National Roundtable of Nonprofit Organisations

# The assessment of charitable status in Australia

*Current practice and recommendations for improvement*

**National Roundtable of Non-profit Organisations**

## Executive Summary


The Non-profit Roundtable has identified and reviewed all Commonwealth, State and Territory legislation that treats charities differently than other organisations. Often such legislation relates to particular taxation or other concessions available to charitable organisations, though a wide range of other legislation exists, including regulations that apply solely to charitable organisations.

The following findings were made:

1. There are 15 Commonwealth Acts and 163 State and Territory Acts under which entitlement to a benefit or some other legal outcome turns on the charitable purpose or status of an organisation.

2. 19 Commonwealth, State and Territory governmental entities are regularly involved in determining the charitable status of organisations, and a further 74 entities may be called on to make such determinations from time to time.

3. The processes for determining the charitable status of organisations vary significantly between government agencies, with little coordination among agencies within and among jurisdictions, and a high degree of inconsistency and duplication.

4. These processes impose substantial unnecessary administrative burdens on charities and the relevant regulators.

The Roundtable advocates the following reforms to improve the processes of determining the charitable status of organisations:

1. Streamline existing processes for assessing an organisation's charitable status by introducing a mutual recognition scheme, as follows:

    a. Each State and Territory should appoint one agency with overarching responsibility in that jurisdiction for determining the charitable status of organisations.

    b. Upon making a determination that an organisation is a charity, the appointed agency should issue the organisation with a certificate of charitable status.

c. In assessing whether an organisation is a charity for purposes of any law, each State and Territory agency or authority should accept, as conclusive evidence of an organisation's charitable purpose, either (1) an endorsement by the Australian Taxation Office or other Commonwealth agency charged with determining charitable status; or (2) a certificate of charitable status issued by any State or Territory.

2. Establish a national authority dedicated to administration and improvement of regulation of the non-profit sector, with responsibilities including the following:
    - coordinating Commonwealth and State regulation of non-profit organisations;
    - reviewing and proposing improvements to existing regulation of the non-profit sector;
    - gathering and disseminating data regarding the sector; and
    - providing advice and support to the sector.

## Introduction

In recent years, there has been substantial interest in the regulation of charities under Australian law. This attention has included the 2001 Inquiry into the Definition of Charities and Related Organisations, significant and often heated debate around the Charities Bill 2003, and finally a tax ruling on the definition of charities finalised by the Australian Taxation Office in 2005.

Much of the debate has focused on the substantive legal question of what kinds of organisations and purposes qualify, or should qualify, as "charitable".

This report tackles a somewhat different but just as important question: who decides what is charitable, and how do they go about it? The focus here is squarely on the *process* of assessing charitable status, rather than the substantive legal definition of the term.

These processes are of central importance to the actual day-to-day operations of charities. Assessment of charitable status is not a straightforward task, and can raise detailed and nuanced questions about the goals and activities of an organisation. Effective, timely and sensible assessment procedures can assist charities to remain focused on achieving their goals, while ensuring that public resources are targeted to groups genuinely pursuing charitable objects. On the other hand, duplicative and inconsistent procedures impose unnecessary costs on governments and charities alike, and can exacerbate the confusion and complexity of an already difficult area of law.

The goal of this report is to identify statutes in force in Australia in which entitlement to a benefit or some other legal outcome turns on the charitable purpose or status of an organisation, to describe the current processes of assessing charitable status under those statutes, and to suggest some ways of streamlining and improving these processes.

## 1. The role of charities in Australian society

Charities perform vital functions in all Australian communities. They provide essential services in health, welfare and education, employment and training, counselling and legal advice, as well as religious and cultural services. They provide emergency relief, community housing, and services for persons with disabilities, youth, the elderly and the infirm. Charities also play a vital role in protecting our natural environment, defending human rights, and promoting other important interests.

The not-for-profit sector, of which charities are an important component, makes an important contribution to Australia's economy. According to the Australian Non-profit Data Project, in 1996 there were nearly 32,000 non-profit employers, with nearly 19,000 of these being classified as charities[1]. The non-profit sector employed 6.9 per cent of all

[1] The ANDP estimates that there might have been as many as 700,000 third sector organisations in 1996 but states that such an estimate should be treated with great caution. Most of these would not employ staff but would rely on volunteers. Lyons, M and Hocking, S, *Dimensions of Australia's Third Sector*, Centre for

people employed in Australia (579,367 people), with entities described as charities directly accounting for about 4.8 per cent of people employed (398,339 people).[2]

The non-profit sector also makes a strong financial contribution to the Australian economy. In 1996 the sector contributed $14.6 billion, or 3 per cent to Australia's Gross Domestic Product (GDP). Charities contributed $9.9 billion, or 2 per cent of GDP.[3] By 1999/2000 the non-profit sector was contributing $21 billion.

These figures underestimate the total contribution of charities and the non-profit sector, as they do not include the impact of volunteer work. The Australian Bureau of Statistics estimates that, if the value of services provided by volunteers were included in its GDP calculations, the non-profit sector contribution to GDP would have been 4.9 per cent in 1999-2000 -- greater than that for government administration and defence (4.1%) or mining (4.6%).[4]

**2. A summary of Acts of parliament that relate to charities**

The Roundtable's research identified 178 Commonwealth, State and Territory Acts, under which entitlement to a benefit or some other legal outcome turns on or is related to the charitable purpose or status of an organisation. A list of these laws is included as Annexure 1 to this report.

This list does not include statutes that relate to specific, individual charities, nor does it includes laws that apply to charities, but not because of their charitable status. For example, charities are generally subject to occupational health and safety laws, but so are other kinds of organisations; there is nothing special about how those laws apply to charities in most cases. The only statutes included in the list are those that treat a charity differently *because it is a charity* or those that include charities as a member of a class (typically non-profit organisations with) entitled to a benefit or on which some other legal outcome turns. Many of these statutes grant benefits or impose regulation on charities, as well as other categories of entities. For instance, the Queensland Charitable Gaming Act permits "eligible associations" to engage in certain gaming activities; the list of such associations includes associations "formed and operated principally for a charitable, community, patriotic or sporting purpose or a similar purpose prescribed under a regulation…." Such statutes have been included in this analysis, because charitable status is one way of establishing the entitlement.

Finally, a number of statutes refer to categories of organisations that may include charities or overlap substantially with the usual notion of charities, but without using the term "charity" or "charitable" as such. Such statutes have not been included in this analysis.

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Australian Community Organisations and Management, University of Technology, Sydney, (2000), p. 89. There are about 48,000 endorsed charities in Australia.

[2] Lyons and Hocking p. 27-51, 77 and 81.

[3] Lyons and Hocking, p.89 -95.

[4] This figure is the gross value added. Australian Bureau of Statistics, *5256.0 - Australian National Accounts: Non-Profit Institutions Satellite Account*, 1999-2000.

Of the 178 statutes, 15 are Commonwealth laws and the rest are State or Territory laws.

The majority of these laws grant charities and in some instances other non-profit organisations certain concessions, exemptions or other favourable treatment, in recognition of the contribution they make to society. On some issues such as fundraising, however, charities may be subject to regulation that does not apply to non-charitable entities. Finally, there is a set of statutes that neither grant concessions nor impose particular regulations, such as laws modifying the operation of the rule against perpetuities as it applies to charitable trusts. The following table is a short overview of these statutes:

| | **Number of statutes** |
|---|---|
| **Statutes providing tax or revenue concessions** | **40** |
| The main tax concessions are federal income, FBT and GST concessions; and payroll, duties and land tax concessions in most States. Also falling into this category are a variety of exemptions or concessions from local rates and various registration charges. | |
| **Statutes providing other benefits to charities** | **101** |
| - exemptions from liability under anti-discrimination laws | 11 |
| - other limitations on liability | 16 |
| - ability to receive funding from particular bodies | 27 |
| - exemptions from registration or permitting requirements | 20 |
| - other miscellaneous benefits | 27 |
| **Statutes imposing special regulations on charities** | **17** |
| The most important laws in this category are the various State and Territory laws that regulate gaming and other fundraising activities by charities. Some states regulate fundraising by charities only; others regulate fundraising more generally. | |
| **Miscellaneous statutes relating to charities** | **20** |
| This category includes laws that pertain to various rules of legal construction, laws for the incorporation of associations, and a range of other legislation. | |
| **Total** | **178** |

*Legal definitions of "charity" – common law*

The large majority of the laws surveyed either do not provide a specific definition of the words "charity" or "charitable", or define them in a way that simply refers to the general law definition of the terms.

A list of purposes that were considered to be "charitable" purposes were first set out in the Preamble to the *Charitable Uses Act 1601*, referred to as the Statute of Elizabeth. The list embodied a broad concept of charity that continues to be applied today. The 1891

decision in *Pemsel's* case,[5] which refers back to the Statute of Elizabeth, is widely referred to as the definitive authority for determining charitable status. The case established four categories of charitable purpose:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community not falling into any of the preceding heads.

In addition, to qualify as a charitable purpose the purpose must also be for the 'public benefit.'

The generality of these categories, particularly the fourth "catch-all" category and the 'public benefit' test, leaves great room for judicial interpretation, and also scope for the practical definition to evolve over time. For instance, certain purposes related to human rights and environmental protection have come to be regarded as "charitable" through developments in case law and administrative practice, rather than through specific legislative changes.

The process of judicial definition of "charity" has not always provided clarity in principles or in practice – Sir Owen Dixon observed in 1938 that certain aspects of charities law was in an "unsatisfactory condition,"[6] and the same may justifiably be said today. The arguments for and against the current common law approach to defining charity have been explored elsewhere; for present purposes it is sufficient to observe that the common law definition continues to evolve through legal and statutory modification, but a respectful body of opinion exists that the law lags behind public understanding of what should be regarded as "charitable".

*Legal definitions of "charity" – statutory modifications*

Legislatures have specifically derogated from the common law definition of "charity" and "charitable", either by expanding or restricting the categories of charitable purpose.
In the case of the *Extension of Charitable Purpose Act 2004*, the definition of "charitable purpose" was deliberately extended to include non-profit child care services, self-help groups, and contemplative religious orders. This statute expressly applies to all Commonwealth laws, but does not apply to state laws.

In other cases, the modification of the common law definition is more idiosyncratic. Certain New South Wales laws pertaining to charitable fundraising define "charitable purpose" as "including any benevolent, philanthropic or patriotic purpose." These terms are certainly different to, and arguably broader than, the usual common law definition.

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[5] *Income Tax Special Purposes Commissioners v Pemsel* [1891] All ER Rep 28; [1891] AC 531.
[6] Royal North Shore Hospital of Sydney v Attorney-General (NSW) [1938] HCA 39; (1938) 60 CLR 396 (19 August 1938)

In Queensland, section 10(5) of the *Charitable and Non-profit Gaming Act 1999* defines "charitable purpose" narrowly, being only certain health, disability, welfare and natural disaster-relate purposes, plus any purposes listed in the regulations. This definition is at odds with more expansive definitions in the *Collections Act 1966* and other relevant Queensland legislation.

Fundraising legislation in South Australia and Western Australia also have specific statutory definitions of "charitable purpose" that differ substantially from the common law definition.

These statutory variances can have curious, and surely unintended, effects. For instance, in South Australia, fundraising is regulated by the *Collections for Charitable Purposes Act 1939*, which has a specific statutory definition for "charitable purpose" that does not include many purposes recognised as charitable under the common law, such as religion. Other South Australian legislation adopts a different definition. Section 13A of the *Land Tax Act 1915*, for example, specifically includes religious institutions as being charitable for purposes of obtaining land tax exemptions. It follows that a religious institution in South Australia *is* charitable for purposes of land tax, but *is not* charitable for purposes of fundraising regulation. An organisation in this position is able to avail itself of all of the benefits, without being subject to the additional regulatory scrutiny, of charitable status. It is difficult to imagine a principled policy argument in favour of such differential treatment.

### 3. Who determines charitable status?

Under the 178 statutes identified above, a total of 93 Commonwealth, State and Territory government entities are theoretically responsible for determining the charitable status of organisations. The process of determining which entities are charities is thus highly devolved and decentralised in Australia.

The picture is perhaps not quite as bad as these figures may suggest. Many of the authorities will in practice seldom if ever actually be called upon to make a determination as to charitable status. For instance, in New South Wales, a permit may be issued by NSW Fisheries to allow the taking of fish that would not otherwise be permitted, if the fish will be sold by auction to benefit a charitable purpose. Leaving aside the question of how frequently charitable fish auctions actually occur, the charitable nature of the beneficiary of such an odd event will not often be in doubt, and one might imagine that NSW Fisheries would simply look for guidance from another agency that deals with such issues more regularly if they had to.

Still, at least 19 separate agencies across Australia do regularly make determinations as to charitable status. These include the ATO and from one to three agencies per State and Territory. In most States, the relevant authorities include the State Revenue Office or equivalent, and one or two authorities that administer the charitable gaming and fundraising laws. Ultimately, of course, the judiciary has the ultimate determinative role

in contested matters or matters brought by trustees under the various Trust Acts – although in practice such cases are vanishingly few.

For most of these agencies, dealing with charities is an ancillary role. For instance, in many States regulation of charitable gaming and fundraising may be consigned to authorities concerned more broadly with gambling regulation or consumer protection and fair trading. Such agencies may view charities as a sideline.

For instance, in South Australia, the administration of charitable fundraising falls, curiously, to the Office of the Liquor and Gambling Commissioner.[7] An application for a charitable fundraising licence is available under the "Lotteries" section on the website of this office, even though most fundraising has nothing to do with lotteries. The website features a wealth of information about liquor and gambling, but only a single page of information about charitable fundraising, and no guidance whatsoever on what is regarded as "charitable". This is not to criticise that particular office, but merely to observe that regulation of charities is at best an ancillary part of its responsibilities.

Even focusing on these 19 agencies that regularly interface with the legal questions around definition of charities, the need for an efficient and coordinated approach within and across jurisdictions should be evident.

**4. How is charitable status determined by government agencies?**

Of the 19 Commonwealth, State and Territory agencies that are regularly involved in determining the charitable status of organisations, all provide applications forms and/or other guidance on how to apply for a charitable concession.

These application materials vary considerably in their form and substance. Some of the differences are understandable as they relate solely to the particular benefit; for example, to apply for an exemption under the various Land Tax Acts, a charity must generally submit details of the use of the land in relation to which an exemption is sought. However, even the aspects of the forms designed to elicit information regarding the charitable status of the applicant show little consistency. Most agencies require the submission of certain documents, but the specific mix of documentary requirements is highly variable: some agencies require nothing more than a copy of the organisation's constitution, while others require extensive materials relating to the organisation's financial statements, membership lists, minutes of meetings, descriptions of activities undertaken, and so on.

The lack of consistency occurs among jurisdictions, among different agencies in the same jurisdiction, and even among different application forms submitted to the same agency.

[7] South Australia is not alone in grouping charities with regulation of gambling, alcohol, and racing. There is a certain irony in consigning charities, which symbolise the best in human virtue, to be regulated by agencies whose primary role is oversight of companies dealing in human vice. One can't help but wonder whether the cautious and exacting attitude that would properly be applied to scrutinising gambling licences is also deployed against charities, where a more facilitative approach is warranted.

For example, in Victoria, to apply for an exemption under the *Land Tax Act*, a charity must submit to the State Revenue Office the following documentation[8]:

(a) where the body seeking the exemption is incorporated: the Certificate of Incorporation and Memorandum and Articles of Association.
(b) financial statements for current and past three financial years;
(c) details of the organisation's aims, objectives and rules;
(d) details of prior State Revenue Office exemption approvals to the organisation;
(e) other information to indicate that the organisation is charitable, such as a description of services provided; and
(f) evidence of a wind-up clause stating that assets will be:
    (i) passed onto another charitable organisation in the event of wind-up and that;
    (ii) assets will not be distributed to members of either organisation;
(g) details of the use of the land;
(h) promotional material; and
(i) any relevant information on exemptions granted by other state or Commonwealth jurisdictions.

Of these requirements, only (g) relates to the particular land tax concession requirements; the other items all relate to the organisation's charitable status. Some of this documentation is relatively straightforward, such as providing a copy of the financial statements, but several of the items may entail significant effort. A mid- to large-sized charity operating nationally may have substantial amounts of "promotional material", for instance, as well as potentially dozens of exemptions granted by other jurisdictions.

The requirements for an application for a payroll tax exemption, which is also submitted to the State Revenue Office, are similar, yet contain important differences in wording and content:[9]

- The Constitution (formerly known as Memorandum and Articles of Association), Rules or Trust Deed (these documents are collectively referred to as Governing Rules);
- Evidence (this will be found in the Governing Rules of the organisation) that the assets and income of the organisation will be applied solely towards the promotion or furtherance of its objectives and that the - of particular importance is the inclusion in the Governing Rules of the organisation, a winding-up clause which provides that:
    a) assets will be passed onto another charitable organisation in the event of a winding-up; and
    b) other purposes beneficial to the community.
- Financial statements for the current and previous financial years;
- Details of any commercial ventures, the number of employees and their duties, and the address and use made of any land owned or leased by the organisation.
- Details of prior exemptions granted by the SRO (if the aims and objectives have changed since the last approval, you must advise the SRO and provide new documentation);
- Details of all services provided and activities undertaken (promotional material such as pamphlets, newsletters and brochures should be supplied); and
- Details of any relevant information on exemptions granted by other State, a Territory or the Commonwealth.

The differences in the documentary requirements are minor but can not be ignored by those faced with actually completing the forms. For land tax, one provides only a

[8] Revenue Ruling LT.011, Land used exclusively for Charitable Purposes
[9] http://www.sro.vic.gov.au/sro/SROWebSite.nsf/taxes_charitable_exemptions.htm

description of "services provided", but for payroll tax it is a description of "services provided and activities undertaken". For land tax, three years of financials are to be provided; for payroll tax it is only two years.

Different again is the application to the Victorian Commission for Gambling Regulation (VCGR) for charitable status, which entitles the organisation to engage in certain minor gaming activities. The supporting documentation for that application requires, amongst other things, a list of members of the organisation for the past 2 years.[10] This requirement is far from straightforward, given that large organisations may have tens of thousands of members and a constantly changing electronic register. Further, it is unclear how that information is relevant to the legal test for charitable status, which hinges on the "purpose" of an organisation, not the identity of its members.

It is worth noting that the SRO and the VCGR do not appear to recognise each other's determinations of charitable status, even though they operate in the same jurisdiction and the underlying legal test for charitable status is identical.

The situation in other States and Territories is similar, and in particular there seems to be little or no coordination between the various state revenue authorities responsible for taxation concessions, and the consumer and other authorities responsible for fundraising regulations.

In fact, the only clear instance identified in this research where an authority recognises, without further inquiry, the determinations of another authority, is in Tasmania, where under applicable law certain state revenue concessions are available to only those charities that are endorsed as such by the Australian Taxation Office. In all other cases, each government authority appears to conduct its assessments of charitable status in isolation from all others, with no apparent effort to harmonise or coordinate the application requirements and assessment standards. At best, a decision of one agency may be used as guidance by another agency.

## 5. Burdens imposed by the processes for determining charitable status.

The processes for determining the charitable status of organisations vary significantly between government agencies, with little coordination among agencies within and among jurisdictions, and a high degree of inconsistency and duplication. These processes impose an unnecessary administrative burden on charities and regulators alike, and present a risk of inconsistent outcomes.

*Regulatory duplication*

The sheer degree of duplication is particularly noteworthy. Even though the substantive legal question of what constitutes a "charity" or a "charitable purpose" is identical throughout Australia, save for statutory modifications, none of the 19 governmental

[10] Victorian Commission for Gambling Regulation, Declaration as a Community or Charitable Organisation Information Sheet, available at www.vcgr.vic.gov.au.

authorities that regularly deal with this question accept the determinations of any of the other authorities, even within the same jurisdiction.

As a consequence, a single charity with operations across Australia may have to have its charitable status assessed many times, following a different application process each time. Even if it has been endorsed as a charity and qualified for tax relief at a Commonwealth level, it must re-establish its charitable status to the satisfaction of each state and territory revenue office to access exemptions from state and territory taxes such as pay-roll tax, land tax and stamp duty – wholly aside from the particular additional statutory criteria required to access those entitlements. It must yet again establish its charitable status to other state and territory agencies in order to obtain permits to undertake charitable collections and other fundraising activities, and to access other benefits available to charities.

Nor is duplication a problem only at the point of application for concessions. The burden of responding to reviews can be even more onerous. To give but one example, the Roundtable is aware of one charity that applied for a payroll tax exemption, but was initially denied. A challenge before an administrative tribunal followed, and the charity was ultimately recognised as having charitable purposes after a close examination of its objects and activities. A scant two years later, the ATO initiated an audit of this organisation's charitable status, even though there had been no alteration in the charity's goals, activities or any other significant characteristic in the intervening two years. The ATO review affirmed the charitable status of the organisation, after a lengthy process that required several hundred hours of internal staff time at the charity. The ATO process was certainly not improper, yet one must reflect upon the use of resources in a situation where both State and Commonwealth authorities conducted such an exhaustive review of the charity's status so close in time to one another.

*Divergent assessment procedures*

The fact that each of the 19 agencies that regularly assess charitable status has its own application form or forms, and its own unique mix of documentation requirements, further exacerbates the burden of regulatory duplication. Divergent assessment processes exists within individual authorities, among authorities in the same jurisdiction, and among jurisdictions.

Because the regulators all require a different set of documents, charities can not simply maintain a "standard pack" of documents that will satisfy all of the regulators as to their charitable status. The particular mix of documents required is ultimately arbitrary; there would seem to be no reason why some authorities require nothing more than a copy of the organisation's constitution, while others have extensive checklists of documentation requirements.

The costs of these divergent processes are difficult to estimate. However, anecdotal evidence from Roundtable members suggests that the internal costs of gathering, reviewing and storing this information are not inconsequential.

*Inconsistent assessment criteria and outcomes*

Charitable organisations may be granted a concession or exemption in one jurisdiction but denied the very same concession or exemption in another jurisdiction. Some degree of inconsistency arises from differing statutory criteria among jurisdiction, but this does not explain all difference. Inconsistency may also arise due to:

a) different determinations by different agencies in relation to the same organisation; or

b) a narrowing or expansion of the definition of "charity" or "charitable purpose" for policy reasons to narrow or broaden the class of organisations that can access concessions and exemptions; or

c) different approaches to regulation.

In Western Australia, pay-roll tax exemptions are granted to "charitable bodies and organisations" including, "religious organisations, government departments, hospitals, public benevolent institutions, schools and charities." However, in South Australia, only "public benevolent institutions," a category that excludes a large number of charities from qualifying for an exemption from pay-roll tax. A charity operating nationally may therefore gain an exemption from pay-roll tax in WA but not in SA, despite pursuing identical charitable purposes in both jurisdictions.

Inconsistent outcomes even within a single jurisdiction are equally possible. As noted above, for instance, religious institutions in South Australia are charitable for some purposes, but not charitable for others due do differences in the way "charitable purpose" is defined in different laws.

It is more difficult to ascertain how often government authorities in different jurisdictions reach differing results as to an organisation's charitable status. There is some evidence that regulators do have differing interpretations of the common law. For instance, the WA Department of Consumer and Employment Protection (DOCEP) is responsible for licensing charitable collections in Western Australia. Information on the DOCEP website indicates that "conservation, environmental, and animal welfare" groups do not require fundraising approval, because they are "non-charitable".[11] This interpretation is at odds with ATO guidance[12] and the interpretation of most other authorities, which have recognised those purposes as charitable under the common law. The differences can not easily be explained by any difference in the applicable statutes; it appears to be more a matter of differing views on the nature of the common law.

Again, anecdotal evidence by the members of the Roundtable suggests that, while there is a large degree of consistency in outcomes regarding charitable status from the different

[11] http://www.docep.wa.gov.au/charities/default.asp?id=/cp/charities/guide, accessed 25 September 2007.
[12] See ATO Taxation Ruling TR 2005/21, p. 64.

regulators, at the margins different authorities do on occasion have different approaches to what they regard as "charitable".

## 6. Recommendations for Reform

It seems incontrovertible that the divergent approaches to regulation of charitable and other non-profit organisations, including both the statutory frameworks and administrative processes, impose unnecessary burdens on charities and governments alike. A progressive alignment of entitlement categories and criteria is highly desirable, and the establishment of a Charities Commission to coordinate regulatory reform for the non-profit sector generally is strongly recommended.

Even within the scope of the current statutory landscape, however, there is tremendous scope for streamlining of administrative processes for assessing charitable status. One immediately achievable step in reducing the administrative burden would be an intergovernmental agreement providing for mutual recognition of determinations of charitable status by governmental authorities.

*Mutual recognition of charitable status determinations*

Much of the administrative burden, duplication and inconsistent outcomes described in this report would be alleviated by a system of mutual recognition of determinations as to charitable status.

Such an agreement would avoid much of the waste of resources in assessing an organisation's charitable status where another credible governmental agency in Australia has already undertaken that task.

In brief, there are three steps that would be required to achieve this:

1. First, each State and Territory would appoint a single agency with exclusive responsibility in that jurisdiction for determining the charitable status of organisations. The Roundtable believes the state agency responsible for managing community services in each state be charged with this role as it is this agency that most regularly interfaces with charities and other not-for-profit organisations and will be best placed to understand and assess the purposes and ultimately determine the status of an organisation seeking confirmation of its charitable status.

2. Upon making a determination that an organisation is a charity, the appointed agency would issue the organisation with a Certificate of Charitable Status.

3. In assessing whether an organisation is a charity for purposes of any law, each State and Territory agency or authority should accept, as conclusive evidence of an organisation's charitable purpose, either (1) an endorsement by the Australian Taxation Office or other Commonwealth agency charged with determining

charitable status; or (2) a Certificate of Charitable Status issued by any State or Territory.

In other words, a charity would only have to apply for an ATO endorsement or a Certificate of Charitable Status in one jurisdiction; having obtained either of those, it could present it in each other jurisdiction as required as conclusive evidence of its charitable purpose. This would not do away entirely with separate application forms for various concessions and other benefits, but such forms would be much simplified.

Under this system, it is likely that the ATO endorsement would be the primary means for most charities to demonstrate their charitable status. However, State and Territory authorities would retain the power to extend concessions and exemptions to organisations that for whatever reason have not sought or obtained endorsement from the ATO.

Harmonisation of State and Territory laws has already proven to have reduced regulatory burdens in many other sectors of the economy. Mutual recognition schemes, such as those set up under the Australian Mutual Recognition Agreement and the Trans Tasman Mutual Recognition Agreement, have been highly effective in overcoming regulatory differences.[13]

*Establishment of a National Authority for the Nonprofit Sector*

The parlous state of processes for assessing charitable status, as outlined in this report, is just one area in which the regulation of non-profit organisations could be substantially improved. Other areas where regulatory improvement is urgently required include fundraising laws, corporate structures, disclosure and accounting standards, and taxation.

The regulatory inefficiencies regarding the administration of charities law are symptomatic of deeper causes of regulatory neglect in the nonprofit sector. The causes of this may include the dispersed and diverse nature of nonprofit organisations themselves, the lack of political priority for addressing the needs of nonprofit organisations, and the fact that nonprofit organisations are generally an ancillary responsibility for most regulators that interface with them. As a result, there is no clear locus of responsibility within the Commonwealth and State bureaucracies for driving regulatory improvement across the nonprofit sector generally.

The establishment of a national regulator for the nonprofit sector would greatly assist in overcoming these hurdles to create a regulatory environment that promotes nonprofit enterprise, integrity and funder confidence. This proposal builds on the recommendation of the Charities Definition Inquiry in 2001 to create a national independent entity to

[13] Australian Government Productivity Commission, *Evaluation of Mutual Recognition Schemes* (17 October 2003).

administer charities law, registering charities as well as periodically reviewing the definition of charity, among other responsibilities.[14]

The Roundtable strongly supports a broader role for an independent national authority to promote effective and efficient regulation of non-profit organisations generally. Such an authority could coordinate Commonwealth and State regulation, propose improvements to existing regulation of the sector, gather and disseminate data regarding the sector, and providing advice and support to the sector.

The United Kingdom Charity Commission is a useful example of such a central coordinating authority for the charitable sector. The UK Charity Commission has the objectives of increasing public confidence in charities, promoting understanding of the public benefit test for charities, promoting compliance and efficient use of charitable resources, enhancing accountability of charities. The Commission has responsibility for determining the charitable status of institutions, and the inland revenue follows the Commission's determinations in this respect.

A national body charged with similar objectives and functions would serve charities, governments, donors and recipients of charity far better than the existing ad-hoc and fragmented approach to administration and regulation of the sector.

**About the Roundtable**

In October 2002, the National Roundtable of Nonprofit Organisations (the Nonprofit Roundtable) was formed by a group of committed national nonprofit organisations and peaks to bring together the collective views, voices and experiences of the nonprofit sector in Australia. The aim of the Nonprofit Roundtable is to promote the general wellbeing and advancement of the community. It does this by presenting an effective voice to the Australian community on common and shared issues affecting the contribution, performance and reputation of nonprofit organisations, as pare of the third sector.

The initial participants of the Roundtable include:

Philanthropy Australia
Fundraising Institute of Australia
Sport Industry Australia
ArtsPeak
Third Sector Research Institute (UTS, QUT, Deakin University)
National Council of Churches in Australia
ACOSS
ACROD
Aged and Community Services
Australian Conservation Foundation
Australian Consumers Association
Australian Council for Overseas Aid
Australian Society of Assoc Executives
Consumers Health Forum
FECCA
Jobs Australia
National Council of Independent Schools Association
Volunteering Australia

[14] *Report of the Inquiry into the Definition of Charities and Related Organisations* p. 291-293.

For the first time ever the Nonprofit Roundtable brings together organisations involved in the sector's funding/financing area, research and nonprofit endeavour across the broadest spectrum of activity. It is providing a unique opportunity to present the sector, its issues and its diverse and significant contribution to the Australian Community.

Enhancing the sector's reputation and recognition and greatly improving the infrastructure underpinning the sector are key priorities.

## Annexure I

## Legislation in which some legal outcome turns on interpretation of the words "charity" and/or "charitable"

### COMMONWEALTH LAWS

A New Tax System (Goods and Services Tax) Act 1999
Age Discrimination Act 2004
Aircraft Noise Levy Act 1995
Corporations Act 2001
Disability Discrimination Act 1992
Extension of Charitable Purpose Act 2004
Foreign Acquisitions and Takeovers Regulations 1989
Fringe Benefits Tax Assessment Act 1986
Housing Assistance Act 1978
Income Tax Assessment Act 1936
Income Tax Assessment Act 1997
Native Title Act 1993
Racial Discrimination Act 1975
Sex Discrimination Act 1984
Trade Practices Act 1974

### STATE AND TERRITORY LAWS

Acquisition of Land Act 1967 (Qld)
Adoption Act 1988 (Tas)
Adoption Act 1993 (ACT)
Adoption Act 2000 (NSW)
Anti-Discrimination Act (NT)
Anti-Discrimination Act 1977 (NSW)
Anti-Discrimination Act 1991 (Qld)
Anti-Discrimination Act 1998 (Tas)
Associations Act (NT)
Associations Incorporation Act 1964 (Tas)
Associations Incorporation Act 1981 (Vic)
Associations Incorporation Act 1985 (SA)
Associations Incorporation Act 1987 (WA)
Auction Sales Act 1973 (WA)
Building and Construction Industry (Portable Long Service Leave) Act 1991 (Qld)
Charitable and Non-Profit Gaming Act 1999 (Qld)
Charitable Collections Act 1946 (WA)
Charitable Collections Act 2003 (ACT)
Charitable Fundraising Act 1991 (NSW)
Charitable Funds Act 1958 (Qld)
Charitable Trusts Act 1962 (WA)
Charitable Trusts Act 1993 (NSW)
Charities Act 1978 (Vic)
Child Welfare Act 1947 (WA)
Children, Young Persons and their Families Act 1997 (Tas)
Chiropractic and Osteopathy Practice Act 2005 (SA)
Civil Law (Wrongs) Act 2002 (ACT)
Civil Liability Act 2002 (Tas)
Civil Liability Act 2003 (Qld)
Collections Act 1966 (Qld)
Collections for Charitable Purposes (Collection Bins) Regulations (SA)
Collections for Charitable Purposes Act 1939 (SA)
Collections for Charities Act 2001 (Tas)
Companies (Co-operative) Act 1943 (WA)
Congestion Levy Act 2003 (Vic)
Co-operative Act 1996 (Vic)
Cooperatives Act (NT)
Co-operatives Act 1992 (NSW)
Co-operatives Act 1997 (Qld)
Co-operatives Act 1997 (SA)
Cooperatives Act 1999 (Tas)
Cooperatives Act 2002 (ACT)
Crown Lands Act 1929 (SA)
Darwin Rates Act (NT)
Debits Tax Act 1990 (Vic)
Door-to-Door Trading Act 1991 (ACT)
Dormant Funds Act 1942 (NSW)
Duties Act 1997 (NSW)
Duties Act 1999 (ACT)
Duties Act 2000 (Vic)
Duties Act 2001 (Qld)
Duties Act 2001 (Tas)
Emergency Services Funding Act 1998 (SA)
Employment Agents Registration Act 1993 (SA)
Environment Protection Act 1970 (Vic)
Equal Opportunity Act 1984 (WA)
Equal Opportunity Act 1984 (SA)
Equal Opportunity Act 1995 (Vic)
Fair Work Act 1994 (SA)
Fisheries Management Act 1994 (NSW)
Food Act 2006 (Qld)
Gambling (Two-up) Act 1998 (NSW)
Gambling Regulation Act 2003 (Vic)
Gaming and Wagering Commission Act 1987 (WA)
Gaming Control Act (NT)
Gaming Control Act 1993 (Tas)
Gaming Machine Act 1991 (Qld)
Gaming Machine Act 2004 (ACT)
Hospital and Health Services Act 1927 (WA)
Housing Act 1983 (Vic)
Industrial Relations Act 1984 (Tas)
Insurance Protection Tax Act 2001 (NSW)
Introduction Agents Act 1997 (Vic)
Introduction Agents Act 2001 (Qld)
Irrigation (Land Tenure) Act 1930 (SA)
Land Acquisition (Charitable Institutions) Act 1946 (NSW)
Land Act 1994 (Qld)
Land Drainage Act 1925 (WA)
Land Tax Act 1915 (Qld)
Land Tax Act 1936 (SA)
Land Tax Act 2000 (Tas)
Land Tax Act 2005 (Vic)
Land Tax Assessment Act 2002 (WA)
Land Tax Management Act 1956 (NSW)
Law of Property Act (NT)
Law of Property Act 1936 (SA)

Liquor Act 1992 (Qld)
Local Government Act 1989 (Vic)
Local Government Act 1993 (NSW)
Local Government Act 1993 (Qld)
Local Government Act 1995 (WA)
Local Government Act 1999 (SA)
Lotteries Act 1964 (ACT)
Lotteries and Art Unions Act 1901 (NSW)
Lotteries Commission Act 1990 (WA)
Medical Practice Act 2004 (SA)
Occupational Therapy Act 2005 (SA)
Optometry Practice Act 2007 (SA)
Parking Space Levy Act 1992 (NSW)
Parliamentary Disclosure of Interests Act 1996 (Tas)
Pawnbrokers and Second-hand Dealers Act 1996 (NSW)
Pay-Roll Tax Act 1971 (NSW)
Pay-Roll Tax Act 1971 (Qld)
Pay-roll Tax Act 1971 (Vic)
Payroll Tax Act 1987 (ACT)
Pay-roll Tax Assessment Act 2002 (WA)
Personal Injuries (Liabilities & Damages) Act (NT)
Physiotherapy Practice Act 2005 (SA)
Podiatry Practice Act 2005 (SA)
Police Act 1892 (WA)
Port Authorities Act 1999 (WA)
Prevention of Cruelty to Animals Act 1979 (NSW)
Prisons Act 1981 (WA)
Property Agents and Land Transactions Act 2005 (Tas)
Property Agents and Motor Dealers Act 2000 (Qld)
Property Law Act 1958 (Vic)
Property Law Act 1969 (WA)
Property Law Act 1974 (Qld)
Property, Stock and Business Agents Act 2002 (NSW)
Public Transport Authority Act 2003 (WA)
Public Trustee Act 1995 (SA)
Public Trusts Act 1882 (Tas)
Racing and Wagering Western Australia Act 2003 (WA)
Rates Act 2004 (ACT)
Residential Services (Accommodation) Act 2002 (Qld)
Retail Trading Hours Act 1987 (WA)
Retirement Villages Act 1987 (SA)
Retirement Villages Act 1999 (Qld)
Road Safety (Vehicles) Regulations 1999 (Vic)
Road Transport (Heavy Vehicles Registration Charges) Act 1995 (NSW)
Roads (Opening and Closing) Act 1991 (SA)
Second-hand Dealers and Pawnbrokers Act 2003 (Qld)
Sewerage Act 1929 (SA)
Shop Trading Hours Act 1977 (SA)
Special Purposes Leases Act (NT)
Stamp Act 1921 (WA)
Stamp Duties Act 1923 (SA)
State Loans and Loan Guarantees Act 1976 (Tas)
Statistics Act 1935 (SA)
Summary Offences Act 2005 (Qld)
Supreme Court Rules 2000 (Tas)
Survey Act 1992 (SA)
Sydney Water Act 1994 (NSW)
Tasmanian Community Fund Act 2005 (Tas)
Trading (Allowable Hours) Act 1990 (Qld)
Transport Act 1983 (Vic)
Transport Administration Act 1988 (NSW)
Transport Operations (Passenger Transport) Act 1994 (Qld)
Trustee Act 1936 (SA)
Trusts Act 1973 (Qld)
Variation of Trusts Act 1994 (Tas)
Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas)
Veterans Act 2005 (Vic)
Veterinary Practice Act 2003 (SA)
Volunteers Protection Act 2001 (SA)
Volunteers Protection from Liability Act 2002 (WA)
Water Boards Act 1904 (WA)
Water Conservation Act 1936 (SA)
Water Corporation Act 1995 (WA)
Water Management Act 2000 (NSW)
Waterworks Act 1932 (SA)
Workers Compensation Act 1987 (NSW)
Wrongs Act 1958 (Vic)

**Annexure II**

List of government entities that are in some way responsible for interpreting and determining the charitable status of organisations under relevant legislation. Entities marked with an asterisk are regularly involved in making such determinations; others have some legal responsibility but in practice may be called upon to make an actual determination less frequently or, in some cases, seldom if ever.

## COMMONWEALTH

Australian Competition and Consumer Commission
Australian Securities & Investments Commission
Australian Taxation Office*
Department of Families, Community Services and Indigenous Affairs
Department of Transport and Regional Services
Foreign Investment Review Board
Human Rights and Equal Opportunity Commission

## AUSTRALIAN CAPITAL TERRITORY

ACT Registrar-General*
ACT Revenue Office*
Department of Disability, Housing and Community Services
Gambling and Racing Commission
Office of Fair Trading

## NEW SOUTH WALES

Attorney General's Department
Department of Commerce
Department of Community Services
Department of Primary Industries
Local government councils
NSW Fisheries
Office of Charities*
Office of Fair Trading
Office of State Revenue*
Office of the Public Trustee
Roads and Traffic Authority
Water supply authorities
WorkCover Authority

## NORTHERN TERRITORY

Anti-discrimination Commission
Consumer and Business Affairs
Department of Local Government, Housing and Sport
Department of Planning and Infrastructure
Treasury - Racing, Gaming & Licensing Division*

## QUEENSLAND

Anti-Discrimination Commission Queensland
Building and Construction Industry (Portable Long Service Leave) Authority
Department of Employment and Industrial Relations
Local government councils
Office of Fair Trading*
Office of Gaming Regulation*
Office of State Revenue*
Queensland Health
Queensland Transport
Treasurer

## SOUTH AUSTRALIA

Chiropractic and Osteopathy Board
Development Assessment Commission
Equal Opportunity Commission
Government Statist
Governor of South Australia
Institution of Surveyors, Australia, South Australia Division Incorporated
Local government councils
Medical Board
Minister for Water
Office of Business and Consumer Affairs
Office of Consumer and Business Affairs
Office of the Liquor and Gambling Commissioner*
Optometry Board
Physiotherapy Board
Podiatry Board
RevenueSA*
Safework SA
South Australia Water Corporation
Veterinary Surgeons Board

## TASMANIA

Anti-discrimination Commissioner
Attorney General's Department
Commissioner for Corporate Affairs
Consumer Affairs and Fair Trading*
Department of Health and Human Services
Department of Infrastructure, Energy, Resources
Department of Treasury & Finance
State Revenue Office*
Tasmanian Community Fund Board
Tasmanian Gaming Commission*
Tasmanian Industrial Commission
Tasmanian Parliament

## VICTORIA

Attorney General
Commission for Gambling Regulation*
Consumer Affairs Victoria
Department for Victorian Communities
Department of Human Services
Department of Infrastructure
EPA Victoria
Equal Opportunity and Human Rights Commission
Local government councils
State Revenue Office*
VicRoads

## WESTERN AUSTRALIA

Department for Child Protection
Department of Consumer and Employment Protection*
Department of Corrective Services
Department of Racing, Gaming and Liquor*
Department of the Attorney General
Equal Opportunity Commission
Local government councils
Local police
Lotteries Commission
Office of State Revenue*
Water Corporation