



**The Institute of  
Chartered Accountants  
in Australia**

23 December 2011

Mr Chris Leggett  
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Dear Chris

### **A Definition of Charity – Consultation Paper**

The Institute of Chartered Accountants in Australia (the Institute) appreciates the opportunity to comment on the consultation paper entitled "A Definition of Charity" (the Consultation Paper) released by the then Assistant Treasurer, the Hon Bill Shorten MP, on 28 October 2011.

Part A of the submission begins by highlighting some important overarching issues and Part B provides responses to the specific questions raised in the Consultation Paper.

Please do not hesitate to contact me on (02) 9290 5623 or Kerry Hicks on (02) 9290 5703 if you need clarification in respect of any of our comments.

Yours sincerely

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The comments from the Institute of Chartered Accountants in Australia (the Institute) on the consultation paper entitled "A Definition of Charity" (the Consultation Paper) are set out below.

### Part A - General comments

Prior to addressing the questions put in the Consultation Paper, we would like to make some general comments about certain high level issues that we believe should be examined as part of this consultation process:

- The proposed definition of charity is largely a codification of case law developments and Australian Tax Office [ATO] guidance. A legislative statement that this is a codification of the Common Law and should be interpreted accordingly would perhaps be helpful in practice.
- In some places it is not clear whether the Consultation Paper is discussing the term 'charity' or 'not-for-profit'. It will be important in developing the framework for the draft legislation that Treasury is mindful of the need to delineate between the two concepts. As you will be aware, charities are generally regarded as a sub-set of the broader not-for-profit designation (i.e. in that all charities are not-for-profits but not all not-for-profits are charities).
- It is difficult for us to fully appreciate the method behind conducting three separate, but interrelated, consultation processes as part of this broad reform package. That is, as noted in the Consultation Paper, not only is:
  - (i) a separate "not-for-profit" test being developed as part of the proposed legislation on restating the "in Australia" special conditions for various tax concessions; but
  - (ii) the treatment of "unrelated commercial activities" [UCA] of not-for-profit entities (intended to apply from 1 July 2011) is also being considered by the Government under a separate process.

The Institute's view is that development of all of these measures is inextricably linked and therefore they should be examined as part of one consolidated process. This would ensure that there is lower risk of eroding the principle recognised in the *Word Investments* case, namely, that "not-for-profit" includes activities undertaken which generate a profit where that profit is applied for charitable purposes.

Similarly, the Institute is of the view that the UCA measures ought to be considered in the context of, and in conjunction with, establishing a statutory definition for charities rather than being considered in isolation.

We would support therefore, the deferral of the development and commencement of the UCA and not-for-profit rules to align with the development and commencement of a charity definition. Not doing so may otherwise jeopardise the potential benefits flowing from the introduction of a statutory definition for charities, especially in the context of the compliance burdens that may be imposed on not-for-profit entities.

- We believe that there is a need for information to be given on the proposed supervision and appeal processes for approval or disapproval of organisations. In particular, whether the Australian Charities and Not-for-profit Commission [ACNC] will act in all of these roles or whether other agencies (for example the Administrative Appeals Tribunal) will have a role. While it appears that the ATO will manage the taxation aspects after the designation has been applied to a particular not-for-profit, how will assurance processes operate in relation to the maintenance of that status and would the ATO's removal of taxation privileges automatically mean the not-for-profit would have its designation removed by the national regulator?

As a related issue, charities will no longer be able to obtain a private binding ruling [PBR] from the ATO to obtain greater certainty on eligibility for charity status, as there will be no facility for this in the proposed ACNC Bill. This seems to be a worse outcome than is currently the case under



existing law as a PBR would be limited to aspects that the ATO is responsible for. The Institute's view is that there should be a procedure for charities to be able to obtain the same level of certainty through private binding guidance from the ACNC as is currently available in relation to the law that is administered by the ATO. It is also important that proposed charitable entities are able to discuss, consult and seek confirmation of eligibility, should they wish to do so prior to the charitable entity being established.

- In a related sense, we are concerned about the potential compliance burden for charitable organisations who will be required to comply with three different sets of rules (until the law is harmonised). Firstly, in meeting the definition of a charity under the ACNC Bill; secondly, in meeting the requirements imposed by the ATO for being a charity that is eligible for a tax concession; and thirdly, in complying with the obligations imposed by each State in order to be a 'charity' for State taxation purposes.

We believe that it is critically important that a harmonised definition of a charity applies (i.e. instead of, effectively, two federal government definitions of what constitutes a 'charity' alongside a separate definition within each State).

The balance of this paper serves to address the questions raised in the discussion paper directly.

## Part B - Consultation Paper questions

### 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?***

The Institute supports retaining the 'dominant purpose' requirement.

We consider that the term 'exclusively charitable' is too onerous and highly restrictive. In our view, such an approach would impose an unnecessary compliance burden on entities to consider the impacts of purposes that may otherwise be 'ancillary' or 'incidental' to a dominant charitable purpose.

Notwithstanding, should an 'exclusive' test be adopted (which we do not support), it may be necessary to have certain exceptions and also be able to adapt to ongoing change in community needs without having to regularly amend the legislative definition.

Importantly, the introduction of an 'exclusive' type test must permit charities to undertake UCA provided the profits are applied for charitable purposes.

### 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?***

We cannot provide a view based on the information in the Consultation Paper. However, in line with our response to question one above, we consider that it is valid for peak bodies to continue to be able to be classified as charities. Additionally, given the role of some peak bodies in supporting, developing and enhancing the work of charitable entities of their members, we see that the definition can be extended to include peak bodies activities notwithstanding they may be 'indirect', in that they provide services to charities which in turn provide services or undertake activities that would be classified as charitable.

The Institute notes that peak bodies are highly likely to be affected by a decision on whether to maintain a 'dominant' charitable purpose test versus an 'exclusively' charitable purpose test (which we do not support), and the extent to which advocacy activities constitute an excluded purpose.



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

Any statutory description of the public benefit test needs to have sufficient flexibility in its design to suitably accommodate the provision of benefits or services by a wide range of different not-for-profit organisations whose target groups vary considerably in size and scope.

Care needs to be taken to ensure that small scale not-for-profit groups, with limited resources, are not inadvertently compelled to provide benefits to a broader group than they are capable of. Furthermore, such groups should not be compelled to amalgamate with other bodies, simply to satisfy a 'sufficient section of the general community' test.

**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?**

We note that there are discussions underway to establish Indigenous Community Development Corporations, which can be structured as vehicles for beneficiaries of funds arising from native title ownership. If this occurs then we believe this will achieve this goal and not require a reference in the Charities Bill. We would be concerned if the definition sought to cover every circumstance as this would make it difficult for many parties who are to continue to be subject to legislation and regulation that falls outside of the ACNC's purview.

**5. Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in 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?**

The current 'presumption' of public benefit puts the onus on a government authority to demonstrate the absence of such benefit and any proposed removal of this presumption would put the onus on the entity to demonstrate 'public benefit'. This may impose an additional compliance cost for affected entities.

**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?**

Yes, we believe it would.

**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?**

As noted above, the current 'presumption' of public benefit puts the onus on a government authority to demonstrate the absence of such benefit and any proposed removal of this presumption would put the onus on the entity to demonstrate 'public benefit'. This may impose an additional compliance cost for affected entities.

**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 materials and some post-application consultation. Extensive training in the first instance would be required and then key guidance for charitable activities and industry groupings would take the form of articulated principles and case studies and other examples.



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

We do not believe that religious or education organisations will have any greater issues than other organisations, provided that the issues covered in our earlier answers regarding purpose and public benefit are incorporated into the ACNC's resolution of this issue. Should there be particular issues, consideration could be given to having the legislation deem such organisations to have a public benefit purpose, similar to that afforded to self-help groups and closed or contemplative religious orders under the *Extension of Charitable Purpose Act 2004*.

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

We support the existing common law concept that the activities of a charity be in furtherance or in aid of an entity's charitable purpose in order for it to qualify as a charity.

However, it will be important to ensure that the concepts of "purpose" and "activity" are clearly separated in the design of the statutory definition of charity, in order to ensure that there is no confusion as to which concept is applicable in a particular context. For example, in relation to question one above, the maintenance of a "dominant purpose" test should not adversely impact not-for-profit organisations undertaking commercial activities where the proceeds of such activities are directed at furthering the charitable purposes of the organisation.

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

We support the Board of Taxation's comments that there is a need to limit confusion between activities and purposes in the proposed statutory definition of charity, and our response to question ten is also relevant to this question.

We tend to support the approach taken in the Charities Bill 2003 of identifying "disqualifying" activities, such as the proposed section 8 of the Charities Bill 2003, as indicators of factors that will make an entity ineligible. This approach would be easier to administer by not-for-profit entities as well as relevant regulators.

**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?**

Our view is that advocacy should continue to be permitted but that party political activities should not be permitted. We support a change as noted in paragraph 112. However we consider that the paragraph (c) of paragraph 8(2) in the Charities Bill 2003 (as noted in paragraph 103 in the Consultation Paper) should be removed from an exclusion. We consider this to be policy advocacy rather than political activity.

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

Please refer to answer to question 12.

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

In general, we agree with clarification of the type of legal entity to ensure charities are not inadvertently classed as government entities or fall under inappropriate legislative requirements (e.g. the case of a proprietary company being used for charitable purposes). However, beyond this we do not support any prescription of the type of entity. We believe that the outcome here should be achieved by definition and not by prescription of legal entity types. Additionally, there are many entity types that have grown up out of common law for very good reasons and it is highly unlikely that the ACNC will be in a position to develop legislation, regulation and policy relative for all of these or even be in a position to identify them all. Further,



the various regulators and existing legislation will only be compounded where the ACNC attempts to add to the regulatory requirements of those entities already acting under settled law.

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

Yes. We agree with the comments in the Consultation Paper that the concept of 'control' will need to be carefully defined (in terms of whether a body is 'controlled' by the Commonwealth, State or a territory).

**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?**

Yes, but we suggest adding the Pemsel list.

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

Please see response to question 16 above.

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

This is an issue for the Commonwealth and State/Territory Governments and agencies to consider after agreement on the principles.

However, the Institute has a concern with the two stage process referred to in paragraph 142 – that is, describing the entity firstly as a registered charity before seeking to narrow those charities that are being identified as eligible for a tax concession. We believe that this will not assist in achieving a harmonised definition of a charity as instead there would be two Commonwealth Government definitions of what constitutes a 'charity', as well as a separate definition in each State jurisdiction.

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

ADRFs should be incorporated into the general definition of charity. We do not see a need for a separate class of charity.

**20. Are there any other transitional issues with enacting a statutory definition of charity?**

The transitional treatment of pre-1 July 2013 entities with charitable status is unclear in the Consultation Paper. It suggests that the statutory definition may be applied to pre-existing charities on either a self assessment basis or may be reviewed by the ACNC over time. We consider that this would be an unjustified compliance burden for entities that have complied with existing requirements.

We are of the view that the proposed statutory definition should have prospective operation for entities created from 1 July 2013 or for operations commenced from 1 July 2013 for pre-existing dormant entities.

If contrary to the submission above, existing organisations will be transitioned into the proposed statutory definition, this should be subject to specified milestone triggers, such as a significant variation to the constitution of the entity (for example, amendments to the entity's objects clause or distribution clauses). Otherwise, there will be an enormous resourcing burden placed on the ACNC as well as the compliance burden placed on individual entities.

Clarity will be needed on the time available for an existing charity to meet the new definition. We envisage that some organisations may need to amend their constitutional documents and possibly structures to accommodate the new regulation of charity. We suggest that at least 12 months are given for existing organisations to comply but ideally the time period allowed should be much longer. Additionally, as stated elsewhere in this response, we consider that adequate resources for training be provided to ensure the transition is as smooth and beneficial to the sector as possible.

