MOORESLEGAL

Submission on the Consultation Paper: *Definition of Charity*

9 December 2011

SUBMISSION ON THE STATUTORY DEFINITION OF CHARITY

1. INTRODUCTION

1.1 Moores Legal is an Australian law firm with a team that practices exclusively in the area of Not for Profit ("NFP") law and governance and advises a wide range of organisations in the NFP sector.

1.2 This submission is based on our understanding of the history, policy, case law and client needs of the NFP sector and the application of NFP law.

1.3 Moores Legal welcomes the Government's intention to introduce a statutory definition of 'charity'. We agree that this will serve the policy objectives of clarity, transparency and greater harmonisation with State and Territory law.

1.4 We submit, however, that there are a number of issues raised in the consultation paper that warrant closer consideration.

1.5 We have not addressed every question in the consultation paper but have focussed our responses on a selection of questions.

Allocation of functions – ACNC & ATO

We wish to begin by raising a threshold issue which has been introduced by the consultation paper but not raised in any of the consultation questions.

The Paper states at paragraph 32:

> *"From 1 July 2012, the Australian Taxation Office (ATO) will endorse an entity as eligible to access individual tax concessions. The ATO will no longer determine whether an entity is a charity but will instead accept the ACNC's registration and then only assess whether other special conditions contained in the taxation laws are met."*

Based on statements made in the Federal Budget Papers, the *2010 Productivity Commission Report,* the *Final Report on the Scoping Study for a Not For Profit Regulator* and the example of other jurisdictions, we had been under the impression that once the ACNC came into operation, the ACNC alone would determine an entity's not-for-profit status and that its income tax exempt status would follow. These materials are referred to below.

Budget Paper

The Federal Budget Paper No. 2 announcing the establishment of the ACNC stated:

> *"The Commissioner of the ACNC will be appointed by the Government and report to Parliament through the Assistant Treasurer. The Commissioner will have* ***sole responsibility*** *for determining charitable, public benevolent institution, and other not-for-profit status for all Commonwealth purposes.*
> *…*
> *From 1 July 2011, the ATO will structurally separate its role of determining charitable status from its role of administering tax concessions, in preparation for the establishment of the ACNC. The Commissioner of Taxation will retain responsibility for* ***administering*** *tax concessions for the not-for-profit sector."*

We took "administering" to mean auditing the continuing entitlement to tax concessions, not being the gateway to concessions.

Recommendations of the Productivity Commission Report

The consultation paper regularly refers to the 2010 Productivity Commission Research Report, *Contribution of the Not-for-profit Sector* ("PC Report").

Recommendation 6.5 of the PC Report was that:

> *"The Australian Government should establish a one-stop-shop for Commonwealth regulation…. The Registrar [now the Commissioner of the ACNC] will undertake the following key functions: …* ***assess the eligibility of not-for-profit organisations for Commonwealth tax concession status endorsement*** *and maintain a register of endorsed organisations."*

Recommendation 6.4 states:

> *"****Responsibility for endorsement for Commonwealth tax concessional status for not-for-profit organisations and maintaining a register of endorsed organisations should sit with the Registrar for Community and Charitable Purpose Organisations****. To retain endorsement for Commonwealth tax concessions, endorsed organisations should be required to submit an annual community-purpose statement to the Registrar which would be accessible to the public.*
>
> ***The Australian Commissioner for Taxation should have the right to seek a review of decisions of the Registrar in relation to the endorsement of not-for-profit organisations for tax concessional status****. The Commissioner should also have the power to issue a directive to the Registrar for the dis-endorsement of an organisation where there has been a breach of taxation compliance requirements."*

The implication of these recommendations is that the ACNC would determine not-for-profit status and therefore entitlement to tax concessions. This is the model followed in comparable jurisdictions as discussed below.

Scoping Study

Furthermore page 29 of the *Final Report on the Scoping Study for a Not For Profit Regulator* released by the Assistant Treasurer in April 2011 states some of the findings as follows:

> *"****A government body should be given the responsibility to endorse and register*** *NFP entities. Registration should be recognised by agencies at the Commonwealth, state and territory levels.* ***This would lead to the greatest reductions in compliance and administrative burden*** *from both the sector's and governments' perspectives.*
>
> *An NFP regulator would be best placed to determine the status of NFP entities. The NFP regulator would oversee the performance of the sector and collect relevant information on the financial and operational performance of NFP entities.* ***This information should be used as a basis to determine an entity's NFP status,***

register entities and monitor entities ongoing eligibility *to operate under a specific NFP status. NFP entities should be able to apply to have their status determined and be registered on a voluntary basis, noting that they would need to be registered to access government support."*

Again this implies that the ACNC's determination will determine its entitlement to tax concessions.

Other Jurisdictions

The consultation paper refers at length to the experience of other jurisdictions in introducing a statutory definition of charity.

However, the paper does not note that in each of the overseas jurisdictions cited there is no duality of function between the Charities Regulator and the Revenue Regulator as is proposed for Australia.

In the jurisdictions referred to by the paper (England and Wales, Scotland, Ireland, Northern Ireland, New Zealand and Canada) there are no additional "special conditions" assessed by the Revenue Regulator. While the Revenue Regulator will generally register a charity for access to tax concessions once the Charities Regulator has determined that the entity is a charity, there are not additional conditions.

This is achieved in two ways:

1. The conditions in the Charities Act and the Income Tax Act in those jurisdictions mirror each other; or

2. The Revenue Regulator automatically accepts the findings of the Charities Regulator and registers the entity for income tax exemption.

New Zealand adopts the first approach, whereas England and Wales, the Republic of Ireland, Northern Ireland, Scotland and Canada adopt the second approach.

We recommend that the Government adopt one of the above approaches. It is not clear why another approach would be adopted given that it has not been advocated by any of the Government enquiries and reports to date, and is not adopted by any jurisdictions similar to Australia.

Policy Objectives of the ACNC

In addition, to the expectations created by the above materials and jurisdictions, we submit that it is not consistent with the policy objectives of creating the ACNC for the ATO to determine whether the special conditions have been met.

Two of the reasons the establishment of the ACNC was proposed were:

1) To overcome the "*perceived conflict of interest within the NFP sector between the Commissioner of Taxation's revenue collection focus and his role as default NFP regulator.*[1]"

2) To create a 'one-stop shop regulator' with resultant efficiency gains.

[1] *Final Report on the Scoping Study for a Not For Profit Regulator*, April 2011, p.66

We are concerned that if the ACNC determines whether or not an entity is a not-for-profit and the ATO determines whether the special conditions are met, neither objective will be met.

Firstly, the ATO in exercising its discretion as to whether the special conditions have been met, is in a potential conflict with an interest in finding that the special conditions have not been met.

Secondly, another objective in creating a one-stop shop was to reduce the need for not-for-profits ("NFPs") to deal with multiple regulators at the Commonwealth and State or Territory level. However until the State or Territory Governments refer powers to the Commonwealth, the creation of this "dual system of endorsement" will only add a layer of regulation. Therefore for example, a company limited by guarantee registered in Victoria will be required to deal with ASIC, Consumer Affairs Victoria in relation to fundraising applications, the State Revenue Office for payroll tax exemption, the ACNC and the ATO.

We cannot see how the addition of another regulator into this process will make the system more efficient. The process of applying for endorsement is likely to take more time and be more inefficient because the ACNC and the ATO are likely to require similar information in making their independent assessments.

We appreciate that the "in Australia" special conditions are being considered by Treasury and a second set of draft legislation will be released shortly. However under the first draft, one of the proposed conditions for income tax exempt entities under Division 50 is that the entity must use its income and assets solely to pursue the purposes for which it was established" – proposed s.50-50(3)(b). It appears to us that the information used to assess this condition, would be similar to the information required by the ACNC to determine whether the entity is a charity (or other tax exempt entity).

One of the stated aspirations and priorities for action set out in the *National Compact* was to "reduce red tape and streamline reporting." The duplication involved in liaising with both the ACNC and ATO is likely to increase red tape and increase reporting.

Practical Application

Moores Legal recently submitted an application to the ATO for endorsement of a proposed public ancillary fund as a Deductible Gift Recipient ("DGR") and Taxation Concession Charity ("TCC"). We were told that in anticipation of the ACNC, the ATO was processing the DGR application and the structurally separate "charities unit" of the ATO would process the TCC application.

It is not clear to us why the DGR application would not be processed by the "charities unit". We are concerned that this model will be used when the ACNC comes into operation. We understand that the ACNC is to be the regulator of charities and other not-for-profits, therefore why would it not also determine whether an entity is a public ancillary fund and therefore a DGR?

Some of the information required to process the TCC and DGR applications will overlap. For example, a copy of the Trust Deed of establishment, details of the trustee, some financial information, any intended transactions with related parties. If a prospective public ancillary fund must make separate application to the ACNC and ATO, it will need to provide this information to both agencies and the functions of both agencies will overlap. In our view it would a more efficient use of resources by the NFP, the ATO and ACNC for both applications to be dealt with by the ACNC. We refer you again to our comments regarding the aspirations of the *National Compact.*

Recommendation 1:

We recommend that the ACNC determine both the charitable or NFP status of an entity and whether or not it meets the special conditions.

Question 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?

Exclusively charitable purpose or dominant purpose

In our view replacing the current "dominant purpose" requirement with a requirement that a charity have an "exclusively charitable purpose" is at risk of being misunderstood by the sector and other stakeholders.

The case law indicates that to be a charity, an entity must have a charitable purpose. It cannot have both charitable and non-charitable purposes unless the latter are incidental or ancillary. The articulation of these principles over time has led to a variety of terminology to describe the requisite charitable purposes of the entity. For example, the case law has said that the entity must have an "exclusively", "main", "chief", "dominant", "primary", "predominant", "fundamental", "leading" or "paramount" charitable purpose or purposes. Some of these terms have been used in other jurisdictions – including the UK, Canada and New Zealand.

In our view, it is appropriate that Australia use the most recent articulation by the High Court of Australia.

In *Word Investments,* the majority of the High Court stated:

> *"In examining the objects, it is necessary to see whether its* ***main or predominant or dominant*** *objects, as distinct from its concomitant or incidental or ancillary objects, are charitable."*

The above passage was quoted by the majority of the High Court in *Aid/Watch,* the most recent High Court decision on charitable law.

In the same case of *Aid/Watch*, Kiefel J who was in the minority stated:

> *"Whether an organisation has charitable purposes is determined by reference to the natural and probable consequences of its activities, as well as its stated purposes. In examining those purposes and their purported effectuation in the activities of the organisation, attention is directed to the* ***main or predominant*** *purposes, rather than those which are ancillary or incidental."*

Further, paragraph 26 of the finalised Taxation Ruling on income tax and fringe benefits tax for charities, TR 2011/4, states:

> *"An institution is charitable if:*
>
> - *its only, or its **'main or predominant or dominant' purpose** is charitable in the technical legal meaning,[22] and*
> - *it was established and is maintained for that charitable purpose.[23]*
>
> *In this Ruling, we typically refer to the required purpose as the 'sole purpose' of the institution because a charitable institution cannot have an independent non-charitable purpose (regardless of how minor that independent non-charitable purpose may be).[24]"*

This passage of the Ruling cites the majority decision in *Word Investments*, which was handed down after the *Charities Bill 2003* was drafted.

An alternative would be for the Bill to state that a charity must have a charitable purpose or purposes only, other than any purposes which are incidental or ancillary.

Recommendation 2:

We recommend that the Bill state that:

"A charity must have a main or predominant or dominant purpose that is charitable."

OR

"A charity must have a charitable purpose or purposes only, other than any purpose which is incidental or ancillary."

This will mean that the phrase will be interpreted with reference to the *Word Investments* and *Aid/Watch* decisions and any future decisions of the Court. This will therefore achieve the Government's policy objective of "providing increased certainty and consistency on the meaning of charity."

More than one charitable purpose

As a separate issue, we recommend that the statutory definition of charity explicitly state that a charity may have more than one charitable purpose as is the position at common law. This is also recognised by the ATO in TR 2011/4, paragraph 5.

The *Charities Bill 2003* indicates at section 4(1)(b)(i) that:

> *"a reference in any Act to a charity, to a charitable institution or to any other kind of charitable body is a reference to an entity that has **a** dominant purpose that is charitable."*

This may imply that a charity can have only one main or dominant or predominant purpose rather than multiple charitable purposes.

Recommendation 3:

We recommend that the Bill state that a charity may have more than one charitable purpose.

Question 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 recommend that the legislative definition explicitly state that peak bodies can be charities.

The case of *Social Ventures Australia Limited v. Chief Commissioner of State Revenue* [2008] NSWADT 331 was decided by the New South Wales Administrative Decisions Tribunal and therefore is not binding in other States or Territories or at a higher level in the New South Wales Courts.

Including peak bodies in the statutory definition will serve to clarify the legislative intention that they be included within the realm of charity.

Recommendation 4:

We recommend that the legislative definition of charity explicitly encompass "peak bodies".

Question 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?

It is the view of Moores Legal that the introduction of a public benefit test would have serious implications for the Not for Profit Sector. We do not recommend it.

Resource Allocation

Experience from overseas shows that the introduction of a public benefit test imposes significant administrative and compliance costs on charities and the regulator.

An example is the Church Missionary Society ("CMS"), a well-credentialed organisation established in 1799 by William Wilberforce and John Newton. It is evident that significant time and resources were required by both CMS and the Charities Commission to undertake

the CMS public benefit assessment which resulted in the 10-page report[2] produced by the Charity Commission for England and Wales ("the Commission") confirming what was already known – that CMS was a charity for the public benefit.

Charities for the Advancement of Religion

The removal of the presumption of public benefit and requirement to positively demonstrate public benefit is likely to cause difficulties where the benefit is intangible. For example, for charities established for the advancement of religion, this can lead to the secularisation of the debate. This has arisen in the United Kingdom.

The requirement to prove public benefit is likely to lead to organisations placing a greater emphasis on the tangible benefits because it is difficult to demonstrate the benefits of prayer, religious teaching, worship and evangelism.

An example of this is the basis upon which the CMS was found by the UK Charities Commission to have satisfied the public benefit test. The CMS submission was accepted to have satisfied the test because it had a combination of tangible and intangible benefits which, in their "totality" were found by the Commission to satisfy the test. The emphasis on intangible benefits is of concern because it will effectively require the articulation of the public benefit of religious organisations in secular terms. It suggests that religious organisations will be regulated by a law that does not properly fit or accommodate their very reason for existence but rather will create a pressure to reframe what they do and why they exist. This is not ideal and should be avoided.

Julian Rivers comments on the issues created by a public benefit test for religious organisations in *The Law of Organised Religions: Between Establishment and Secularism* (2010), Oxford Scholarship Online (see pages 162-166). He argues that the statutory guidance of the Charity Commission of England and Wales "displays a subtle but strong secularising tendency". He states that (p165):

> "…there is a deep-rooted instrumentalization [sic] of religion to Governmental ends. This has been achieved by … requiring an additional demonstration of 'public benefit' in terms of a beneficial moral impact on society, that is according to modern mores. If one takes this seriously, it would not longer be sufficient to show merely that a place of worship is open to the public. Rather, it would need to satisfy the public impact test that the religious worship taking place makes a worthwhile moral contribution to society as a whole. There are even suggestions that religious organisations need to provide evidence of this contribution … This re-interpretation of the law is strengthened by the view that adherents of one religion do not count as a section of the public, which assimilates all religious belief to private club membership…."

This is not a desirable outcome for religious organisations which constitute a significant proportion of the NFP sector.

It is also inconsistent with the *Extension of Charitable Purposes Act 2004* (Cth) which recognised the intangible benefits of prayer by expressly providing for closed or contemplative religious orders to be found to be charitable where they provide prayerful intervention at the request of the public.

[2] *Church Mission Society - A public benefit assessment report by the Charity Commission*, July 2009

Educational Institutions

The introduction of a public benefit test has similarly undesirable implications for educational institutions. Where it has been introduced in the United Kingdom it has been highly contentious, prompted extensive litigation, and resulted in a complex judgement. After 108 pages of reasoning, the Tribunal concluded their final remarks in *The Independent Schools Council v The Charity Commission for England & Wales & Ors* [2011] UKUT 421 (TCC) (at 260):

> "Our Decision will not, we know, give the parties the clarity for which they were hoping. It will satisfy neither side of the political debate. But political debates must have political conclusions, and it should not be expected of the judicial process that it should resolve the conflict between deeply held views. We venture to think, however, that the political issue is not really about whether private schools should be charities in legal terms but whether they should have the benefit of the fiscal advantages which Parliament has seen right to grant to charities. It is for Parliament to grapple with this issue. It is quite separate from the issues which have dogged the many committees which have, over the years, addressed reform of charity law but have never been able to come up with a definition of charity more use than the concept which developed through case law."

United Kingdom Experience

Finally, we quote from the conclusion of Debra Morris in *Public Benefit: the long and winding road to reforming the public benefit test for charity: a worthwhile trip or 'Is your journey really necessary?'* in *Modernising Charity, Recent Developments and Future Directions* (2010), Edward Elgar (p119-120)*:*

> "…the English experience has proved, so far, that it is difficult to remove certain aspects of the common law legacy, derived from the Preamble to the 1601 Act and subsequent case law. Moreover, it is unclear, as yet, whether or not it would be desirable to do so. Public benefit, in particular, is a complex concept, deriving from case law decided over several centuries. There are many principles to be considered which have to be delicately balanced, and some of these apply to some heads of charity and not to others.
>
> Some would argue that the common law of charity, together with the public benefit component, has served society well and will continue to do so…
>
> So far, and it is admittedly early days, the English journey on the road to reform has been a bumpy one, whose ultimate destination may well prove in time to be somewhere very close to its departure point. It is hoped that other jurisdictions will learn from this experience and take a more straightforward route to their desired location."

Further, the experience of the United Kingdom, particularly in education and religion, leads to an unhappy allocation of resources and complexity by deliberate diversion of resources from core charitable work into "popular causes" for the purpose of establishing charitable status. For example, there is anecdotal evidence that independent schools in the United Kingdom make grants to disadvantaged schools simply to bolster their "public benefit" argument.

The conclusion we draw from the English experience is that the introduction of the public benefit test has been an unnecessary administrative and financial burden both on charities and on the Charity Commissioner. What benefit it achieves is yet to be seen. However the

experience suggests that it will lead to the secularisation of religious organisations and result in contested litigation which will not necessarily provide clarity on the meaning of "public benefit".

Our Recommendation

We recommend that the presumption be maintained. As it is a presumption, it can be rebutted.

We recognise that there is scope for further clarification around the disqualifying factors which would lead to the rebuttal of the presumption in any given instance - for example, private benefit and public harm or detriment.

The advantage of this approach is that it is easier to define and regulate the disqualifying factors than it is to articulate the intangible public benefits of charities. Focusing on improving clarity around the disqualifying factors is therefore likely to lead to greater clarity, greater consistency in decisions, and will consume less resources on the part of both charities and the ACNC.

Recommendation 5:

We recommend that the presumption of public benefit be maintained because of the difficulties in requiring a charity to positively demonstrate public benefit.

Question 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?

As discussed above, we recommend that the presumption of public benefit be maintained which will reserve the resources of the ACNC to focus on the rebutting of the presumption where there are prima facie "disqualifying factors", that is, private benefit and harm or detriment.

The allocation of vast resources to the ACNC to assist organisations to establish public benefit is not necessary if the law remains the same.

Recommendation 6:

We recommend that the presumption of public benefit be maintained and that the ACNC provide clarification in relation to the disqualifying factors.

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

Please refer to our response to question 7.

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

In our view there are significant issues with the requirement that the activities of a charity be in furtherance of or in aid of its charitable purpose.

Under the common law, a charity can have a non-charitable purpose if the purpose is *ancillary* or *incidental* to the charitable purposes of the entity.

Gibbs J, with whom Barwick CJ, Menzies and Walsh JJ concurred, in *Stratton v Simpson* said:

> *"It is established that 'an institution is a charitable institution if its main purpose is charitable although it **may have other purposes which are merely concomitant and incidental to that purpose'** or in other words if each of its objects is either charitable in itself or should be construed as ancillary to other objects which themselves are charitable. If however the **noncharitable purpose** is not merely incidental or ancillary to the main charitable purpose, the institution will not be charitable."*

Therefore because a charity may have non-charitable incidental or ancillary purposes, it may undertake activities in furtherance of the incidental or ancillary purposes.

For example, in the High Court case of *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375, the appellant's objects included the maintenance of philanthropic agencies and the preservation of civil and religious liberty. These were both found to be non-charitable objects, but in context, the High Court found them to be ancillary to the main object to advance religion.

In *Thistlethwayte's* case, the appellant's activities which furthered the non-charitable objects would not have been in furtherance of or in aid of its charitable purpose. They would have been in aid of its non-charitable purposes.

In our view the statutory definition of charity should not include a requirement that the charity not engage in **activities** that do not further or aid its charitable purpose. The High Court in *Word Investments* has clarified this issue by finding that consideration of the activities of an entity is a key component under the "holistic test" in determining whether the entity has a charitable purpose. We have detailed our views on this in response to other questions.

In our view a requirement that the activities of a charity be in aid of its charitable purpose would result in a constraint in the activities of charities when compared to current common law position.

We submit that drawing conclusions from activities alone is a denial of the key question of purpose. Many activities could disclose either a charitable or non-charitable purpose when an holistic analysis is made.

Recommendation 7:

We do not recommend that the Bill state that the activities of a charity must be in furtherance or in aid of its charitable purpose.

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

Before this question can be addressed, in our view it is appropriate to first ask whether activities should be considered in determining whether or not an entity is a charity.

The common law focuses on what the charitable **purpose** of an entity is. It only considers activities in the context of this question.

In *Word Investments,* Gummow, Hayne, Heydon and Crennan JJ found that a holistic test should apply in ascertaining the entity's purpose and stated at paragraphs 17, 25 and 34 respectively:

> *"It is necessary to examine the objects, and the purported effectuation of those objects in the activities, of the institution in question. In examining the objects, it is necessary to see whether its main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable."*
>
> *"In addition to what flows from the construction to be given to the memorandum of association, it is necessary to take into account the circumstances in which Word was formed."*
>
> *"To avoid doubt in future, it should be noted that it would not be enough that the purpose or main purpose of an institution were charitable if in fact it ceased to carry out that purpose…. the statute 'directs the inquiry to a particular time, namely, the year of income so that consideration must be given not only to the purpose for which the [institution] was established but also the purpose for which it is currently conducted."*

This approach was subsequently referred to by the Full Court of the Federal Court in *Commissioner of Taxation v. Aid/Watch Inc.* (2009) 178 FCR 423 at 429 [29] and was not queried by the majority of the High Court in the appeal *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, [4].

In our view it would be appropriate for the legislation introducing a statutory definition of charity to require that the entity has a "main or predominant or dominant" purpose that is charitable and then in a separate sub-section clarify what is meant by this.

For example:

> *"The entity's main or predominant or dominant purpose will be charitable if:*
>
> *(a) it was established for charitable purposes; and*
>
> *(b) it continues to be conducted for charitable purposes.*

In our view this is an accurate statement of the common law which appropriately takes into account the activities of an entity in determining whether or not it is for a charitable purpose.

Recommendation 8:

Further to recommendation 2, we recommend that the Bill include a statement such as:

"The entity's main or predominant or dominant purpose will be charitable if:

(a) it was established for charitable purposes; and

(b) it continues to be conducted for charitable purposes.

Question 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?

The consultation paper makes reference to the *Aid/Watch* case by stating in paragraph 105 that:

> *"The High Court, in the Aid/Watch decision, held that generation of public debate by lawful means, concerning matters arising under one of the established heads of charity, is itself an* ***activity*** *beneficial to the community. It also decided that there is no general doctrine in Australia that excludes political purposes from being charitable."*

The consultation paper when referring to *Aid/Watch* and in questions 12 and 13 refers to ***activities***. In contrast, the High Court decision focuses on whether or not the ***purposes*** of Aid/Watch Incorporated were charitable. The submissions of the two parties also focussed on the issue of purpose not activity.

The majority of the High Court stated at paragraphs 47 and 48 of the judgment:

> *"This is because the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a* ***purpose*** *beneficial to the community within the fourth head in* Pemsel*.*
>
> *…*

> *What, however, this appeal should decide is that in Australia there is no general doctrine which excludes from charitable* ***purposes*** *"political* ***objects****" and has the scope indicated in England by* McGovern v Attorney-General.*"*

Therefore it is incorrect to confine the application of *Aid/Watch* to activities rather than purpose.

If the legislature sees fit to prohibit charities from engaging in certain political pursuits, in our view it is preferable that it legislate that charities cannot be established for the pursuit of such ***purposes****.* Indeed this is how the *Charities Bill 2003* was drafted. It stated that the following were disqualifying ***purposes***:

- advocating a political party or case;
- supporting a candidate for political office; and
- attempting to change the law or government policy.

In our view as a result of *Aid/Watch,* the common law now regards the third purpose as being charitable if the attempt as change is in relation to a charitable purpose.

Recommendation 9:

We recommend that the Bill focus on purpose rather than activity, particularly as a result of *Aid/Watch.*

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

Arguably the *Aid/Watch* case does not necessarily prevent a charity from advocating a political party or supporting or opposing a candidate for political office.

During the hearing at the High Court, this issue was explored by the Court. Notably Chief Justice French said:

> *"You pitch your submissions, as I see them, at paragraphs 84 and following at a certain level of generality which avoids getting into the merits or demerits of particular issues by saying that public debate itself is a public good. Once you say that then the question is how do you exclude funding to a* ***political party*** *which has an agenda to improve administration of government, improve laws, and so forth?"*

The response of Mr Williams, counsel for the appellant, Aid/Watch Incorporated was:

> *"The answer is that there may not be an absolute prohibition. The answer may be that it depends upon the particular organisation with which one is concerned, the particular objectives which it has and a consideration of whether, in current times,*

those objectives can be seen to be – at least within the fourth class of Pemsel's Case *– in the public interest, or for a public benefit, I should say."*

The issue of advocating a particular political party was raised in the hearing but the Court did not make a finding on the issue because it was not directly relevant to the questions under consideration. It was not necessary to decide whether advocating in favour of or against a political party or candidate was consistent with the charitable purpose of generation by lawful means of public debate.

It is arguable that these purposes are charitable purposes. If they are drafted as being disqualifying purposes, a coherent and logical explanation as to why, must be articulated.

Recommendation 10:

If charities are to be prohibited from advocating a political party or supporting or opposing a candidate for political office, we recommend that this be expressed in the Bill as a disqualifying purpose rather than a disqualifying activity.

However, first we recommend that the legislature gives careful thought to why this ought to be a disqualifying purpose.

Question 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?

In our view the list of charitable purposes in the *Charities Bill 2003 and Extension of Charitable Purposes Act 2004* is not appropriate. It does not include those additional charitable purposes recognised by the common law after 2004.

The following ought to be included as charitable purposes:

1. The generation by lawful means of public debate regarding a charitable purpose; and

2. The promotion of physical and emotional fitness.

The first purpose was recognised by the High Court in *Aid/Watch* and we refer you to our response to question 12. The High Court's decision clearly focused on charitable purpose, not activities.

An alternative would be for the statute to state that the term "advancement" in the articulation of a charitable purpose, encompasses the generation of public debate.

The second purpose was recognised by the Administrative Appeals Tribunal in *Bicycle Victoria Inc v. Federal Commissioner of Taxation* [2011] AATA 444. The decision in this case was handed down on 24 June 2011 after the Draft Ruling TR 2011/D2 was published in May 2011 but before the ruling was finalised in TR 2011/4.

The judgment stated:

> *"It [Bicycle Victoria] is for the purpose of promoting cycling in all its forms and for the overall purpose of promoting fitness. That is a purpose that has been recognised as charitable. Therefore, I am satisfied that Bicycle Victoria is a charitable institution."*

The ATO in its Decision Impact Statement on the case said:

> *"The finding of the Tribunal that the applicant had a purpose of promoting cycling in all its forms and an overall purpose of promoting fitness, which is a charitable purpose, was open to the Tribunal on the facts.*
>
> *The ATO will apply the decision to institutions that promote an activity that is sporting or recreational in nature, if the facts indicate that the activity is a means by which a broader charitable purpose is achieved.".*

The Decision Impact Statement also indicated that this finding would be reflected in the finalised Ruling.

Paragraph 266 of TR 2011/4 states:

> *"An institution that promotes an activity that is sporting or recreational in nature can still be charitable if the activity is simply a means by which a broader charitable purpose is achieved. In* Bicycle Victoria Inc v. Federal Commissioner of Taxation *[2011] AATA 444, an association with objects of promoting fitness and well being by encouraging cycling in all its forms was accepted as charitable. The association ran behavioural change programmes including the Over 50s Riding Program and the Women's Cycling Program, promoted cycling as an activity and lobbied for the development of facilities for cycling. The Tribunal held that a purpose of promoting cycling in all its forms for the overall purpose of promoting fitness benefitted the general community, and was charitable."*

Therefore, if the statutory definition of charity does not list the promotion of fitness as a charitable purpose, it will be inconsistent with the common law.

During the hearing in the *Bicycle Victoria* matter, the encouragement of cycling was expressed as a "pill" prescribed in response to our sedentary lifestyle and the public health crisis created by obesity and the spectrum of physical and mental illnesses which result. Therefore in our view both the common law and the public interest would be served by inclusion of promotion of fitness as a statutorily recognised charitable purpose.

Recommendation 11:

We recommend that the Bill include the following as charitable purposes:

1. The generation by lawful means of public debate regarding a charitable purpose OR that the term "advancement" explicitly exbrace the generation by lawful means of public debate; and

2. The promotion of fitness.

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

In addition to the additional two purposes set out in response to question 16 and the list of purposes articulated in the *Charities Bill 2003* and the *Extension of Charitable Purpose Act 2004,* we recommend that the legislature give consideration to recognising the purposes statutorily recognised in similar jurisdictions:

1. the advancement of citizenship or community development – section 2(2)(e)of the *Charities Act 2006* of England and Wales;

2. the advancement of the arts, culture, heritage or science - section 2(2)(f)of the *Charities Act 2006* of England and Wales;

3. the advancement of public participation in sport - section 2(h) of the *Charities and Trustee Investment (Scotland) Act 2005*;

4. the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity - section 2(2)(h)of the *Charities Act 2006* of England and Wales;

5. the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage - section 2(2)(j)of the *Charities Act 2006* of England and Wales;

6. the advancement of animal welfare - section 2(2)(k)of the *Charities Act 2006* of England and Wales;

7. the promotion of the efficiency of the armed forces, or of the efficiency of the police, fire and rescue services or ambulance services - section 2(2)(l)of the *Charities Act 2006* of England and Wales;

8. the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended – section 7(2)(i) of the *Charities and Trustee Investment (Scotland) Act 2005;*

9. the advancement of environmental sustainability – section 11(h) of the *Charities Act 2009* (Ireland);

We also recommend that consideration be given to substituting section 10(1)(a) of the *Charities Bill 2003* which states "the advancement of health" with "the advancement of health or the saving of lives" to mirror the position in section 2(2)(d)of the *Charities Act 2006* of England and Wales.

Further we recommend the substitution of section 10(1)()f) of the *Charities Bill 2003* with section 2(2)(i) of the *Charities Act 2006* of England and Wales which states "the advancement of environmental protection or improvement."

In our view inclusion of the above will help to facilitate certainty for charities and minimise litigation to test the scope of the "catch-all" purpose "other purposes beneficial to the community."

If the legislature determines that the above purposes are beneficial to the community, we recommend that they be explicitly recognised in the statute.

Recommendation 12:

We recommend that the legislature consider including as charitable purposes, a number of the purposes recognised by similar jurisdictions, unless they are considered not to be beneficial to the Australian community.

Question 20: Are there any other transitional issues with enacting a statutory definition of charity?

There are transitional issues in enacting a statutory definition of charity as it is currently proposed.

As set out in our response to question 16, the list of charitable purposes set out in the *Charities Bill 2003 and Extension of Charitable Purposes Act 2004* is inconsistent with the common law because they do not include the findings of the *Aid/Watch* and *Bicycle Victoria* cases.

Therefore if the statutory definition of charity were enacted, organisations similar to Aid/Watch Incorporated and Bicycle Victoria Incorporated are at risk of losing their charitable status.

Recommendation 13:

We reiterate Recommendation 11.

Acknowledgements

This submission was prepared by Murray Baird, Suhanya Ponniah and Elizabeth Turnour on behalf of the Moores Legal Not for Profit team, with contributions from Libby Klein, Fiona Thomas, Aaron Farr, Jessica Sapountsis, Wendy Ooi, Belinda Newnham and Nikki Hughes.

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