taxation, (2008) FCA 983, clause 149

Aid/Watch

In 2006 the ATO disqualified Aid/Watch as a charitable organisation, on the basis that their role was to monitor the delivery of the aid program, not deliver aid. This decision cut to the heart of how the law views the role of charities in relation to advocacy. Over the next four years, Aid/Watch and the ATO have sought resolution in the courts, forming the most direct test case on charities and advocacy seen in Australian history.

Aid/Watch won their appeal in the Administrative Appeals Tribunal in 2008. However, the ATO appealed to the Federal Court's Full Court in 2009 and this Court subsequently found in favour of the ATO. Aid/Watch then took their case to the High Court, which subsequently found in their favour in 2010.

7. The Policy Context

Reform of the NFP sector has been much investigated and discussed by Government over past years. However, very few law reforms or policy changes have resulted to date.

In September 2010 the Senate Economics Legislation Committee reported on its inquiry into the proposal to insert a public benefit test into tax laws for charities receiving tax benefits. The Committee noted the following relevant inquiries in its report:

- 2000-2001 *Inquiry into the Definition of Charities and Related Organisations*
- 2008 Senate Standing Committee on Economics *Inquiry into Disclosure Regimes for Charities and Not-for-Profit Organisations*
- 2010 Productivity Commission *Inquiry into the Contribution of the Not for Profit Sector*
- 2010 *Australia's Future Tax System*

The Committee noted that these previous inquiries had made consistent recommendations, in particular regarding the need to establish an independent regulator for the not-for-profit sector.[28]

Regarding tax concessions for charities and NFPs, the 2010 *Australia's Future Tax System* recommended that the tax concession framework be simplified and be made to better reflect community values. Importantly, it recommended the establishment of an independent regulator first, and that the regulator then be charged with modernising the charity definition and streamlining the tax concessions framework.[29]

The 2010 Productivity Commission inquiry also investigated the area of tax concessions. It recommended that access to gift deductibility be progressively widened to include all endorsed charities.[30]

The establishment of a national regulator for the NFP sector is on the public agenda, with a consultation currently underway, under the auspices of the Commonwealth Treasury. The proposal aims to enhance public confidence through improving sector accountability for the tax concessions provided to NFPs, while reducing regulatory burden on the sector.[31] In examining past reviews, the consultation paper notes "a consistent theme has emerged from these reviews that the regulation of the NFP sector should be significantly improved by establishing a national regulator and harmonising and simplifying regulatory and taxation arrangements."[32]

The Senate Economics Legislation Committee identified the lack of information on the sector as being a key impediment to policy development and reform. This includes information on the depth and breadth of the sector overall, as well as particular information on the value of tax concessions provided to NFPs.[33]

None of the past inquiries have been specifically instructed to investigate the role of NFPs in advocacy for public policy reform. However, there are clear implications for the ability of NFPs to undertake advocacy in each of the policy proposals which have been investigated. For instance, reform of the taxation system could result in either more or less funding for advocacy. Similarly, a statutory definition of charity could either enhance or restrict the ability of charities to participate in advocacy depending upon how a 'charity' is defined.

While the issue of charity advocacy has been primarily a background issue in past policy reform processes, it has the capacity to shift to the forefront. This was well demonstrated when the Howard Government attempted to establish a statutory charity definition. The 2003 draft Charity Bill sought to exclude from charitable status those organisations with purposes focused on policy and law reform or 'advocating a cause', unless the purposes were no more than ancillary or incidental. A wide range of NFPs strongly objected to this aspect of the Bill and it was ultimately withdrawn.[34]

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28 Senate Economics Legislation Committee, Tax Laws Amendment (Public Benefit Test) Bill 2010, p15
29 Commonwealth of Australia, Australia's Future Tax System, Part 2 – Detailed Analysis, B3-1, 2010
30 Productivity Commission, Inquiry into the Contribution of the Not for Profit Sector, recommendation 7.3, 2010
31 Commonwealth of Australia, Scoping study for an national not-for-profit regulator, Consultation Paper, January 2011, p3
32 Commonwealth of Australia, p3
33 Senate Economics Legislation Committee p12
34 Staples, Joan, pp6-7

The Gillard Government has publicly expressed support for charities to undertake public policy reform advocacy through the National Compact. It is now taking the first steps towards the establishment of a national regulator, a concept that the NFP sector is broadly in favour of. The consultation paper makes no specific mention of advocacy.

Case study – *National Compact*

In March 2010 the then Prime Minister of Australia, Hon. Kevin Rudd MP, released the National Compact between the Australian Government and the Third Sector. "National Compact – Working Together" signalled a shift towards more positive relations between the Australian Government and the Third Sector. The right of non government organisations to undertake advocacy and the benefits of participation by such organisations in public policy debate is clearly outlined in the document. Four of the ten Shared Principles touch either directly or indirectly on advocacy:

- *"We believe a strong* ***independent*** *Sector is vital for a fair, inclusive society. We acknowledge and value the immense contribution the Sector and its volunteers make to Australian life.*
- *We aspire to a relationship between the Government and the Sector based on* ***mutual respect and trust****.*
- *We agree that authentic consultation,* ***constructive advocacy*** *and genuine collaboration between the Sector and the Government will lead to better policies, programs and services for our communities.*
- *We share a desire to improve our life in Australia through cultural, social, humanitarian, environmental and economic activity. To achieve this,* ***we need to plan, learn and improve together, building on existing strengths and making thoughtful decisions using sound evidence****."*[35]

The second Priority for Action commits the Government to "protect the Sector's right to advocacy irrespective of any funding relationship that might exist."[36] *The Government has taken steps to remove gag clauses from funding agreements.*

35 *Australian Government, National Compact – Working Together, 2010, p3. Note that bold highlights have been added by the author of this paper*

36 *National Compact page 6*

8. The Legal Context

8.1 Introduction to the legal context

Except for some minor legislation, the law that governs charitable status in Australia today is the common law, founded on the preamble to the English *Statute of Elizabeth 1601* and centuries of court decisions. This accounts for two key criticisms of charity law. Firstly, it is anachronistic as its foundations stem from times very different to today. Secondly, it is very complex, as the law is shaped by different case decisions, not necessarily in ways which are consistent or easy to interpret.

This situation is clearly illustrated by the High Court decision on *Aid/Watch v Commissioner of Taxation (2010)*. This decision overturned the conventional interpretation of the law on charitable status in relation to political activity. This chapter explains how the law was understood prior to the Aid/Watch decision, as this old interpretation created the conditions which led to this project being needed.

In addition to the common law, charities themselves are impacted by a wide range of laws and regulations. Most important to the issue of charities and public policy reform are tax laws which govern the types of tax concessions which charities and other not for profit organisations can access.

8.2 What is a charity?

The meaning of 'charity' is defined by the common law in ways which are quite different and separate to the everyday use of the word 'charity'. The Preamble to the Statute of Elizabeth described charitable purposes in the following way:

> (1) The relief of aged, impotent and poor people. (2) The maintenance of sick and maimed soldiers and mariners. (3) The maintenance of schools of learning, free schools and scholars in universities. (4) The repair of bridges, ports, havens, causeways, churches, seabanks and highways. (5) The education and preferment of orphans. (6) The relief, stock or maintenance of houses of correction. (7) Marriages of poor maids. (8) The supportation aid and help for young tradesmen, handicraftsmen and persons decayed. (9) The relief or redemption of prisoners or captives. (10) The aid and ease of any poor inhabitants concerning payment of fifteens, setting out soldiers, and other taxes.[37]

The 400 years old Statute of Elizabeth 1 is still referred to today by Australian courts making decisions about what constitutes a charity.[38] This is despite the fact that the statute was never intended to provide an all-encompassing legal framework for charities, rather being directed at abuses by particular charitable trusts at that time.[39]

Some 280 years later, a more technical approach to defining charities was developed by Lord MacNaghten, who established what are commonly described as the four "heads of charity". These "heads" are categories, namely: the relief of poverty, age or impotence; the advancement of education; the advancement of religion; and other purposes beneficial to the community.[40] For the first three heads, the existence of community benefit is presumed, whereas for areas outside of these categories the Preamble is used as an external reference point.[41]

Charity status is "all or nothing"; however judges have accepted that associations can undertake non-charitable activities that are incidental and ancillary without jeopardizing their charitable status. However, when it comes to gifts or trusts, judges are more concerned about the application of money or property to non-charitable activities, even where the motive is charitable.[42]

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37 Dal Pont, p17
38 G E Dal Pont, Law of Charity, LexisNexis Butterworths, Australia, 2010, p4
39 Dal Pont, p4
40 Dal Pont, p17
41 Dal Pont, p20
42 Dal Pont, pp8-9

8.3 How did charity law consider political activity, prior to the Aid/Watch decision?

The restrictions on charities participating in political activities were of relatively recent origin,[43] originating in a decision made in 1917, in which Lord Parker stated:

> "A trust for the attainment of a political object has always been invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift." (Bowman v Secular Society Ltd, 1917, AC 406 at 442)[44]

The restrictions on political activity were entrenched by the National Anti-Vivisection case in 1947.[45] The courts have extended this principle beyond proposed changes in the law to changes in government policy and governmental decisions (including those of a foreign country), and some decisions have extended it even to organisations or gifts whose prime objective is to retain the law in its current state.[46] Accordingly, organisations or gifts whose **main** object or purpose is to advocate for a change to law or policy, or to advocate for the retention of current law were not considered to be charitable. This included laws or government policy of an overseas country.[47]

Party political purposes or gifts to support party political activities were also not charitable.

While political purposes were not consistent with charitable purposes, this did not mean that political activities were inconsistent with charitable purposes per se.

The law distinguished between the purposes of an organisation (the ends) and the means by which it achieved its purposes. The purpose or object of a charity (the ends) must fall under at least one of the four charitable heads (or the Statute of Elizabeth) as described above. Charities could have a purpose which was political, so long as it was not their main purpose and it needed to be ancillary or incidental to the attainment of the main charitable purpose.[48]

Political activity which was ancillary or incidental to the attainment of the charitable purpose could be a legitimate means by which a charity achieved its ends. However, the question of degree was important in determining whether the political activity was the means of achieving the purpose (which is legitimate), or had become a purpose (which may not be legitimate).

In other words, a charitable organisation could engage in political activities, so long as those activities were consistent with their charitable purposes and the undertaking of the political activity did not dominate to the degree that it became a purpose in and of itself. How this was actually determined by the courts was not a precise science, as it was not determined on quantitative terms (how much time or money is spent on charitable purposes versus political activity) but on qualitative terms.[49]

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43 See report Advisory Group on Campaigning and the Voluntary Sector, UK, May 2007, p7. Also Dr Kerry O'Halloran, Charity and Public Advocacy/Political Campaigning: Charity Law Reform and the Voice of the Sector in Australia, unpublished paper October 2010, p1

44 Dal Pont, p299

45 Melbourne Law School, Not-for-Profit Project, Defining Charity – A Literature Review, 2011, p31

46 Dal Pont, pp290-291

47 Dal Pont, p293

48 Dal Pont, p294

49 Dal Pont, p296

8.4 Against public policy

It has been a requirement that charities "conform to public policy" and it is envisaged that this remains unchanged by the Aid/Watch decision. This requirement does not restrict charities in criticising public policy where doing so is furthering their charitable object. The types of things which the courts have seen as being against public policy are:

- Illegal acts
- Objects which threaten national security – for instance support for terrorist organisations
- Religious objects where the public benefit criteria is clearly not met because the religious order acts illegally or in ways that place adherents at risk of harm – for instance cults
- Educating people to undertake acts which will be harmful to them or illegal – such as educating about the benefits of smoking
- Discrimination against particular classes of people which goes beyond what is allowed under the law[50]

These particular limitations cannot be considered to be overly restrictive, nor do they obstruct charities from undertaking advocacy to change laws or policies as charities do in the main. The exception to this would be charities which engage in civil disobedience activities, where the law can be unclear or where the law conflicts with what some might see as moral responsibilities.[51]

8.5 Impact of the 2010 High Court decision re Aid/ Watch v Commissioner of Taxation

In December 2010 the High Court brought down its decision in the Aid/Watch v Commissioner of Taxation case. The High Court found in Aid/Watch's favour, but most importantly made a decision which overturned the conventional view that political activity is not charitable. This means that the previous approach applied by the Tax Office is no longer open to it.

The Aid/Watch case dated back to a decision by the ATO in 2006 to disqualify Aid/Watch from being a charity on the basis that its purpose was to monitor the aid program, not deliver aid[52] and that it was engaged in political activities. In making this decision, the Commissioner for Taxation had relied upon common law dating back to 1917 England where Lord Parker in Bowman v Secular Society found that political objects cannot be charitable as the courts cannot determine whether changing the law is in the public benefit.

However, the High Court found that the Bowman decision and those stemming from it did not apply in Australia. Much importance was placed by the High Court on how Australia's system of law, as defined by our Constitution, relies upon "communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics..."[53] The constitutional context assumes that there is 'public benefit' from advocacy, which is inconsistent with the doctrine of political objects.

As a result, the High Court reasoned that "there is no general doctrine which excludes from charitable purposes "political objects"[54] (such as law or policy reform objects), effectively removing the rift between "charitable" and "political" under the law. In addition, the High Court found that Aid/Watch's campaigning work was charitable on the grounds that generating debate by lawful means, at least in relation to the first three 'heads' of charity, provides a public benefit.

50 Dal Pont, pp72-75

51 For instance, entering private property without permission to rescue a maltreated animal may contravene the private property rights of an individual, but it may also be seen as consistent with Animal Protection laws and the moral duties of citizens to intervene to prevent cruelty to animals

52 Marion Webster, Pursuing Public Policy Reform, Changemakers Newsletter, Spring 2010, p5

53 High Court of Australia, Aid/Watch Incorporated v Commissioner of Taxation (2010) HCA 42, 1 December 2010, clause 44, p17

54 High Court of Australia, clause 48, p 19

Changemakers considers that the application of the Aid/Watch decision should remove the barriers to advocacy for public policy reform, which have been enshrined in charity law. The door should now be open for organisations which are charitable in other ways to have public policy reform objects, without jeopardising their charitable status. Such organisations would then be eligible for Tax Concession Charity status. Charities should be able to undertake advocacy for public policy reform to further their charitable objects without having to limit themselves to "ancillary" levels of advocacy. Philanthropic organisations should no longer have to view advocacy projects as different from other projects which charities may seek funding for.

There is debate about how far the decision goes in removing restrictions on political activities more generally. For instance, can charities now advocate on issues which are unrelated to the first three 'heads' of charity? Can charities undertake party political activities, such as endorsing candidates or standing for office? Will charitable status be available to organisations which would have historically been considered as "political", such as gun lobby groups, anti-abortion groups, voluntary euthanasia organisations or some animal activist groups?

The ATO's interpretation of the Aid/Watch decision will not be clear until the Tax Ruling on charities is updated to reflect the decision. The process of updating the Tax Ruling usually involves the release of a draft for public comment. It is expected that the Tax Office will seek to limit the number of organisations which might be eligible for charitable status, where it can be justified under the Aid/Watch decision. Changemakers would be concerned by any narrowing of the interpretation which reinstates barriers to advocacy for public policy reform, or which compel charities to self regulate to the detriment of their charitable work.

How widely the decision is interpreted raises important issues for the NFP sector, such as whether there should be restrictions on the ability of charities to engage in party political activities. The NFP sector needs the opportunity to consider and debate the implications of the Aid/Watch decision on charities and form its own view about whether there is a rationale for placing restrictions on charities, which are not also binding on non-charitable organisations which receive tax concessions. Such considerations go far beyond tax and public expenditure, to wider notions of the role of charities in modern Australian society.

Regarding tax laws (which are discussed in the next section), the current structure of tax concessions will not be affected by the Aid/Watch decision. However, the High Court's emphasis on the importance of communication to the functioning of the Australian democracy, adds further weight to the push for NFP tax law reform.

8.6 Tax Law and its impact on charities and advocacy

The laws which govern the tax concession framework are of high importance to charities as they strongly impact upon organisational resources. A significant level of resources is provided to the NFP sector through the tax concession framework:

> "Philanthropic gifts claimed as tax deductions have increased each year since 1992, rising also as a proportion of GDP. In the ten years to 2007-08, donations claimed by individuals increased by an average annual rate of 14.4 per cent to reach $2.34 billion, with claims in 2007-08 estimated to have reduced tax revenue by $810 million. Donations to private ancillary funds, an intermediary to the NFP sector, resulted in an estimated cost to revenue of $210 million in 2007-08. Refundable franking credits to NFPs have also risen significantly from 2001-02 to 2008-09, from $93 million to $554 million per annum."[55]

Not all charities are able to access the same tax concessions and certain tax concessions are available to organisations which are not charities. The tax concession framework is overly complex and that complexity is exacerbated by the application of outdated charity laws.[56] This situation is illustrated in the results of the peak survey, which are included at Attachment Two of this report.

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55 Commonwealth of Australia, Scoping study for a national not-for-profit regulator, Consultation Paper January 2011

56 Commonwealth of Australia, Australia's Future Tax System, Part 2 – Detailed Analysis, B3-1, 2010

8.6.1 Overview of tax concessions available for charities

The types of tax concessions available for charities are established by statute. At a Commonwealth level, the following statutes provide particular tax concessions:

- Income Tax Assessment Act 1997
- Fringe Benefits Tax Assessment Act 1986
- A New Tax System (Goods and Services Tax) Act 1999

There are also different tax concessions provided to charities by State Governments. Where a charity resides in a particular state, it may be eligible for concessions relating to payroll tax and land tax.

The following sections describe the main tax benefit categories which are available to charities. See also a table at Attachment 5 which summarises different Commonwealth tax concessions.

8.6.2 Tax Concession Charity Status

Tax Concession Charity (TCC) status provides charities with an exemption on income tax, GST concessions and a rebate on fringe benefits tax. While it does not directly affect the level of resources a charity can generate, it does enable a charity to retain a higher level of their income by reducing their tax obligations. Many charities hold TCC status.

8.6.3 Deductible Gift Recipient Status

Deductible gift recipient (DGR) status is valuable as it enables an organisation to provide a donor with a tax deductible receipt. This creates an incentive for individuals to donate money to the charity. In addition, many philanthropic organisations are unable to donate to charities without DGR status. For instance, Public Ancillary Funds and Private Ancillary Funds are both legally required to ensure their grants are only made to charities with DGR status.

DGR status is available to a wide range of organisations, including educational institutions, hospitals and war memorials. However, DGR is only available to a limited range of charities. Charities operating in the welfare and rights sector must be one of the following to receive DGR:

- A public benevolent institution (PBI), or a public fund established by a PBI, or a public fund for direct relief provision
- A PBI type institution which also promotes disease prevention or harm prevention
- A public fund on the register of harm prevention charities
- A public fund for charitable purposes in the event of a disaster
- A charity providing care to animals

Charities working in the welfare and rights area can only receive DGR if they are PBIs or have achieved specific listing in the Tax Act. There is no DGR category for charitable organisations which advocate to improve conditions for people experiencing poverty, sickness, suffering, distress, misfortune, disability or helplessness.

8.6.4 Specific listing

Charities which do not meet any of the categories listed for DGR status can apply to the Treasurer for specific listing under the Act. This requires an amendment to the Act and is a political process. Different Governments have approached specific listing in different ways. However, to achieve specific listing it would be expected that the organisation would need influence and the capacity to successfully lobby government.

In the Welfare and Rights section, there are 36 organisations individually listed. This includes:

- 9 Crime Stoppers organisations
- 8 Kidsafe organisations
- 8 Prevention of Cruelty to Animals organisations
- 11 varied, including Amnesty International and Ian Thorpe's Fountain for Youth Limited

Some of these organisations clearly play an advocacy role.

Case Study - *Does improving democracy warrant tax concessions?*

The Citizens Charter is a not for profit organisation dedicated to improving Australian democracy through civic education campaigns, public consultation and public deliberative forums. Their work helps to strengthen citizenship and active participation in the democratic life of the nation.

Citizens Charter does not meet tax rules to be considered a Tax Concession Charity, nor does it meet criteria for Deductible Gift Recipient Status. Despite philanthropic interest in providing resources to support their work, the lack of DGR status has restricted their ability to receive philanthropic funds.

To rectify this situation, Citizens Charter wrote to the Treasury in 2010 requesting specific listing. In March 2010 the Assistant Treasurer Senator the Hon Nick Sherry wrote to Citizens Charter to explain that their request was denied. The letter stated that "the general DGR categories deliberately restrict DGR status to a closely targeted subset of organisations reflecting areas of government policy priorities, generally to organisations that provide hands-on, direct services to the community" and that Citizens Charter did not meet the DGR criteria.[57] *While commending Citizens Charter on their objectives, the Assistant Treasurer did not support specific listing on the grounds that other organisations exist to promote knowledge and education in Australia without the benefit of DGR status and concern that providing Citizens Charter with specific listing would create public perception of preferential treatment.*

Citizens Charter Executive Officer Rodger Hills points out that numerous other non government organisations with similar objectives have the privilege of specific listing, and civic education functions within government are funded directly by government. Being denied specific listing effectively locks Citizens Charter out of funding, making it impossible to work towards its goals.

8.6.5 Auspice arrangements to access DGR

One outcome of limiting DGR categories is the practice of auspicing. This occurs when an organisation without DGR forms a relationship with a DGR holder to receive funding on their behalf. This is a common practice but raises issues for "funding" and "doing" charities.

Regarding "doing" charities, the law is not clear on how sound the practice is. A "doing" charity has to comply with its organisation's objectives and any endorsement criteria for its DGR category when receiving funding.[58] More broadly, auspicing can create risk for organisations when they are legally accountable for funds and the completion of a project, but not necessarily in control of how the project is being implemented.

Charitable trusts are not allowed to use auspicing arrangements to subvert their Trust Deed.[59] However, they may be able to fund a partnership project where a partner with DGR receives the funding, and other non-DGR partners participate in the project. This is only legitimate if the partner receiving the funding is both actively involved in the project and the project itself is consistent with the charitable objects of the receiving organisation.[60]

57 *Letter from the Assistant Treasurer Senator the Hon Nick Sherry to Mr Rodger Hills, Citizens Charter, 23 March 2010*
58 *PILCHConnect, DGR Frequently Asked Questions (FAQs), www.pilch.org.au/DGRFAQs/#5*
59 *John Emerson, Auspicing – A Trap for Well Intentioned Trustees, Philanthropy, Summer, 1995, pp2-3*
60 *Alice Macdougall, Community Foundations Structure and Compliance Overview, Freehills, 2005, pp12-13*

8.6.6 Public Benevolent Institutions (PBIs)

PBIs are a special category of charities, entitled to the widest range of tax concessions. PBI status is only available for organisations whose primary role is **direct relief** to individuals who need benevolent relief, namely those experiencing "poverty, sickness, suffering, distress, misfortune, disability or helplessness."[61]

PBIs receive Fringe Benefit Tax exemptions, which allow them to offer salary packaging for their employees, effectively increasing the "take home pay" received by workers and thereby enhancing organisational competitiveness regarding staff recruitment and retention. Organisations which hold PBI status are entitled to Deductible Gift Recipient status, which enables them to provide tax receipts for donors and also makes them eligible for the widest range of philanthropic funding.

8.6.7 PBI status and political restrictions

PBIs experience greater restrictions on their advocacy activities due to the requirement that PBIs are predominantly concerned with the provision of direct relief. As a result, "if an organisation exists to promote social welfare in the community generally, it will lack the required direct benevolence. For example, organisations for lobbying, advocacy, research and policy studies, and disseminating information are not PBIs."[62] Any other activities they undertake must be incidental to their direct relief and be "minor in extent and importance."[63] The importance of direct relief provision for PBIs impacts on advocacy in broadly two ways. Firstly, as noted above, achieving and retaining PBI status requires the charity to be predominantly involved in the provision of direct relief. Advocacy activities are not direct relief, so PBIs are obliged to control the level of their advocacy activities, if they are to ensure their PBI status is not jeopardised.

Secondly, welfare organisations which do not provide direct relief or provide low levels of direct relief will not qualify for PBI status and this in turn can bar them from DGR status. This has a direct resource implication for such charities and thereby impacts on the level of advocacy such organisations can undertake.

8.6.8 Availability of tax concessions for peak advocacy organisations

Peak charitable organisations are well placed to undertake effective advocacy on behalf of their members. However, the tax concession framework deals inconsistently with peaks, providing a small number with the full array of tax benefits and others with the lowest level of tax benefits.

As described above, in the welfare and rights sector it is very difficult to get DGR status unless an organisation is a PBI. It is also very difficult for peak welfare and rights organisations to achieve PBI status, unless they also provide direct relief services. Peak organisations that want to focus their activities on advocacy and sector development therefore have difficulty achieving concessions beyond TCC status.

The ATO was challenged on this issue in the Supreme Court of the ACT by the Australian Council for Overseas Aid (now ACFID) which "did not itself dispense aid but coordinated and performed education, government liaison and other services for organisations which provided benevolent relief to poor people overseas."[64] ACFOA won their case and were provided with PBI status on the basis that "nearly everything which the taxpayer does is done in the course of and for the furtherance of the relief of poverty even though it is done in conjunction with other institutions".[65]

However, the ATO has limited the applicability of the ACFOA ruling to the point where very few peak organisations in the welfare sector can be eligible. The ATO states that it will "accept that a non-profit organisation may be a public benevolent institution in the circumstances of the Australian Council for Overseas Aid case where:

- Its members are predominantly public benevolent institutions
- It has a common benevolent purpose with its members

61 ATO, Giftpack, 2008, p30
62 ATO, Giftpack, p31
63 ATO, Giftpack, p32
64 ATO, Tax Ruling 2003/5, Income tax and fringe benefits tax: public benevolent institutions, para 63
65 As above

- It provides services only to its members (apart from any provided directly to persons in need of benevolent relief)
- For those members which are not public benevolent institutions, it serves them only in relation to their public benevolent activities
- It does not carry on activities separate from its members
- Its activities can be properly considered as a step in the benevolent process of the group of organisations
- It and its members can be appropriately regarded as one whole enterprise of which the organisation is an integral part and
- Its activities are such that if they had been performed by the members themselves they would have been regarded as being carried on in the course of performing their benevolent activities."[66]

Organisations which achieve PBI status as a result of the ACFOA ruling are in a different position than other PBIs, in that they do not need to minimise their advocacy activities in relation to the provision of direct relief. However, advocacy undertaken must have a direct link back to the member organisations providing direct relief. While the ability for this limited number of peak organisations to undertake less restricted advocacy is positive, it highlights the lack of a consistent approach towards the issue of NFPs and advocacy more broadly.

8.6.9 Not for profit registers

The Commonwealth Government departments of Environment, Health and Arts have all maintained registers for non-profit organisations which are eligible for tax concessions. These organisations, may not strictly be charities in the legal sense, but are treated like charities in tax terms. It appears that they have also been subject to the same limitations on political activity that charities must comply with.

Case Study – *Australian Conservation Foundation – Charity or Not?*

Charities are eligible for certain tax concessions at a Commonwealth level, and other tax concessions on a State level (and yet others at a local government level). The Australian Conservation Foundation found itself in the position of being considered a charity by the Commonwealth Government, but not by the Victorian Government. This resulted in the ACF being denied access to payroll tax exemption by the Victorian Government.

The Australian Business Register describes the ACF as a Charitable Institution and records that they have been Income Tax Exempt since July 2000. However, the Victorian Government refused to recognise the ACF as a charity. This led the ACF to challenge the decision at the Victorian Civil and Administrative Tribunal (VCAT) in 2002.[67]

VCAT agreed that the ACF was a charity, on the basis that its work was for the public benefit. That the ACF undertook advocacy for public policy reform to protect the environment was not considered grounds to deny them charitable status. The Tribunal found in favour of the ACF and the Victorian Government was instructed to refund payroll tax paid since January 1998.

8.7 Other types of organisations and tax concessions

While this project has been concerned predominantly with charities, it is important to note that charities are not the only organisations which receive tax benefits. They are however the only organisations which have to abide by the political activity restrictions described in this paper.

Industry associations and trade unions are entirely exempt from income tax,[68] yet are able to participate without restriction in political activities such as lobbying and advocating for law reform.

66 ATO, Tax Ruling 2003/5, Income tax and fringe benefits tax: public benevolent institutions, para 65
67 Australian Conservation Foundation Inc v Commissioner of State Revenue (2002) VCAT 1491 (18 October 2002)
68 Income Tax Assessment Act 1997 (Cth), Part 2-15, Subdivision 50-A

9. How other countries deal with advocacy

Since the High Court decision on Aid/Watch, Australia has emerged as an international leader in its approach towards charities and advocacy. Arguably no other common law country has such a broad legal basis for the right of NFPs to undertake advocacy for public policy reform. Therefore, unless there are future approaches to restrict advocacy through the Tax Ruling or legislation, there is little to be gained in adopting approaches of other common law countries as a means of lessening restrictions. In fact it is more likely that other common law countries will be reviewing the Aid/Watch decision in relation to their own law.

However, the project has looked at the approaches of other countries and it is worth noting how other countries deal with this issue.

9.1 UK approach

The most referred to system for regulating advocacy by charities is the one in place in the UK. The Charity Commission for England and Wales regulates charity compliance on a range of regulatory matters, including advocacy. Consistent with Australia pre-Aid/Watch, charities in these countries are able to undertake advocacy, but only if it is incidental and ancillary to their charitable objects.

The Commission has taken a broadly liberal approach to its interpretation of the law, encouraging charities to undertake advocacy as means of achieving their charitable objects. For instance, the foreword to the Guidance on campaigning and advocacy states:

> "The experience of charities means that it is right that they should have a strong and assertive voice. Often they speak for those who are powerless, and cannot make their case themselves. Sometimes charities confront extreme social injustice, which they will want to tackle head-on. The work that charities do, and the major role they play in public life, is something they should be proud of."[69]

The Commission draws a clear distinction between political and party political activities, with party political activities disallowed. Its approach has evolved over time, with charities involved in the process of updating Guidance documents.

Before the Aid/Watch decision, this model was favoured by most of the participants in interviews for this project.

9.2 USA approach

The USA does restrict political activities but not by relying upon the common law. The restrictions are codified in taxation legislation. There are three principal restrictions in US taxation legislation affecting charitable organisations. Section 501(3) of the Internal Revenue Code, which is the major provision exempting entities from tax, requires that the organisations listed within it fulfil two requirements. First, there are restrictions on lobbying to influence legislation. Second, there are restrictions on electioneering. The specific types of activities that are restricted under these provisions are set out in the legislation. In addition, private foundations (which are a separate legal category under US tax law) are subject to special rules that impose federal excise taxes on foundations attempting to influence the outcome of a specific public election or carrying on voter registration drives.[70]

The US approach allows charities to undertake lobbying without jeopardising their tax concessions, so long as they allocate no more than a specified percentage of their budget on this activity. A similar approach has also been implemented in Canada. While it looks simple, critics argue that the US approach is complicated and heavy in compliance costs.[71] There was little enthusiasm for the US model amongst those who participated in interviews for this project, with some arguing that it provides an incentive for "dodgy accounting".

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69 Charity Commission of England and Wales, Speaking out: Guidance on Campaigning and Political Activity by Charities (CC9), www.charity-commission.gove.uk/Publications/cc9.aspx#1

70 Thanks to Dr Joyce Chia for assistance with summarising the US approach to political activity restrictions

71 ACOSS, A charity by any other name, 2003, p15

9.3 New Zealand

Since 2005 New Zealand has had an independent Charities Commission. This Commission administers a statutory definition of a charity which is based on the common law. Regarding advocacy, the Commission advises charities that they "can still qualify to register under the Charities Act if the charitable purpose is representational advocacy, or political advocacy which is ancillary to your main charitable purpose."[72] In 2010 the NZ Charities Commission deregistered the National Council of Women of New Zealand Inc, on the basis that its purposes "were not exclusively charitable and amounted to political advocacy, which could not be considered ancillary."[73] This was because the Council tracked government inquiries on a broad range of issues and made submissions.

Rather than adopt the UK approach of facilitating advocacy through the issuing of guidance and consultation, the NZ Charities Commission has recommended charities with "non charitable" advocacy functions should split their organisation,[74] effectively removing the advocacy component into a separate organisation with no access to charitable tax benefits.

72 *New Zealand Charities Commission website, "Advocacy" and the Charities Act information page,* http://charities.govt.nz/Settingupacharity/Charitablepurpose/AdvocacyandtheCharitiesAct/tabid/170/Default.aspx

73 *New Zealand Charities Commission, Deregistration decision: National Council of Women of New Zealand Incorporated, 22 July 2010, p1*

74 *Simon Collins, Splitting best way to keep tax advantage, says charities boss, NZ Herald, 15 July 2010*

10. The impact of charity laws pre Aid/ Watch on charities doing and funding advocacy

The following section combines the results of the interviews with "doing" charities and "funding" charities, as well as the email survey of peaks on charity status and philanthropic funding. It also describes a philanthropic funding hypothetical which the project undertook with the support of the Australian Taxation Office.

10.1 Significance of holding charity status

The project undertook to understand what the impact would be on the charities involved in the interviews if they were to lose their charitable status due to undertaking activities deemed "political" by the law. For the "doing" charities there was complete agreement that tax concessions, whatever their type, provide benefit to the organisation. Where those concessions reduce costs, they free up more resources for service delivery. Where those concessions provide tax deductibility for donations, they open up options for generating independent funds. Finally, where those concessions provide salary packaging, they result in higher income benefits to staff and thereby enable the recruitment and retention of higher quality staff.

Accordingly, the loss of tax concessions would have a significant impact on all of the organisations and the greater the number of concessions enjoyed, the worse the impact. One participant reported losing their DGR status in the 1980's. The loss led to a significant reduction in advocacy capacity, changing the nature of the organisation. One PBI noted that loss of their tax concessions would result in a significantly different organisation which would be smaller and have higher cost structures.

"Funding" charities also receive tax concessions and the types of concessions they receive vary according to the nature of their trust. Private Ancillary Funds allow an individual to receive an immediate tax deduction for amounts transferred into the trust. Those with funds invested in businesses where fully franked credits are allowed, or with businesses attached to the trust, certainly have their granting capacity increased by their charitable status. However, the significance of charitable status for philanthropics goes beyond tax concessions, to the very existence of the trust itself. This provides a more fundamental issue for "funding" charities, as they could be risking the integrity of their trust if they fund activities which are not charitable.

10.2 Does the law impede charities in undertaking advocacy?

The "doing" charities interviewed did not report that the law *prevented* them from undertaking advocacy.[75] Rather, charity law is perceived as creating a level of risk for those charities which undertake advocacy. The risk is most significant for those charities which view advocacy as integral to achieving their objects.

Those charities who were familiar with the 2005 Tax Ruling generally felt that they could work within the approach described in the Ruling. The Tax Ruling provides many examples of different sorts of activities under the title "political, lobbying and advocacy"[76] which are acceptable when undertaken by a particular charity in a particular context. However, a significant limitation of the Ruling is the lack of clarity – or bright line determinations – about what they should or shouldn't do and how much is ok. This magnifies the risk as there is no absolute line between acceptable advocacy and unacceptable advocacy.

A number of the "doing" charities reported that they undertook advocacy regardless of the risk, as they could not achieve their charitable purposes without doing so. Around half of the "doing" charities reported that they managed the risk associated with undertaking advocacy. Examples of risk management approaches include:

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75 Significantly, most of the organisations interviewed had experienced issues with their charitable status in the past. All of those which had been audited by the ATO came through the process with a strong sense that they were able to undertake advocacy and the process had left them better informed of how they should view advocacy in light of their charitable status. If the interview sample had included more organisations that had not undergone this process, the results may well be different.

76 ATO, Charities – political, lobbying and advocacy activities, December 2005

- ensuring the advocacy is only one activity in a wider mix of activities;
- controlling the language used to refer to their advocacy activities;
- getting legal advice;
- implementing processes to plan their activities where the advocacy they intend to undertake can be linked directly to their charitable objects and/or other organisational priorities;
- being cautious about how they collaborate with other organisations.

As noted above, organisations see having a mix of activities as important to be able to achieve the "incidental and ancillary" criteria for advocacy. A key advantage of bigger charities is that their size provides them with the capacity to show less "political" activity in relation to the rest of their activities.

10.3 Does the law impede charities in funding advocacy?

The vast majority of the "funding" charities interviewed saw investment in social change as extremely important. All of those involved in the granting process had numerous examples of where they had invested in social change and this was seen to be both highly appropriate and a very efficient use of philanthropic funds. However, most were concerned about the risk involved with funding public policy reform projects. Law reform and lobbying were seen to be most risky, but some philanthropics also saw anything described as a "campaign" as being risky, as the use of this language demonstrated a more "political" approach.

A number of the "funding" charities responded to the risk by perceiving some activities in the social change area – such as research, capacity building, seed funding – as being legitimate activities that they could fund without risk. However, when a project involved lobbying or law reform, the charity might respond in a number of ways.

- refuse funding for the project on the grounds that it was "political";
- work with the charity proposing the project to remove the risky elements of the project and fund the aspects that weren't risky;
- rather than focusing on a particular project, look to ensure a balance of activities that the philanthropic funds overall;
- provide an untied grant instead of a project grant, thereby distancing themselves from the project.

One interviewee described that they would look closely at the charity proposing the project to ensure that they could justify the advocacy on the basis that it was incidental to their charitable purpose. This process would be very time-consuming, as the charity seeking funding rarely understood the restrictions on "political" activity under the law.

A number of the interviewees talked about the need to use language to depoliticise projects. This may involve responding negatively to particular words, such as "campaign". Or it could involve repackaging an "advocacy" project so that it was a "research and capacity building" project. There was no uniform approach to this however, demonstrating that different people see different things as being "political" or "controversial".

Another issue which arose in the interviews was how certain organisations are seen to be "respectable" and therefore less risky than other "ratbag" organisations. Therefore a request for funding for an advocacy project from a large, well regarded charity would be favourably regarded, whereas the same request from a "ratbag" organisation would not be. While the issue was not explored in detail with all of the interviewees, it was suggested by some that an organisation would not be well regarded if it participated in organising demonstrations or was involved in a public way in conflict with government or industry.

Case Study - *What makes a project political?*

A family foundation operates under the umbrella of a large Trustee company which must approve all grants from the Foundation's account.

The family trustees are interested in funding social change and public policy reform projects. However, they have met with resistance from the Trustee company on the basis that particular projects are too 'political'.

For example, the family foundation wanted to support the Australian Conservation Foundation's proposal to set up a website on climate change to educate and encourage grassroots community involvement in the issue. The Trustee's lawyers were concerned about political overtones of the project. They objected to some of the wording, most notably the use of the word 'campaign' – as in 'education campaign' -- in the funding proposal. The funding proposal had to be redrafted a number of times -- a process that created a lot of work and tension over several weeks. Eventually the Trustee company agreed to the grant.

The Al Gore Climate Change Ambassador project was also potentially problematic. It involved Nobel Laureate, former US Vice President Gore, training hundreds of climate change ambassadors to educate the community about climate change issues. Funding the first two years of the project went without a hitch. However when Gore was coming to Australia, to train ambassadors in lobbying techniques prior to the Copenhagen Climate Change Summit, the family trustees realised the project would be viewed as overtly political -- albeit non-partisan. Rather than even try to get the approval of the Trustee firm's lawyers they instead opted to give the ACF an unconditional capacity-building grant.

It was clear from the interviews with philanthropic organisations that they have been in the position of having legal obligations around political activity, but without any guidance as to how they should approach the funding of political projects. While some philanthropics report having communication with the Attorneys General, there has been no public guidance from this source that the project knows of. Therefore they have had to work out for themselves, with the assistance of legal advice, how the common law should apply to them.

The project has also interviewed a number of legal experts, some of whom provide advice to philanthropics. They also had no shared view on how philanthropics should approach political projects. One interviewee explained that the 2005 Tax Ruling had changed his approach in advising philanthropic clients. This interviewee argued that the emphasis on advocacy being incidental to their charitable objects meant that most philanthropics could not fund advocacy, as they lacked a clear charitable object (such as poverty relief) with which to link and justify advocacy funding. This interpretation was disputed by another legal expert.

10.3.1 Hypothetical on philanthropic funding for advocacy projects

In response to this situation the project engaged the Australian Tax Office in a "hypothetical", where they provided feedback on four possible scenarios involving the funding of advocacy projects (see attachment 4). In summary, the ATO advised that the philanthropic organisation should take steps to assure themselves that by funding the project they would not be jeopardising the charity status of the "doing" charity. With this reassurance and assuming that all other legal matters (such as the terms of the Trust deed and any regulations applying to the particular philanthropic) were resolved positively, advocacy projects could be funded. Interestingly, only one of the philanthropic organisations interviewed had an approach similar to this. This demonstrates how "in the dark" the philanthropic sector have been in relation to this important legal issue.

The ATO's approach to the hypothetical projects was much more lenient than the approach implemented by most of the philanthropics interviewed. However, one wonders how responsible philanthropic organisations can be for another organisation's charitable status. Would the philanthropic be in some way accountable if they funded an advocacy project and the charity funded did "too much" advocacy?

10.4 Impact of charity law – restrictions on resources for advocacy

"Doing" charities reported two key restrictions on their ability to generate private funds for advocacy. The first is that DGR status is required for charities to be able to access private funds. It was felt that most philanthropic organisations require DGR status as a precondition of any grants. The ability to generate donations from private individuals who support the charity is also greatly reliant on DGR status.

As an individual can make donations to DGR organisations and receive a tax deductible receipt, asking the same individual to make a donation without the receipt is a clear disincentive.

Hence DGR status is very important, but very difficult to access for social welfare and human rights organisations that do not undertake direct relief work. More than half of the peak welfare organisations which participated in the Peak Survey reported that they did not have DGR status. Accordingly, these peak organisations were far less likely to receive philanthropic funding.

The second restriction on resources for advocacy as reported by "doing" charities relates to their perception that philanthropic organisations are generally unwilling to fund advocacy. Those charities which do receive philanthropic funding for advocacy report a limited number of trusts which are willing to provide such funding. Concern was expressed by some charities that trusts seem to view advocacy and campaigning activities as illegal rather than restricted.

Case study – *Neighbourhood Houses and Learning Centres*

Neighbourhood Houses and Learning Centres provide social, educational and recreational activities for their communities in a welcoming and supportive environment. They are managed by volunteer committees and paid staff. Good quality affordable childcare and playgroups are offered at most houses. Activities are generally run at low or no cost to participants.

The Association of Neighbourhood Houses and Learning Centres report that 7% of their 370 members have access to DGR. Some have applied and been refused – despite the fact that their peers have been successful in achieving DGR. The Association itself does not have DGR status.

The Association has been advocating for the review of tax laws to enable charities which undertake preventative work to access Deductible Gift Recipient status. They argue that recognition of prevention in the tax laws will enable such charities to access philanthropic funding and business partnerships to resource their work. This will result in far wider social and economic benefits.[77]

77 *Association of Neighbourhood Houses and Learning Centres – DGR Research and Advocacy Project, 'Prevention is better than cure...' A briefing paper on why Australian DGR tax laws should be amended, 2008*

11. Conclusion

[1]The Charity Law Reform Project has considered the issue of barriers to advocacy during a time of change and opportunity. Charities have faced unfair restrictions on their ability to advocate for public policy reforms which directly contribute to achieving their charitable goals. While the vast majority of charities have not been penalised for their advocacy, all have had to function with a level of risk and uncertainty not faced by other players in the policy landscape. Philanthropic organisations have been particularly concerned about risk and this has restricted resources available for advocacy.

The High Court decision on Aid/Watch should flag a new era for charities by removing the common law basis for restricting "political" activities. However, until the Tax Office updates its Tax Ruling, it is not possible to predict with complete certainty the ramifications of the decision.

The tax concession framework also plays a role in restricting advocacy, particularly through barring many charities from access to DGR. The framework needs to be revised in light of this research. This role should fall to the independent NFP regulator once it is established.

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Attachment 1 -
Results of community organisations survey

22 December 2010

Nine organisations participated in the community organisations survey. Most of the organisations were selected for interview because they were known to have had experienced issues around their charitable status. In addition, the Australian Council of Social Services was interviewed because of its significant history of policy work in the area and its relationship with charities across Australia.

Organisations which participated in the survey:

- Australian Conservation Foundation
- Australian Council of Social Service
- Catholic Family Services Victoria
- Federation of Community Legal Centres
- Human Rights Law Resource Centre
- Oxfam Australia
- Public Interest Advocacy Centre
- The Wilderness Society
- Victorian Council of Social Service

Question 1 - *What sort of tax concessions do you and/or the organisations you represent have, and what is the significance of them?*

All had TCC status, giving them access to income tax exemption, GST charity concessions and FBT rebates.

Six of the organisations also had DGR status (five of which were also PBIs). One of the organisations, which was made up of separate state entities and a national entity, only had DGR status for the national entity.

The five organisations with PBI status had with access to fringe benefit tax exemptions.

One of the organisations, which only had TCC status, had held DGR status in the past but had lost this entitlement during the 1980s.

Significance of income tax exemption

All of the organisations with access to tax concessions noted the significance of the concessions to their organisation. The higher the level of tax concessions, the more significant they were to the organisation. According to one organisation (which had income tax exemption, DGR and PBI status), the loss of tax concessions would have significant material impacts on the organisation, resulting in a smaller organisation with a higher cost structure.

Two of the organisations noted the significance of being income tax exempt, in terms of minimising the costs to the organisation and maximising the ability to use income generated through fee for service activities.

Significance of DGR status

Most of the organisations with DGR status noted a high level of importance for the organisation in terms of providing access to philanthropic funds and member donations. Two organisations noted very high levels of reliance on philanthropic funding (50% and 30% respectively) and that philanthropic sources usually require DGR status on behalf of the recipient.

Another organisation received most of its funding through monthly donations from individuals. For them, the loss of DGR status would lead to a loss of competitiveness and a reduction in revenue, as it would likely lead to some donors redirecting their donations to other organisations with DGR status.

Two PBIs noted that they did not use their DGR status much. One explained that they did not want to compete with their member organisations for fundraising. The other said that they were currently seeking to generate more resources through private donations.

The organisation which had lost its DGR status in the 1980's reported that this had resulted in wide-ranging changes within the organisation. A number of projects had been auspiced by the organisation prior to the loss of DGR and these projects left the organisation. The ability to fundraise through philanthropic sources or private individuals was very limited.

Significance of PBI

The five organisations with PBI status all concurred regarding the importance of the resulting fringe benefit tax exemption in terms of salary packaging. This enabled the recruitment and retention of higher quality staff. One organisation reported that the salary packaging was worth $5000 "in the hand" to each staff member and would cost the organisation around $100,000 to make up if it was lost.

For one organisation, all of the staff had been employed in the private sector prior and had experienced substantial pay cuts when they commenced employment with the community organisation (which equated to a 60% pay cut for one staff member).

One organisation had PBI status for one of its entities and only TCC status for its trading entity. As a result it had to manage two separate enterprise agreements and found it more difficult to recruit staff for the trading entity, which did not offer salary packaging.

Question 2 - *What is the impact of current charity law on the way you approach public policy reform projects?*

None of the organisations reported that charity law prevented them from undertaking public policy reform projects. Around half of the organisations reported taking specific steps to minimise the risk to their organisation's charitable status, while the other half reported that they undertook advocacy regardless of the risk.

Three of the organisations noted the importance of having a mix of activities within the organisation to ensure that political activities are balanced with other activities such as educational, sector development, research etc. One of the organisations ensured its annual report highlighted the range of activities undertaken. One of the organisations was concerned that they were at risk of "doing too much" public policy reform, as they were auspicing an advocacy project in addition to their own internal advocacy work.

Three of the organisations reported that they had made changes to the way in which they plan for and undertake advocacy in response to charity law.

- Two of these organisations described more rigorous planning processes to identify issues where advocacy will be undertaken. The purpose of planning for one organisation was to ensure that the issue fits within the organisation's charitable purpose; the other organisation considers potential advocacy issues under set criteria.

- Two of the organisations pay careful attention to the way in which they use language to describe their activities.

- Two of the organisations reported using legal advice at times.

- One of the organisations reported ceasing particular activities which had been seen as legitimate prior to an ATO audit, namely handing out how to vote cards.

- One of the organisations reported becoming "nervous" about working in coalition with other groups who are engaged in direct action where there exists a significant "grey area" regarding what is legal and what is not.

One of the organisations reported that their tax concession status comes under a peak body ruling, which allows for advocacy. Hence they did not see charity laws as a constraint on their advocacy.

Two of the organisations noted that there was an increasing interest in the charity sector to engage in advocacy. The changing policy landscape and the nature of the contracting relationship between organisations and government have impacted strongly on those organisations. Accordingly, organisations want to have more impact on policy and this can only be achieved through advocacy.

One organisation reported that they had implemented a number of measures which were compatible with the types of responses to charity law, but that they did so for risk management and branding reasons. These measures included an internal arrangement whereby advocacy is not funded by tax deductible donations and an advocacy approach which is evidence based and strongly aligned to the organisations dominant purpose.

Question 3 - *Has the charity status of you or your member organisations been challenged? If so, what happened and what were the implications?*

Six of the nine organisations had experienced a challenge of some kind to their charitable status:

- One had been subjected to three audits by the Australian Tax Office. They were advised to change some of their activities to ensure compliance but did not lose their charitable status;
- One had lost their DGR status in the 1980s. This resulted in the loss of project activity and restricted fund-raising potential;
- One had been advised by a major law firm specialising in tax law and charities that they were ineligible for charity status. They subsequently applied themselves and were provided with status as a TCC and PBI status;
- One had been subjected to criticism by a government Minister in the media, linked to a review of government funding;
- One had been refused charitable status by a state government. The decision was successfully overturned;
- One had its DGR status revoked by the Australian Tax Office on the basis that it did not do enough direct service delivery. This decision was subsequently reversed.

Other related issues of importance

The community organisations raised a number of issues which are related to, but separate from, political activity by charities issue.

Fundraising for public policy reform work: Four of the organisations raised the issue of philanthropic funding for advocacy. The organisation without DGR status noted the limitations this placed on their ability to apply for philanthropic funds. For one organisation, the limited view foundations take of what they can legitimately fund under charity law was a problem which restricted their ability to fundraise for advocacy projects. This situation was viewed by another organisation as stifling advocacy which in turn stifles the alleviation of poverty and disadvantage.

Relationship with government: Four organisations noted the relationship the NFP sector has with government, in the context of NFPs being funded by government (both to deliver services which traditionally were provided directly by government and to deliver services not traditionally the domain of government). Two organisations reported that gag clauses had impacted upon the ability of the sector to advocate. One organisation reported that their direct funding by government was much more significant to them than their fundraising income enabled by their charitable status. Another organisation reported having multiple funding arrangements with the same state government and that having state government support for their work in a funding capacity did make them more interested in the results of their advocacy projects. One organisation reflected on the years when the Kennett Government was on

office, where there was widespread criticism of charities by the government and particular charities were targeted for their advocacy.

Other charity laws: One organisation reported that the government entity test was a more immediate concern for their member organisations. One organisation noted the desirability of extending the charities definition to include prevention. Another organisation noted that there is a clear link between advocacy and prevention (ie, advocacy which results in policy change can be a preventative measure).

Other regulations: One organisation noted that reducing red tape was an important issue for the sector generally. Inconsistent fundraising laws across Australia was noted by one organisation as more of a problem than charity laws. Another organisation noted the importance of enhancing the accountability of the sector more broadly. It reflects badly upon the whole sector when one organisation does something questionable in the mind of donors. Currently the only option open to charities concerned about this is self regulation; appropriate levels of regulation are required.

Question 4 - *Do you have any ideas about how to remove barriers to public policy reform work by charities?*

In general, the organisations were interested in "bigger picture" approaches to removing barriers to public policy reform work by charities.

Independent regulator

Six of the organisations were strongly in favour of the establishment of an independent regulator for the sector which would take over the ATO's role in determining charity status and overseeing the sector.

One organisation was less in favour of an independent regulator, on the basis that they were unsure that an intermediary between the ATO and individual charities was a good thing and concern that the UK system is onerous for small charities. One organisation not in favour of a new regulator stated that their concern might be overcome if the body was independent from government.

Charities definition

Seven of the organisations were in favour of updating the charities definition on the basis that the common law charity definition is outdated. Two of the organisations recommended that the definition issue be tackled subsequent to the regulatory issue, so that the regulator oversees the process of updating the definition. One stated that human rights needs to be added to the list of charitable purposes.

Regarding the charitable definition, two organisations were less enthusiastic about a statutory definition. One felt that the Tax Ruling (on Charities – political, lobbying and advocacy activities) was a positive measure and was concerned that the situation might go backwards if a new definition was developed. The other stated that the new definition won't get rid of ambiguity as there will always be cases which are not clear cut.

Break the "ancillary and incidental" requirement

Four of the organisations recommended removing the restriction on advocacy which stems from the legal requirement that political activity by ancillary and incidental to charitable purposes. One organisation said that there shouldn't be a line between political and charitable activities as engagement in democracy and debate is in the public interest. Another stated that advocacy is not an incidental part of alleviating poverty and the law should reflect this. One of the organisations suggested that this barrier could be removed by judging charity status on the organisation's purpose, not their activities.

Transparency and accountability

None of the organisations supported the implementation of a US style approach where there is strict codification of what can and can't be done by charities and charities need to administer systems which measure the amount of resource going towards political activity. Two of the organisations were concerned that the system promote transparency, not "dodgy accounting".

However, there was also support for more clarity in the law of what can and can't be done. One described this as

more “bright line tests” for things to remove the grey areas. Another recommended the ATO prioritise the release of a document which is clear and that the process of clarification be conducted under the auspices of a parliamentary committee.

New classification for advocacy based organisations

Two organisations recommended the consideration of the creation of a new type of income tax exempt / DGR organisation outside of charity law. This would be aimed at civil society organisations with public benefit objects that were set up predominantly to provide advice to government about policy.

More robust registers

One organisation recommended a more robust approach in law to the administration of registers (such as the Register of Environmental Organisations) as it is currently entirely at the Minister’s discretion what organisation enters and leaves the register.

Attachment 2 -

Results of peak organisations survey

Tax concession status and philanthropic funding

November 2010

Question 1 – *What sort of charitable status do you have?*

Peak organisations were asked to indicate the types of tax concessions they had by selecting from a list. A wide range of results emerged, with ten different combinations experienced across the 23 respondent organisations.

The table below shows how many organisations indicated that they had a particular category of tax concession. They were able to select as many types of tax concession as applied to their organisation.

Tax concession type	# of organisations
None	2
Income tax exempt	12
Payroll tax exempt	7
Fringe benefits tax rebate[1]	1
Land tax exempt	1
Public Benevolent Institution	2
All of the above	5
Total	30[2]

As organisations could choose multiple tax concession options, an array of different combinations resulted. This table shows how many organisations hold each different tax concession combination. It also splits the responses into inferior and superior tax concession status; those with inferior status have less access to philanthropic and private income support than those with superior status.

Tax concession type	# of organisations
None	2
Payroll tax exempt	1
Income tax exempt	5
Income tax exempt and payroll tax exempt	3
Income tax exempt and fringe benefit tax rebate	1
Income tax exempt, payroll tax exempt and land tax exempt	1
Total organisations with inferior tax concession status	**13**
Deductible Gift Recipient	2
Deductible Gift Recipient and Public Benevolent Institution status	1
All except for land tax exempt	2
All	5
Total organisations with superior tax concession status	**10**

As the table shows, thirteen peak organisations have "inferior tax concession status" which encompasses all of the combinations which do not include DGR. Ten peak organisations have "superior tax concession status" which encompasses all of the combinations which include DGR.

(Footnotes)

1 Fringe benefit rebate was not provided as an option in the survey; however one respondent added the category to the list. As the rebate is part of the "package" of being a Tax Concession Charity and linked to income tax exemption, more organisations would be eligible for this rebate than indicated by this table.

2 Organisations were able to choose more than one type of tax concession

Question 2 – *How does your charitable status compare with your member organisations?*

In comparison with our member organisations our charitable status is...	# of organisations
Less	9
It varies	9
The same	4
Not sure	1
Total	**23**

The vast majority of the peaks had either less charitable status than their member organisations or variable charitable status. All of the peaks with less charitable status are also classified as having inferior tax concession status. Two of the peaks which specified their charitable status varied in comparison to the members also noted that they had mainly less status than their member organisations. One further noted that, while they only had income tax exempt status, 7% of their members had DGR.

A minority of the peak organisations had the same charitable status as their member organisations. All of the peaks with the same status as their member organisations had superior tax concession status.

Two of the peaks with all tax concessions indicated that their status varied in comparison to their member organisations. One of these noted that they used their tax concession status to attract project funding and auspice projects on behalf of their members.

Question 3 – *Do you receive funding from philanthropic organisations?*

Whether funding is received from philanthropic organisations	# of organisations
Yes	8
No	10
Other	5
Total	**23**

Eight peaks indicated that they received funding and ten that they did not receive funding from philanthropic organisations. Of those which indicated "yes", all except for one had superior tax concession status. Those who indicated "other" could generally be considered a qualified "yes" response to the question. They explained their situation as follows:

- We auspice our funds on behalf of other organisations and have, in the past, received them directly *(peak with superior tax concession status)*
- Several years ago, not in recent times *(peak with inferior tax concession status)*
- Occasionally, not often applied for as Alcohol and Drugs don't seem to be that attractive *(peak with superior tax concession status)*
- A philanthropic trust supports one of our projects but the funding is channelled through a member organisation with DGR and does not come directly to us *(peak with inferior tax concession status)*
- In the past, ie Myer Foundation *(peak with inferior tax concession status)*

Of those which indicated "no", all had inferior tax concession status except for two. Two of the peaks which indicated "no" also noted that they attempted to receive philanthropic funding.

Question 4 - *for those organisations which receive philanthropic funding, do you receive philanthropic support for advocacy related projects?*

Whether philanthropic support is given for advocacy related projects	# of organisations
Yes	6
No	3
Other	4
Total	**13**

Almost half of the peaks which have received philanthropic funding have had such support for advocacy related projects. A number of respondents made comments as follows:

- Other – we receive minimal philanthropic support – unsure of application of these prior to my commencement
- Yes – but not for individual advocacy only systemic advocacy. We desperately need recurrent funding for individual advocacy given the demand for same by people with a mental illness
- Other – research and conference support which indirectly supports our advocacy work
- Other – receive for research projects which we then use to advocate
- Other – in the past for advocacy linked to service around employment

Further analysis – DGR status, philanthropic fundraising and public policy reform

As discussed above, 13 of the peak organisations had inferior tax concession status, meaning they lacked access to DGR. There is a direct correlation between organisations holding DGR and getting access to philanthropic funds, so organisations without DGR are less likely to get philanthropic funding. Those peaks who receive philanthropic funding tend to receive funding for advocacy projects, or projects which support advocacy (such as research projects). Hence DGR status plays an important role in enabling peaks to get independent funding for advocacy.

Organisations without DGR

Of these, 5 of the organisations were Councils of Social Service (or COSSs). Each COSS reported that they had less charitable status than their member organisations (which would include large PBIs, as well as a variety of other Not for Profit organisations).

The remaining 8 organisations lacking DGR were an assortment of peak organisations and networks. They either reported that they have less charitable status than their member organisations, or that it varies.

While there is some view within peaks that the Tax Office provides similar tax concession status to peaks as their members have, there doesn't appear to be a clear link between the status of members and their peaks.

DGR status – where peaks fit in the Tax Act

Assuming that none of the organisations without DGR status are direct service providers (which would qualify them for PBI status and DGR), to achieve DGR they would need to fit the narrow criteria for Welfare and Rights organisations under the Income Tax Assessment Act 1997. These criteria allow for harm prevention charities, relief of persons in Australia in necessitous circumstances, Australian disaster relief, animal care, and PBIs which also promote harm or disease prevention.

The other way to qualify for DGR is to be listed directly in the Act. In the Welfare and Rights section, there are 36 organisations individually listed.

Does the advocacy role of peaks make it difficult to achieve charity status?

Playing a role in the policy process and advocacy for disadvantaged people is an important role for all of the COSS's. Seven of the eight non-COSS peaks without DGR clearly see advocacy as a key purpose, as promoted on their websites. They include reference to forms of political activity such as:

- Policy advocacy
- Promoting the voice of their members and family clients
- Make representations to government
- lobbying

Despite peaks clearly playing an important role in advocacy, all bar two of the peaks had been classified as a charity by either the Commonwealth Government (by providing them with income tax exemption) or the state government (by providing them with payroll tax exemption). Therefore the issue isn't whether or not peaks are charities – by and large they are. It is whether they fit the criteria to be a PBI (provision of direct relief) or DGR (see above).

All of them also undertake sector development activities as well, playing an important role in supporting their member organisations (many of which are direct service providers) with an enhanced capacity to undertake their work. This role is not valued under the current tax concession criteria.

Attachment 3 -
Philanthropic Organisation Interviews

9 December 2010

Organisations interviewed:

- Melbourne Community Foundation
- ANZ Trustees
- Reichstein Foundation
- RE Ross Trust
- Education Foundation – Foundation for Young Australians
- Ruffin Falkiner Foundation
- Myer Foundation and the Sydney Myer Fund
- Becher Foundation
- JB Were

What sort of philanthropic organisation are you?

The organisations interviewed came from a wide range of philanthropic organisations. They described themselves as:

- Public Ancillary Fund
- Trustees for a variety of legal structures, including Public Ancillary Fund, Private Ancillary Fund, private charitable trusts, testamentary charitable foundations
- Small family trust, sub fund of a Public Ancillary Fund
- Family foundation
- Charitable foundation
- Trust established under will - 2
- Private Ancillary Fund – 2
- Philanthropic services team within a larger company that provides private wealth management services

Due to the wide range of organisational types, not all of the interviewees were asked the same questions. This will account for different numbers of respondents for some of questions below.

What tax benefits do you (or your clients) receive from your charity status?

Eight respondents were asked this question and the responses varied as below:

- TCC and get imputation for tax credits, don't pay some sales tax
- TCC, franking credits refunded. Have a business which effectively doesn't pay tax as any tax paid is returned.
- Initial tax break when the funds were put in (2)

- TCC and DGR for main fund
- Specifically listed organisation with PBI status
- TCC and franking credits refunded
- Franking credits refund where funds are invested in eligible Australian or NZ companies– increases grant making capacity

What is your accountability to Government, including the Tax Office and Attorney Generals office?

One respondent had no fiduciary role, only providing pro bono advice to clients who are themselves accountable to government.

Tax Office – 3 reported that they had no accountability, 5 that they had limited accountability. One Private Ancillary Fund provides a return to the ATO to account that donations have been made to applicable charities, but not on how the money was spent.All of the respondents replied that they had no (3) or limited (5) accountability to the Tax Office.

Another reported that the ATO seeks returns on PAF and PPF structures which included the names of the organisations to which grants have been made so they can check DGR status. They reported that the main purpose of this was to ensure that organisations which have been set up to donate income are doing so and to eligible activities.

The other two respondents noting limited accountability stated that this was limited to “standard financial reporting” and to “ordinary business activities like GST”.

Other areas of government were seen to be more important in terms of accountability to a number of the respondents. Four reported that they had to make annual returns to ASIC including things like Trustee changes and financial statements. Two noted the Attorney General; one stated that this was the main accountability in each state and involved both annual returns and ongoing contact throughout the year, the other that they made a Pains and Troubles report to the Attorney General.

What are the objects of your organisation? Do you have any policies which govern your approach to giving?

All except one of the organisations had a granting role and therefore had objects and policies. Of the latter, all had different approaches to giving, in relation to what they were able to or wanted to give to, and the requirements of grants. For instance:

- Was only a grantmaking organisation but now gives away small amounts and also raises and gives, plus does direct project delivery. The balance is now more in research and advocacy. DGR not required. Can provide funding directly to individuals with safeguards in to protect the funds. For instance, a large grant may require an auspicing organisation.
- No written policies, family trustees operate loosely together. Tend to be environmentally focused or look to projects which are worthwhile but don’t get funding easily. Most funds allocated to systemic change projects, the rest are ones that make you feel good.
- Flexible will which identified four particular areas – relief of disadvantage, public education, early years and conservation of native flora and fauna. Also any charitable purposes, not just charitable institutions, so can fund anything which fits within the charity definition. Also happy to fund the capacity of organisations, not just projects.
- Target groups are grassroots, which often requires more of a community development approach. Very broad trust deed, focused on funding projects in the state of Victoria. Is defined differently at different times; honed down to social justice, funding smaller community based organisations, supporting them to take more

- control of their lives and thereby build civil society. Fund projects which tackle structural causes, not direct service delivery. Fund the needs which relate to where the group is at.
- Trust deed deliberately designed to be as none-restrictive as possible with a view to having policies which shape the approach to giving. Try not to limit the donors.
- Won't make a general distribution to an organisation, we want to fund projects so that we can work out what happened at the end. Want to have boundaries around so we can evaluate. We support and encourage social change projects.
- Object of trust is to support the community to create a better society. Will specifies religion, education and general charitable purposes. Provide small grants for small community groups with an urgent need. Have larger grants which are allocated over a number of years and we work intensely with the organisation to develop the relationship and learn how the project is working.
- Philosophy is to support social change. Focus on refugees and asylum seekers, indigenous issues, overseas aid, Jewish community and other projects which are too good to go past.

For philanthropics which cover more than a single fund. What role do you have in the distribution of funds from the clients you manage? What role do your clients play in determining how their money is allocated?

There were two respondents whose organisations covered more than a single fund and therefore they had a relationship with clients whose money was being invested and gifted. Both described their role in distributing funds similarly, in that the organisation has a legal responsibility for the funds and the power to determine the allocation of funds, but that the donor was also seen to have an important role to play.

One reported that they talk to donors and take their opinions into account. The other that their clients fall into two main groups, one which the organisation provides advice to and the other which "does their own thing" with the organisation only providing legal due diligence. Both organisations reported that they make the grants in line with the clients wishes, so long as the wishes are legitimate (ie funding something charitable). One organisation reported that they do a lot of legal due diligence to ensure that all grants are legitimate.

Do you fund any organisations which are pursuing social change, or encourage your clients to support social change? Describe.

All of the respondents involved in granting reported that the support of social change was very important to them, with three reporting that these are the main types of organisations or projects they are interested in funding. The respondents provided many examples of projects or organisations they had funded which were focused on systemic change. This included public policy research projects, funding campaigns run by young people and individuals with a platform which met the foundation objects, positions which gather statistics and information on target groups, seed projects which demonstrate a different approach to responding to a social problem.

Two of the organisations also had clients under their structure who played a role in granting and both of these organisations reported that they try and educate their clients to support social change projects and that some of their clients see the importance of this.

One organisation had no formal role in granting but did provide advice to clients about how they can approach granting so that it works for them. They didn't promote social change over and above other approaches, but did get them to think about it.

Have you funded any public policy reform (PPR) projects or how do you advise a client that was interested in funding public policy reform?

All of the respondents reported funding projects which had PPR dimensions. However, this particular area of activity was one where there were different views on what could legally by funded and what is appropriate to fund. In terms of what can and can't be funded under the law:

- One organisation reported that they fund public policy reform projects that are linked to their charitable objects. This organisation also reported being specifically listed in the Income Tax Act and that this made them feel more comfortable working in the public policy reform space than if they were not specifically listed.
- One organisation reported that they fund think tanks which are interested in policy and regulation. They provide untied grants to these organisations.
- One organisation provided grants to a number of organisations for public policy reform projects and are concerned to see these projects influencing the policy process. However, language is important so the Trustees would be concerned about funding something described as a campaign. Avoid things which are Capital P political.
- The family trust organisation reported that they wanted to fund public policy reform, but that the Trustee Manager had concerns that such projects are political and therefore can't be funded. This meant that projects had to be "packaged" in certain ways to make them acceptable.
- One organisation reported that they funded such projects within the scope of existing restrictions about incidental. So it is safer to have PPR as part of a wider project. They would never fund a party political project.
- Two organisations reported that they do not fund "overtly political" elements of PPR projects. For both, law reform and lobbying were seen to be not fundable, but all the stages leading up to that point were fundable. One of these organisations noted that the majority of any PPR project is in the stages prior to lobbying, and it is consistent with charitable to fund work to quantify a problem, engage with the community, research into the needs of a target group, build an evidence base, develop models education and community building.

One of the organisations with a strong background in funding PPR projects regarded the issue of what can and can't be funded in non-legal terms. Their view was that funding lobbying was not appropriate, nor was funding direct action type campaigns such as demonstrations. They advised that philanthropics need to take care in terms of how they align themselves and should not get involved in the political process.

One organisation providing advice to clients about granting reported that clients with an interest in PPR are usually well connected in the area they want to fund. They would advise them to be cautious about funding projects in politically sensitive areas and use ATO publications to advise them on how to approach the issue.

Does funding PPR make you concerned about putting your own charitable status at risk? Do you take any measures to reduce risk to your charitable status?

Most of the respondents saw that there was an element of risk involved with funding PPR. How much they saw this as a material risk for their own organisation varied according to their level of interest in funding such projects and how confident they were in their own risk management approach.

5 reported implementing risk management approaches:

- 2 managed the project documentation to exclude reference to particular activities, such as lobbying
- 2 would be concerned about funding projects which were described as 'campaigns' and may refuse funding for such projects
- 3 made general donations at times to avoid funding projects which could be seen as political. One noted that the weakness of this approach is that the funded organisation may still promote the philanthropic as having a role in an overtly political project anyway.
- 1 described always worrying about the risk, particularly when organisations they support get to the stage of needing funds for lobbying. They tried to manage risk by communicating with the groups they fund to ensure they understand what can be funded.
- 1 put a lot of effort into looking at the intention and real purpose behind the organisation seeking the funds, to ensure that they would not be breaching their charitable purpose by undertaking the advocacy

3 didn't report using risk management approaches:

- One explained that their tax status as a specifically listed organisation meant that they did not fear contravening their charitable status. However, under the structure of a past organisation which had PBI status but wasn't specifically listed, they had been concerned that PPR was both risky generally and also that engaging in projects for PPR reasons could jeopardise their PBI status.
- One which didn't see a risk explained that this was because the projects they funded were non partisan and did not include lobbying. Instead they focused on building the evidence base and building capacity.
- Another organisation said that they had funded PPR projects including lobbying, but at the time the Board did not see the projects as risky and that the trust deed did not prevent them from funding such projects. In addition, all of the organisations funded were charities which primarily do direct relief and it was a small proportion of the funds distributed in a year.

Charitable status required for organisations funded

Seven respondents, covering 8 trusts, provided information about whether charitable status was required for organisations funded and, if so, what kind.

- Three did not require DGR; however one also noted that it is nearly always provided.
- The two organisations which had a range of foundations under the one structure stated that they had some "streams" which by law required DGR, and others which did not. One of these provided the example of private charitable trusts, which can fund charitable projects but don't require any sort of charitable tax status. This means they can fund an individual for an education scholarship, as the scholarship would be for charitable purposes.
- Two organisation reported that they require Tax Concession Charity status, DGR and the project must further the charitable purposes of the organisation being funded.
- One organisation reported that they need DGR status

Attachment 4 -
Hypothetical
General Advice Provided by the ATO

SCENARIO PART 1 *(requested 6th of October 2010)*

Philanthropic Organisation 1

The Goodworks Foundation has received two separate funding applications from charities. Their Trust Deed makes the following provision regarding how funding may be allocated:

> The Trustees may at any time determine with respect to all or any part or parts of the income of the Trust Fund derived in each Accounting Period to pay or apply the income for the purpose of providing money, property or benefits to or for charitable institutions or funds, or for charitable purposes, or for the establishment of charitable institutions or funds.

Project 1 – Towards Emission Regulation

This project aims to address climate change by improving the regulation of greenhouse gas pollutants. In the absence of a price on carbon emissions, there are currently no substantive policy measures in place to enable Australia to meet its commitments under the Kyoto protocol. A viable alternative to carbon pricing mechanisms is better regulation of greenhouse gases. However, environmental regulator the Environment Protection Authority lacks powers to properly regulate greenhouse gases such as carbon dioxide and methane. This project will:

- Research how state legislation and regulations, and the National Pollutant Inventory, work to restrict or manage the discharge of greenhouse pollutants;
- Research how the Environment Protection Authorities in the USA and the UK regulate greenhouse pollutants;
- Develop a proposal for how the Australian approach to regulating greenhouse emissions could be improved;
- Promote the results of the project in the media and through publications such as the One Planet newsletter;
- Provide information for key Members of Parliament, including the Environment Minister and the Shadow Environment Minister, on the research and the proposal for legislative and regulatory reform.

The Proponent

One Planet Inc is an environmental organisation, which aims to promote the protection of the Australian environment. It has income tax exempt status and DGR status.

Project 2 – Eliminate Youth Drunkenness

The Proponent

The Direct Help Charity provides a range of services to young people in distress. One particular service involves providing help to young people in the CBDs of Australia's eastern states during the night on weekends. The Charity has observed an increase in the number of youths requiring its help due to drunkenness. Drunken youths are both the victims and perpetrators of violent crimes and other youth issues, such as homelessness and mental illness, are being exacerbated by excessive drinking. As a result, the Direct Health Charity believes that youth drunkenness needs to be addressed through legislation which restricts opening hours of licensed premises and changes to alcohol taxation regimes to increase the price of alcoholic beverages.

The Direct Health Charity is a PBI and has DGR status.

The Project

The Direct Health Charity has requested funding to enable it to send representatives to Canberra to participate in a lobbying forum organised by a peak body.

ISSUE 1: If Goodworks Foundation ("the Foundation") makes a transfer of money to another entity purported to be established for charitable purposes has it fulfilled its obligation to apply its funds to charitable institutions and/or charitable purposes?

Where an endorsed charity makes a transfer of money to another endorsed charity the ATO will generally assume that the funds will be used for the charitable purposes of the receiving charitable entity. This assumption could be rebutted if there was evidence available to the transferor to indicate that the money transferred would not to be used for charitable purposes. For example if the transferring charity knew or ought to have known that the funds would be misapplied.

In relation to a distribution by the Foundation to One Planet Inc. ("One Planet"), the Foundation should establish that One Planet is endorsed as a Charitable Institution. This can be done by searching for the charitable status of One Planet on the Australian Business Register website at www.abr.gov.au. If the Foundation does not have any other additional information about One Planet a payment by the Foundation to One Planet would be considered a payment to a charitable institution which is consistent with the Foundation's trust deed. However if the Foundation has other knowledge of One Planet's purposes and activities that sheds doubt on its charitable purposes the Foundation would need to consider whether their distribution will be truly made to a charitable institution.

In the hypothetical facts outlined in Project 1 One Planet is seeking funding for a project that involves research, development and promotion of a proposal for legislative and regulatory reform to improve the regulation of greenhouse gas emissions. Overall the project has a purpose to change the government policy on regulation of greenhouse gas emissions which is not charitable. Therefore a payment to One Planet for the funding of this project

would not be a payment 'for charitable purposes'. However the Trust Deed also allows payments to 'charitable institutions'. If the Foundation knows that their transfer is to be spent on lobbying activities they should ask One Planet whether the lobbying activities will affect One Planet's status as a charitable institution. If One Planet gives the Foundation a reasonable explanation that their charitable status will not be affected it could make the payment to One Planet with a reasonable belief that One Planet is a charitable institution.

In the hypothetical facts outlined in Project 2 Direct Help Charity ("Direct Help") is a PBI and therefore also a charitable institution. A payment by the Foundation to Direct Help would be a payment to 'a charitable institution' and therefore consistent with the Foundation's trust deed. However If the Foundation knows that the funds will be used to support a lobbying activity they should ask the Direct Help if the lobbying activities will affect their charitable status. If Direct Help gives the Foundation a reasonable explanation that their charitable status will not be affected it could make the payment to Direct Help with a reasonable belief that Direct Help is a charitable institution.

ISSUE 2: How do the lobbying activities affect the charitable status of One Planet and Direct Help?

As stated at paragraph 111 in TR 2005/21 'a purpose of seeking changes to government policy or particular decisions of governmental authorities is not charitable'. However the ruling also states at paragraph 112 that 'this is not to say that all activities associated with changing the law or government policy are necessarily inconsistent with charity…. Many charities undertake activities to affect or change particular governmental policies or decisions as part of carrying out their charitable purposes'.

Therefore if Planet One has been set up with a purpose to implement Project 1 it is likely that their overall purpose will not be charitable. However if this project is only one part of its environmental activities it may not affect its charitable status. Similarly since Direct Help undertakes a range of services to assist young people in distress and it is likely that the lobbying activity is only incidental to its charitable purpose. Whether a lobbying activity is incidental to the charitable purpose is a question of fact which can be determined by examining the entity's stated purpose and activities.

SCENARIO PART TWO *(requested 14th of October)*

Philanthropic Organisation 2

The funding applications for the Towards Emission Regulation project and the Eliminate Youth Drunkenness project have also been sent to the ABCD Foundation. ABCD is a public ancillary fund. Their Trust Deed makes the following provision regarding how funding may be allocated:

> The Trustees may at any time determine with respect to all or any part or parts of the income of the Trust Fund derived in each Accounting Period to pay or apply the income for the purpose of providing money, property or benefits to or for Eligible Charities, or for the establishment of Eligible Charities.

This part of the hypothetical is answered using the assumption that an Eligible Charity means a fund, authority or institution:

a) which is charitable at law; and

b) gifts to which are deductible under item 1 of the table in section 30-15 of ITAA 97.

ISSUE: Can the ABCD Foundation distribute to One Planet and Direct Help for the Towards Emission Regulation and Eliminate Youth Drunkenness projects respectively?

ABCD Foundation ("ABCD") needs to be satisfied that the entities receiving the distributions are Eligible Charities. This involves making an assessment of whether the receiving entity is charitable at law. If there are facts such as participation in lobbying activities that raises doubt that an entity may be charitable ABCD needs to make enquiries to be satisfied that the receiving entity is charitable. Under the above definition of Eligible Charity ABCD will also need to ensure that the entity is endorsed as a Deductible Gift Recipient under Division 30-BA of the ITAA 97.

Attachment 5 –
Summary of Commonwealth tax concessions by charity type

Type of charity	Commonwealth tax concessions available
Charitable fund ("funding" charities) - all	• Income tax exemption • GST charity concessions
Charitable fund – limited to those listed in Income Tax Assessment Act 1997 Part 2-5, Division 30	• Deductible Gift Recipient status
Charitable institution ("doing" charities) - all	• Income tax exemption • GST charity concessions • FBT rebate (subject to a $30,000 capping threshold)
Charitable institutions – limited to those listed in Income Tax Assessment Act 1997 Part 2-5, Division 30	• Deductible Gift Recipient status
Public benevolent institutions	• Income tax exemption • GST charity concessions • FBT exemptions (subject to a $30,000 capping threshold) • Deductible Gift Recipient status
Health promotion charity	• Income tax exemption • GST charity concessions • FBT exemption (subject to a $30,000 capping threshold) • Deductible Gift Recipient status
Charity endorsed as an income tax exempt charity, income tax exempt fund or with DGR	• Franking credit refund on dividends paid by certain Australian or New Zealand companies