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## Redefining NGOs: the emerging debate (updated May 2004)

In July 2003, the Government released an exposure draft of legislation (Charities Bill 2003) which seeks to redefine what constitutes a charitable organisation. It also asked the Board of Taxation to conduct a public enquiry to determine the criteria for organisations to be given charitable status. The report of the enquiry was submitted to the Treasurer on 19 December 2003. This Current Issues Brief, initially released in December 2003, explains the background to the debate on the definition of a charity and noted that there are many issues to be resolved. It has been updated to include the Government's decision not to proceed with the draft Charities Bill.

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## Introduction

On 22 July 2003, Treasurer Peter Costello announced 'the release of an exposure draft of legislation defining a charity for the purposes of all Commonwealth legislation,' (*Charities Bill 2003*).<sup>1</sup> He stated that this proposed redefinition of a charity closely followed the definition that had been determined by over four centuries of common law but that the new definition would provide greater clarity and transparency for charities. The proposed legislation covers the entire range of non-government organisations (NGOs) ranging from those which are active in poverty reduction to organisations ('think tanks') which carry out 'research directed towards expanding human knowledge'. By definition, they will all be considered to be 'charities'. Appendix 1 illustrates the size and complexity of the non-profit sector in Australia. Appendix 2 provides a select list of overseas aid NGOs, Australian NGOs and 'think tanks' which fall into the category to be captured by this legislation.

## What is Being Proposed?

If this legislative proposal comes into effect, from 1 July 2004 an organisation endorsed to access tax concessions—including tax exemption as a charity and deductible gift recipient status—will need to be endorsed by the Australian Taxation Office (ATO), have its charity status attached to its Australian Business Number (ABN) and be able to be publicly accessed through the Australian Business Register (ABR). The aim of these changes is to enable greater government scrutiny of charities and improve public confidence in charities. The Treasurer also announced that the draft legislation had been referred to the Board of Taxation<sup>2</sup> for consultation with the charitable sector to determine 'whether the public benefit test in the exposure draft should require the dominant purpose of a charitable entity to be altruistic, as recommended by the *Report of the Inquiry into the Definition of Charities and Related Organisations*'. Under its Terms of Reference the Board 'should consult primarily with organisations intended to fall within the new definition of a charity'.<sup>3</sup> Submissions were to be provided by 30 September and the Board was scheduled to provide its recommendations to the Government by 1 December 2003. This deadline has been extended and the Board is now expected to submit its report to the Treasurer by 19 December.

NGOs/charities expressed serious reservations about some provisions of the proposed legislation. Section 8 lists what would disqualify an organisation as a charity for taxation purposes. Sub-section (2c) provides for the disqualification of an organisation if it conducts activities for 'the purpose of attempting to change the law or government policy; if it is ... more than ancillary or incidental to other purposes of the entity concerned'. The explanatory note to this provision stipulates that, while NGOs can make representations to government which are incidental to their declared purpose, 'the independence of charities from government and from political processes is an important component of their role in serving the public benefit'.

## Stakeholder Response

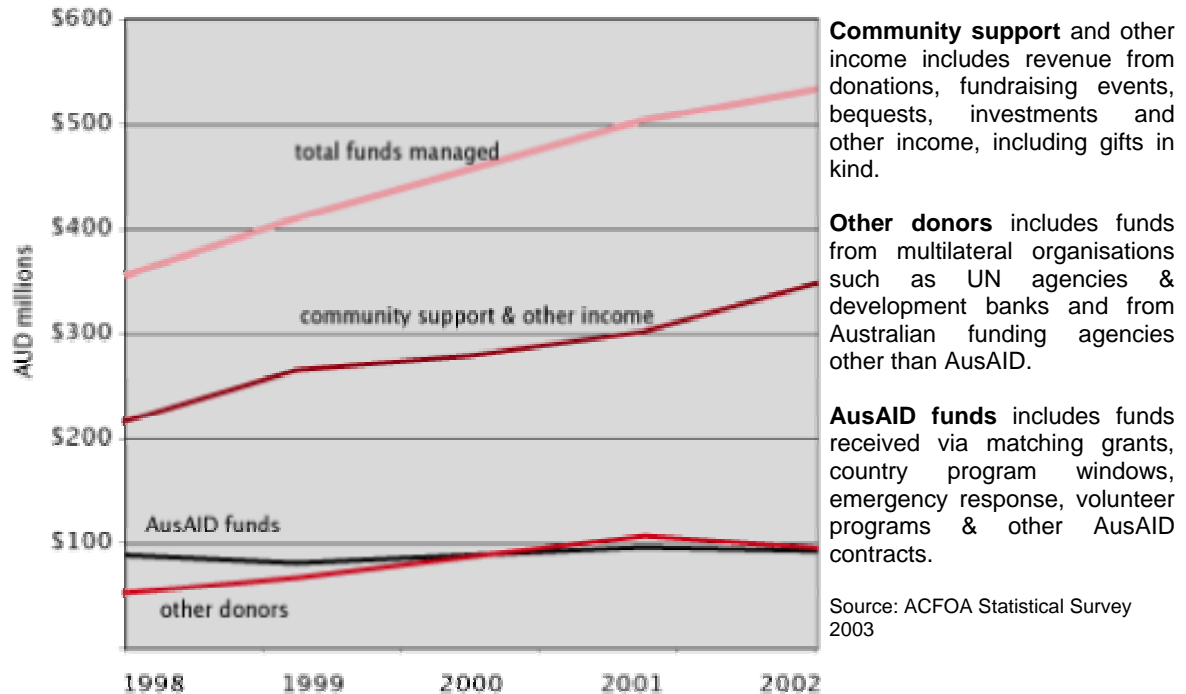
Stakeholders generally have criticised this proposal on two grounds. Firstly, the ATO, which would be responsible for administering this legislation would also have the authority to determine if an organisation was in breach of it. This would be 'unworkable and inappropriate' and the judicial system should be responsible for making such determinations. But, defending their charitable status through the judicial system could be 'potentially devastating to charities in terms of the financial costs'.<sup>4</sup> Secondly, on the basis that the 'disqualifying' definitions have given rise to the apprehension that the Government is 'seeking to restrain some charitable organisations or at least their peak bodies from critical comment. Aid agencies, for instance, regularly call for an increase in Australia's commitment to overseas assistance, now at its lowest percentage of GDP'.<sup>5</sup>

These criticisms were dismissed by the Treasurer, who stated that the proposed reform 'does not attempt to restrict criticism of public policy by recognised charities. There is no change from existing practice'.<sup>6</sup>

The Australian Council for Overseas Aid (ACFOA), with 80 overseas aid agencies as members, has also commented on the conflicting messages emanating from the government. Firstly, the government's aid agency, AusAID, lists governance (promoting democratic and accountable government and effective public administration) as one of the five key themes that guide Australia's aid program. The objective should be to 'encourage the development of robust, representative and capable civil society to create demand for good governance'. Secondly, it cites the current negotiations for NGO–AusAID cooperation agreements for Africa in which the priority for AusAID 'includes the capacity building of the partner NGO and relevant staff, in policy development and engagement'.<sup>7</sup>

Over one million Australians give their time or money to overseas aid each year and in 2002, contributed \$358 million to overseas aid agencies. This represented more than 60 per cent of the aid agencies annual income. Community donations and other income increased at an average annual rate of 15.24 per cent during the period 1998–2002 compared to an average increase of 1.1 per cent of funds sourced from AusAID during the same period. ACFOA argues that if activities that the agencies undertake to achieve their organisational objectives are curtailed, 'their ability to satisfy community expectations will be hampered because the work they undertake will become less effective'.<sup>8</sup> In other words, the advocacy role of charities should not be singled out as a cause for disqualification. The table below is indicative of the public support for NGOs. Funds from the Australian community continue to provide the largest proportion of money for overseas work undertaken by Australian NGOs.

## Overseas Aid Funds Managed by Australian NGOs 1998–2002



It should also be emphasised that charities and other not for profit organisations make a substantial contribution to the Australian economy. In 1999–2000 for example, this sector accounted for 6.6 per cent of Australians in employment and contributed 3.3 per cent of the GDP. (For details see Appendix 1). Philanthropy Australia, a peak body representing 217 philanthropic trusts, foundations and individuals, in its submission to the BoT has also been critical of the Charities Bill:

To exclude lobbying, advocacy, or activities designed to achieve changes in government policy or legislation, is to take charities back 40 years. Such an exclusion would severely limit the effectiveness of many organisations, including the RSPCA, Cancer Councils, and environmental groups such as the Australian Conservation Foundation.<sup>9</sup>

The organisation is of the view that deficiencies in the Bill in its present form render it unworkable and that it should be abandoned.

### Review by the Institute of Public Affairs (IPA)

Since the announcement of these planned legislative changes, the debate about the appropriate role and responsibilities of NGOs has become more heated, with the revelation that the Federal Government has appointed the Institute of Public Affairs (IPA) to audit how NGOs lobby or work with government departments. This move is controversial

mainly because the IPA, a 'think tank' NGO, is perceived to be 'a trenchant critic'<sup>10</sup> of the practices of many other NGOs, particularly environmental groups and those involved in foreign aid delivery.<sup>11</sup> The IPA audit is to cover eight Government departments and agencies which have substantial dealings with NGOs. Although the Departments themselves have not been named, they are expected to be 'those responsible for immigration, the environment, communications, forest and fisheries, foreign affairs and AusAID'.<sup>12</sup> The audit is due to be completed in December 2003.

Although no public announcements were made by the Government or the IPA at the time, the two had been involved in discussions on this issue since 2002.<sup>13</sup> The appointment of the IPA to conduct this audit was reported in *The Weekend Australian* on 2 August 2003, nearly a fortnight after the Treasurer's announcement of the BoT inquiry into the redefinition of charitable status. The newspaper report indicated that NGOs 'could be forced to prove they are legitimate representatives of community groups after the review', and stated that the Government had offered \$2.5 million to fund a peak body for non-profit NGOs to be able to 'speak with one voice'.

The IPA has published a series of papers calling for greater disclosure and accountability by NGOs receiving funding from and working with Government agencies. The IPA's position is that NGOs represent a challenge to elected governments in democracies, because the electorate has no direct control over these organisations, their activities or finances.

In its January 2001 submission to the *Inquiry into the Definition of Charities and Related Organisations*, the IPA argued that a 'tight and watertight' statutory redefinition of charity was necessary. According to the IPA, organisations and activities not falling exclusively within the definition should not qualify. The IPA also recommended that the Australian Tax Office should supervise the application of definitions.

In June 2003, Gary Johns a Senior Fellow at the IPA, addressed a conference on NGOs organised jointly with the American Enterprise Institute (AEI) in Washington. He revealed that the IPA was currently undertaking a project for the Australian Government that could result in legislation similar to that existing in the US, under which the Government could 'ask that the credentials of NGOs who want access and who want money and resources be tested ...'<sup>14</sup>

Interestingly, the US legislation itself is not without flaws. As one commentator has observed, while the 'so called Gucci crowd' can spend as much as it wants to lobby government, yet, 'legally speaking, disability groups, hospices, community health centres and other(s) ... are regarded as something of a threat to the integrity of our political process. This is too large a price to pay for tax deductibility'.<sup>15</sup>

On 7 August, prominent Australian NGO, Oxfam Community Aid Abroad, 'condemned the government's decision to appoint the IPA to conduct a study of NGOs 'in light of the Institute's own NGO status and ongoing smear campaign against charities, welfare and aid



agencies'. It also stated that, in contrast to many other NGOs criticised by the IPA, the IPA itself lacked transparency with its board members not being democratically appointed and the Institute making no public disclosure of its corporate funding.<sup>16</sup>

Following further media coverage of the issue, on 8 August 2003 the IPA announced it had been awarded a contract by the Commonwealth Department of Family and Community Services to undertake a study entitled 'The Protocol: Managing Relations with NGOs'.<sup>17</sup> The objectives of the study are to make publicly available information and awareness about NGOs that have 'relationships' with the government. To capture the scope and nature of the Government-NGO relationships the study will cover the eight Government departments that have substantial dealings with NGOs. The report will contain:

- a comprehensive assessment of the links between key Commonwealth Departments and their client NGOs
- a framework for assessing the role and standing of NGOs, based on the information requirements of those Departments and Ministers
- a framework for a database of NGOs, including their standing, and
- a proposed trial Protocol that requests NGOs to supply information about their organisation that will be publicly available.

On 8 August 2003 *The Age* newspaper published an article by Mike Nahan, executive director of the IPA, endorsing the Government's draft charity legislation and accusing the non-profit sector of 'aversion to accountability'. On 10 August the *Sunday Age* quoted Gary Johns of the IPA as saying that the US system 'is the sort of direction in which we're headed'. He reportedly stated, 'It's up to government, but I'd like to see a system of disclosure'. Catholic Health Australia (which represents some 680 Catholic organisations) is of the view that the IPA audit 'only gives more credence to the view that there is an agenda to restrict charities either through less benefits or through 'big brother' tactics to gain compliance rather than permitting strong public advocacy'.<sup>18</sup> Other commentators argue the issue is not whether the IPA's views on NGOs are right or wrong, rather that the IPA is a player (with vested interests) in the very debate upon which it's been asked to adjudicate. One commentator claims that appointing the IPA to this role is 'akin to appointing the ACTU or the Australian Chamber of Commerce and Industry to conduct an inquiry on behalf of a government about labour-market laws!'.<sup>19</sup> Arguably, too, the IPA is itself potentially susceptible to charges of insufficient transparency and accountability. NGO 'think tanks' like the IPA also have traditionally been the recipients of some forms of tax relief and have been criticised as reticent about disclosing the range of their sources of funding. The IPA itself intends for the first time to publish a list of donors in its next annual report.<sup>20</sup>

## Conclusion

The debate about the accountability, funding and the ability of NGOs to lobby for their causes without losing their charity status is now on the public agenda. The redefinition of a charitable organisation currently being explored by the Board of Taxation, along with the IPA contract to enable the government to refashion its relations with NGOs, has already generated heated debate.

The response by ACFOA made it clear that the draft legislation is perceived as an attempt to curtail what the NGOs consider to be legitimate means of achieving their objectives. However this debate is resolved, questions about the definition and accountability of NGOs are a legitimate matter of public concern.

The Board of Taxation's Consultation on the Definition of a Charity received a total of 267 written submissions as well as inputs at meetings with key groups. The Report was submitted to the Treasurer on 19 December 2003. The Government responded to the Report on 11 May 2004.

### The Government

...announced that the common law meaning of a charity will continue to apply...The Government has decided not to proceed with the draft Charities Bill.

The Government has taken advice from the Board of Taxation that the draft legislation does not achieve the level of clarity and certainty that was intended to be brought to the charitable sector.<sup>21</sup>

While charities can currently self-assess their eligibility for a tax concession, it has been proposed that they will now be required to satisfy the Commissioner of Taxation that they are eligible for the tax concession. Legislation to give effect to this decision was introduced into Parliament as part of the *Tax Laws Amendment (2004 Measures No. 1) Bill 2004* on 19 February 2004 and was expected to be effective from 1 July 2004. Since the Bill has yet to pass through Parliament, the Government has decided to 'delay until 1 July 2005 the date by which charities, public benevolent institutions and health promotion charities need endorsement by the Commissioner of Taxation...'. This will also 'ensure that charities do not face unreasonable compliance costs and that they will have sufficient lead time to comply with the new arrangements'.<sup>22</sup>

There is another, more practical reason for the delay. As of May 2004, application forms for endorsement were not yet available. Commenting on the endorsement process, the Senate Economics Legislation Committee observed that:

The Committee recognises that the application process for the current measure must provide the Commissioner (of Taxation) with sufficient information to ensure the integrity of decision-making. However, the application process should not become so

onerous that eligible organisations, particularly those reliant on volunteers, are deterred from applying.<sup>23</sup>

## Endnotes

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1. *Press Release No. 59*, 22 July 2003.
2. The Board of Taxation comes under the Treasury portfolio and provides advice to the Treasurer on taxation issues.
3. Board of Taxation, *Press Release No. 12*, 22 July 2003. The Report of the inquiry was released in August 2002.
4. Australian Council for Overseas Aid, *Submission to the Board of Taxation on the Draft Charities Bill*, September 2003, pp. 4, 8.
5. The United Nations Association of Australia in its newsletter *UNity*, No. 345, 1 August 2003.
6. *Press Release No. 66*, 30 July 2003.
7. *ACFOA Submission*, pp. 6–7.
8. *ACFOA Submission*, p. 7.
9. Philanthropy Australia, *Submission to the Board of Taxation On The Draft Charities Bill*, October 2003, p. 5.
10. Greg Barnes in the *Canberra Times*, 12 August 2003.
11. See, for example, IPA's Don D'Cruz in the *Australian*, 13 May 2002 and Mike Nahan in the *Age*, 8 August 2003.
12. *Sunday Age*, 10 August 2003.
13. *ibid.*
14. Transcript. *We're Not from the Government, but We're Here to Help*, Conference organised by the AEI and the IPA, Washington D.C., 11 June 2003.
15. Professor Jeffrey M. Berry in the *New York Times*, 30 November 2003.
16. *News Release*, 7 August 2003.
17. *Press Release*, 8 August 2003.
18. *Sunday Age*, 10 August 2003.
19. Greg Barnes in the *Canberra Times*, 12 August 2003.
20. *Sydney Morning Herald*, 12 August 2003.
21. Treasurer's Press Release No. 031, 11 May 2004.
22. *ibid.*
23. Senate Economics Committee Report, *Tax Laws Amendment (2004 Measures No. 1) Bill 2004*, May 2004, p. 22).

## **Appendix 1: The Non-profit Sector in Australia**

For an excellent overview of the Non-profit Sector in Australia, see Philanthropy Australia's Factsheet on the topic, which is available on the web at:

Source: Philanthropy Australia: <http://www.philanthropy.org.au/factsheets/7-05-03-nonprof.htm>

## **Appendix 2: Select Overseas Aid NGOs**

Adventist Development & Relief Agency  
Australian Baptist World Aid  
Australian Foundation for the Peoples of Asia and the Pacific  
Australian Legal Resources International  
Australian Lutheran World Service  
Australian People for Health, Education and Development Abroad  
Australian Red Cross  
Australian Volunteers International  
Australians Caring for Refugees  
Burnet Institute  
CARE Australia (CARE)  
CARITAS Australia  
Christian Children's Fund of Australia  
Credit Union Foundation Australia  
Fred Hollows Foundation  
International Women's Development Agency  
Leprosy Mission  
National Council of Churches Australia  
Oxfam Australia  
PLAN International Australia  
Salvation Army  
Save the Children Fund Australia  
UNICEF Australia  
World Vision Australia  
World Wide Fund for Nature

Anglican Board of Mission Australia

Anglicans Cooperating in Overseas Relief and Development

Archbishop of Sydney's Overseas Relief and Aid Fund

Australian Conservation Foundation

Australian Cranio-Maxillo Facial Foundation

Marist Mission Centre

Medecins Sans Frontieres

OzGREEN–Global Rivers Environmental Education Network (Aust)

**Select Australian NGOs**

Smith Family

St Vincent de Paul

Leukaemia Foundation

Heart Foundation

Cancer Council

Salvation Army

Australian Conservation Foundation

RSPCA

**Think Tanks**

There are a few but growing number of privately funded think tanks which conduct research on foreign policy, social and other issues. A number of them also enjoy some form of tax concessions. For example, donations to the Centre for Independent Studies and The Australia Institute are tax deductible while the Institute of Public Affairs enjoys tax exempt status under Section 50–5 of the Income Tax Assessment Act.