

**TEMPLATE FOR COMPARATIVE COUNTRY STUDIES ON
LAWS AND REGULATIONS GOVERNING CHARITABLE ORGANIZATIONS**

FOR

“INTERNATIONAL CHARITY LAW: COMPARATIVE SEMINAR”

BEIJING, CHINA

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I. INTRODUCTION.

This document sets out a template or pattern to be used in drafting country reports for the seminar entitled “International Charity Law: Comparative Seminar,” to be held under the auspices of the China Charity Federation (“CCF”) in Beijing in October of 2004. The purpose of the Conference is to discuss the legal structures that govern the establishment and operation of charitable organizations in a number of major representative countries. Edited versions of the resulting papers [and examples of relevant laws from the countries surveyed] will be published by CCF in China. As a rough guideline, it is anticipated that the matters covered by this template could be covered in approximately 20 double-spaced pages. To the extent possible, the outline points from this template should be used as headings for the relevant portions of the country reports to facilitate country comparisons. This template is based on analysis and research provided by the International Center for Not-for-Profit Law in Washington, D.C., which is serving as one of the co-organizers of the conference.

The Chinese co-organizers of the conference have requested that the country reports focus on “charitable organizations.” Since different legal systems use different terminology, this is obviously not intended as a technical legal concept. What is intended is the range of philanthropic organizations, such as Section 501(c)(3) organizations in the United States, charities in the United Kingdom, and public benefit organizations in civil law countries.

II. PROVISIONS OF THE GENERAL LAWS.¹

A. Consistency and Clarity of the Laws.

One general question that needs to be addressed is whether the various laws and regulations that affect the charitable sector are multiple, unclear, or contradictory. If the country has a federal system, are there different provisions in state laws and national laws? Are the laws simple and easily administrable or complex and difficult to understand and follow?

The legal framework of nonprofit organisations in Australia is not a rational jurisprudential structure compared to a civil law framework. As Australia was once part of the British Empire, it has a strong English common law influence. Australia has continued in a common law tradition and a majority of its law have English antecedents. In the last two decades Australian law has been influenced by the American jurisdiction, particularly in the area of anti-trust law, commercial law, consumer legislation and administrative law. This reliance on the common law together with the federal system of government makes for a complex system of regulation.

Australia is a federation of States and Territories. There is a division of constitutional powers between the States and Commonwealth government. The Commonwealth government can usually impose its will either directly on the States through its powers or indirectly using its taxing powers. In the last decade there has been significant reform of governmental structures

¹ It is recognized that the laws of most countries do not have all of the kinds of possible provisions that are alluded to in the questions that follow. The questions are provided, not only to provide a common format for the country reports, but also to suggest issues and topics that contributors should consider. If the laws of a particularly country are silent on an issue, the report may, of course, be similarly silent, or may identify alternative approaches to handling the relevant issues.

and economic institutions by agreement between the states and commonwealth. This has largely been confined to commercial legislation and governmental agencies and has not yet flowed on to the nonprofit sector's legal environment. Each State has its own judicial system as well as the Commonwealth's system of federal courts. An appeal lies from the State courts to the High Court of Australia.

Australian has another level of government which consists of local or municipal councils which are responsible for the provision of services such as water, sewerage, waste disposal, local transport, building codes and some community welfare services. The councils are supervised by State governments. A council's involvement with nonprofit organisations and their regulation varies greatly. The most common regulatory provisions involve concessions on property rates and services, building and site use proposals, health and hygiene regulations.

Division of government responsibility for the legal framework of nonprofit organisations is shared primarily between the States and the Commonwealth. Each State of Australia has different statutory laws permitting the incorporation of nonprofit organisations. The Commonwealth also permits the incorporation of nonprofit organisations in its general code of business corporations, (*The Corporations Act*) and specialist nonprofit associations (for example, aboriginal councils and associations). The common law (case law) which is similar throughout Australia, permits the nonprofit legal forms of the charitable trust and the unincorporated association. There are also nonprofit organisations that are created by specific Acts of the various parliaments. These are usually quite old organisations or churches. Before modern nonprofit incorporation statutes, the inherent powers of the Queen of England and her representatives in Australia were used to establish nonprofit organisations. These organisations were established by charters or letters patent, and it is rare for such power to be exercised now.

The federal nature of the Australia system of government creates a number of diverse jurisdictions. The lack of co-ordination of the laws in the differing state jurisdictions is starting to lead to a number of problems for nonprofit organisations. Nonprofit organisations that operate in more than one state face conflicts in law, duplication of regulation and costs. It is also structurally inefficient for a nation of 20 million people having eight state or territory jurisdictions, a Commonwealth jurisdiction and a layer of local government.

B. General Constitutional and Legal Framework.

Each paper should provide an overview of relevant constitutional and legal provisions that govern the charitable sector. What general rights and limitations (e.g., national security or public order) are relevant to the charitable environment?

The constitutions of the Australian Federal government or state governments do not contain any directly relevant material in respect of the charitable sector. There is no bill of rights guaranteeing freedom of association or civil society participation.

As mentioned above there is a division of powers between the Federal and State governments where the State governments have prime responsibility for laws in respect of charity and charitable organisations. The Federal government through its powers of taxation and federal corporate regulation does have a role to play in the charity sector.

Australia has laws which in its federal Crimes Act deal with associations of people that seek to overthrow the government by revolution or sabotage dating back to the 1930s.² They were enacted in respect of communist organisations. Only one person in this time has been convicted and this was later overturned on appeal. Recently the Federal government has amended various Acts in regard to terrorism which implement the United Nations Treaties on such matters.³

² *Crimes Act 1914 (Cth) Part IIA*

³ *Suppression of the Financing of Terrorism Act 2002 (Cth).*

C. Types of Organization.

What types of organizations can be formed under the law, and what are the defining characteristics of each type of organization?⁴ More specifically, are societies, companies, associations, foundations, or other types of organizations recognized by the law as juridical entities? Does the law distinguish between charitable organizations that provide a public benefit and those that serve their members' private or mutual interests? If so, how are these distinctions made? Please briefly describe the types of charitable organizations that are permitted to exist.

There is no uniform law for the creation of charitable bodies. The common law does define a “charitable purpose” and a range of different legal forms can have a “charitable purpose”. Having a charitable purpose (no matter what the legal body form) will allow access to various taxation concessions, fundraising licences and charitable gaming permits. The main types of legal bodies that are charitable or have charitable purposes are the:

- charitable trust;
- unincorporated association;
- incorporated association;
- company limited by guarantee;

and some rare forms of bodies which are often unique charitable organisations. Each of them is dealt with in turn below.

⁴ We are dealing in this context with laws affecting charitable organizations and not those that are specialized, such as trade unions, religious organizations, political parties, and cooperatives.

THE CHARITABLE TRUST

While charitable trust is a dominant nonprofit form in the United Kingdom, it is only a minor form in Australia. A trust is a concept foreign to many civil lawyers.

A private trust for persons is an equitable obligation placed on a person (trustee) as legal owner of property (trust property) for the benefit of another person (*cestui que trust*/beneficiary). The essence is that one person is legal owner, but is bound by conditions to solely benefit another. The trustee owes duties to the beneficiary which are enforceable in equity by the beneficiary. Such trusts can be employed to facilitate a number of arrangements such as family property inheritance, public investment, trading, minimisation of tax, provision for improvident persons, securing priority of favoured creditors and the transfer of property to persons for certain purposes. A trust form is not a corporate body (juridical entity), but a relationship between the trustee and the beneficiary of the trust.

The legal form of a trust facilitates transfers between two parties. The trustee is the intermediary, who has title to the property given by settlor (donor), for the benefit of the *cestui que trust* (donee). A trust may arise solely on the intention of the donor, not an agreement between donor and donee. Further, the remedies a beneficiary can pursue for a breach of trust are far more liberal than those available in contract.

The charitable trust is a public trust which is created for specified charitable purposes. These charitable purposes are for the advancement of religion, education or the relief of poverty that is for the “public benefit”. This requires that the purpose be a “benefit” (cannot be a vague or

inconsequential purpose (such as offering prayers) and also to be public. A charitable trust is barred from advancing the interests of its members (if any) or individual self interest and any purpose must be for the benefit of the general public or an “appreciably important class of the public”. The charitable trust is markedly different to a private trust for persons. The differences are that the charitable trust may be for a purpose rather than certain human beneficiaries, the rule against perpetual duration does not restrict a charitable trust and the doctrine of lapse will save charitable property transfers, its terms being enforced by the Attorney General. The trustee of a charitable trust is personally liable for breaches of the terms of the trust or their fiduciary duties. It is unusual for a charitable trust to have members in Australia and it usually only consists of a small number of trustees or a trustee corporation.

The trust's use in Australia is uncommon compared to other charitable vehicles and usually reserved to facilitate testamentary gifts and large private foundations.

THE UNINCORPORATED ASSOCIATION

Unincorporated Associations are used for a variety of other nonprofit purposes such as commerce, clubs, mutual assistance organisations, industrial unions, political activities and charitable purposes. An unincorporated association is merely the sum of its members.⁵ The association has no legal *persona*, as might a company or chartered body.⁶ Accordingly, it does not have a perpetual existence, it can not be sued or sue, receive, hold or dispose of property in its own name as the law does not recognise its existence.⁷ Liability may rest personally on the

⁵ *Steele v Gourley and Davis* (1886) 3 T.L.R. 772.

⁶ H.A.J. Ford & R.P. Austin, *Ford's Principles of Corporations Law*, 5th ed., Butterworths, Sydney, 1992 at p.43.

⁷ For example see *Australian Nursing Federation Tasmanian Branch v. Fawdry* (1987) 73 A.L.R. 540; *Fells v. Read* (1796) 3 Ves. Jun. 70; 30 E.R. 899.

committee of management, rather than the association.⁸ The source of the authority, control and facilitation of an unincorporated association is the consensual agreement between members evidenced by the constitution, be it a formal written document or unwritten rules formed by tradition.⁹ The word "consensual" is used because in Australia the judiciary is bound by a High Court precedent that such agreements are not contractual in nature unless expressly agreed to be contractual and in reference to some proprietary right.

The device of a trust provided by equity is used to make the unincorporated association into an entity that can function as an quasi-corporate body.¹⁰ As Cross J indicates,

... the terms or circumstances of the gift or the rules of the association may show that the property in question is not to be at the disposal of the members for the time being, but is to be held in trust for and applied for the purposes of the association as a quasi-corporate entity. In this case the gift will fail unless the association is a charitable body.¹¹

The trust device is not only used to facilitate gifts, but also bare property holding by the management committee on behalf of the members.

THE INCORPORATED ASSOCIATION

⁸ *M & M Civil Engineering Pty Ltd v Sunshine Coast Turf Club* [1987] 2 Qd R. 401, a member may be able to be indemnified by the association for the debt or liability, but this must be specifically provided for in the constitution.

⁹ K.L. Fletcher, *The Law Relating to Non-profit Associations in Australia and New Zealand*, The Law Book Company Limited, 1986 at p.44, citing *Cameron v Hogan* (1934) 51 C.L.R. 358.

¹⁰ *Neville Estates v Madden* [1962] Ch. 832 at p.849.

¹¹ *Neville Estates v Madden* [1962] Ch. 832 at p. 849 quoted by Adam J. in *Re Goodson* [1971] V.R. 801 at 812.

Incorporated associations have been a development of Australasian law not yet found in England. It is an association that is nonprofit and possessing a corporate *persona* and accompanying attributes. Each State and Territory of Australia has its own incorporated association legislation.¹² While the scheme of each of the Acts is similar, they all have differences. This diversity causes problems such as hampering nonprofit organisations operating in more than one State or Territory. The popularity of the use of this legal form has grown rapidly in the last decade.

The incorporated association mirrors the simple regulatory form of commercial company legislation with some alterations to ensure that the form is used only for nonprofit activity. It places the management of the association under democratic procedures with the management committee being elected yearly. Liability of members is limited to their yearly subscription and the liability of committee members is limited to the property of the incorporated association under their control. This limited liability status gives the incorporated association an advantage over unincorporated associations whose committee has unlimited personal liability.

These associations can have charitable purposes. This permits them to qualify for certain taxation concessions and other licences. Members are prevented in such organisations from benefiting privately and organisations are bound not to distribute any profits or surpluses to members either while it is operating or upon its dissolution.

¹² Australian Acts permitting incorporated associations are *Associations Incorporation Ordinance* 1953 (A.C.T.); *Associations Incorporation Act* 1984 (N.S.W.); *Associations Incorporation Act* 1978 (N.T.); *Associations Incorporation Act* 1981 (Qld.); *Associations Incorporation Act* 1985 (S.A.); *Associations Incorporation Act* 1964 (Tas.) *Associations Incorporation Act* 1981 (Vic.); *Associations Incorporation Act* 1895 (W.A.).

THE COMPANY LIMITED BY GUARANTEE

A company limited by guarantee or guarantee and shares¹³ is a class of company provided by the general corporations law in England and Australia.¹⁴ The company limited by guarantee is classed as a public company.¹⁵ Its chief distinction from other companies is that the liability of its members is limited by the amount of the guarantee given on joining the company which is contained in the company's constitution. The guarantee is only payable on the winding up of the company where there is a shortfall in the company's capacity to satisfy all its liabilities.

The company limited by guarantee is classified as a public company and is thus subject to the same regulation as companies that seek capital through the capital markets. The directors of such companies are also expected to comply with heightened duties of public company directors. This includes personal liability for the trading debts of an insolvent company.

A company limited by guarantee has the advantage of being able to trade in any State or Territory of Australia as it is incorporated under a special federal law. Many peak or umbrella organisations spanning several States use the company limited by guarantee for this reason.

This class of entity can be used for for-profit as well as nonprofit ventures, although the vast majority of such corporations in Australia appear to be used for nonprofit activities. There are approximately 10,000 companies limited by guarantee in Australia, but the rate of incorporation

¹³ R. McQueen & M. McGregor-Lowndes, 'The Company Limited by Shares and Guarantee', *Company and Securities Law Journal*, Vol.9, No.4, 1991, pp.248-257.

¹⁴ In Australia refer section 115 of the *Corporations Act* (Cth).

¹⁵ Section 9, *Corporations Act* (Cth).

of these companies has decreased since the introduction of an alternate nonprofit form, the incorporated association, in 1980s.

These companies can have charitable purposes. This permits them to qualify for certain taxation concessions and other licences. Members are prevented in such organisations from benefiting privately and organisations are bound not to distribute any profits or surpluses to members either while it is operating or upon its dissolution.

SOME RARE LEGAL FORMS

A fascinating range of rare legal forms can also be found in Australia. Although the organisations in each legal form are small in number, they include some of the largest nonprofit organisations in Australia, a couple with annual expenditures over a billion dollars.¹⁶ Some organisations owe their rare legal form to formation last century under now repealed legislation while others are specially regulated by specific statutes.

It is an interesting pattern that legislation which repeals nonprofit legal forms will exempt organisations that exist at the time of the repeal. Such organisations rarely contemplate updating their legal form because of legal costs and the usually lax regulatory environment under the repealed legislation. This creates the environment where some of the largest nonprofit organisations in Australia are virtually unregulated compared to more recent statutory schemes.

¹⁶ These are religious denominations.

An example of this is the Queensland *Religious Educational and Charitable Institutions Act* of 1861. This Act permitted charities to incorporate their trustees under a grant of artificial personality by the Queensland Governor exercising powers of the United Kingdom Monarch. When the Act was repealed in 1981, all existing organisations were permitted to continue. There is no requirement for these organisations to make public any financial or other report, nor has the state any statutory power to investigate or sanction these organisations. The organisations are not required to even disclose who are the trustees or how one might contact the organisation.

Incorporation of nonprofit organisations can also be obtained by a special Act of Parliament and by royal charter. Incorporation by royal charter involves the use of royal prerogatives to incorporate a body usually by letter patent. An example of this is the Institute of Chartered Accountants. The Prime Minister's Office, which is responsible for such matters, will no longer process such applications.

A special Act of Parliament can also create an incorporated body. Many of the state's universities and religious organisations are incorporated in this way. It must be demonstrated to the government of the day that the organisation is substantial and cannot be accommodated under other incorporating statutes. The process is lengthy and expensive.

Other special Acts exist to incorporate or facilitate certain special types of bodies such as:

- *Parents' and Citizens' Association formed under the Education Act 1964-1974*

Public schools in Australia have auxiliaries that primarily fundraise for improved school facilities.

· *Hospitals Foundation Act 1982*

This Act permits the incorporation of foundations attached to nonprofit and state medical establishments. It is an example of legislation designed for a specific type of nonprofit organisation.

These bodies often have charitable purposes and will constrain the distribution of benefits to members.

D. Purposes.

What are the purposes for which different types of charitable entities may be established (e.g., educational, cultural, scientific, etc.)?

Australian statutes or common law do not usually prescribe required purposes for a nonprofit legal form, once it has been registered. They are usually required to adhere to their stated objectives and be active. In some cases, incorporated association legislation has an activity test, but this is usually very wide and not well policed in the vast majority of cases. An incorporated association which infringes the required purposes test may be asked to show cause why it should not be de-registered. Incorporated association and company limited by guarantee statutes have provisions saving contracts made in excess of powers or objects with third parties, and the *ultra vires* event may only be relied on for internal proceedings or proceedings by the state.

However, to be regarded as charitable, an entity or corporate body must have as its object, charitable purposes.

Charitable Trust

A charitable trust must abide by its charitable objectives. The trustees will be personally responsible for any breach of trust which may be litigated by the Attorney-General. If the purposes of the trust become impossible or administratively break down, then a scheme of *cy-pres* is available through the superior courts or offices of the Attorney-General to reconstruct the trust in a meaningful way.

Unincorporated Association

An unincorporated association by definition is not for illegal purposes and has a non-distribution constraint clause. It will be charitable if it has charitable purposes, that is the advancement of religion, education or the relief of poverty.

Incorporated Association

There is considerable variation on the limitations and prohibitions placed on incorporated associations. Their members cannot receive a pecuniary profit as discussed in the previous topic. In Tasmania and the Northern Territory incorporated associations are prohibited from activities which would generate income from trading. In other jurisdictions there are provisions that where an incorporated association engages in substantial trading activities to support its objectives, then it may in the discretion of the registrar, be moved to the *Corporations Act* regime.

Such associations will be charitable, if it has charitable purposes, that is the advancement of religion, education or the relief of poverty.

Special Legal Forms

Prohibitions and limitations will depend on the individual terms of the statute or grant. Such bodies will be charitable, if they have charitable purposes, that is the advancement of religion, education or the relief of poverty.

E. Registration or Incorporation Requirements.

What do the laws provide for formal establishment of a charitable organization as a legal entity? Where and how are they registered? Who may found or create them? May non-natural legal persons or foreigners be founders or members? Are "umbrella charitable organizations" (e.g., associations of charitable organizations) permitted? How many founders or initial members must there be? What are the general registration procedures and what requirements must be met before registration will be permitted? Is a certain amount of base capital required to form a charitable organization? Who are the registering authorities? May registration be rejected and for what reasons? May an organization appeal from such a rejection? To what bodies and under what standard of review? What fees are required to register a charitable organization? Are there other significant requirements that need to be considered?

In all legal forms registration fees charged by the registering authority are modest and less than commercial bodies fees. Non-natural persons can be members or trustees of all bodies and there is no special legal form for "umbrella bodies" which may choose from a number of legal vehicles. There are no base capital requirements before registration will be permitted.

THE CHARITABLE TRUST

The charitable trust is a public trust which is created for specified charitable purposes. It is created by private deed and does not require registration with any government authority to be valid. Charitable trusts are usually endorsed by the Australian Taxation Office, but it is unusual for the Office to require or inspect the terms of the trust deed.

The charitable trust facilitates a donor or donors giving property to trustees for furtherance of purposes that the law characterises as charitable. As long as the property settled on the trust is certain, there is no minimum value required. There are no fees required for the establishment of a charitable trust.

The trust's use in Australia is uncommon and usually reserved to facilitate testamentary gifts and large private foundations. There is no requirement for trusts to register with any government authority and hence it is not known how many exist in Australia. A charitable trust only needs a founder and a trustee. No members are required.

THE UNINCORPORATED ASSOCIATION

Unincorporated Associations are used for a variety of nonprofit purposes such as commerce, clubs, mutual assistance organisations, industrial unions and political activities, but can be formed for charitable purposes. If it is to have charitable purposes, members cannot benefit directly from its activities.

There is no requirement for unincorporated associations to register with any government authority and hence it is not known how many exist in Australia. However, governments have increasingly adopted the stance over the last decade that if a nonprofit association wishes to gain a government grant, subsidy, exemption or licence, then it must incorporate. Most have chosen to become incorporated associations. There are no fees for establishment.

THE INCORPORATED ASSOCIATION

Each State and Territory of Australia has its own incorporated association legislation.¹⁷ While the scheme of each of the Acts is similar, they all have differences. Usually the Fair Trading or Consumer Affairs Department is the registration authority. A minister of the crown is usually responsible for the actions of the department, may determine administrative appeals in some cases and has a discretion to refuse incorporation which is rarely exercised.¹⁸ Many statutes have a minimum number of members, a registration fee, need for a constitution conforming to set guidelines and an application form. Nonprofit organisations which already have specialist statutes permitting their incorporation are required to incorporate under that regime, rather than the more general association incorporation statutes, (for example, trades unions and employer associations).

All incorporation statutes are only available to those associations that are established for purposes of other than making profits for members and distribution of profits to members in the

¹⁷ Australian Acts permitting incorporated associations are *Associations Incorporation Ordinance 1953* (A.C.T.); *Associations Incorporation Act 1984* (N.S.W.); *Associations Incorporation Act 1978* (N.T.); *Associations Incorporation Act 1981* (Qld.); *Associations Incorporation Act 1985* (S.A.); *Associations Incorporation Act 1964* (Tas.) *Associations Incorporation Act 1981* (Vic.); *Associations Incorporation Act 1895* (W.A.).

¹⁸ But see the case of *R V Medcalf; ex parte Conacher* [1978] WAR 53 where a minister refused an application by a group wishing to form an association to protest against wood chipping of the state's forests.

form of dividends is prohibited. All profits are required to be employed in furthering the objects of the association. This is statutorily achieved either by listing a number of permissible activities accompanied by a non-distribution clause or permitting any lawful activity with a non-distribution clause.

No association may be established for an illegal purpose.

Company Limited by Guarantee

A company limited by guarantee is created by application to the Australian Securities Commission which administers the Corporations Act. The Australian Securities Commission serves as a registry for all corporations in Australia. A company limited by guarantee requires one subscriber, two directors, a unique name, a constitution, a registered office, an incorporation fee and several completed forms to be registered as a company. Once these matters have been completed there is no formal or practical discretion to prohibit registering the company. The registration fees for nonprofit corporations are modest.

Special Legal Forms

As indicated above there are a number of other special legal forms in use, although relatively small in number, some of the largest nonprofit organisations take these legal forms. The creation of such forms depends on the source of authority involved. For example, state and federal parliaments exercise discretion when legislating to create special nonprofit organisations. Royal charters and letters patent are now rare, the Queen being advised by the Prime Minister's Office which in the last decade and a half has avoided recommendation of such

nonprofit forms. There are no registration fees for such bodies, but the legal expenses in securing their enactment can be substantial.

F. Charitable Organization Register.

Is there a register of charitable organizations? Where is it maintained and by whom? What information is entered into the register? Does the public have access to the register? Are defunct organizations purged from the register? Does the register list organizations that were denied the right to register or which have been sanctioned or disciplined? Is the register generally considered to be accurate and up to date?

Australia does not have a Charity Commission such as in England and Wales which maintains a register of charitable organisations with annual filings that are scrutinized and available for public inspection. Incorporation registries (such as for incorporated associations and companies limited by guarantee) do maintain registries, but these registries include organisations that would not be classified as charitable, but still are nonprofit (such as sporting and membership associations). Other registries such as for organisations permitted to raise funds from the public, conduct charitable gambling and alcohol sales have registries with information available to the public, again this is based on function and activities rather than the charity status of an organisation. The public does have access to these registries, but the information available differs and the quality of the information is variable. While the Australian Securities and Investment Commission (companies limited by guarantee) has high quality information and inactive organisation purges, this is less true for state based regulators.

The Australian Taxation Office does maintain a registry of income tax exempt charities which began in 2000. The only records that it has, is the initial endorsement as an income tax exempt

charity and no annual filings are required. A public register consisting of the name, taxation status, date of approval and Australian Business Number of the organisation will be available from 1 July 2005.

G. General Powers.

What are charitable organizations permitted to do and what are they forbidden from doing (e.g., can they exercise the general rights and powers of juridical entities, such as ownership of real property or entering into contracts)? Who may raise issues about their failure to comply with these limitations on their activities, and how are such issues raised (e.g., complaint to attorney general or public prosecutor, petition in court)? Do possible or intended beneficiaries of charitable organizations have the right to go to court to seek action against a charitable organization?

Australian statutes or common law do not usually prescribe required purposes for a nonprofit legal form, once it has been registered. They are usually required to adhere to their stated objectives and be active. In some cases, incorporated association legislation has an activity test, but this is usually very wide and not well policed in the vast majority of cases. An incorporated association which infringes the required purposes test may be asked to show cause why it should not be de-registered. Incorporated association and company limited by guarantee statutes have provisions saving contracts made in excess of powers or objects with third parties, and the *ultra vires* event may only be relied on for internal proceedings or proceedings by the state.

Where a body (of any form) is for charitable purposes the Attorney-General has inherent jurisdiction to supervise the charitable purposes. If the purposes of the trust become impossible or administratively break down, then a scheme of *cy-pres* is available through the superior courts or offices of the Attorney-General to reconstruct the trust in a meaningful way. Members of charitable trusts or the public have limited rights to seek redress from charitable trusts and must seek permission of the Attorney-General. Members in other legal forms have varying internal rights to seek to bring the organisation to account for breach of its charitable purpose.

Charitable Trust

A charitable trust must abide by its charitable objectives. The trustees will be personally responsible for any breach of trust which may be litigated by the Attorney-General. If the purposes of the trust become impossible or administratively break down, then a scheme of *cy-pres* is available through the superior courts or offices of the Attorney-General to reconstruct the trust in a meaningful way.

Unincorporated Association

An unincorporated association by definition is not for illegal purposes and has a non-distribution constraint clause. A member may seek redress from the courts in limited circumstances

Incorporated Association

There is considerable variation on the limitations and prohibitions placed on incorporated associations. Their members cannot receive a pecuniary profit as discussed in the previous

topic. In Tasmania and the Northern Territory incorporated associations are prohibited from activities which would generate income from trading. In other jurisdictions there are provisions that where an incorporated association engages in substantial trading activities to support its objectives, then it may in the discretion of the registrar, be moved to the *Corporations Act* regime.

A member may seek redress from the courts in limited circumstances which are usually wider than that for unincorporated associations.

Special Legal Forms

Prohibitions and limitations will depend on the individual terms of the statute or grant. Supervision may be by various bodies or person including the Attorney-General depending on the situation.

H. Membership Organizations.

What special rules, if any, exist for charitable membership-organizations (associations or societies)? May these organizations exclude or remove members? What are the procedures for a member to join or resign from the organization?

Membership organisations usually take the form of incorporated associations or companies limited by guarantee. Very small and very large membership associations may adopt the form of an unincorporated association. Very small organisations adopt the form of an unincorporated association because the incorporation is initially too costly and costly to maintain. Very large

organisations such as Churches and political parties adopt the form because of flexibility issues, but use a corporate trustee to hold their assets and undertakings.

Over the last couple of decades federal and state jurisdictions have enacted statutes which prevent discrimination of persons on the grounds of race, age, gender, trade union membership and religion. In many cases, nonprofit organisations and particularly religious organisations are exempted from such provisions.

Each organisation will have provisions in its constitution or rules concerning the admission or resignation of members. This usually takes the simple form of a member submitting a form to the organisation and its approval by the board or management committee.

Unincorporated Associations

The general policy of the law is not to interfere in the internal decisions of an unincorporated association. This follows the policy of the judiciary to refrain where possible from interfering in the internal affairs of such bodies which are regarded as “domestic” affairs. However, in recent decades the judiciary has become involved in several areas of internal dispute resolution in respect of unincorporated associations where a property right of a member is affected or the livelihood of a member is diminished without due process.

Incorporated Associations

There are differences between the statutes in each state in respect of admitting, excluding or removing members of an incorporated association. As a general rule, statutes make the rules of the association a contract between the members from time to time and the association. This

contract, like any contract that might be made, is enforceable by the courts. A member who is deprived of a right conferred under the association's rules to have the court adjudicate on the validity of the decision. This adjudication by the court is not primarily concerned about investigating whether the deprivation was just or fair in the circumstances, but whether the deprivation of the member's right was achieved by following the rules of the association and the rules of natural justice.

An association might expel or refuse to admit a member for what any fair-minded person might regard as unfair reasons, but as long as the association follows the requirements of its rules and obeys the rules of natural justice, the court will not interfere with the decision.

Company Limited By Guarantee

The Corporations legislation follows the general framework of the provisions of the incorporation statutes making the constitution a contract between the members and membership a property right that can be defended through the courts.

III. GOVERNANCE.

A. Structures

What does the law provide with respect to the governance of charitable organizations? Are there different governance rules for foundations, associations, or other non-profit organizations? What kinds of governing bodies are permitted or required (e.g., assembly of members, board of directors, etc.)? What kinds of officers (e.g., President, Vice-Chairman, etc.) are permitted or required? What are their powers? What are the rules for voting (e.g., quorums, majorities, super-majorities for some issues, etc.)?

B. Accountability

What does the law provide about duties and responsibilities of governing bodies (e.g., must the assembly of members review the budget, may board of directors delegate signing powers to management)? Under what circumstances, if any, are members of governing bodies personally liable for harm to the organization or to third parties? Are there legal rules about conflicts of interest and self-dealing? How are they enforced? Who in the private sector has the ability to bring a suit challenging the conduct of the governing body? Is there a history of governing body members being held liable for violations of duties such as the duty of care, duty of loyalty, duty of good faith, etc.? What other techniques are there for self-regulation of charitable organizations? Are there private sector organizations that help monitor charitable organizations?

Charitable bodies governing members are generally held to a higher level of fiduciary duty where charitable purposes are involved. This includes strict rules about conflicts of interest and self dealing. There are few cases dealing with governance body abuses compared to the United States. Nonprofit board members can be personally liable for the debts of an insolvent organisation where they continued trading once it ought to have been realized that the organisation faced insolvency. There have been a number of such cases, sometimes involving charitable organisations.

Judicial proceedings by regulators is rare, usually preferring administrative sanctions. The activity of regulators varies across jurisdictions, but in the main it is low.

All Australian jurisdictions have recently adopted American style volunteer protection legislation that protects volunteers from liability to third parties for honest, but negligent acts and omissions. The liability is in most cases assumed by the nonprofit organisation. In some jurisdictions this protection also extends to volunteer committee or board members.

The Australian taxation system generally adopts a self-assessment approach with taxpayers only selected for audit on a risk management basis. Australian regulators are making increasing use of industry codes of conduct and this is evident in many jurisdictions as a part of fundraising regulation.

There are no private sector organisations that monitor Australian charitable organisations such as Guide Star or Better Business Bureau. There are some small organisations that assist donors by providing benchmarking of some larger charitable bodies.¹⁹

Unincorporated Association

The unincorporated association's internal governance is a matter for the members of the association and its founders.

The duties of a governing body would be ascertained by reference to the association's constitution. Members of a governing committee would be in the position of a fiduciary and be required to act in the best interest of members. Committee members who fail to carry out their fiduciary responsibilities could be sanctioned under the unincorporated association's rules or by judicial sanction.

Incorporated Association

It is usual for an incorporated association to have a single governing body. The selection process is usually by election at an annual general meeting of members, but some jurisdictions permit appointment by an external body or class of members. Committee members usually serve a term of one year, most jurisdictions permit rotating terms of multiple years, but this is relatively uncommon. Committee members may be removed from office by a majority vote of the general meeting. There is usually no appeal to a higher authority, unless due process has been breached. The office of a committee member may be vacated under certain

¹⁹ For example, Givewell - <http://www.givewell.org.au>.

conditions such as unsoundness of mind or bankruptcy. This may be contained in the act or rules of the association.

The management committee is usually accountable for the activities of the association and may delegate responsibilities to others, usually paid employees. They are still obliged to supervise delegations of their power. Committees are obliged by fiduciary principles to act in the best interests of the association and avoid personal conflicts of interest. This is either by express provision in the relevant act, fiduciary duties or express duties in the association's constitution.

Whilst the corporate persona of the incorporated association brings limited liability to members and the management committee, some jurisdiction's make committee members personally responsible for insolvent trading. Statutory provisions outside the associations incorporation act in all jurisdictions will pierce the corporate veil in certain situations, eg pollution, workers health and safety and discrimination. Committee members face criminal sanctions as well as civil damages.

Company Limited by Guarantee

A company limited by guarantee is usually governed by a board of directors. However, the appointment of such a board is more flexible than many incorporated association act provisions. Usually directors are nominated by members and elected by ballot at the annual general meeting. It is common for directors to be elected for a 3 year term which rotates. Under the Corporations Act, directors may only be removed from office on a majority vote of the members and there is no appeal unless due process has not been followed. Office may be vacated pursuant to events listed in the articles of association or the Corporations Law.

Usually the memorandum and articles of association gives the power to run the business of the company limited by guarantee to the board of directors. They may delegate responsibilities to others, usually paid employees. They are still accountable for the activities of the corporation. Directors are obliged to act in the best interests of the corporation by force of their fiduciary duties and specific duties listed in the *Corporations Act*. The standard of their duties is largely influenced by judicial pronouncement and there are a number of recent cases which have been steadily raising the standard of such duties in recent years. Directors can be made personally liable for the liabilities of the corporation by the *Corporations Act* (insolvent trading) and other statutes such as workplace health and safety, discrimination. Civil and criminal penalties may be imposed on directors.

Charitable Trust

The governing body in a charitable trust is the trustee. The initial trustees are usually named in the trust deed. Successors are decided according to the terms of the trust deed and may be appointed by the settlor, an outside party or the remaining or retiring trustee. Trustees may serve for a term or life and may be removed from office by a specified event detailed in the trust deed or a breach of fiduciary duties acted on by the court.

Trustees are obliged to manage the affairs of the trust in accordance with the terms of the trust and in accord with their fiduciary duties. They must avoid a conflict of interests in the performance of their duties as a trustee. There is a substantial body of judicial precedent as to the nature of a trustee's duties. Trustees are held to be personally liable for failure to carry out their duties as trustees. Civil and criminal penalties may apply.

Special Legal Forms

Usually there is a governing body, but its appointment varies with circumstances, many being perpetual or by outside body appointment. Removal from office and review depends on the circumstances.

The duties and responsibilities of the governing body will depend on the act or authority creating the nonprofit body, but usually the fiduciary principles will apply. This will catch conflicts of interest and provide the judicial precedent of fiduciary duties as a guide. Civil and criminal penalties may be attracted to breaches of duties.

IV. DISSOLUTION, WINDING UP, AND LIQUIDATION OF ASSETS.

Who is permitted to initiate the voluntary or involuntary dissolution of a charitable organization and under what conditions? What are the procedures for doing so? Where do the assets go upon liquidation? What are the rights of creditors? Are decisions regarding involuntary dissolution subject to administrative or judicial appeal?

Charitable Trusts

A charitable trust is a perpetual organisation and the courts will not allow it to fail. Charitable trusts are supervised by the Attorney-General. Diversion of charitable assets is demanded and facilitated by the law where a charitable trust can no longer fulfill its purposes because:

- it does not have sufficient income or capital;
- the purpose is no longer relevant;
- the trust ceases to operate; or
- the trust has excess funds.

The common law doctrine of *cy prés* operates as a positive duty on trustees to seek the guidance of the courts to redirect the funds to purposes as near as possible to the original intention of the donors. This usually involves the Attorney-General as the protector of charities and the court in approving the changed purposes. In Australia, *cy prés* applications are notoriously expensive and delayed. Appeal from a *cy pres* decision is permitted.

Incorporated Bodies

Incorporated bodies such as incorporated associations and companies limited by guarantee are usually dealt with under similar insolvency rules. A creditor, governing body member, member or regulatory agency can seek a court order to have an organisation placed into liquidation. Surplus assets are usually dealt with according to the provisions of the rules or constitution. These usually mirror a *cy pres* style application to a body with a similar purpose. Such decisions are subject to judicial supervision.

V. REGULATION.

A. Regulatory Authorities.

Which agency(ies) have principal regulatory authority over charitable organizations?

No one regulatory agency has authority over charitable organisations. It is shared by the Attorney-General, Australian Taxation Office and agencies responsible for various corporate forms or licence activities such as fundraising or gambling.

B. Licensing and Governmental Approvals

What licensing or other regulatory requirements are there for organizations that affect public safety, health, children, etc.? How do the regulatory burdens compare with those for comparable public institutions?

Charitable organisations are generally responsible to regulatory requirements that apply to all activities such as workplace health and safety, criminal laws and corporate administration. There is little difference to other public institutions.

C. Reporting.

What reporting requirements exist to confirm that charitable organizations continue to fulfill the eligibility requirements for charitable status over time?. What reports are filed? how frequently? with whom? What types of financial data must be included? To what extent are these reports publicly accessible?

No reports are filed on the basis that an organisation is accorded charitable status. From 1 July 2005 the Australian Taxation Office will have an Internet register of all names, taxation status and Australian Business Numbers of Income Tax Exempt Charities. Other regulators of incorporated associations, companies and fundraising licences have varying reporting requirements and public accessibility. The company limited by guarantee has the highest level of public financial reporting. This requires full financial statements, audited to public company standards. However, a charitable trust or unincorporated association may avoid any registration process and filing of any public returns.

D. State Enforcement and Sanctions

What are the penalties for failure to file reports, etc.? Are they enforced? What other state-initiated regulatory procedures are used to regulate charitable organizations? Is there a mechanism for holding governing bodies liable for misuse or misappropriation of funds or for other malfeasance? What appeal rights does a charitable organization have from adverse decisions?

For those agencies that do require returns from nonprofit organisations there are modest penalties. They are rarely enforced apart from companies limited by guarantee under the Australian Securities and Investment Commission. Governing bodies of incorporated

associations and companies limited by guarantee can be held responsible by member action and investigation by supervising agencies. There are appeal rights from adverse decisions through the judicial system.

VI. FOREIGN ORGANIZATIONS.

A. Registration. etc.

Are there special rules for the registration, regulation, or dissolution of foreign charitable organizations? If so, what are they?

Foreign incorporated organizations that carry on business in Australia may be required to register with the Australian Securities and Investment Commission. This process involves a simple identification form, the payment of a fee and filing of a constitution and foreign incorporation papers. Foreign bodies that earn income in Australian may be required to register under taxation regulations.

B. Foreign grants.

Are there special rules for domestic organizations to receive foreign grants (e.g., permission of a ministry)?

No, apart from reporting of large currency transactions.

VII. MISCELLANEOUS.

A. What are the rules for mergers and split-ups of charitable organizations?

Charitable trusts will require the approval of the courts through the Attorney-General if the trust deed permits a merger. Incorporated associations and companies limited by guarantee have specific procedural rules which require the approval of the membership and often sanction by the government regulator or the courts.

B. Are there special rules for investing the property or endowment (patrimony) of a charitable organization (for example, may charitable organizations invest in any legal investment or is there list of permitted investments)?

Yes. The Trust statutes in each state require trustees to adopt the standards of a prudent investor unless the trust deed specifies otherwise. Over the last decade all jurisdictions have repealed laws which mandated a list of specific investments.

C. May charitable organizations invest abroad?

Yes, subject to their rules.

D. May charitable organizations engage in political or legislative activities (for example, endorsing candidates for public office, helping to draft laws, or urging the government to adopt certain policies)?

Charitable organisations are prohibited from having as their **purpose** the reform of the law or government policy. They may engage in advocacy activities, for example lobbying, to achieve their purpose, for example conservation, but it cannot be their sole purpose. Such activities are usually incidental to their other activities that are directed at achieving their purpose.

VIII. TAX LAWS

A. Are charitable organizations granted tax-exempt status or does the law exempt certain kinds of income, such as contributions, from income tax?

Charitable Institutions and Funds are granted income tax exemption for all income and are not required to file any taxation returns.

If so:

1. What are the requirements for exemption from national income/profits taxes and which governmental body makes this decision?

The entity must be for charitable purposes according to the common law. The Australian Tax Office (ATO) will endorse the organisation as having this taxation status.

2. What are the requirements for exemption from state and local income/profits taxes and which governmental body makes this decision?

State and local government laws follow the ATO charitable purposes test, but also have other requirements such as using the property (land tax) for those purposes. The agencies of such governments administering the laws would make these determinations.

3. What are the requirements for exemption from or zero rating for VAT and which governmental body makes this decision?

The ATO administers the VAT or (Goods and Services Tax). There is no blanket rating for charities, but certain transactions may be “GST free” in certain circumstances, such as education or health services.

4. May charitable organizations import products free of duties, customs excises, and the like, and, if so, under what circumstances?

Imported goods are subject to duty and/or GST. In general, goods donated or bequeathed by a person, company, or organization domiciled or established outside of Australia to an organization established in Australia for the purpose of performing “work of a philanthropic nature” are exempt from customs duties.²⁰ In addition, goods, as prescribed by law, that have been “donated or bequeathed to the public” or to a public institution, are exempt from customs duties. There is some ambiguity about the scope of these exemptions, however, because the terms “work of a philanthropic nature” and “donated or bequeathed to the public” are not well-defined. Customs duty rates vary and depend on a number of factors such as type of goods and country of origin. There are no Customs concerns on monetary transfers via the banking system. However, persons carrying cash amounts of Au\$10,000 or more (or in the foreign equivalent) must be declared to Customs.

²⁰ Customs Tariff Schedule 4 - Items 23A and 23B

B. Are donors entitled to deductions, credits, or rebates for contributions to qualified charitable organizations?

Yes, under certain conditions, individual donors may claim gifts as a deduction from their income tax. Business may claim sponsorships are a deductible cost of doing business.

If so:

1. What are the limits on contributions by businesses?

No limit, provided that it is a legitimate cost of generating assessable income.

2. What are the limits on contributions by individuals?

Individuals must donate more than \$2.00 in cash or \$5,000 in property (valuation determined by the ATO) and there is no upper limit, other than the deduction can only be set off against assessable income (that is a tax loss cannot be generated). A deductible gifts may be spread over five years of income tax returns.

3. Are contributions by estates or under a last will and testament deductible or creditable?

No.

4. Are there special state or local tax laws?

Yes, but these relate to property, land and stamp duties.

C. Endowment issues.

1. Are earnings on endowments (e.g., interest and dividends) taxable?

No.

2. May endowments be invested in majority ownership of businesses?

Are dividends or other payments to a charitable organization from such subsidiaries free of income tax?

No.

D. Commercial/Business/Economic Activities.

1. To what extent are charitable organizations permitted to engage in commercial/ business/economic activities?

Income Tax Exempt Charities do not pay income tax on unrelated business income. They can engage in business activities that are connected with their charitable purposes, for example a school or hospital charging fees from consumers.

2. May business activities be conducted directly by the charitable organization or must they be conducted through for-profit subsidiaries?

They can be conducted by the charitable body provided that they are for charitable purposes.

3. To what extent are commercial/business/economic activities subject to tax?

Not subject to income tax. May be subject to VAT.

4. Do the tax rules distinguish between "related" and "unrelated" commercial/business/economic activities? If so, how are these terms defined?

No.

E. Reporting.

1. What type of tax reporting is required?

Nil, apart from Prescribed Private Foundations that are required to file an annual return.

2. Are there substantiation rules for contributions (e.g., all donations larger than a certain amount must be supported by a receipt issued by the charitable organization)?

All donations over \$2.00 must be issued a receipt and be placed in a separate bank account. Gifted property must be recorded in a property register.

3. Are foundations subject to separate rules because of their endowments?

Australia does not have the legal conception of a foundation, but Prescribed Private Funds which are similar to an American Family Foundation do have extra regulation.

F. Miscellaneous.

1. Are there limits on administrative expenses or salaries (e.g., administrative expenses cannot exceed X% of income, and no salaries higher than \$Y may be paid.)

Not generally. The Australian Taxation Office requires that administration costs for deductible gift recipients (particularly Prescribed Private Funds) are reasonable in the circumstances of the fund.

2. Are there special accounting rules for charitable organizations (e.g., charitable organizations report on the basis of fund accounting and receipts and expenditures rather than a balance sheet and statement of profit and loss)?

No.

IX. COMPLIANCE.

A. General.

Is it generally thought that the rules applicable to charitable organizations are well understood and complied with? Is enforcement of them knowledgeable, fair, and effective? Have any studies been done on compliance by charitable organizations with the law?

Generally the rules applicable to charitable organisations are not well understood. However, the general Australian culture mitigates against fraud, sharp practices or subversion of the non-distribution constraint in the vast majority of charitable and nonprofit organisations compared to the US experience.

Over the last decade, Australia has had charity scandals, as noted in Gibelman and Gelman's analysis of wrongdoing by nongovernmental organisations which drew on alleged or actual scandals in countries such as the United States, the UK, Germany, France, Ecuador, Ireland, Israel, and Scotland.²¹ There is certainly a level of petty theft in nonprofit organisations, as in any type of organisation but, unlike the US, there have been no significant controversies about excessive executive remuneration (United Way), pyramid financing schemes (New Era), taxation fraud, large fundraising fraud, self-dealing by foundations or inappropriate health industry conversions. Inappropriate sexual behaviour within religious institutions has been the most prolific and notable scandal in Australia over the last decade. Indigenous organisations

²¹ Gibelman, M. and S. R. Gelman, "Very Public Scandals: Nongovernmental Organizations in Trouble", *International Journal of Voluntary and Nonprofit Organizations*, 12(1), 2001, pp.49-66.

have been embroiled in significant and serious diversions of charitable assets, but these form only a small part of the Australian nonprofit sector and are significantly unrepresentative of the wider sector because of special circumstances.

Australia's largest nonprofit insolvency did not involve any diversion of charitable assets.²² The Chief Executive Office defrauded 27 Australian and international financial institutions of loan monies through illusory securities. These loan funds made the organisation into one of the best rescue organisations in the world, but nothing was diverted and the CEO did not personally profit. The Australian Red Cross was criticised for its management of the Bali bombing appeal, but was later cleared by an independent investigation of any fraud or misuse of donor funds.²³ The major issue was the effectiveness of its communication systems with victims and the public, rather than diversion of assets to fraudulent, inappropriate or illegal purposes.

Reasons for this lack of 'diversion scandals' compared to other developed countries is a puzzle. It may be that diversions are undetected due to the lack of an effective central regulator and generally uninterested popular media. As Australian nonprofit bodies are heavily membership driven and professionally audited, this encourages close scrutiny of activities, preventing abuse. Organisations may cover up diversions when discovered by insiders to protect the reputation of the organisation. The smaller reliance on fundraising and philanthropy combined with a comparatively restrictive tax regime for charitable tax deductions may also

²² Refer: McGregor-Lowndes, M., "Nonprofit Corporations – Reflections on Australia's Largest Nonprofit Insolvency", *Australian Journal of Corporate Law*, 5(4), December 1995, pp. 417-441; *Commonwealth Bank of Australia v Friedrich* (1991) 9 ACLC 946.

²³ Australian Red Cross, *Review of the Issues Surrounding the Administration of the Bali Assistance Fund*, Australian Red Cross:Sydney, 2003; Department of Gaming and Racing, *Report of the Inquiry into the Australian Red Cross Bali Appeal*, Depart of Gaming and Racing, New South Wales: Sydney, 2003.

create less fertile ground for diversion. Finally, it may just be that there are few diversions of any note.

B. Specific.

1. Is there a perception that charitable organizations have been used to avoid taxes that ought to be paid on business or commercial profits?

Australian charitable organisations are exempt from income tax and generally their unrelated business income is also exempt which is unusual in OECD tax regimes. This has caused for profit competitors to object publicly to the status of unrelated business income, particularly in the fields of health, education, employment training and placement and housing.

2. Is there a perception that charitable organizations have been used by politicians or government officials to benefit themselves politically or financially?

No

C. Sanctions.

If a charitable organization has violated the law, are there any provisions for suspending its operations, freezing its bank accounts, or appointing officers or directors to act for it, or any other special sanctions? Are these sanctions self-executing (i.e., agency does not have to apply to court for them to take effect) or non-self-executing.

Supervision by the Attorney-General of charitable trusts and bodies with charitable objects is through the judicial system.

Regulators of incorporated associations and companies limited by guarantee have limited power to take action in serious cases of fraud. Members of these organisations may engage the insolvency laws to protect the assets of the organisation in certain situations.

X. GOVERNMENT FUNDING.

Are charitable organizations permitted to compete for government funds in free and open competitions for which there are set bidding rules? Can they gain access to government funds through unsolicited proposals for grants and contracts? Does the government permit charitable organizations to bid to become the recipients of certain assets it is seeking to privatize (e.g., a museum or health clinic)? Does it recognize the need to continue to provide support for privatized services? Are government assets and funding distributed proportionately among charitable organizations formed or controlled by the government or particular officials (e.g., QUANGO's -- quasi-NGO's, or GONGO's -- government organized NGO's) and other, independent charities?

All levels of government in Australia have diverse funding relationships with nonprofit organisations. There is grant funding to organisations which is by a process not dissimilar to making an application for support to a private foundation, however this is waning. Competitive tenders for community service provision is becoming more common, often with for profit competitors. Examples of this are in the provision of health and disability services. A form of voucher funding is also common where the consumer receives a voucher funded by the government which can be used to purchase services from an organisation chosen by the consumer.

Governments are, in a limited number of cases, handing over assets such as museums to nonprofit organisations, but this is not usually achieved by a bidding process, but private

negotiation. There is no pattern to this distribution between independent nonprofit organisations and government controlled entities.

Australian governments are increasingly creating bodies outside government that resemble nonprofit organizational forms but are effectively controlled by government or its agencies. Examples are ambulance, rescue and firefighting bodies that rely heavily on volunteers.

XI. PRIVATIZATION.

Have special legal forms or procedures been created to permit or facilitate the privatization into the charitable organization sector of state assets or programs, such as cultural, educational, or health institutions or programs? Has the government in effect privatized certain formerly state activities by outsourcing them by contract to charitable organizations?

Australia has not experienced the wave of health care conversions that has been occurring in the USA over the last decade. However, given the aggressive adoption in Australia of the privatisation of government businesses and demutualisation of insurance and financial institutions, it may be that the conditions for conversion of nonprofit institutions to for-profits will soon be upon us. Already, for-profit American health corporations are assessing the Australian health market for rapid acquisition and growth. Some small nonprofit employment services have already converted from being nonprofit community agencies into for-profit businesses, usually without considering the *cy prés* arrangements in the transfer. There are no special provisions to deal with conversion issues apart from *cy-pres* arrangements.

New public management practices have been embraced by all levels of Australian government with emphasis on outsourcing services and creating contestable markets for the provision of community services such as welfare, child protection, employment benefits and training, health services, education at all levels and even prisons. Both for profit and charitable organisations have been contracted to deliver these services.

XII. CONCLUSIONS.

What do you consider to be the most important legal issues currently confronting the charitable sector? What concrete steps can be taken to improve the laws, or their administration and enforcement, in order to strength the charitable sector?

The Australian economy has been transformed by bold federal government initiatives over the last decade. The political rhetoric is that without these reforms, the Australian economy will falter and be uncompetitive in a global market place. Despite the electoral disquiet that rapid systemic change brings, both sides of politics have adopted the broad starting point that it is imperative that our economy be transformed or Australian living standards will dramatically plummet.

Legal infrastructure reform in Australia accompanying the major reform initiatives by the federal government has made both government agency regulation and the cost of doing business for participants in the market place "cheaper, better and faster". Many of the legal infrastructure reforms have directly permitted business organisations to increase their productivity and financial health.

In contrast, nonprofit organisations have not benefited to the same extent as business organisations from the regulatory reform. If nonprofit organisations do actually play the significant economic role in the Australian economy that the Australian Nonprofit Data Project

suggests, substantial benefits could accrue to the Australian economy through assisting nonprofit organisations to achieve their transactions "cheaper, better and faster".²⁴

The Australian government has not designated the nonprofit sector as a major part of the economy for reform, unlike some other governments.²⁵ The Industry Commission Report on Charitable Organisations in the mid-nineties was released immediately before an election and has not led to a coherent and articulated policy by federal governments.²⁶ The reasons for this lack of attention are a direct consequence of the government's sense of reform agenda priorities, that to date has not perceived the nonprofit sector as existing or being a part of the economy that could benefit from reform. The formation of these priorities is a combination of the political agendas of the present coalition government and a lack of agitation by nonprofit interests and government agencies that deal with nonprofits. Australia is unlike the US and UK where nonprofit peak organisations seek to represent the whole of the broad nonprofit sector and advocate for whole of sector recognition and policy initiatives. Nonprofit peaks that advocate for social policy reforms or represent specific industry groupings within the sector such as disability or aged care characterize the Australian policy environment.²⁷ Given such factors it is not surprising that the nonprofit sector as a whole has not been considered as a priority of the reform agenda.

²⁴ M Lyons, S Hocking, L Helms & Lester M Salamon, "Australia", in *Global Civil Society - Dimensions of the Nonprofit Sector*, ed Lester M Salamon, Helmut K Anheier, Regina List, Stefan Toepler, S. Wojciech Sokolowski and Associates, The Johns Hopkins Centre for Civil Society Studies, Baltimore, MD, 1999.

²⁵ Home Office, *Getting it Right Together. Compact on relations between Government and the Voluntary Sector in England*, Cm 4100, London, 1998.

²⁶ Industry Commission, *Charitable Organisations in Australia*, Report No. 45, AGPS, Melbourne, 1995.

²⁷ J. May, "The Role of Peak Bodies in a Civil Society" in *Keeping it Together – State and Civil Society in Australia*, ed Adam Farrar and Jane Inglis, Pluto Press, Leichhardt, 1996.

The reform agenda should include a complete review of fundraising regulation, incorporation statutes, taxation incentives and sector regulation through a central regulator such as a Charity Commission.