

Charities Alert

June 2013

Statutory definition of charity

The Charities Bill 2013 has been introduced into Federal Parliament providing for a statutory definition of 'charity'. While the proposed legislation essentially codifies what is already the law, it will require entities to pass a series of tests to qualify as a charity. There is no grandfathering provision continuing the status of entities that have been accepted as charities to date – if the legislation comes into effect as planned on 1 January 2014 all charities, existing and new, will need to pass all five of the statutory tests.

[Click here](#) to access the Bill and other detailed information. In particular, the explanatory memorandum has useful examples of what have been accepted as charitable purposes within the 12 categories of charitable purpose set out in the draft legislation. One category of

charitable purpose is 'any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of,' any of the first 10 specific categories. The government says this is to allow what is a charitable purpose to develop through court decisions or by parliament, in accordance with contemporary Australian society's needs and expectations.

The statutory definition will apply for all Commonwealth purposes, but what is 'charitable' under state and territories laws will continue to be determined by existing state and territory legislation and the common law.

Will you still be a charity?

If the draft legislation becomes law, the tests you will need to pass to maintain status as a charity are summarised below. You will have to pass every test to be a charity.

TEST 1: Not-for-profit

Is your entity:

- not carried on for the profit or gain of its owners or members (while operating or upon winding up)?
AND
- prohibited from distributing its profits or assets to its owners or members (except to another not-for-profit entity with a similar purpose, or as genuine compensation for services or reasonable expenses)?

YES

PASS

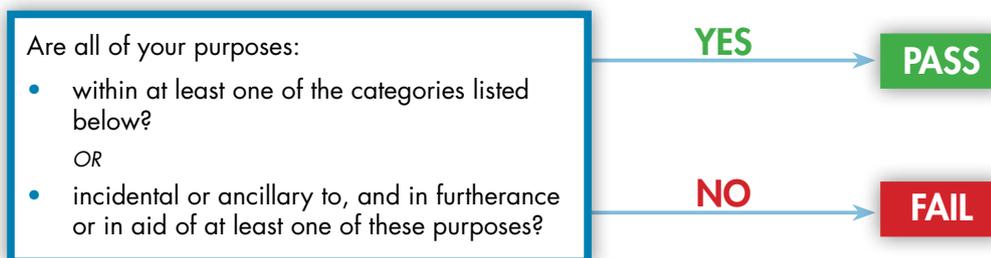
NO

FAIL

TEST 2: Individuals, political parties & government entities



TEST 3: Charitable purpose

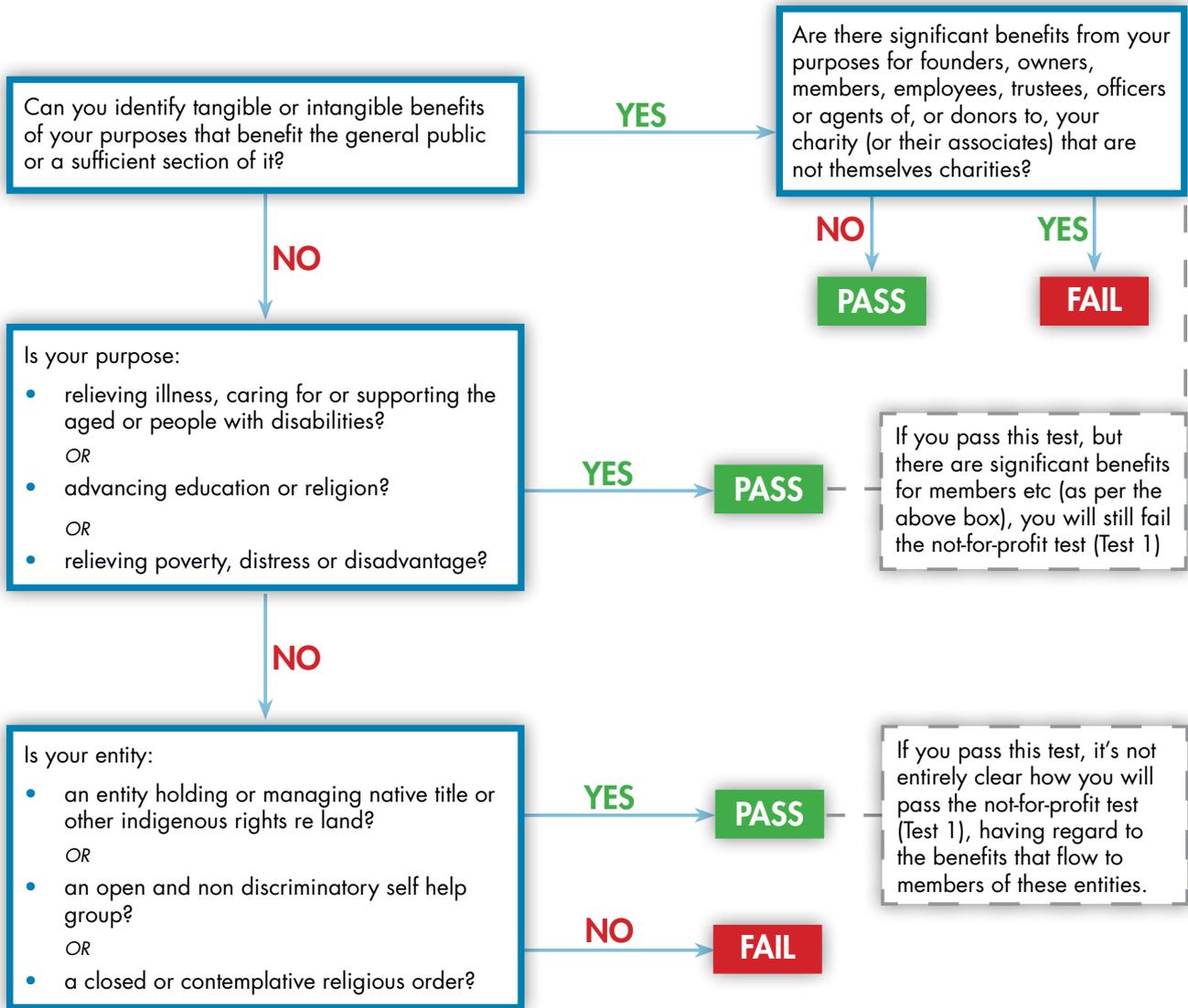


LIST OF CHARITABLE PURPOSES:

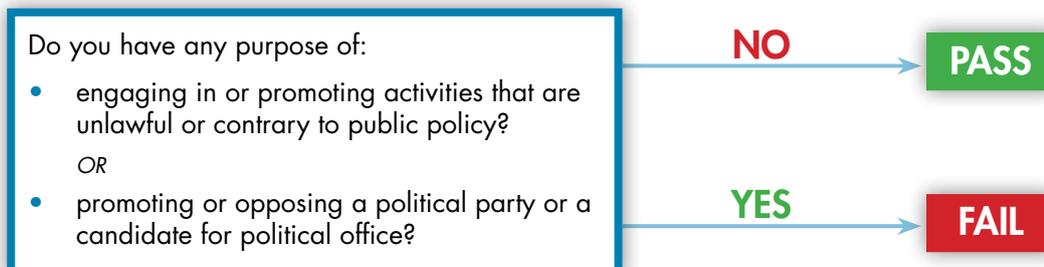
Charitable purpose means any of the following:

- advancing health;
- advancing education;
- advancing social or public welfare, this includes:
 - relieving poverty, distress or disadvantage,
 - care of the aged or people with disabilities,
 - caring for, supporting and protecting children and young people (including child care services), and
 - disaster relief.
- advancing religion;
- advancing culture (including preserving Australian heritage);
- promoting reconciliation, mutual respect and tolerance between groups of individuals in Australia;
- promoting or protecting human rights;
- protecting the security or safety of the general public;
- preventing or relieving the suffering of animals;
- advancing the natural environment;
- any other purpose beneficial to the general public that is regarded as analogous to, or within the spirit of, any of the purposes mentioned above;
- promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
 - the change is in furtherance or in aid of one or more of the purposes mentioned above; or
 - the change is in opposition to, or in hindrance of, one or more of the purposes mentioned above.

TEST 4: Public benefit



TEST 5: Disqualifying purposes



The ACNC under a coalition government

Kevin Andrews, Shadow Minister for Families, Housing and Human Services, recently outlined a very different vision for the role of the ACNC during a speech delivered at the Centre for Independent studies.

If elected, Mr Andrews stated that the coalition would restructure the ACNC, removing its regulatory powers to return them to the ATO and ASIC. The ACNC under the coalition would perform a much narrower support, educative and training function for charities and the NFP sector.

The coalition would roll back the current financial reporting system, and instead ask the reformed ACNC to co-ordinate with the charities and NFP sector, the Commonwealth, States and Territories to formulate a new common financial and reporting standard.

In respect of the scope and definition of charity, the coalition would retain the common law definition of charity, and would maintain the public benefit test.

To view the full text of Mr Andrews address [click here](#).

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Tax deductibility for donations to school or college building funds

Donations to school or college building funds are tax deductible if various conditions are satisfied. The main condition is that the school or college building fund is a Deductible Gift Recipient (**DGR**) under item 2.1.10 of s30-15 of the *Income Tax Assessment Act 1997* (**ITAA 97**). School or college building funds that are already endorsed by the Australian Taxation Office (**ATO**) as DGRs under item 2.1.10 should review their eligibility of their DGR endorsement as part of their annual review of compliance with the law.

The ATO published Taxation Ruling TR 2013/2 in February 2013. It adopts a stricter view than in the previous Taxation Ruling TR 96/8, and highlights a number of traps for school or college building funds.

Conditions for item 2.1.10 DGR endorsement

Each fund must satisfy the following conditions:

- it is established and maintained solely for the purpose of providing money for the acquisition, construction or maintenance of a building used as a school or college;
- the building must be used as a school or college by a government, a public authority or a non-profit society or association; and
- the fund must generally be registered under the *Australian Charities and Not-for-profits Commission Act 2012* (**ACNC Act**).

There must be a building

Each fund must ensure that expenditure relates to acquiring, constructing or maintaining a building.

A building includes fixtures which become a permanent addition to a building (eg ducted heating systems, fixed air conditioning systems, and carpets permanently fixed to the floor). So expenditure on fixtures would be permitted.

A building does not include non-fixtures that are used to fit out a school (eg computers, furniture, training equipment and laboratory equipment). So expenditure on these types of items would not be permitted.

Another example of expenditure not permitted is expenditure on maintaining facilities which are not buildings, such as sports fields, playgrounds, landscaping and carparks.

Used as a school or college

Each fund must ensure that the building is used as a school or college (**'school use'**). According to the ATO's Taxation Ruling TR 2013/2, the school use must be substantial. Any other use must not materially limit, detract from or otherwise be incompatible with the provision of appropriate instruction to students.

This is a change from the previous practice. Previously, under the ATO's Taxation Ruling TR 96/8, a building was used as a school or college if it was used as a school or college for more than 50% of the time. TR 96/8 has been withdrawn, and replaced by TR 2013/2.

This 50% test no longer applies, except for the purposes of arrangements for the acquisition or construction of a building which the fund became committed to before 13

February 2013. For example, before 13 February 2013, the fund accepted significant donations relating to the arrangement or the fund incurred, or became legally required to incur, significant financial costs for the purposes of entering into or carrying out the arrangement.

So the extent a building can be used for non-school purposes is now more limited than it used to be.

The fund must be established and maintained for the requisite purpose

The funds would need to ensure that they are maintained **solely** in order to provide money for the particular purposes (ie the acquisition, construction or maintenance of a building used as a school or college by a qualifying body). The purposes of the fund are determined on an objective basis, having regard to all of the surrounding circumstances, including the constituent documents of the fund and what money is actually provided for. Funds should review their constituent documents and activities for compliance with this requirement.

So, for example, a loan from a fund to a school for less than an arm's length interest rate would not be the use of funds for an appropriate purpose.

Sunday schools

In Taxation Ruling TR 2013/2, the ATO gives one example of a Sunday school that is a school, and another example of a Sunday school which is not a school.

In one example, the ATO considers that the Sunday school groups conducted by a church for children of various ages are a school. In this example, the church establishes a Sunday school committee, which is responsible for selecting qualified teachers, and for the curriculum that is taught (which takes into account the age and level of knowledge of children). This is accepted as a 'school'.

In another example, the ATO considers that the Sunday school groups conducted by the church for children of various ages are not a school. In this example, the Sunday school groups do not have an organisational identity which is sufficiently distinct from that of the church. Also, the instruction provided to children is not sufficiently regular and systematic, as it depends upon when children attend church.

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