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Dear Sir

A Definition of Charity Consultation Paper October 2011

Thank you for the opportunity to submit our comments in relation to Treasury's Consultation Paper "A Definition of Charity" (**Consultation Paper**). As a general comment, we support the introduction of a statutory definition of "charity" with the intention of improving clarity and certainty for organisations which operate for the public benefit.

Please see our specific comments below relating to a number of sections within the Consultation Paper.

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1. Concise definition

As an overarching comment, we consider it is important that the definition of charity is not expanded to the extent that it becomes a cumbersome definition which is difficult to navigate for not for profit (**NFP**) organisations. In our experience, NFPs, particularly smaller organisations, which have limited resources, frequently comment on the complexity of the tax provisions relating to NFPs. It is imperative that the statutory definition of charity is not expanded to the point of becoming incomprehensible to the entities which it is intended to apply, particularly given the intention of increasing clarity and reducing confusion and costly legal disputes (see paragraph 25 of the Consultation Paper).

2. Clarifying the continued relevance of the common law

The statutory definition proposed may make some substantive changes to the public benefit test – mainly in relation to the presumption of public benefit – but otherwise is largely intended to restate the common law. If the aim is to increase certainty and consistency for the NFP sector as well as supporting harmonisation between local, State and Federal government laws, then to avoid increasing confusion by now requiring NFPs to refer to both the common law and the statute:

- (a) the continued relevance of the common law in relation to each concept used in the statute should be expressly clarified in the statute; and

- (b) where the common law remains relevant, the provisions should be clearly and simply drafted to act as appropriate signposts to the common law, rather than attempting to restate the common law.

That is, to the extent that common law concepts continue to be relevant, use them without restating their meaning. If common law concepts are inadequate, the appropriate concept should be set out in full in the legislation to replace the inadequate concept.

3. Issues in defining charity

3.1 Dominant purpose

We support the proposal to amend the definition of dominant purpose, as contained in the *Charities Bill 2003 (Cth)* (**Bill**), so that the purpose or purposes of a charity must be exclusively charitable to the extent that this reflects the common law. It is important that the new definition provides that incidental or ancillary purposes that are non-charitable are still permitted, as outlined in paragraph 54 of the Consultation Paper. This is particularly relevant in a situation where activities may not be, on their face, charitable, but may further a charitable purpose.

In relation to question 2 in the Consultation Paper, we consider that, given a key aim of the introduction of a statutory definition of charity is to reduce the reliance on the common law, it would be valuable to include some clarification around when a peak body is entitled to be classified as a charity.

3.2 For the public benefit

While we consider that the arguments posed in the Consultation Paper for reversing the presumption of public benefit (as currently contained in the common law for entities falling under the first three heads of charity) are valid on the most part, we consider that the better course of action is to retain the presumption of public benefit for organisations which are for the relief of poverty, advancement of education and the advancement of religion.

Generally, the nature of the activities undertaken by organisations relying on being classified as charitable are overwhelmingly benevolent. Consequently, the current common law position that an entity is presumed to be for the public benefit (in certain circumstances), unless evidence to the contrary is adduced, should remain in order to encourage and support such benevolent organisations.

Our work with numerous charitable organisations has illuminated the difficulties faced by many NFPs in dealing with the legislative provisions relating to charities and the associated tax endorsements. The presumption that the public benefit test is satisfied (for organisations which are for the relief of poverty, advancement of education and the advancement of religion) reduces the number of issues to be addressed by an often under resourced and ill-equipped charitable sector.

Importantly, the presumption of public benefit in relation to the first three heads of charity, is merely that, a presumption and is able to be rebutted if evidence to the contrary is identified. However, to ensure that organisations which are clearly not for the public benefit are not classified as charities, we consider that it would be prudent to provide the Australian Charities and Not-for-Profit Commission (**ACNC**) with additional powers to question an organisation to ensure that entities which are not for the public benefit are prevented from being classed as a charity. We adopt this position on the basis that the ACNC will be better resourced and equipped to consider such issues and to access relevant information and resources used in other jurisdictions in determining whether an entity operates for the public benefit. Retaining the current position will permit NFPs seeking to be recognised as a charity to expend their efforts and resources in the way they know best – helping others.

The fact that most organisations seeking to satisfy the public benefit requirement are likely to succeed should not be a factor in shifting the burden to those organisations. The administrative burden associated with establishing public benefit will cause limited resources to be diverted from the organisations benevolent activities. It is more appropriate for the ACNC to determine whether to investigate this issue further on an exceptions basis.

Further, by maintaining a position akin to the common law, a number of the issues raised in the Consultation Paper in paragraphs 65-70 would be resolved. Additionally, the statutory definition of charity would be simplified, rather than being further complicated.

If the presumption of public benefit is removed, as contemplated in the Consultation Paper, we consider that significant guidance and assistance should be provided by the ACNC to ensure that organisations are guided through the process of satisfying the public benefit test. The extent and type of assistance provided by the ACNC should take into account overseas experience and should cater specifically for smaller charities with limited resources, capabilities and understanding of the legislative landscape. Assistance could be provided in the form of:

- (a) detailed and tailored fact sheets relating to the various different categories of public benefit;
- (b) ACNC rulings and determinations (similar to tax rulings); and
- (c) a phone service to assist charities in establishing their public benefit.

Irrespective of whether the presumption of public benefit is reversed, we agree with:

- (a) the 2010 Senate Inquiry that in the public benefit test, any benefit must be balanced against any detriment or harm (paragraph 60);
- (b) the Board of Taxation's (**BoT**) recommendation that "sufficient section" be defined as one which is not merely "numerically negligible" compared with the size of that part of the community to whom the purpose would be relevant (paragraph 63-64) and recommended in part 6.25 of the Board of Taxation report to the Treasurer on the definition of charity (**BoT Report**).

This change, while subtle, would allow an organisation which assists a very small class of people to satisfy the public benefit test, provided it was not numerically negligible when assessed against the size of the part of the community to whom the purpose would be relevant, rather than the community at large. Without this change, assistance to a particular small group would be prohibited as they would be "numerically negligible" relative to the community at large.

While acknowledging the difficulty in defining "numerically negligible", further guidance around the meaning of the phrase would be greatly beneficial to prospective charities in providing certainty regarding their eligibility to be classified as a charity;

- (c) the comments in paragraph 65, that a member of an organisation is entitled to benefit from the organisation's activities, but not as a result of them being a member, rather because they are part of the broad group of people the organisation is designed to benefit. However, we consider that a change to the definition is not required, rather a comment in the explanatory memorandum would be sufficient;
- (d) the comments in paragraphs 67 and 68, that native title claimants and holders should not be precluded from being characterised as a section of the public based on "familial ties" given the cultural and social differences between such groups and

the Australian and UK blood relations scenarios on which the relevant charity cases were based; and

- (e) the BoT, that the public benefit test in section 7 of the Bill is adequate, and that if any further explanation is required it should be in the explanatory materials (see part 7.16 of the BoT Report). Additionally, the test as outlined in section 7 allows for some flexibility and given the difficulty in determining what constitutes a benefit, the flexibility is advantageous and is a further reason that the test should not be altered.

3.3 Activities to be in furtherance of charitable purpose

We support the requirement that the activities of a charity be in furtherance or in aid of its charitable purposes, so long as inadvertent or isolated instances of activities in violation of the requirement do not automatically lead to loss of charitable status.

We also note that accumulation of funds is not discussed at all in the Consultation Paper. We consider that it would be beneficial to consider the accumulation of funds within a charitable organisation in the statutory definition of charity so that it is clear for all charities what level of accumulation is permitted without jeopardising an organisation's charitable status.

3.4 Disqualifying activities

We support the inclusion of a section 8(2) of the Bill as it legislates the position with regard to political activities and provides greater certainty and clarity by taking the issue from the realm of common law to statute. We also specifically support the proposed modification discussed in paragraph 108 relating to the removal of section 8(2)(c) of the Bill. However, as highlighted by paragraph 112 of the Consultation Paper, we do not consider that ancillary and incidental party political activities need to be precluded absolutely. Enabling an organisation to undertake lobbying and political activities with a purpose of attempting to bring about a change in a law or government policy may lead to some affiliation with certain political figures or a particular party due to a commonality of beliefs on a particular issue. If there was an absolute prohibition on advocating a political party or candidate etc, the general lobbying activities of an organisation could compromise their status as a charity due to a perception that the organisation's activities were in fact in support of a party or person who coincidentally holds a similar position on a matter. Allowing incidental and ancillary political activities provides some limited flexibility and should allow an organisation to lobby to change a law in an appropriate manner.

We agree with the comments in paragraph 114 of the Consultation Paper, originally endorsed by the BoT (discussed at part 3.45 of the BoT Report), and specifically support the removal of "cause" from section 8(2)(a) of the Bill.

3.5 Type of entity

We consider that the types of legal entity which can be used to operate a charity does not need to be clarified or changed, nor does the existing definition of "government body". In the interests of simplicity, these provisions / definitions should remain as clear and uncomplicated as possible. Further explanation and detail around the precise meanings of the terms should be provided in explanatory materials and rulings. We again stress the importance of keeping legislation that is relevant to NFPs, as clear and concise as possible.

4. Charitable purposes

We consider that specifically listing a charitable purpose in section 10 of the Bill if there is doubt about whether it fits within one of the general heads of charity or where the

government wishes to encourage activity in a particular area would increase certainty in the NFP sector.

As perceptions regarding the types of activities that should be provided with support in the form of taxation and other concessions changes over time, the implementation of a statutory definition of charity will provide the NFP sector and the community generally with an excellent opportunity to debate and modify what purposes the government and community thinks should be provided with support.

If the existing, concise list (provided in paragraph 124 of the Consultation Paper) is to be retained, we support the comments in paragraph 129 and recommend adopting a definition of the advancement of social or community welfare which is far more explicit about what is covered than that adopted in the Bill. For instance, the definition should refer expressly to poverty. In addition, further to the comment in paragraph 125, we support the express inclusion of "prevention" within the meaning of "advancement"

In relation to the comments in paragraph 132, we note that the existence of a public benefit requirement should make it unnecessary to refer to "confer[ing] private benefits" or purposes which are "vague or of insufficient value to the community" separately as disqualifying purposes.

We agree with the comments in paragraph 133 recognising that sporting or recreational purposes may be charitable if they are sufficiently connected with a recognised charitable purpose, such as education or health care. In a similar way, we contend that social activities that are sufficiently connected to charitable purposes should be charitable. For example social activities for elderly people suffering loneliness and isolation.

5. Other issues

5.1 State and Territory issues

We consider that Commonwealth, State and Territory laws should be amended so that an reference to a charity is taken to be a charity as defined by the Commonwealth legislation. States and Territories could then expand or limit the definition as they see fit.

5.2 Australian Disaster Relief Funds (ADRFs)

Issues currently arise in the effective use of ADRFs related to timing issues. ADRFs cannot be established to generally support disaster relief activities as and when a disaster occurs (or even as and when a disaster is declared). This makes it impossible for funds to be collected in advance of disasters occurring and necessarily results in a delay of being able to raise funds and then distribute those funds to those affected by the disaster, or used in providing goods and services to those affected.

The introduction of a general head of charitable purpose that will be activated as and when disasters arise (or are declared) would assist in enabling entities to be "disaster-ready". Some specific acknowledgement of an ability to accumulate funds in a general ADRF would be required to recognise the forward-looking nature of such a fund.

5.3 Transitional issues

In enacting a statutory definition of charity, consideration should be given to providing a transitional period for existing charities that may need to restructure or amend their governing documents to fit within the definition of charity or make other organisational changes depending on the final form of the statutory definition.

We would welcome the opportunity to be further involved in the process of finalising Treasury's views in relation to the introduction of a statutory definition of charity.

Please contact Teresa Dyson on (07) 3259 7369 or Josh Franklyn on (03) 9679 3086 if you have any questions.

Yours faithfully



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