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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**REVENUE (CHARITABLE ORGANISATIONS) LEGISLATION
AMENDMENT BILL 2015**

EXPLANATORY STATEMENT

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REVENUE (CHARITABLE ORGANISATIONS) LEGISLATION AMENDMENT BILL 2015

The Revenue (Charitable Organisations) Legislation Amendment Bill 2015 makes amendments to the *Duties Act 1999* (Duties Act), *Payroll Tax Act 2011* (Payroll Tax Act), *Rates Act 2004* (Rates Act) and *Taxation Administration Act 1999* (TAA).

Background

Under ACT tax law charitable organisations receive concessions and exemptions from various taxes.

Whether an organisation is granted tax-exempt status depends on the technical legal meaning of the term ‘charitable’. This meaning has been developed under the common law. Evolution in interpreting and applying this law, as well as a number of recent court decisions outside the ACT, have broadened the definition of ‘charitable organisation’ away from the original policy intent and away from community expectations about benevolent activities, presenting a revenue risk.

Legal developments

The 2010 High Court decision of *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 (*Aid/Watch*) called into question whether an organisation could be charitable in spite of its engagement in political advocacy. Before *Aid/Watch*, it was generally accepted that political activities disqualified an organisation from charitable status.

The 2012 WA State Administrative Tribunal decision of *Chamber of Commerce and Industry of Western Australia Inc v Commissioner of State Revenue (WA)* [2012] WASAT 146 (*CCIWA*), referring in part to *Aid/Watch*, extended charitable status to the Chamber of Commerce and Industry of Western Australia.

These legal developments have significantly affected the scope of what is considered charitable, and therefore what organisations are eligible for tax exemptions, to include those engaging in political activity as well as peak professional bodies.

Given the nature of the legal developments, the ACT’s tax revenue is more at risk relative to other jurisdictions. The ACT’s economy is smaller and a higher proportion of political and peak professional bodies operate in the ACT.

The amendments proposed in this Bill exclude specific types of politically-oriented or professional bodies operating in the ACT from obtaining charitable status. These amendments will ensure the sustainability of existing tax exemptions for not-for-profit charitable providers, while also ensuring ACT revenue is protected.

Exemption from paying tax is a significant advantage, and one that should only be provided in extraordinary circumstances. It is a broadly held view that only not-for-profit organisations that serve a wider community benefit should be provided this advantage. Organisations representing certain, narrow professional or political communities are not viewed by the general community as providing a community benefit.

Excluded organisations

To ensure revenue protection, this Bill would exclude the following types of organisation from obtaining charitable status:

- political parties;
- industrial organisations (trade unions);
- professional organisations; and
- organisations that promote trade, industry or commerce.

While Australian courts have not generally considered the charitable status of political parties and trade unions, they are included in these amendments to provide certainty for the future.

Objection and appeal rights

The Bill streamlines the process of obtaining charitable tax exemptions and clarifies the objection, appeal and reassessment process for relevant decisions regarding charitable status.

As a safeguard against the risk of the amendments inadvertently excluding a more traditional charity, the Commissioner for ACT Revenue (the Commissioner) will be able to make a beneficial organisation determination (BOD) to regrant tax-exempt status to some organisations. The Commissioner must be satisfied that the organisation has a predominantly charitable purpose, and that its excluded objects or activities are not significant to its overall purpose, before making a BOD. The organisation must also not have a purpose that benefits a smaller class of people rather than the general community.

Only professional organisations or organisations that promote trade, industry or commerce are able to apply for a BOD.

Organisations will retain the right to seek a BOD, to lodge an objection through the regular procedures, and have an objection decision reviewed in the ACT Civil and Administrative Tribunal (ACAT) and other courts, subject to the restrictions on reassessment outlined below.

Refunds

The Bill limits the scope of reassessments and refunds for excluded organisations to reinforce its revenue protection purpose.

For ordinary charitable organisations, the usual reassessment process will apply.

For excluded organisations, a transitional provision will prevent the Commissioner making a reassessment under the TAA under the pre-amendment state of the law.

For organisations where a BOD has been made in respect of the organisation, the usual reassessment process will apply.

This limitation applies regardless of whether the organisation made a submission to the Commissioner or ACAT (including an objection or appeal) about the matter. It is restricted to situations where the reassessment's purpose is to give effect to a decision that a now

excluded organisation was or is a charitable organisation (and its tax liability was therefore nil or negligible).

Human rights and retrospective operation

This Bill does not have human rights implications, except in relation to the common law principle against the retrospective operation of non-criminal laws.

Section 84 of the *Legislation Act 2001* provides that, in general, amending a law does not affect rights already existing under the law. An investigation, proceeding or remedy in relation to an existing right may be completed and enforced as if the amendment had not happened.

In addition, section 9 (2) of the TAA provides that (emphasis added):

- (2) *A reassessment of a tax liability must be made in accordance with the legal interpretations and assessment practices generally applied by the commissioner in relation to matters of that kind **at the time the tax liability arose** except to the extent that any departure from those interpretations and practices is required by a change in the law (whether legislative or non-legislative) made after that time.*

In relation to criminal laws, section 25 of the *Human Rights Act 2004* expressly recognises a prohibition on retrospective criminal offences as a fundamental human right.

For non-criminal laws, such as this Bill, there is only a general presumption that laws do not operate retrospectively. Under section 75B of the *Legislation Act 2001* a law may displace the presumption by clear indication.

The new transitional provision has a retrospective operation because it applies regardless of submissions made by an organisation which became an excluded organisation on commencement.

Therefore, the amendments in the Bill affects the rights or claims of an organisation that exercised a right of review under ACT tax law before commencement of the amendments (for example, by lodging an objection before commencement)

The need for this retrospective operation lies in the importance of certainty and predictability of government revenue. The amendments protect the original policy intent of providing tax exemptions to those organisations that the community associates with charitable status.

The correct reporting and collection of taxation revenue is necessary to appropriately apply budget allocations. Certainty would be undermined if organisations could challenge their charitable status, and therefore their tax liability, well after a legislative change in the law had occurred.

The amendments do not impose financial burdens on taxpayers by requiring the repayment of refunded tax. They are clearly drafted to state that the transitional provision does not apply to reassessments of tax liability that were completed before the commencement date.

In addition to certainty of revenue, another justification is the ACT Government's need to consider an appropriate response to judicial developments that create a significant revenue risk.

The potential erosion of the ACT tax base, as a consequence of the expanding definition of charitable organisations, requires consideration of the most appropriate response.

The extension of charitable status to peak bodies and national professional organisations has a proportionately larger impact in the ACT. Many such organisations are headquartered in Canberra for access to Parliament and Australian Government agencies.

The Government needs to ensure that sufficient taxation is collected to provide health, education and municipal services and to maintain equity in the tax system. Balanced against this is the need to encourage and support the work of existing charitable organisations by exempting them from taxation.

These interests require choices to be made about the most appropriate organisations to receive exemptions so that the Territory's revenue base is protected.

It is clear that the absence of a tax exemption does not impede excluded organisations from carrying on their work. Under the previous state of the common law, they were not considered charitable and could not access tax exemptions. Only after court cases called their status into question (often several years after an original tax assessment) did some of these organisations seek to challenge their charitable status.

The excluded organisations defined in this Bill also have a much greater focus on political advocacy activities that serve a narrow section of the community, such as a particular industry sector or profession, as opposed to most charitable organisations which focus on activities which are beneficial to the whole community.

For these reasons, the new refund provisions are considered a justifiable derogation from the principle against retrospectivity.

Commencement

The amendments will be effective from the day after notification.

Details of the *Revenue (Charitable Organisations) Legislation Amendment Bill 2015*

Clause 1 Name of Act

This clause provides that the name of the Act is the *Revenue (Charitable Organisations) Legislation Amendment Act 2015*.

Clause 2 Commencement

This clause provides that the Act commences on the day after its notification day.

Clause 3 Legislation amended

This clause provides that the Act amends the *Duties Act 1999*, *Payroll Tax Act 2011*, *Rates Act 2004* and *Taxation Administration Act 1999*.

Part 2 Duties Act 1999

New section 232 of the Duties Act, inserted by clause 10, provides for a blanket exemption for duty payable by charitable organisations.

New section 232 (2) defines *charitable organisation* by reference to new section 18B of the TAA.

For the Duties Act, a *charitable organisation* does not include an organisation related to an excluded organisation. An organisation is *related* if it holds dutiable property as trustee of a trust, and the excluded organisation is a beneficiary under the trust.

As new section 232 applies to the whole of the Duties Act, clauses 4 to 8 of this Bill omit the term ‘charitable organisation’ from the following sections:

- section 62 (Transfer of property from one superannuation fund to another);
- section 63 (Transfers between trustees and custodians of superannuation funds or trusts);
- section 64 (Transfer of land to certain authorities and other bodies);
- section 91 (Ch 3 transactions—concessional duty);
- section 201 (Insurance exempt from duty generally);
- section 210A (Charitable organisations); and
- dictionary, definition of *charitable organisation*.

Other than section 210A, the concessions and exemptions in the sections above continue to apply in the same manner to hospitals and schools.

Section 210A provides for an exemption for motor vehicle duty payable only by a charitable organisation or a person holding a vehicle on behalf of or as a trustee for a charitable organisation. After commencement of the amendments, the same exemption will be available pursuant to new section 232.

Part 3 Payroll Tax Act 2011

Section 48 (Charitable organisations) of the Payroll Tax Act, operating together with schedule 2, section 2.13 (Exemption from payroll tax—charitable organisations), provide that wages paid or payable by charitable organisations are exempt wages.

Clause 12 substitutes the existing definition of *charitable organisation* in the Act with a definition referring to new section 18B of the TAA. This amendment ensures the Payroll Tax Act definition is subject to the new provisions regarding excluded organisations.

However, charitable organisations that are post-secondary schools or colleges (not technical schools or colleges) will continue to be subject to payroll tax.

Part 4 Rates Act 2004

Clause 13 substitutes section 8 of the Rates Act, regarding the meaning of *rateable land* and categories of land which are excluded from that definition. It also reorganises the provisions to reflect current drafting practice.

The wording ‘sites of ... benevolent institutions and buildings used exclusively for public charitable purposes’ has been replaced with an exemption applying to land:

- leased to charitable organisations; and
- used exclusively for religious, educational, benevolent or charitable purposes.

Charitable organisations are defined by reference to new section 18B of the TAA.

The existing rates exemption for sites of churches and other buildings used exclusively for public worship is not affected by the amendments.

For this section, charitable purposes do not include community housing purposes.

Part 5 Taxation Administration Act 1999

Clause 14 substitutes section 9 (3) of the TAA. The purpose of this provision is to limit the Commissioner’s power to make a reassessment of a taxpayer’s tax liability for an excluded organisation without a beneficial organisation determination.

If the reassessment would give effect to a decision that an excluded organisation has a (negligible) tax liability or no tax liability under a relevant provision, the Commissioner cannot make a reassessment of that liability.

The Commissioner may make the reassessment if the excluded organisation applies for and is given a beneficial organisation determination. Section 9 (3) (b) would then not apply, and a reassessment could be made as for other taxpayers.

Clause 15 inserts new section 9 (5) of the TAA to define a *relevant provision* as one of the provisions granting charitable exemptions from duty, payroll tax or rates.

Clause 16 inserts new part 3A (Charitable organisations) into the TAA, providing for exclusion of categories of organisation from the definition of a charitable organisation.

The following table summarises the impact of the amendments in part 5:

Excluded organisations		
Category: s 18C (1)	Definition: s 18C (2)	Can apply for determination: s 18F
<i>political party</i>	organisation that has as one of its purposes the promotion of the election to the Legislative Assembly, Commonwealth parliament or State parliament of a candidate endorsed by it	No
<i>industrial organisation</i>	trade union, association of employees or association of employers	No
<i>organisation that promotes trade, industry or commerce</i>	organisation that has as one of its purposes promoting or advocating for trade, industry or commerce, whether generally or limited to a particular kind	Yes
<i>professional organisation</i>	organisation that has as one of its purposes the promotion of the interests of its members in a profession	Yes
class of organisation prescribed by regulation	N/A	Yes, if regulation prescribing the class states s 18E applies

Section 18A clarifies that an organisation includes an association, society, institution or body.

Section 18B defines a *charitable organisation* as an organisation carried on for a religious, educational, benevolent or charitable purpose. However, it excludes an organisation carried on for securing pecuniary benefits to its members (that is, a for-profit organisation) and an excluded organisation if a beneficial organisation determination is not in force for that organisation.

Section 18C defines an ***excluded organisation*** as an organisation in one of the following categories:

- political party;
- industrial organisation;
- organisation that promotes trade, industry or commerce;
- professional organisation; or
- organisation prescribed by regulation.

Subsection (2) defines the types of organisation listed above. Excluded categories are generally defined according to the purposes of the organisation, regardless of whether the excluding purpose is a major or minor aspect of the overall organisation.

Section 18D provides that the purpose or purposes of an organisation are determined having regard to all the relevant circumstances, including the organisation's stated objects (if any) and its activities. For example, purposes could be determined with regard to the objects clause of the organisation's constitution or memorandum of association, or to the types of public activity it undertakes.

This provision reflects the way that an organisation is analysed as charitable under the common law.

Section 18E provides that an ***organisation that promotes trade, industry or commerce*** or ***professional organisation*** (but not a ***political party*** or ***industrial organisation***) may apply to the Commissioner for a determination that the organisation is a charitable organisation.

Organisations in a class prescribed by regulation may only apply for a determination if the relevant regulation states that section 18E applies.

Section 18F provides the Commissioner may make a determination by notifiable instrument only if satisfied of the following:

- the predominant purpose of the organisation is to advance religion, advance education, relieve poverty, or otherwise benefit the community;
- the objects and activities of the organisation that make the organisation an excluded organisation are not significant in relation to the purpose of the organisation considered as a whole; and
- the purpose of the organisation is not, or is not intended to be, beneficial to a particular class of people (whether or not members of the organisation) rather than the community generally.

Section 18G provides for the effect of a determination under section 18F on an organisation's tax liability.

The date of effect of a determination is the date the organisation applied for the determination, not the day the determination is made.

A determination will apply to duty for a dutiable transaction entered into after the application for determination was made under section 18E, up to the date the Commissioner makes the determination under section 18F.

For payroll tax and rates, the determination will apply beginning at the start of the financial year in which the application is made, and any other financial year up to and including the financial year in which the determination is made.

Subsection (3) requires the Commissioner to reassess an organisation's duty, payroll tax or rates liability if the determination applies to that liability, to a maximum of 5 years after the determination is made.

Clause 17 inserts new part 20 into the TAA as a transitional provision. This complements section 9 (3) of the Act, but applies to excluded organisations that may have objected to or appealed a decision about charitable status before commencement.

Section 300 defines *commencement day* for the purpose of part 20.

Section 301 prevents the Commissioner from making a reassessment for a tax liability in any period before the commencement day of the legislation if the following conditions are met:

- the purpose of the reassessment must be to give effect to a decision that the organisation has a tax liability, or has no tax liability;
- the organisation was a charitable organisation or should have been treated as a charitable organisation; under the Duties Act, Payroll Tax Act or Rates Act as in force immediately in force before the commencement day (the *pre-amendment law*).

New section 301 (3) applies this restriction regardless of any previous submission, objection or appeal about an organisation's charitable status, and any decision on submission, objection or appeal. However, under section 301 (4), if a relevant reassessment was made (completed) before the commencement date, section 301 does not apply to that reassessment.

Therefore, any reassessment for an excluded organisation made by the Commissioner or ACT Civil and Administrative Tribunal (ACAT) stands as long as it was completed before the commencement day. Submissions, objections or appeals that have not been determined as at the commencement day will be subject to section 301 (2).

Under section 302 the transitional part expires 5 years after commencement.

Clause 18 provides that the Commissioner's refusal of an application for a beneficial organisation determination is a reviewable decision. The revocation of a determination is also a reviewable decision.

Under section 100 of the TAA, taxpayers may object to decisions made under the new provisions, and appeal the relevant decisions on objection to the ACAT under section 108A.

Clause 19 inserts new definitions into the dictionary to the TAA as a result of other amendments.