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Manager
Philanthropy and Exemption Unit
The Treasury
Langton Crescent
PARKES ACT 2600

By email: nfpreform@treasury.gov.au

Dear Sir/Madam,

Subject: Consultation Paper – A Definition Of Charity

CPA Australia represents the diverse interests of more than 132,000 members in 111 countries throughout the world. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders.

Against this background, CPA Australia welcomes the opportunity to comment on the issues raised in the abovementioned Consultation Paper.

If you have any queries regarding any aspects of the attached submission, please contact Garry Addison, Senior Tax Counsel, on (03) 9606 9771 or via email at garry.addison@cpaaustralia.com.au.

Yours faithfully,

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Attachment

Submission by CPA Australia on 'A Definition of Charity' – Treasury Consultation Paper (CP)

General comments re: Consultation

- The definition aims to rule out businesses that are using charity status to avoid paying tax, or to protect/maximise their profit ('protected businesses') eg. non-charitable commercial operations. The danger is that the process may inadvertently disadvantage the charities that operate businesses to subsidise their outreach programs that have social benefit (e.g. church op shops). The definition must avoid the unintended consequences of penalising the latter for being innovative in the manner in which they generate funds for their outreach programs.

- It is probably easier to rule protected business 'out', than to rule genuine charities 'in'. Some groups have better access to representation that will lobby government on their behalf. In particular, the impact of the definition on indigenous organisations in the Northern Territory (NT) is likely to be under-stated, not because it does not affect them but rather because they are not as easily represented in the discussion. Extra effort should be put into assessing the impact on these groups.

- The system should aim to minimise compliance costs and effort – charities and NFPs require a reporting framework that is useful to the entity and to the external parties using the reports.

Consultation questions

Q1. *Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose*?

We do have a number of issues with the proposed change from 'dominant purpose' to a purpose or purposes which would be 'exclusively charitable'. For example, if a charity has another purpose that considered in isolation would not be charitable, it should be the nature of *what is done* with the profits originating from such a purpose that determines whether it affects the charity's status. In particular, if a charity derives profits from a non-charitable purpose but invests those profits fully into furthering the charitable purpose of the charity then the fact that the particular non-charitable purpose may not be considered purely 'incidental or ancillary' should not affect its registration.

Further, the term 'exclusively charitable purpose' seems to be based on the English Charities Definition of 2006 which has by no means a settled meaning. In this respect, it seems that the Government is following too closely the structures in place in England notwithstanding the differences between the 'common law' in both jurisdictions. We note also that a recent (October 2011) UK Chancellery Chamber decision has already changed the English Charities Commission understanding of 'public benefit'. In this light, it seems likely that this untested 'exclusively charitable purpose' term will have a chequered history in Australian law if adopted.

We note that the Melbourne University Not-for-Profit Law Project prefers an alternative term of 'charitable purposes only'. This is more appropriate in our view as the use of word 'exclusively' strongly suggests that ancillary or incidental activities which are currently clearly recognisable in charity law will be lost. This approach may well lead to a number of charities relinquishing their charity endorsement if the approach of 'exclusively charitable purpose' is adopted.

Q. 2. *Does the decision by the NSW Administrative Tribunal provide sufficient clarification of the circumstances when a peak body can be a charity or is further clarification required? We note from the CP that a decision by the abovementioned Tribunal in 2003 held that a body which enhanced the long-term viability of charitable organisations by providing educational mentoring and support services was itself a charitable institution.*

In our view, more clarity in this area is necessary, particularly in respect to the degree of integration that is going to be required. For example, if a peak body is considered to be a charity because it on the whole deals with charities, but some income is received from non-charitable bodies on an on-going/regular basis, then if the non-charitable purpose, as per question 1, has to be only ancillary or incidental, it needs to be clarified whether that situation would affect their charitable status? If so, this would likely increase the costs for the charities it serves and would thus be considered a less than satisfactory outcome.

Q. 3. *Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?*

We note that the term 'sufficient section of the public' is the one currently used in case law, and thus already has a meaning that is well understood by the NFP sector. Our concern is that change in this area (e.g. by replacing 'public' with 'general community') could simply create more uncertainty and/or be more restrictive. In any event, there would need to be further clarification of a 'sufficient section of the public' to, say, a section which is not numerically negligible compared with the size of that part of the community to whom the purpose would be relevant. In particular, it would be necessary in our view to ensure that charities in geographically isolated or other small rural communities to continue to be able to meet the public benefit requirement.

Q. 4. *Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?*

Due to the operation of the *Native Title Act 1993 (Cth),* the common law in relation to native title and the rules of traditional ownership, native title groups or native title claimants are often familial groups able to trace their connection to a single ancestor. As a result of this, prescribed bodies corporate (PBCs), required under the *Native Title Act*, and trusts established to receive native title payments and for the benefit of a particular native title group, are generally unable to be recognised as charitable, even where the purposes are exclusively charitable and the not for profit requirement is satisfied.

It appears there is confusion and inconsistency as to the structures and types of income tax endorsement received by structures created to receive native title payments.

A significant number of PBCs or trusts adopt the wording required for a public benevolent institution as a result of the wording approved in the *Northern Land Council v Commissioner of Taxes (NT) 2002 ATC 5117* where a court held a corporation negotiating land rights in the Northern Territory was a public benevolent institution (PBI), largely due to the state of disadvantage experienced by the Aboriginal groups in the relevant region.

Some traditional owner groups have been advised or led to understand that this wording is necessary in order to receive charitable status.

We understand the ATO endorses these entities as PBIs on the basis that they are for the relief of poverty and therefore can be restricted to a family grouping.

However restricting native title groups to PBI status and not enabling general charitable purposes:

- restrains the application of the money preventing a number of activities such as education, health and well being, economic development, environmental and cultural activities;
- may not always be applicable or appropriate if not all the native title members fall within the PBI definition of needing benevolent relief; and
- if public benefit is to be required for relief of poverty, not even this opportunity will be available to native title groups.

Native title groups are therefore caught between the operation of two opposing sets of laws – one relating to native title requiring them to restrict the receipt of benefits to a familial group, and the other denying them relevant tax concessions because it is restricted to a familial group.

In order to provide clarification and simplicity we recommend that where an entity is established to receive native title payments and in all other respects meets the requirements for recognition as a charity other than the familial connection, it is able to be charitable.

Q. 5. *Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in ATO ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Island definitions or in the guidance material of the Charities Commission of England and Wales?*

Q.5 and subsequent questions refer to the Public Benefit Test. The intent of the consultation paper is to remove the presumption of public benefit which currently applies under common law to the relief of poverty, the advancement of education and the advancement of religion. Public benefit currently only needs to be proven in respect to 'other purposes beneficial to the community'. The upshot of this approach could be to create for the ACNC as well as charities collectively, a substantial administrative load. The Pemsell case has established that there are three heads, which are seemingly specific, as being already recognised as providing a public benefit without the need for further detailed justification. It is the fourth head where the Court held that for charity status to be granted a benefit to the public was needed.

It is argued by some that there is complexity and confusion about the Public Benefit Test in the present common law position. This is a very relevant reason for this being included in the consultation paper. However, it appears that the result aimed for is to require all charities to continue to satisfy the Public Benefit Test year by year in their annual report. This is the position required by the Charities Commission of England and Wales, where the Commission requires each charity, in their annual report, to summarise the Objects of the charity and report on the main activities and achievements of the charity in relating to its Objects in that year. There are a number of additional requirements that need to be met on an ongoing basis also. If public benefit needs to be demonstrated on a regular basis in annual reports then we can see the majority of smaller charities in Australia (and there a very large number of them) losing their charity endorsement for non-compliance.

We are not arguing that the idea of requiring the information in the report is not reasonable. In fact, we think it is good idea because it sharpens the focus of the members of the charity as to why they are there. However, there is a need in our view to look at the practical outworking of such a situation. Consider as an example a Parents and Citizens Association where the office bearers turn over at regular intervals. It will become much more difficult than even now to get a person to take on the duty as Secretary with these additional reporting obligations. They will be simply frightened of getting it wrong as they do not have the resources or the knowledge to meet the obligations that will be imposed. This could be particularly the case in respect to many small rural communities around the country where there are often only very limited support resources but there will be a number of charitable organisations in operation. This raises a serious concern that many of these vital organisations could be lost with resulting damage to these communities.

Our preferred position is to see the presumption of public benefit retained for the first three heads, the number of heads possibly expanded, again with the presumption of public benefit available and a retention of a general 'other purposes ...' requiring proof of public benefit.

There is also the significant, unnecessary, additional administrative cost for all concerned to consider.

In our view, it would be more reasonable to ensure that the ACNC has the authority in its establishing Act to review individual cases where there is doubt about the appropriateness of their activities than to require all bodies to prove their position annually.

Q.6. *Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit be preferable on the grounds of greater flexibility in this area?*

We would prefer the approach outlined in Q.5 above in preference to reliance on the common law going forward.

Q. 7. *What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?*

We note from the CP that some religious entities have previously raised concerns with the need to meet a public benefit test due to concerns that administrative costs could be considerably increased if it became necessary for religious entities to demonstrate public benefit for each of their constituent entities. That said, however, it has also been noted that in overseas jurisdictions overturning the presumption of public benefit for the advancement of religion has not resulted in any particular difficulties for most religions. Moreover, overseas experience should assist domestic religious entities in determining the impact that a public benefit test may have on them.

Q. 8. *What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?*

The ACNC should provide guidance notes. While we can see a benefit in receiving some advice from the Charities Commission of England and Wales in this regard, such guidance notes need to be prepared to meet Australian conditions and law. The English position is that a charity is not obliged to register until its revenue reaches 50,000 pounds annually (there is no assets test). We understand many charities choose to voluntarily register - similar to the voluntary registration for GST with the charitable sector here in Australia. We also understand that the Federal Government has already said that the ACNC will require all endorsed charities to provide ACNC with an annual report. As a heavy reporting burden would be extremely onerous for the very small charities, we urge the Government to carefully consider their position in this regard including ways in which reporting requirements for such charities could be streamlined. There could be merit in some form of tiered reporting - perhaps along the lines of the tiers for Companies Limited by Guarantee under the Corporations Act. Tiered reporting seems to be acceptable now with associations incorporated around Australia, with Victoria and Western Australia likely to introduce amendments in this area in the very near future.

Q. 9. *What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?*

We note that if the focus of the law in this area is changed to 'exclusively charitable' and a religious body has to prove 'public benefit' as well then such a body which runs an educational establishment for the training of ministers but their beliefs do not allow for female ministers then the body may have problems establishing that they provide a benefit for a sufficient section of the general community, especially if the educational institution is a separate body to the religious body.

If a presumption of public benefit is overturned for such entities then they may face the loss of special tax treatment from the date that their failure to meet such a test is established.

Accordingly, we urge that, prior to any removal of the presumption of public benefit, further consultations be held with the peak bodies of the education and religious sector, including representatives of heads of schools and churches.

Q. 10. *Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?*

If the Government retains the present 'dominant purpose' test or adopts the Melbourne University 'charitable purposes only' terminology', both of which appear to secure ancillary or incidental activity, this would seem to be in order. However, if the proposed change to 'exclusively charitable

purpose' is adopted, then we believe that there could be a serious problem for the bulk of charitable organisations in the country in proving that all of their activities fit 'exclusively', notwithstanding the recent decision of the High Court in the *'Word Investments'* case.

Q. 11.*Should the role of activities in determining an entity's status as a charity be further clarified?*

We do not see a need for any further clarification in respect to the 'role of activities' in light of the High Court's decision in the '*Word Investments'* case.

Q. 12. *Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?*

We do not have any issues in this regard as we support the suggested changes to the Charities Bill 2003 as canvassed in the CP to allow charities to engage in certain political activities in light of the High Court's decision in the Aid/Watch case.

Q. 13. *Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?*

We support this proposed approach and do not see any issues involved in this regard.

Q. 14. *Is any further clarification required in the definition of the types of legal entity which can be used to operate a charity?*

We do not see any need for further clarification here.

Q. 15. *In the light of the Central Bayside decision, is the existing definition of 'government body' in the Charities Bill 2003 adequate?*

Yes

Q. 16.

Yes

Q. 17. *If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?*

See answer to Q. 16.

Q. 18. *What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?*

CPA Australia supports appropriate changes to the Charities Bill 2003 and other relevant Commonwealth, State and Territory laws to achieve a harmonised definition of charity throughout Australia.

Q. 19. *What are the current problems and limitations with ADRFs?*

We note that the main problem with ADRFs under current legislative arrangements is that they must establish and expend funds in relation to one disaster only, and cannot collect funds prior to a disaster occurring nor hold finds from one disaster to another. Other problems with ADRFs include a lack of flexibility and continuity which could be addressed by allowing them to incorporate. This would enable funds to be available at the time of the disaster and thereby eliminating delay in providing the valuable support that they give in post-disaster situations..

Accordingly, we would support appropriate action to deal with issues in this area in the future.

Q. 20. *Transitional issues*

We note that there may be some transitional issues with enacting a statutory definition of charity although these are expected to be minimal.

Apart from the potential problem associated with existing charities previously endorsed by the ATO prior to the commencement date and whether they will retain their charitable status from that date, we are not aware of any other transitional issues.