

U.S. INTERNATIONAL GRANTMAKING

Country Information

Australia

Current as of March 2008

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I. Summary

A. Types of Organizations

Australia has a common law system. There are three levels of government: federal, state (including several territories) and local authority. The federal government, states, and territories all have legislation enabling the creation of nongovernmental, not-for-profit organizations (NPOs).

- The most common NPO organizational forms are:
- Incorporated Associations;
- Charitable Trusts; and
- Companies Limited by Guarantee.

Other not-for-profit legal forms, which are outside the focus of this Note due to their limited interaction with foreign grantmakers, include religious organizations, political parties, political movements, and trade unions.

B. Tax Laws

The federal government has responsibility for the income tax, capital gains tax, fringe benefits tax, customs duties, and Goods and Services Tax (GST). State and territory governments are responsible for taxes such as land, payroll, and stamp duties. Local authorities levy rates and charges. At each level of government, NPOs are, to varying degrees, exempt from taxation.

In general, a natural or legal person, including a company, is entitled to a deduction from assessable income for cash donations (over Australian Dollar {AUD} \$2) to certain NPOs, public funds, public authorities, and specified persons. To be deductible, gifts of property must have a value exceeding AUD \$5,000 as valued by the Commissioner of Taxation.

The Australian Taxation Office (ATO) has in recent years vastly increased the amount of information readily accessible on the taxation of NPOs and incentives for philanthropy. It maintains a comprehensive website containing legislation, cases, policy statements, and plain English fact sheets and guides.

II. Applicable Laws

As noted above, Australia is a federal system with applicable laws at the federal, state/territorial, and local level enabling the creation of NPOs. In addition, a majority of states and territories have legislation regulating fundraising, and each attorney general has inherent responsibility to supervise charitable trusts. Key legislation includes:

Commonwealth Acts

- A New Tax System (Goods and Services Tax) Act 1999

- Corporations Act 2001
- Income Tax Assessment Act 1936 (ITAA 1936)
- Income Tax Assessment Act 1997 (ITAA 1997)
- Racial Discrimination Act 1975

State and Territory Acts

Australian Capital Territory (ACT)

- Associations Incorporation Act 1991 (ACT)
- Collections Act 1959 (ACT)
- Discrimination Act 1991 (ACT)
- Perpetuities and Accumulations Act 1985 (ACT)

New South Wales (NSW)

- Anti-Discrimination Act 1977 (NSW)
- Associations Incorporation Act 1984 (NSW)
- Charitable Fundraising Act 1991 (NSW)
- Charitable Fundraising Act Regulation 1998 (NSW)
- Charitable Trusts Act 1993 (NSW)
- Perpetuities Act 1984 (NSW)
- Trustee Act 1925 (NSW)

Queensland (Qld)

- Anti-Discrimination Act 1991 (Qld)
- Associations Incorporation Act 1981 (Qld)
- Charities Funds Act 1958 (Qld)
- Collections Act 1966 (Qld)
- Collections Regulation 1998 (Qld)
- Education (General Provisions) Act 1989 (Qld)
- Trusts Act 1973 (Qld)

South Australia (SA)

- Associations Incorporation Act 1985 (SA)
- Charitable Trusts Procedure Act 1922 (SA)
- Collections for Charitable Purposes Act 1939 (SA)
- Public Charities Funds Act 1935 (SA)
- Trustee Act 1936 (SA)

Tasmania (Tas)

- Associations Incorporation Act 1964 (Tas)
- Collections for Charities Bill 2000 (Tas)
- Perpetuities and Accumulations Act 1992 (Tas)
- Trustee Act 1898 (Tas)

- Variation of Trusts Act 1994 (Tas)
- Variation of Trusts Regulations 1994 (Tas)

Western Australia (WA)

- Associations Incorporation Act 1987 (WA)
- Charitable Collections Act 1946 (WA)
- Charitable Trusts Act 1962 (WA)
- Trustees Act 1962 (WA)
- Vocational Education and Training Act 1996 (WA)

Victoria (Vic)

- Associations Incorporation Act 1981 (Vic)
- Charities Act 1978 (Vic)
- Education Act 1958 (Vic)
- Perpetuities and Accumulation Act 1968 (Vic)
- Trustee Act 1958 (Vic)

III. Relevant Legal Forms

A. General Legal Forms

Incorporated Associations

Incorporated associations are membership-based NPOs created under the legislation of a particular state/territory. An incorporated association can take the form of a society, club, or institution. They cannot be formed for pecuniary gain or trade and can only carry out lawful objects. [Associations Incorporation Act 1991 (ACT), Associations Incorporation Act 1984 (NSW), Associations Incorporation Act 1981 (Qld), Associations Incorporation Act 1985 (SA), Associations Incorporation Act 1964 (Tas), Associations Incorporation Act 1987 (WA), Associations Incorporation Act 1981 (Vic)] There are approximately 140,000 such organizations. This type of legal structure is mainly used by small sporting clubs and community organizations.

Charitable Trusts

The common law of each state and territory allows for the creation of charitable trusts with some modification provided by the trust legislation of each state. A charitable trust, by definition, is not charitable unless its assets and property are used for the advancement of religion, relief of poverty, advancement of education or other purposes beneficial to the community (but always in the public benefit). [Charitable Trusts Act 1962 (WA), Charitable Trusts Act of 1993 (NSW), Charitable Trusts Procedure Act 1922 (SA)] Often a company limited by guarantee acts as a trustee of a charitable trust.

Companies Limited by Guarantee

The federal government's Corporations Act 2001 permits the incorporation of companies limited by guarantee, most of which are not-for-profit. A company limited by guarantee is modeled on the English company limited by guarantee. It has no shareholders, only members who guarantee to pay a certain sum to creditors if, upon dissolution, the company is unable to pay its debts. The guarantee sum is found in the constitution of the company and is usually quite nominal. It is treated as a public company with a higher standard of regulation compared to proprietary/private companies. This was a popular corporate nonprofit structure before the introduction of the incorporated association form in the 1980s. There are currently about 11,000 of these companies in Australia, and they can be formed for any lawful purpose.

B. Public Benefit Status

Charities must satisfy the common law test of "charity." There is no federal definitional code for this term (such as IRC 501(c)(3)), and the concept of what constitutes charitable activities draws heavily on traditional English common law dating back several centuries. Over the years, the courts have generally based their interpretation of "charity" on four categories described in English common law:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- certain other purposes for the benefit of the community.

For the most part, the Australian states and territories have not defined "charity" or "charitable purposes" in legislation but - similar to the federal approach - have left it to the courts to apply common law. However, in some jurisdictions there are statutory definitions, which, to varying degrees, expand or modify the common law definition. The Federal Government from July 2004 has for the purposes of its law (including income tax) extended the common law definition to include self-help groups and contemplative religious orders that are for the public benefit and child care services delivered on a nonprofit basis. [Extension of Charitable Purpose Act 2004]

IV. Specific Questions Regarding Local Law

A. Inurement

Incorporated Associations

Although the legislation in each Australian jurisdiction is slightly different, an association may only be incorporated for a lawful purpose, "but not for pecuniary gain of its members." Thus distributing "dividends" or "income" to members is not permitted. Some jurisdictions limit a member's remuneration or pecuniary gain to the amount that the person would have been entitled to receive had the person not been a member of the association. [Associations Incorporation Act 1991 (ACT) §8]

In most jurisdictions, there is no prohibition on paying committee/board members, and the legislation is silent on excess benefits. Common law is clear that excessive benefits would breach a committee/board member's fiduciary duties to the corporate body. Nor are there specific provisions regulating the compensation of senior employees.

Charitable Trust

By force of common law, a charitable trust cannot distribute dividends or similar forms of income. In most jurisdictions, trustees cannot seek remuneration unless authorized by the trust deed, and such remuneration is subject to review by the courts. Trustees may be removed from duties for "misconduct and mismanagement," [1] and common law regulates conflicts of interest which are strictly dealt with under the law of trusts. In some jurisdictions, however, there are no specific provisions regulating the compensation of senior NPO employees.

Australia does have a history of private companies providing professional trustee services (trustee companies). Trustee companies are regulated by special laws that restrict their fees, and such matters are supervised by the courts or the attorney general.

Company Limited by Guarantee

A company limited by guarantee can be incorporated for any lawful purpose. There are no restrictions in the Corporations Act 2001 against such a company distributing income to its members.

Section 30-220 of the ITAA 1997 (inserted by Act No. 121 of 1997, and amended by Act No. 176 of 1999), in conjunction with subsection 78A(5) of the ITAA 1936 allows a donor a reduced tax deduction in cases where the donee does not, under the terms and conditions of the gift, have full title, custody or control of the property.

B. Proprietary Interest

Incorporated Association

Although the legislation in each Australian jurisdiction is slightly different, an association is prohibited from having capital of the association divided into stock or shares held by members. In addition, associations are prohibited from holding property in which members have a disposable interest, directly or otherwise. [Association Incorporation Act 1991 (ACT) §14, Association Incorporation Act 1984 (NSW) §7, Association Incorporation Act 1981 (Qld) §5(1)(e)]

Company Limited by Guarantee

The corporate entity is the legal owner of the corporate property. A tax-deductible gift is absolute without conditions, and donors cannot under ordinary circumstances receive their gift back. Australian tax law does not permit donors to claim a tax deduction for a so-called "gift" in which they retain special rights or benefits. They could conceivably give property to

an NPO and retain some interest or benefit, but they would not receive a tax break; it would be considered a transaction.

Charitable Trust

The trustees of a charitable trust hold legal title to any trust property strictly for the purposes of the trust. Moreover, it would generally be a breach of fiduciary duty for a trustee to have any other interest in trust property. Trust property must be owned and fully conveyed to the trustees.

C. Dissolution

Incorporated Association

There are various rules governing the distribution of assets upon dissolution of an incorporated association. For example, distribution of assets to members upon dissolution is clearly prohibited in the Australian Capital Territory [Association Incorporation Act 1991 (ACT) §92], New South Wales [Association Incorporation Act 1984 (NSW) §53], and South Australia [Associations Incorporation Act 1985 (SA) §43]. Queensland, however, is not clear on the prohibition of distribution of assets upon dissolution, stating that distribution is subject to agreement or in accordance with its governing documents without restrictions. [Associations Incorporation Act 1981 (Qld) §92] However, in most cases where associations are exempt from income tax, the taxation authorities insist on a clause in the association's constitution that requires that the assets be distributed cy pres (i.e., to another entity with the same or similar objectives) of the same tax classification.

Company Limited by Guarantee

If a company limited by guarantee is wound up with surplus assets, the constitutional provisions of the individual company determine the distribution of the surplus. However, in most cases where such companies are income tax exempt, the taxation authorities insist on a clause in their constitutions which directs the assets cy pres to another entity of the same taxation classification.

Charitable Trust

A charitable trust exists in perpetuity and if it has surplus assets or cannot achieve its purposes, then the court will apply the distribution of surplus assets cy pres [Charitable Trusts Act 1993 (NSW) §9, Charitable Trusts Act 1962 (WA) §7].

D. Activities

1. General Activities

Incorporated Association

The purposes of the association must be lawful. Some jurisdictions require associations to be formed for certain purposes relating to community and sporting objectives. Other jurisdictions focus on whether the association is "not for pecuniary gain of its members" as the distinguishing feature.

Company Limited by Guarantee

There is broad discretion for a company limited by guarantee to pursue any lawful purpose.

Charitable Trust

A charitable trust must be formed for the purposes regarded as charitable in the narrow English tradition of advancement of religion, relief of poverty, advancement of education or other purposes beneficial to the community (but always for the public benefit) [see Section III (B) above, Charitable Trusts Act 1962 (WA) §5(4)].

2. Public Benefit Activities

Only charitable trusts are subject to a strict public benefit test discussed in the previous section [see also Charitable Trusts Act 1962 (WA) §5(4)]. That being said, all organizational forms are permitted to engage in public benefit activities.

3. Economic Activities

Incorporated Association

State jurisdictions differ on the amount of commercial and/or unrelated business an incorporated association may conduct. In practice, however, governing legislation is construed to mean that associations are prohibited from having economic activities as their primary purpose.

Company Limited by Guarantee

There are no specific restrictions on a company limited by guarantee's business or economic activities.

Charitable Trust

The trustees of a charity trust must only conduct commercial transactions that are within the scope of the charitable purposes of the particular trust. For example, a charitable school or hospital could charge tuition fees or surgery fees.

E. Political Activities

Under state and federal legislation, bodies that seek to be political parties are required to register under special legislation. The expression of views by not-for-profit organizations on what are considered to be political or electoral matters may trigger legal obligations under the

Commonwealth Electoral Act 1918 (the “Act”). From the 2006-07 financial year on, third parties, such as not-for-profit organizations, that engage in political expression have three basic compliance obligations under the Act, as amended:

- Inclusion of authorization statements on certain publications that contain “electoral matter” (sections 328 & 328A);
- Annual disclosure of “political expenditure,” if such expenditure exceeds AUD \$10,000 (section 314AEB); and
- Annual disclosure of gifts of AUD \$10,000 or more that are used to enable such “political expenditure” (section 314AEC).

However, the laws do not address the extent to which NPOs may engage in political or lobbying activities. While the Australian Tax Office maintains that political, lobbying, and promotional activities are not charitable, they are allowed -- even encouraged in some jurisdictions -- when they are "merely incidental" to a purpose that is otherwise charitable. ATO Tax Ruling 2005/21 states:

“18. Political and lobbying purposes are not charitable. While such purposes may use educational means, this is not sufficient to show a charitable purpose.

19. However, political or lobbying purposes and activities that are merely incidental to a purpose that is otherwise charitable do not by themselves prevent that purpose being charitable.”

F. Discrimination

Although there is no federal law prohibiting racial and ethnic discrimination in private schools, schools are clearly and expressly covered by the applicable state anti-discrimination legislation. For example, in Queensland, The Anti-Discrimination Act, Part 4, Division 3, §37 provides that educational authorities must not discriminate in respect of admission of students (§38) or terms of ongoing enrollment or exclusion of students (§39), though private discrimination is allowable for religious schools solely on the basis of religion. Generally non-state schools (i.e., independent schools that are accredited or provisionally accredited under the Education (Accreditation of Non-State Schools Act, 2001) may discriminate on any grounds other than race or disability.

Put more succinctly, private schools cannot discriminate in accepting students or the terms on which they provide education to them, on the grounds of race or disability.

G. Control of Organization

Australian charities may be established by natural or legal persons, both domestic and foreign. Therefore, it is possible that an Australian NPO may be controlled by a for-profit entity or an American grantor charity.

V. Tax Laws

A. Tax Exemption

Division 50 of The Income Tax Assessment Act 1997 (ITAA) exempts certain classes of NPOs from income tax. It is administered by the Australian Taxation Office which is the responsibility of the Federal Treasurer. The ATO has moved to a self-assessment regime and NPOs are required annually to self-assess whether they fall within the exempt categories. The categories of exemptions are fairly broad and the exemption covers all income however derived. Exemption should not be confused with gift deductibility, as quite different tests and categories apply.

The categories of exempt organizations include:

- religious, scientific, charitable or public educational institutions;
- public and non-profit hospitals;
- hospital and medical benefits organizations;
- the thalidomide foundation;
- trade unions and associations of employers;
- friendly societies;
- associations for musical purposes, art, science or literature;
- encouragement and promotion of games or sport and animal races;
- community service associations;
- associations for the development of aviation, agriculture, pastoral, horticultural, viticultural, manufacturing or industrial resources of Australia; and
- a fund established by a will or trust for public charitable purposes or scientific research through a public university or hospital.

There are some special exemption conditions for charitable institutions. A charitable institution can be entitled to exempt status if it meets at least one of three tests:

- it has a physical presence in Australia and, to the extent it has a physical presence in Australia, it pursues its objectives and incurs its expenditures principally in Australia; and it is a deductible gift recipient; or
- it is prescribed by law in the income tax regulations, and it is located outside Australia and is exempt from income tax in its country of residence; or
- it has a physical presence in Australia but incurs its expenditures and pursues its objectives principally outside Australia.

There are some special exemption conditions for charitable funds. To be entitled to endorsement, all charitable funds must be applied for the purposes for which they were established. Some funds will also need to meet further tests; this depends on whether the charitable fund was:

- established by will before 1 July 1997, and if so what assets it has received since that date, or
- established in Australia after 1 July 1997.

These further tests are very complex and beyond the scope of this Note.

Further information in "plain English" can be found on the ATO web site. Particular note should be taken of two publications available on the site, the Income Tax Guide for Nonprofit Organizations and the CharityPack which deal extensively with income tax exemption. The exempt charitable status of an Australian organization for federal income tax purposes can be quickly determined by searching on the Australian Business Number database (available from 1 July 2005).

B. Deductibility of Charitable Contributions

Classes of organizations and specifically named organizations described in Division 30 of the Income Tax Assessment Act 1997 can be the recipients of tax deductible gifts, some subject to further conditions. Sub-Division 30-A of the Act specifies:

- who the recipient of the gift or contribution can be;
- the type of gift or contribution that a donor can make;
- how much the donor can deduct for the gift or contribution; and
- special conditions that apply.

Recipients

Sub-Division 30B of the Income Tax Assessment Act 1997 is organized around thirteen general categories of deductible gift recipients under the Act. These include:

- health;
- education;
- research;
- welfare and rights;
- defense;
- environment;
- industry, trade and design;
- the family;
- international affairs;
- sports and recreation;
- philanthropic trusts;
- cultural organizations; and
- other recipients.

Under each general category the tax statute lists specific organizations or specific classes of organizations that are eligible to receive tax deductible donations. [2]

The classes of organizations eligible to be deductible gift recipients are either:

- institutions;
- public funds; or
- public authorities. [3]

These terms are not defined in the legislation and have been interpreted by the courts. An institution has been defined as "an establishment, organization, or association, instituted for the promotion of some object, especially one of public utility, religious, charitable, educational etc." Funds are solely grantmaking bodies and authorities are usually controlled by government. [4]

Type of Gift

Until July 1, 1999, generally only certain types of gifts were tax-deductible under Division 30. These included:

- Gifts of AUD \$2 or more (money);
- Property which has been purchased by the donor less than 12 months before the gift was made; and
- Trading stock disposed of outside the ordinary course of business.

After July 1, 1999, some provisions were relaxed to permit an income tax deduction of property worth more than AUD \$5,000, regardless of when or how the property was acquired, as is discussed in the next section.

For a gift to be a tax-deductible donation and claimed as an income tax deduction in individual income tax returns, the gift must usually have the following characteristics:

- is made voluntarily;
- does not provide a material benefit to the donor; and
- essentially arises from benefaction, and proceeds from detached and disinterested generosity.

Generally, for a payment to be considered a gift it must be unfettered, that is, there must be no obligation to do anything in recognition of the gift and no expectation on the part of the donor to receive anything in return for the donation.

Gifts with conditions may be disallowed as deductions where there is an arrangement whereby:

- its value to the donee institution is less than the value of the property at the time the gift is made;
- the donor (or an associate) obtains a collateral benefit in connection with the gift; or
- the donee institution undertakes to acquire property from the donor or an associate of the donor.

Recent amendments have made limited provisions for "contributions" where some minor value is received by the contributor such as for political memberships to a capped limit and minor benefits involving fundraising dinners and auctions.

Amount of deduction

Generally every person, whether an individual, the trustee of a trust estate or superannuation fund, a partnership or a company, and whether a resident or non-resident of Australia, is entitled to a deduction from assessable income for individual gifts of AUD \$2 or more made during the financial year to nominated funds, authorities, institutions, or bodies or classes of them, or specified persons. Gifts of property, as discussed in the previous section, are required to have a value over AUD \$5,000 as valued by the Commissioner of Taxation. Gifts of shares traded on a public stock exchange are now deductible even if under AUD \$5,000 in value.

There is generally no cap for the gift deduction, with the exception that the deduction must not cause an overall tax loss. The exceptions to this statement are discussed below under special gift situations. Where there is a gift of joint property, the taxpayer can deduct so much of the gift as is reasonable having regard to the taxpayer's interest in the property.

As a further incentive to encourage philanthropy, beginning on July 1, 1999, donors have been permitted to spread their deductions over a five-year period for cultural, environmental and heritage gifts. All deductions can be spread over a five-year period from July 1, 2002.

Special Conditions

Most categories of deductible gift recipients have conditions that the fund, authority, institution, or organization: be endorsed as a gift-deductible recipient by the Commissioner of Taxation; issue appropriate receipts for donations; conduct self-reviews of its status; and be 'in Australia.' Some less frequent special conditions are that donations will only be deductible if made between certain dates or for particular purposes of the organization.

Further information in plain English can be found on the ATO web site. Particular note should be taken of a publication available on the site, the GiftPack that deals extensively with gifts, donors, and donees. It also includes checklists. The gift-deductible status of an Australian organization can be quickly determined by searching on the Australian Business Number database.

Finally, most companies claim "gifts" or "sponsorships" as a cost of doing business which is tax deductible, rather than claiming it as a gift and thus deductible. The reason is that it is significantly easier under the Australian system to claim these transfers as business expenses (a business can provide funds to a much wider range of organizations) than to prove that they are gifts (which must flow to a restricted class of organizations).

C. Goods and Services Tax

A Goods and Services Tax (GST) was introduced into Australia for the first time on July 1, 2000. Key features affecting NPOs are summarized below:

- GST is a broad-based tax of 10% on the supply of most goods and services consumed in Australia.
- Non-commercial supplies by charities such as charitable activities are GST-free.

- Charities must register for GST if their annual turnover is AUD \$100,000 or more and they may choose to register if their annual turnover is lower.
- Registered charities can claim credits for the GST included in the price of goods and services they buy during the process of providing their GST-free supplies.
- Foreign grants to an Australian organization may be subject to GST, depending on the nature of the grant or gift and where any services are to be performed as a result of the grant or gift.

Further information about GST and gifts/grants and supply of goods and services from outside Australia can be found on the ATO web site.

D. Import Duties

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. [Customs Tariff Schedule 4 - Items 23A and 23B] 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. General inquiries can be directed to information@customs.gov.au.

There are no Customs concerns on monetary transfers via the banking system. However, persons carrying cash amounts of AUD \$10,000 or more (or in the foreign equivalent) must be declared to Customs.

E. Foreign Organizations and Grants

Registration and Regulation

Foreign incorporated organizations that carry on business in Australia may be required to register with the Australian Securities and Investment Commission (<http://www.asic.gov.au>). This process involves a simple identification form, the payment of a fee, and the filing of a constitution and foreign incorporation papers.

Foreign bodies that earn income in Australian may be required to register under taxation regulations.

Foreign Grants

The flow of funds from overseas is generally free from regulation apart from required reporting for large foreign currency transactions.

F. Double Tax Treaties

A double taxation treaty exists between the United States and Australia.

VI. Knowledgeable Contact

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Footnotes

[1] "Mismanagement and misconduct" includes the remuneration of persons acting in the affairs of the charitable trust concerned, or for administrative purposes, by payments which are excessive in relation to the duties of the persons so acting. [Charitable Trusts Act 1993 (NSW) §7(5)]

[2] Specific organizations have found their way into the statute by persuading Parliament that they deserve the status of deductible gift recipient. There are about one hundred and thirty such organizations.

[3] There are also named classes of organizations such as public benevolent institutions, higher educational institutions, public authorities for research, and ancillary funds. Although the concept of charitable institution and funds is used to determine income tax exemption, a different classification system is used to determine ability to receive tax-deductible donations.

[4] An organization will not be an institution if it is in the form of a trust that merely manages or holds trust property, or if it is organization that is established and controlled by family members and friends. A 'public authority' is an agent of the government exercising power or command for the public advantage, such as railway and transport authorities, local governments and water supply boards. A 'public fund' is a fund that is opened for subscription to the public and to which the public does in fact contribute. In fact, the most notable and common class of organizations is the public benevolent institution. The term 'public benevolent institution' entered the taxation legislation after the English Privy Council overruled the High Court of Australia on the definition of 'charity' in an estate duty case. In *Perpetual Trustee Co. Ltd v Federal Commissioner of Taxation* [1931] 45 CLR 224 the High Court defined the phrase as an institution organized for the relief of poverty, sickness, destitution, helplessness, suffering, distress or misfortune.

