



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

9 December 2011

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A definition of charity: consultation paper

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body in Australia delivering authoritative accredited education and the most practical training and information in the field, CSA is focused on improving organisational performance and transparency.

Our members are all involved in governance, corporate administration and compliance with the *Corporations Act* (the Act). Many of our members serve as officers of not-for-profit (NFP) organisations, or work for or are involved with companies limited by guarantee. CSA itself is a company limited by guarantee, formed to serve the interests of its members, who are governance professionals.

CSA welcomes the opportunity to comment on the consultation paper, *A definition of charity* (the consultation paper) and draws upon the experience of our Members in formulating our submissions on the matters canvassed in the consultation paper.

General comments

CSA supports the proposed regulatory reform announced in the Australian Government's 2011-12 Budget to introduce a statutory definition of charity. The proposal to move towards the harmonisation of the definition of charity will provide the charity sector with certainty and clarity in their operations. This in turn has positive implications for the not-for-profit (NFP) sector as a whole.

CSA has previously been involved in the NFP reform process and has always called for a coordinated and holistic approach to reform, noting that, whereas the for-profit sector has already seen a constant stream of reform over the past decade or so, reform within the NFP sector has been, by contrast, sparse and lacking in direction.

This is well illustrated by the example of the prevailing view of charity which CSA notes draws back to the English definition of charity in the *Charitable Uses Act 1601 (UK)* and through the development of independent case law. There are currently '15 pieces of Commonwealth legislation and 163 pieces of state/territory legislation under which ascertaining entitlement to a benefit or some other legal outcome involves determining the charitable purpose or status of an

organisation'.¹ As a result, charities within the NFP sector remain without proper guidance and operate within a system which is administratively inefficient.

Given the importance of the NFP sector to Australia and the inefficiencies which the dual regulatory NFP regime creates, with state and territory-based associations' legislation co-existing with the national regulation of companies, there are many aspects of reform which will need to be considered in conjunction with the move to a statutory definition of charity. CSA is wary of creating extra administrative burden for charities in the pursuit of harmonisation of charity statutory law. However, CSA is of the view that a statutory definition of charity will provide certainty for charities that operate across different states.

In this respect, CSA welcomes and supports the establishment by the Federal Government of the Australian Charities and Not-for-Profits Commission (ACNC) and the appointment of the new chair of the advisory board² assisting the ACNC. CSA notes that the ACNC has, as its major task, the simplification of the regulation and reporting requirements of all charities, with particular emphasis on good governance practice compatible with ensuring that scarce resources are efficiently and effectively utilised for the official objectives of charities.

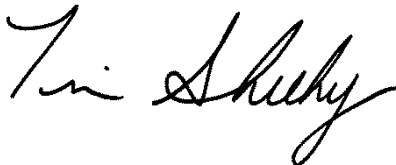
CSA believes, therefore, that central to any discussion about a statutory definition of charity is also a consideration about how the ACNC will educate, regulate and govern this centralised system. The current complexities of the definition of charities, which are captured in Australian Tax Office (ATO) rulings and the common law, are such that any new statutory definition should ensure that any centralised regulatory body be empowered to adequately support the altruistic activities of charities.

CSA also hopes that the ACNC will be empowered to provide regulatory oversight and education for the entire NFP sector, and that its remit will not be restricted to charities.

With these considerations in mind, CSA provides the following submission addressing the questions posed in the consultation paper.

We would welcome the opportunity to discuss any of our views in greater detail.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE

¹ Australian Government, Productivity Commission 'Contribution of the Not-for-Profit Sector' Research Report
Downloaded on 29 November 2011 from http://www.pc.gov.au/data/assets/pdf_file/0003/94548/not-for-profit-report.pdf

² The Hon Bill Shorten MP, 'Next Stage for Not-for-Profit Reforms Announced' (Press Release, 27 May 2011)

(1) 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?

CSA believes that the current definition as captured in the *Charities Bill 2003* requiring an entity to have a ‘dominant purpose which is charitable’ is a satisfactory requirement for the statutory definition of charity. The proposed requirement for an entity to have an ‘exclusively charitable purpose’ provides a much stricter test, and CSA believes that this may not provide the best outcome for charitable organisations.

There can be no argument that at the heart of the operations of a charitable organisation there needs to be a demonstrable ‘charitable’ purpose which has either an altruistic or public benefit aim. However, CSA notes that there are many types of charities which collect funds from different sources, including commercial operations. Charities in this context may sometimes need to pursue non-dominant purposes, with the aim of the commercial activity feeding the organisation’s dominant charitable purpose. CSA notes that the narrowing of the definition, therefore, might inadvertently limit the ability of a charitable organisation to raise funds for its dominant purpose.

CSA also notes that the debate around the ‘purpose’ of the organisation is based primarily in the misapprehension that charities treat profits in the same manner that the ‘for-profit’ industry does. However, CSA notes that charities have particular characteristics and needs which are different and which, therefore, necessitate a definition that accommodates the flexibility of practice prevalent in the charity sector.

CSA is of the view that there is, implicitly, no problem with a charitable organisation making money, whether or not this is in conjunction with the organisation’s dominant purpose. CSA submits that the underlying question relates to how the funding is used to further the organisation’s dominant purpose, rather than to how the funds are raised. For example, CSA notes that there are many religious organisations which operate substantial commercial enterprises; however, the focus for these organisations needs to be on whether or not the organisation is transparent and accountable for how it channels the proceeds in furtherance of the organisation’s altruistic or public benefit objectives, that is, its dominant purpose.

In turning back, therefore, to the concept of ‘dominant purpose’, CSA notes that this term is well established within the legal field and has received extensive review and consideration in the realms of taxation law and legal privilege. CSA believes that this background to the term ‘dominant purpose’ provides ample information from which to draw the definition and limit its applicability. CSA does not see the benefit in creating a new definition which lacks this established understanding and interpretation.

Further, CSA notes that the definition, as embodied in the *Charities Bill 2003*, also contains within it an example of a dominant purpose, which is that an entity must act for a public benefit.

As such, **CSA recommends** the introduction of the statutory definition as embodied in the *Charities Bill 2003*, and does not believe that this should be replaced by the proposed definition incorporating an ‘exclusive dominant purpose’.

(2) Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?

CSA leaves it for other submissions to address whether or not the decision by the New South Wales Administrative Tribunal decision requires any further clarity.

(3) Are any changes required to the Charities Bill 2003 to clarify the meaning of ‘public’ or ‘sufficient section of the general community’?

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

CSA notes that there are circumstances where a charity is established by private individuals or limited sections of the community, to assist an individual. For example, the family of an ill child with a rare disease requiring expensive medical treatment, potentially in another country, will establish a limited purpose charity, as it is the only means available to the family to cover the costs of treatment. Moreover, in such single, limited purpose charities, the fund raising often consists of one event, and under the proposed changes, the charity (in this case, the family) would not know that their organisation was tax exempt until after the event. This would likely hinder the establishment of such single, limited purpose charities, which nonetheless fulfil altruistic and public benefit objectives. The idea, therefore, that an action for the public benefit must either satisfy the concept of the 'public' or a 'sufficient section of the general community', is one which requires further examination.

CSA recognises that the concept of 'for the public benefit' lies at the core of the definition of a charity in the *Charities Bill 2003* and believes that this is an important element for establishing a charity. In clarifying the meaning of the terms 'public' or 'sufficient section of the general community', CSA believes that it would be unreasonable to extend these definitions to exclude single, limited purpose events, which may be charitable. CSA is of the view that the assessment of public benefit is a measurement of how widely the money is collected, rather than how widely it is distributed.

Current taxation law provides that organisations may attract a tax concession from the Australian Tax Office (ATO) where a charitable purpose can be established for a single, limited purpose event. However, this process presents two major hurdles to organisations seeking to utilise this process; firstly, there is no certainty that the concession will be granted, and secondly, the organisation needs to navigate taxation law and a different definition of charity (to the common law) in order to achieve the tax concession.

CSA, therefore, believes that flexibility in the interpretation of charity should be provided by the ACNC. The ACNC should be charged with the power to:

- accept applications for single, limited purpose charities
- issue regulatory guides and guidance notes which can assist charities with single, limited purposes to understand if their application is likely to achieve a tax exemption with the ATO, by appropriately defining the meaning of 'public' or 'sufficient section of the general community' and 'for the public benefit'
- provide qualified approval of the single, limited purpose charity if its purpose aligns with the guidelines issued by the ACNC. CSA is of the view that in most cases the ATO will follow the ACNC ruling.

CSA reiterates that the ACNC is the appropriate organisation to define the meaning of 'public', 'sufficient section of the general community', and 'for the public benefit', and to provide assistance to those organisations seeking to meet the test. It is sufficiently independent of both the ATO and those seeking to raise funds to undertake this role. It also fulfils the educative role that the government has outlined for the ACNC. The ACNC should also be charged with providing guidance to charities about how to apply to the ATO for tax concessions.

(5) Could the term ‘for the public benefit’ be further clarified, for example, by including additional principles outlined in the ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales.

(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 it provides greater flexibility?

CSA acknowledges that there are many good resources from which examples and clarification for the term ‘for the public benefit’ could be drawn, including, for example, Part 3 of the *Charities Act 2006 (UK)*.

Notwithstanding this, **CSA recommends** that the ACNC should provide the relevant interpretations and guidance to charities on the meaning of ‘for the public benefit’.

CSA supports the idea that the ACNC, as the primary regulatory body, should be responsible for managing the statutory definition of charity. This would involve defining the factors which are relevant to the test ‘for the public benefit’ and issuing regulatory guides or explanatory materials to support the interpretation of the statute and its practical application to organisations. CSA notes that applicants for charitable status will generally not have the funds to access lawyers for an interpretation of a statutory or common law definition of charity, and should be able to go to the national regulator to seek assistance on this front. If clarifications of the statutory definition are also included in the statute, CSA is of the view that an unacceptable burden is placed on applicants to seek legal advice to ensure they are meeting the definition.

If the ACNC is responsible for managing the statutory definition of charity and whether applicants meet the test, this burden is removed. Moreover, the role of the ATO is also then clear, with the authority to regulate the appropriate point at which to collect revenue.

CSA opposes a statutory approach with respect to the provision of guidance on the meaning of public benefit. CSA supports the approach taken in England and Wales of codifying the principle of public benefit in the common law and then providing guidance, through the benefit of a regulatory body, such as the Charity Commission. This provides a flexible system which is capable of accommodating the diversity of the sector.

CSA believes that the ACNC provides this flexibility within the developing Australian model for charities. The ACNC is also then placed to make amendments to the boundaries of the meaning of ‘for the public benefit’ as and when changes are required.

(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?

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

(9) What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?

CSA believes that no organisation should be presumed to be acting in the public benefit. **CSA recommends** that all charities be required to articulate their charitable purpose in their constitutions, specifying how there is a ‘public benefit’ in their actions.

All existing charities should be required to submit an application to the ACNC for charitable status. However, in order to ensure that there are no further administrative burdens, organisations should be able to use the documentation which they have previously used to attain charity status and tax exemption. There should also be a transitional period for such applications.

In managing this process, CSA notes that the ACNC could issue a transitional licence to a charity if the ATO has already deemed an organisation to be a charity, they could have, for example, 24 months in which to apply and have that status confirmed by the ACNC. By asking charities to state the basis on which they perceive themselves as acting in the public benefit (for example, through provision of their constitution which sets out their dominant purpose), the ACNC has a document to which it can respond in assessing their status.

CSA notes that, under this model, some organisations may be deemed not to be charities. For example, where an existing organisation is unable to demonstrate how it serves the public benefit, the question arises as to whether that organisation is set up for the public benefit. CSA also notes that some organisations may find, through this process, that they are not-for-profit organisations but not charities.

CSA believes that the ACNC needs to play a central role in providing assistance to charities as to how they can demonstrate that they are 'for the public benefit'. This will involve providing guidance notes to assist charities, particularly the smaller charities.

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

CSA notes that the tension between a charity's purpose and activities is an important question for stakeholders in the organisation. Recent media attention has highlighted that there are instances where the activities and purposes of charitable organisations are not always appropriately aligned. For example, stakeholders often complain that they are not sure where their funding goes, whether it is to further the charitable purpose or towards paying for external service providers, or administrative costs.

However, there are many instances where the activities of the organisation, while not directly reflective of the dominant purpose of the organisation, are benefiting the dominant purpose.

As noted above, the issue is how the funding is used to further the organisation's dominant purpose, rather than to how the funds are raised or expended. Administrative costs support a charity's purpose. Commercial activity could also be to support the charity's purpose.

CSA notes that the actual use of funds is a matter that charities should be required to include in material distributed to raise funds or in annual reports. CSA believes that this can be achieved through implementing better governance reporting guidelines for charities. This open disclosure then allows donors to make an informed decision in the knowledge that a specific disclosed portion of funds raised may be utilised for administration or fund-raising.

CSA recommends that any governance report must cover, among other issues:

- statement of objectives of NFP organisation
- the amounts and sources of funding
- the activities that the fundraising supports

(11) Should the role of activities in determining an entity's status as a charity be further clarified in the definition?

CSA does not believe that the role of activities should be used to determine an organisation's status as a charity. CSA notes that the dominant purpose is the test for determining an organisation's status as a charity. CSA believes that 'activity' is a requirement which a charity should be required to report against (see our notes on governance reporting above under Q10). This short-form report could be a one or two-page document, and so would not be an onerous compliance burden for even small charities.

This governance disclosure should be publicly available so that any person seeking to engage with the charity in any capacity has access to the information.

(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?

CSA is of the view that, in many instances, the need to advocate on behalf of a public benefit issue is paramount to the operation of a charity. CSA believes that charities have a legitimate role to play in the formation of public policy.

CSA notes that what is important is that the dominant purpose question is satisfied by the political activism, that is, does the political activism support the furtherance of the charitable purpose? In this regard, it is important that the charity establish that any political actions they are taking are in line with their dominant purpose.

CSA would support the idea that a charitable organisation should be able to comment upon matters of public policy formation. CSA notes that there are times where an organisation needs to advocate in order to influence change. As an example, CSA notes that, previously, charities that wished to distribute leftover food to homeless and poor people were stifled in their ability to do so due to occupational health and safety regulations. However, after intense advocacy by charities, this restriction was somewhat relaxed, in order to allow for leftover food (within reason) to be distributed.

At the core of any political activism, however, should be a disclosure from the organisation about why the activism was necessary for the organisation to achieve its dominant purpose. CSA believes that disclosure to stakeholders (and the public) can provide good insight into why an organisation has taken a particular stance on a particular issue.

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

CSA does not support the idea that a charity can advocate for specific political parties, or in support or opposition of specific candidates for political office. CSA believes that this is a different issue from the idea of advocating for a particular public policy outcome.

(14) Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?

CSA supports the concept that a charity cannot be an individual, a political party, a superannuation fund, or a government body. However, CSA also believes that some clarification can be brought to the current broad definition through recognition that a charity can also be a partnership or a joint venture between organisations.

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

CSA leaves it for other submissions to address the adequacy of the existing definition of a 'government body' in the *Charities Bill 2003*.

(16) Is the list of charitable purposes in the Charities Bill 2003 and the *Extension of Charitable Purposes Act 2004* an appropriate list of charitable purposes?

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

CSA recommends providing a list of charitable purposes in legislation and, in a similar manner to the management of the test of 'for the public benefit', the ACNC should be charged with the power to update, change and amend the list of charitable purposes over time as necessary. That is, the regulator could expand the list of charitable purposes over time rather than this being undertaken through parliament.

CSA is of the view that the initial list of charitable purposes should refer not only to the Charities Bill 2003 but also to the UK and Irish lists in the first instance.

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

CSA recommends a single Commonwealth statutory regime for all charities by referrals of power from the States to the Commonwealth. Such a referral has already been successfully undertaken with company regulation and if undertaken in relation to charity regulation, responsibility (in the short term) for registration and ongoing regulation should rest with the ACNC. CSA leaves it to the various legal bodies' submissions to address the particular issues inherent in the process to achieve harmonisation of the definition of charity across the *Charities Bill 2003*, and other Commonwealth, State and Territory laws. However, CSA notes that, given that the States have already approved the establishment of a national regulator, the ACNC, the referral of power should be equally supported by the States.

(19) What are the current problems and limitations with ADRFs?

CSA leaves it for other organisations who are involved in the management of ADRF's to provide comment in response to the current problems and limitations which exist.

(20) Are there any other transitional issues with enacting a statutory definition of charity?

CSA reiterates that there will be a variety of transitional issues which will arise during the enacting of a statutory definition of charity. However, in managing the transitional issues, CSA supports the idea that a transitional period could be adopted to assist organisations with changing from various state-based systems to a federal one. CSA notes that this will need to include a wide timeframe which factors in the width and depth of the charity sector.

CSA recommends a five-year transition for those charities that meet state definitions, but that new organisations seeking charitable status should have to apply immediately to the ACNC to confirm if they meet the test.

Providing a reasonable time frame to those under State authority allows them to clarify for themselves if they fit the definition of charity, using the guidance issued by ACNC for this purpose. It also allows them to clarify if they are NFP organisations rather than charities, which will involve a loss of their tax exemption.

CSA also recommends that all existing charities should register with the ACNC in the first place, by lodging with the ACNC information on:

- statement of objectives of NFP organisation
- the amounts and sources of funding
- the activities that the fundraising supports
- the processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support, expenditure and staff and volunteers
- details of directors and secretary(s) and their remuneration (including information on whether non-executive board members are paid and whether there are board committees or equivalent)
- disclosure of all related-party interests.

CSA notes that the ACNC will not be able to review all charities at the same time, but that a process of review can be commenced. The ACNC should have the right to prioritise its review of organisations and whether they meet the definition of charity.