TR 2011/4EC - Compendium

Ruling Compendium – TR 2011/4

This is a compendium of responses to the issues raised by external parties to draft Taxation Ruling TR 2011/D2 – Income tax and fringe benefits tax: charities.

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue no.	Issue raised	ATO response / action taken
1	Some expressions in the Ruling should be simplified or modernised to make the Ruling easier to read and because their meaning will not necessarily be understood by people who are not lawyers. For example, the use of 'intendment' in the phrase 'spirit and intendment of the Statute of Elizabeth' throughout the Ruling is anachronistic. It should be replaced with 'intent'.	No change. The technical expressions used in the Ruling are in context and are established terms for the concepts discussed.
2	There should be more examples dealing with the issue of advocacy. In particular: • an example focused on charitable trusts funding advocacy related activities • an example demonstrating the change resulting from the abandonment of the political purposes doctrine.	Additional examples have been included at paragraphs 95-103 of the final Ruling to help clarify the ATO's position on this issue.
3	The use of the term 'sole purpose' does not reflect the language used in *Aid/Watch Incorporated v. Federal Commissioner of Taxation* [2010] HCA 42; 2010 ATC 20-227; (2010) 77 ATR 195 (*Aid/Watch*) and is likely to cause confusion. Its use should be reconsidered.	No change. Paragraph 5 of the final Ruling explains that the term is being used because a charity can only have charitable purposes (or non-charitable purposes that are incidental or ancillary to a charitable purpose), and to help avoid misunderstandings that can arise because of different usage of various terms the courts have used to describe the required purpose. Nonetheless, to help avoid confusion, a footnoted reference to the explanation in paragraph 5 has been included each time the term 'sole purpose' has been used in the final Ruling.

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4	The draft Ruling is an unnecessarily complex and legalistic document that appears to only partially collate and incorporate the findings of court rulings since TR 2005/21. (a) The principles in *Aid/Watch* should form a greater part of the framework put forward in the draft. (b) The framework of the draft is unnecessarily messy and should be rewritten with a clear enunciation of the relevant common law principles. At present it remains stained with political agendas. (c) The draft is silent on the proposition that profit can be made from a charitable purpose while case law is definite that it can (for example French J in *Victorian Womens Lawyers* at paragraph 131). (d) The draft needs to make it very clear that charities have all legal activities at their disposal to achieve their charitable purpose, just as governments and businesses do. • The draft should clearly state that advocacy, lobbying and political engagement are legitimate activities for charities to engage in. (e) The differentiation between object, independent purpose, purpose connected to charitable main or predominant purpose, incidental or ancillary purpose and activity to further charitable purposes needs to be clarified. • The wording of paragraphs 68 and 288 confuse objects, purposes and activities to further purpose. (f) The draft should contain more explicit recognition that activities to protect and to further the protection of the environment are both done for public benefit and are deserving of tax concessions.	Comments 4(a) and 4(b) No change. The ATO remains of the view that the structure of the Ruling is appropriate, and that the impact of the decision in *Aid/Watch* has been adequately addressed. Comment 4(c) Paragraphs 38 and 219 have been included in the final Ruling to make it clearer that a charitable institution can make a profit from its activities and still be charitable if its profit making goal is only in aid of its charitable purpose. Comment 4(d) Paragraph 287 of the draft Ruling has been revised (paragraph 311 of the final Ruling) and new examples have been added at paragraphs 95-103 to clarify the ATO's position on advocacy and lobbying, both as a purpose and as activities. However, the final Ruling makes it clear at paragraph 312 that the decision in *Aid/Watch* has not changed the view that political parties and activities associated with political parties such as electioneering are not charitable. Paragraphs 290 and 291 of the draft Ruling (paragraphs 313 - 314 of the final Ruling) address the ATO's position on political activities that are incidental to a charitable purpose. Comment 4(e) Paragraph 28 of the draft Ruling (paragraph 29 of the final Ruling) has been reworded to help clarify the distinction between the different concepts. The lobbying dot point in paragraph 68 of the draft Ruling has been removed, and paragraph 288 deleted (the ATO's position on lobbying is now reflected in paragraph 311 of the final Ruling and the examples from paragraph 95 of the final Ruling). Comment 4(f) No change. The Ruling is intended as guidance on the meaning of the word charitable. Placing greater emphasis on environmental protection may limit rather than

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	• There should be a more general acknowledgement in the draft that protection of the environment is a public benefit. At present, there are only limited and very specific aspects included as examples in the Appendix. These unnecessarily constrain and mislead the scope of the environmental charitable purpose. • The draft should recognise that activities done in the advancement of environmental protection are also in the public benefit and hence a charitable purpose in itself. Advocacy, lobbying and the public support of a political party done to further the charitable purpose are all activities that contribute to the public debate on the delivery of a public benefit and are conducted as a charitable purpose.	help clarify the meaning. As explained at paragraph 44 of the draft Ruling (paragraph 46 of the final Ruling), whether particular circumstances meet the requirements of a charitable purpose can only be determined on a case by case basis.
5	Paragraphs 15 to 18 Express reference should be made to the presumption of public benefit that applies in relation to charities for the advancement of education and the advancement of religion.	The paragraphs have been revised to include a reference to the presumption. Refer to paragraphs 16 and 131 of the final Ruling.
6	Paragraph 23 The statement that an institution 'does not include a structure controlled and operated by family members and friends' is not an accurate representation of the law. The paragraph should be amended to recognise that regard must be had to the whole of the circumstances, with no one factor determinative.	The paragraph has been revised to better reflect the law on this issue. Refer to paragraphs 24 and 168 of the final Ruling.

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7	Paragraphs 30 and 31 These paragraphs do not accurately reflect the approach that should be taken in determining whether an institution's purpose is charitable. They should reflect that: • the principal enquiry is whether the main objects (as distinct from concomitant or incidental or ancillary objects) are charitable. • if they are, the institution is charitable unless its activities are clearly not undertaken in furtherance of the charitable purpose established by the objects (*Federal Commissioner of Taxation v. Word Investments Limited* (2008) 236 CLR 204; [2008] HCA 55 (*Word Investments*) at paragraph 26) • if the constituent documents are unclear, an examination of the activities and 'other relevant factors' may be necessary (*Word Investments* at paragraph 14). Relevant authority for each of these other factors should be cited.	No change. In *Word Investments Limited* (2008) 236 CLR 204; [2008] HCA 55 the High Court said at paragraph 17: > ... there is no reason to suppose that the tests laid down in the s 23(e) line of cases no longer apply in relation to the 1997 Act to companies like Word, which state objects in a memorandum. That is, it is necessary to examine the objects, and the purported effectuation of those objects in the activities, of the institution in question. The approach taken in the Ruling aligns with these comments. Footnote 32 has been added to paragraph 32 of the final Ruling to refer to authorities that comment on 'other relevant factors'.
8	Paragraph 46 The third dot point should refer to a charitable purpose that 'is consistent with' rather than 'the same' as the charitable purpose of the institution itself. To require the purpose to be identical is overly limiting and not a reflection of the true position under the law.	The dot point has been adjusted to refer to 'a similar' rather than 'the same' charitable purpose. Refer to paragraph 48 of the final Ruling.
9	Paragraph 59 The accumulated profits discussion is unclear. Accumulated profits are usually cash/investment reserves that generate income which is vital to ensuring that an organisation can meet its operational expenses. Include 'the investment of accumulated funds to generate returns used by the organisation to meet obligations and ensure sufficient	The accumulated profits discussion has been revised. It now states that an institution can hold passive investments to receive a market return to meet reasonable operational expenses without undermining its charitable status. Refer to paragraphs 62 and 276 of the final Ruling.

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	cash flow' in paragraph 59.	
10	Paragraph 59 If holding passive investments is an activity that can be carried on by a charitable institution, there are obvious practical difficulties in distinguishing between a fund and an institution.	Paragraph 59 of the draft Ruling has been revised to make it clear that the passive investment discussion applies where an institution is already undertaking commercial or business like activities. See paragraphs 61, 62, 275 and 276 of the final Ruling.
11	Paragraphs 61–64 Questionable conclusions have been drawn from the authorities the Commissioner has relied on. They are not a good foundation for the position taken.	No change. The ATO remains of the view that the position reflected in these paragraphs is sound. However, the explanation from paragraphs 278-287 of the final Ruling has been expanded to provide a more detailed analysis of the basis for the position taken.
12	Paragraph 68 Direct lobbying of parliamentarians should be accepted as coming within the scope of what the High Court in *Aid/Watch* described as 'an indispensable incident' of the Australian Constitution. It cannot be that charities can legitimately agitate for change using public campaigning tools, but cannot raise matters directly with decision makers. It is a legitimate public campaigning tool and should not be excluded from acceptable purposes.	The ATO accepts that an organisation with a purpose of lobbying (that is, directly approaching parliamentarians or government officials) on a subject matter that is charitable may be charitable, but considers that the status of an organisation can only be determined on a case by case basis. Paragraph 287 of the draft Ruling has been revised (paragraph 311 of the final Ruling) and new examples have been added at paragraphs 95-103 to clarify the ATO's position on advocacy and lobbying, both as a purpose and as activities.
13	Paragraph 68 Singling out direct lobbying is inconsistent with the majority judgment in *Aid/Watch* which did not distinguish between 'direct ' and 'indirect' lobbying and is likely to create uncertainty. It clouds the remainder of the Ruling. If the reference is retained, guidance by way of additional examples illustrating what is meant by 'direct lobbying' should be included.	This issue has been dealt with above.
14	Paragraph 74 The use of 'female' in the example is anachronistic. Replace	The paragraph has been amended to use the word 'women' in place of 'female'. Refer to paragraph 77 of the final Ruling.

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	with 'women'.	
15	Paragraph 153 The quote from *Pamas* is out of context and suggests a far narrower scope than a proper interpretation permits. The full quote states that the juxtaposition of various terms 'tends to suggest' that the word institution is to be given a meaning greater than a structure controlled by family and friends. Further, the Court did not exclude the foundation as an institution merely on the basis of one factor alone.	Paragraph 153 of the draft Ruling has been revised and a new paragraph inserted to better reflect the law on this issue. Refer to paragraphs 166 and 168 of the final Ruling.
16	Paragraph 192 Inconsistent with paragraph 203. Paragraph 192 says 'clauses setting out powers such as the power to accumulate funds' can be relevant in determining purpose, but paragraph 203 states that a power to retain profits cannot negate the character as a charitable institution.	Paragraph 192 of the draft Ruling refers to various elements that can shed light on the purpose of an institution and remains unchanged in the final Ruling (paragraph 209). Paragraph 191 of the draft Ruling has been revised to make it clear that these elements may be relevant to understanding purpose, but do not determine it and that as a practical matter, their importance will vary with the circumstances (paragraph 208 of the final Ruling). This accords with the stated relevance of the power referred to in paragraph 203 of the draft Ruling (paragraph 221 in the final ruling).
17	Paragraph 193 The paragraph refers to operational features helping to indicate whether an institution's purpose is charitable. It is not clear how operational features can influence whether an organisation has a charitable purpose.	This issue has been dealt with above. In addition to paragraph 191 of the draft Ruling (paragraph 208 of the final Ruling) being changed, minor changes have been made to paragraph 193 (paragraph 210 of the final Ruling).
18	Paragraphs 204 and 205. These paragraphs deal with accumulation for a charitable institution. Can the same accumulation principle apply to a charitable fund? Consider including paragraph 21 from TR 2000/11.	New paragraph 230 has been included in the final Ruling to deal with the issue of accumulation by funds. It states that a fund can accumulate investment income and still be charitable. However, it notes that the ability to accumulate significant amounts or to accumulate for extended periods may not be consistent with a charitable purpose, and actual accumulation of significant amounts or for extended periods may cast doubt on whether the fund can satisfy the endorsement requirements.

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19	Paragraph 209 The statement 'the activities carried on by the trustees subsequent to establishment are not relevant to establishing whether a fund is a charitable fund. In this respect charitable funds are different to charitable institutions as the activities of an institution can be relevant in determining its purpose…' suggests the charitable purpose of a fund and the charitable purpose of an institution may be ascertained differently. This is inconsistent with existing case law: it is settled law that 'charity' and 'institution' are separate not composite terms, so determining whether a purpose is charitable should be the same for both funds and institutions.	No change. For the reasons outlined in paragraph 227 of the final Ruling, how the purpose of an entity is established depends on whether the entity is a fund or an institution. Once the purpose is established, determining whether that purpose is charitable or not does not depend on the nature of the entity.
20	Paragraph 211 The discussion regarding Income Tax Exempt Funds requires some changes to clarify the operation of the relevant state trust legislation.	The paragraphs have been revised. Refer to paragraphs 228 and 229 of the final Ruling.
21	Paragraph 233. The reference in the second line to the 'Victorian Administrative Appeals Tribunal' as the relevant Tribunal in *Re Australian Institute of Management (Vic) and Commissioner of State Revenue (Vic)* should be to the 'Victorian Civil and Administrative Tribunal'.	No change. The reference is correct.
22	Paragraphs 235 – 241 Expand the discussion in these paragraphs to more clearly cover economic and community development activities and social enterprises as queries regarding these are much more common than queries regarding organisations like Word Investments or Aid/Watch.	The paragraphs have been revised to include more detailed discussion of the decisions in various community and economic development cases. The comments on the decision in *Commissioners of Inland Revenue v. Oldham Training and Enterprise Council* (1996) 69 TC 231 (*Oldham Training*) have been revised. Refer to paragraphs 251 – 257 of the final Ruling.

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23	Paragraph 235 The discussion in this paragraph regarding *Oldham Training* is misleading. The *Oldham Training* case held that setting up unemployed people in trade and business to enable them to stand on their own feet was charitable as the relief of poverty or within the fourth head as beneficial to the community. The adverse decision turned on a construction of the objects.	This issue has been dealt with above at issue 22.
24	Paragraphs 236 and 237 All the cases and examples are examples of non-charitable purposes. Consider including examples where the private benefit is simply ancillary and incidental The cases listed in paragraph 237 seem to relate to private benefits rather than business like benefits.	The benefits discussion commencing in the draft ruling at paragraph 226 under the heading 'benefits for members' has been revised. The heading 'business-like benefits' has been changed to 'benefits for individual entities that may not be members of an organisation' to better reflect the content (see paragraph 251 of the final Ruling). Refer to paragraphs 245–257 of the final Ruling.
25	Paragraph 241 Needs revision. The reference to 'merely because a motivation of an institution has some social value (such as reducing unemployment)' does not seem consistent with the *Oldham Training* case as a purpose of reducing unemployment can be a charitable purpose, and private benefits can be incidental to the public benefit of reducing unemployment.	This issue has been dealt with above at issue 22.
26	Paragraph 254 Include the following additional dot point: where commercial operations are carried out in order to carry out the charitable purpose – for example conducting a business activity for the purpose of training and employing people suffering from a disadvantage (for example mental or physical disability or homelessness) where employment and training for employment would otherwise be difficult to obtain.	Agreed. Refer to paragraphs 61 and 275 of the final Ruling.

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27	Paragraphs 256–263 Expand to refer to control under statute or in the constituent documents, control through membership or at board level or through the ability of a Minister to control activities or finances or operations. These can all still affect charitable status as *Central Bayside* simply dealt with control through the funding agreement and having aligned purposes as being insufficient to affect charitable status.	These paragraphs have been restructured and revised to clarify the Commissioner's position on this issue. Refer to paragraphs 278 to 286 of the final Ruling.
28	Paragraph 263 Does this apply only to institutions, or can it apply to trusts as well? Include 'provided the entity is not controlled by government'.	The paragraph now includes a reference to funds as well as institutions, and the proviso suggested. Refer to paragraph 287 of the final Ruling.
29	Paragraphs 288, 290 and 291 These could be developed to clarify the ATO's position on lobbying by including an example illustrating acceptable lobbying. This would be a useful reference point for both charities who are engaged in advocacy, and the entities who provide those entities with funding.	The ATO's position on lobbying is now considered in paragraph 311 and new examples from paragraph 95 of the final Ruling.
30	Paragraph 314 Indigenous persons paragraph: • replace 'Islanders' with "Torres Strait Islanders' • replace 'native' with 'Indigenous' Peace and human rights paragraph: • replace 'research into the observance of human rights' with 'working to promote, protect and fulfil human rights, research into human rights violations'.	Agreed. Refer to paragraph 337 of the final Ruling.