

**Australian  
Not For Profit  
Accountants Network  
Inc.  
ABN 58 728 133 062**

*Our Ref: NEH:ab X:\Internal\Aust NFP Network\20111209 Definition of Charity submission.doc*

9 December 2011

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

Dear Sir/Madam

**Re: "Definition of Charity" submission.**

On behalf of the Australian Not-for-Profit Accountants Network we attach our submission on "A Definition of Charity".

Our Network comprises accountants in public practices, all of whom work substantially in the Not-for-Profit Sector.

Would you be good enough to confirm receipt by e-mail in due course?

Yours faithfully

A handwritten signature in black ink, appearing to read 'Noel Harding', written in a cursive style.

**NE HARDING**

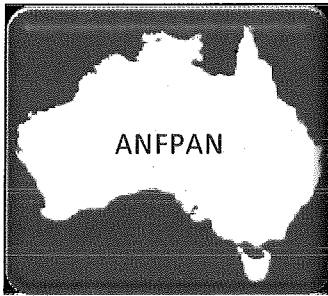
**Vice-Chairman**

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**AUSTRALIAN NOT FOR PROFIT**  
**Accountants Network Inc.**  
ABN 58 728 133 062

## **A DEFINITION OF CHARITY**

This submission is made on behalf of the Members of Australian Not For Profit Accountants Network Inc. being the Accounting Practices identified below:

Shedden & Green, – Sydney

K C Smith Chartered Accountant – Melbourne

Renshaw Dawson Lang – Melbourne

Saward Dawson – Melbourne

Harding & Thornbury - Perth

R J Campbell & Associates Accountants – Perth

Thornburys, – Perth

Powell Accounting – Launceston

Preece Martin – Launceston

D G Martin, Chartered Accountant – Darwin

There are also a number of other accounting practices around Australia that are associated with the Network and participate in our activities who would, we believe, share our views.

The Network comprises a loose but active group of accountants working largely in the Charity Sector that provides audit services together with a significant advisory service. We work with a very diverse group of charities ranging from the tiny and small to the very large. This gives us a broad perspective of the issues of concern within the sector, and its strengths and weaknesses.

### **RESPONSE TO CONSULTATION PAPER**

#### **INTRODUCTION:**

We are concerned that changes to the present Common Law position will, of necessity, create uncertainty to the Charitable Sector. It will be years before there is helpful case law provided by the Courts that will provide clear understanding of such changes. We consider that such a major change to the present position is not needed and should be avoided matter. In the context of the

many other legislative changes that are in the process of being introduced by the Government the new Definition will add heavily to the problems of the Sector, not lighten it. The Common Law tests have served the Sector well for many years and for by far the majority of charities there is not uncertainty.

The colloquialism "If it's not broke don't fix it" could well be applied here with benefit.

We can support a widening of the Definition from its Common Law position utilising a process similar to the process followed in the Extension of Charitable Purpose Act 2004 as that expanded the present law without removing the strength of the present Common Law position. There were good reasons for the Charities Bill of 2003 being withdrawn. We understand that the increase in complexity coupled with the legal uncertainty that would have prevailed were key factors. Even the Word Investments decision doesn't justify the extent of these new proposals.

We understand that the matter of the endorsement of DGR entities is still under discussion, with the possibility of tax deductibility being extended to all TCC endorsed charities being considered, arising from the recommendations of the Hendy Report. While not immediately a part of these consultation questions we felt a comment from practitioners working in the Charity Sector may be of assistance. It would be our expectation that tax deductibility would make little difference to the revenue support for many charities, including most Christian churches. Christian community giving may overall increase but only to a very modest extent. Research conducted in USA where tax deductibility is available to churches seems to support this. It would however be very beneficial to a large group of charities who fail the present tests for DGR endorsement. The change in taxation approach would, we suggest, not present a significant cost to revenue in terms of tax deductibility. However it would be a change that would be an encouragement to the Sector as a whole. We suggest that the volunteers working in the Sector would feel valued more for their efforts and the overall result would be a stimulating morale boost. It would also be helpful to justify the anticipated level of oversight that is envisaged from the ACNC for the Sector (which we commend).

Our comments on the Questions as set out below need to be read in the context of this Introductory Statement.

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?*

Yes. The question infers a ready acceptance of the 2003 Bill's core definition as expressed in Section 4 of that Bill. We do not affirm such an acceptance and confine this comment to the "dominant purpose" test aspect of that Section.

The "dominant purpose" test is already well understood and provides reasonable certainty to the Sector. The term "exclusively charitable" is a significant restriction which in our view will create much uncertainty. In our view it is probable the change would bar many worthy entities from Tax Concession Charity (TCC) endorsement. Many very small charities, particularly in the small rural communities, will be found to have problems primarily introduced by bureaucratic rigidity that pays too much attention to a mere form of words in an Act and pays little or no heed to the actual Objects and activities of the entities concerned, which on examination will be found to pass the "dominant" test. It causes us to ask whether the intent is to substantially reduce the number of qualifying charities. If so, this can only be read as a political objective which we submit has no

role in this Discussion paper as this warrants a more objective discussion concerning societal support for good works which have public benefit.

We support the continuance of "dominant purpose" as it has been well tested by the Courts. We see no benefit for either Government or the Sector from the proposed change.

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?*

The important role of peak bodies needs to be preserved. Where their focus is on advancing and supporting the Charitable Sector or a significant portion of it they should be granted TCC endorsement. There would be a benefit to a legislative change in this area to remove doubt.

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

The Melbourne University NFP Project (MUNFP) submission states "As there is significant complexity in the common law regarding this element of the public benefit test, there should be some clarification through the statutory definition. We recommend that the test be re-stated in the legislation in the following manner:

In determining whether there is a benefit for the public or a sufficient section for the public, regard should be had to:

- 1) the existence of wider benefits to the general community;
- 2) the nature of any limitations on the class to be benefited, including in particular:
  - a. the extent to which the class of potential beneficiaries is open in nature;
  - b. the extent to which such limitations are related to the nature of the charitable purpose; and
  - c. the practical need for such limitations."

We support the MUNFP comment. Our further comment is that the 2003 Charities Bill seeks to impose unreasonable restrictions on small groups (see Section 7.2 of the Bill). In Australia there are thousands of small rural communities. We submit that regard needs to be given to the size of the community that benefits from the activity. Size needs to be relative to the circumstances of the situation. Section 7.2 of the 2003 Bill needs to be removed or substantially modified in this regard.

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?*

This complex matter needs to be addressed with care or the real purpose of charitable benefit may be watered down.

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 question presumes support for the removal of the presumption of public benefit. The removal of the presumption of public benefit from the first three heads of charity is a position we do not support. We consider it would add a major administrative obligation on the ACNC at substantial cost without any evidence to show benefit from such a change. It would place the burden of proof on the Charitable Sector, again at additional cost, again without evidence of any benefit. It will present difficulties for those charities which will remain unaware of the changes, and that will inevitably be a very large proportion of the Sector, because of its size, and diversity. The ACNC will no doubt be given appropriate authority to review instances where there is a clear need. It would be a much simpler and more practical procedure to all concerned to leave the presumption of public benefit unchanged.

Any change needs to also consider the intangible and indirect benefits that may exist. For instance the spiritual benefit of prayer, not only to religious groups, but also within the wider community who are often the direct beneficiaries of those prayers needs to be provided for.

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?*

The approach by the English law is in our view a much more helpful approach as it affirms much of the present Common Law position while empowering the Charities Commission of England and Wales to both provide guidance notes and where appropriate, require compliance.

The provisions of the Common Law currently provide a presumption of public benefit in respect to

–

- Poverty,
- Education, and
- Religion.

We believe this position should be retained for the reasons of greater flexibility and the removal of onerous administrative obligations not only from the charities but from the bureaucracy as well.

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?*

The MUNFP statement reads "This is perhaps the most difficult and contested issue, as the competing arguments are finely balanced. The principle that all charities should be required to prove public benefit affirmatively furthers objectives of transparency and accountability, and could promote public trust and confidence. The abolition of the presumptions also ensures equality across heads of charity.

However, we also express reservations about the desirability of removing the presumptions of public benefit. We consider that the presumptions perform some useful functions, including minimising the evidential (and compliance) burden, and assisting in determinations where public benefit is intangible, diffuse, or involves irresolvable conflicts of beliefs and values.

We are also concerned about the removal of the presumptions from a practical and a political perspective. As a practical matter, the determination of public benefit is likely to be resource-intensive, both on the part of charities and on the part of the regulator. We are not convinced that this is the best use of the regulators (or indeed charities') limited resources. From a political perspective, we note that the removal of the presumptions is likely to be interpreted as an expression of scepticism towards certain parts of the sector, which may undermine support for this reform and harm relations between government and the sector.

Of course, even where public benefit is presumed, that presumption can be rebutted. The Australian Charities and Not-for-Profits Commission (ACNC) should have sufficient powers to enable it to require further information from charities where it considers there is a risk that the public benefit test is not met. Further, charities whose purposes do not fall within recognised categories of charities must still prove public benefit, as is currently done."

We affirm the position of the University of Melbourne which states clearly our significant concerns.

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 MUNFP statement reads "As noted above, the ACNC should be required to provide guidance on the public benefit test in a manner similar to that of Charity Commissions overseas. As the charities will report (presumably annually) to the ACNC, the ACNC is also best placed to identify whether charities are continuing to meet this requirement, and should have appropriate powers to request further information where it considers there is a risk it is not meeting such a requirement."

Our further comment is that the reporting obligations need to make provision for size. The present tiered provisions in the Corporations Act (Cth) and the proposed tiers under the coming amendments to the Associations Incorporation Act (WA) could be emulated with benefit.

There is potential for a conflict of interest where the ACNC carries on an advisory role as well as an enforcement one. It should be clear that the ACNC role is informative and educational to the Sector rather than advisory.

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

Unless the present Common Law position is retained there will be years of uncertainty until the matter is tested in depth before the High Court of Australia. To impose such an onerous burden on the charitable Sector without proven need is, we submit, an instance where the bureaucracy is seeking to crack a peanut with a sledgehammer.

In a secular society such as Australia, some leaders in the religious sector are concerned about community perceptions that public benefit has no connection with religion. Many large organisations that are secular today were commenced by leaders in the religious community as an outworking of their compassion for needs in the community: e.g. The Red Cross and Royal Flying Doctor Service. This continues today through the many charities operated directly by religious organisations. However the public perception that public benefit can be inherently attributable to the outworkings of religion in our society may well be further dispersed in the future. As a result, unless this matter is resolved by legislative intent now, then all future readers of the legislation may too readily be able to call into question the provision of any or all concessions to religious entities. Our position is that a foundation at law that retains the presumption of public benefit of religion and position is also that of most, if not all, religious groups today.

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

The present "dominant" test, if retained, enables the ACNC to review all aspects of a charity and in our view this is sufficient. No activities test should be included. The High Court in *Word Investments* stated that where activities that are not of themselves intrinsically charitable are carried on to achieve a charitable purpose then the activity, in itself, will not deny charitable status. If an activities test is ultimately included, notwithstanding our concerns, then it should merely re-state the present common law position. Most legislation under which charitable entities are now formed typically requires entities to be true to their Objects. Therefore we believe the ACNC will, or should, have sufficient power to gradually require entities to be true to their stated Objects, so as to be able to deal with this issue without resorting to alternative legislation.

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

The inclusion of an activities test in the definition is not needed and adds unnecessary complexity.

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 provisions of Section 8 of the 2003 Bill intrudes on the right to freedom of speech and seems to be politically motivated to remove vigorous debate from a section of the community that is often a leader in the focussing of the community conscience. The *Aid/Watch* case provided a clear instance where substantial advocacy was seen by the High Court to be appropriate. There will be substantial other instances where free speech must be preserved and the Charitable Sector will need to provide leadership. This proposed section needs to be removed.

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

Surely this comes under the heading of "ancillary" to the principle Objects of the charity. A charity needs to be free to speak out where an issue comes within its scope. The appropriate restraint

on charities would be in the form of guidance statements from ACNC that states, for example, that the promotion of a concept or cause is within the Objects of a charity but promoting a person or party is not. Promoting a concept or cause could include quoting what one or more political candidates are stating, but would not include any comment in relation to the person themselves or their political alignment.

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

Current Government policy with both State and Commonwealth Governments is placing increasing emphasis on contracting out services previously conducted by Government. Also increased complexity in compliance areas, be it taxation law, industrial law, or occupational health and safety place onerous requirements on even the larger charities.

As a consequence charities are looking at new ways of working. There is a significant increase in the provision of shared services, of joint ventures and similar working arrangements. These need to be allowed for in a way that does not deny such structures from obtaining and retaining TCC endorsement.

Many older charities, including most of the older religious institutions, have been established under Private Acts of the Parliament of one of the States and need to be included.

Provision should also be made for entities established as subsidiary entities of a charity established under such an Act of Parliament. This may well be a Statute of a University or of one of the large Christian denominations.

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

Central Bayside established a helpful principle and the 2003 Bill seems to affirm the Court decision. There is no need to take the matter further.

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?*

The omission of the relief of poverty from the 2003 Bill is, in our view, singularly inappropriate. It needs to be re-inserted. Currently the 2003 Bill would leave poverty to the less clear "advancement of social or community welfare" or "other purposes beneficial to the community", which seem to be quite inadequate.

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

As stated in our Introductory Statement we maintain that the retention of the present Common Law position has both practical merit and embraces legal certainty for most charities. We advocate merely a widening of the definition following similar procedures to the 2004 Act.



We consider that both the 2003 Bill and the 2004 Act defining objectives were in themselves useful.

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

Given the diversity of definition in other jurisdictions an appropriate widening following the procedures applied in the 2004 Act would be useful.

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

The original intent of ADRFs has clearly not been met due to some of the restrictions imposed by the legislation. These need to be addressed to enable the ADRFs to operate more effectively. This also provides a clear message that supports our argument to retain the present clarity from the Common Law. A new Act is not needed. An addition to the Common Law however may well be beneficial.

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

Yes. We support minimal changes from the present Common Law position. To expand the meaning of what constitutes a charity to embrace today's needs is a worthy objective. To bring substantive untested bureaucratic obligations at a time when Government is also introducing other major reforms is, on the other hand, an onerous and, in our view, unnecessary action.

There is a more complex legal issue that arises in respect to the provisions of a Will or a Trust Deed, operative now, but binding on future transfers of either Income or Capital, for the benefit of an entity that is currently endorsed as TCC, DGR or both. Such benefit may have a presumption of TCC/DGR endorsement in its existing conditions which may, if endorsement is lost after the transitional period, invalidate the Trust direction. This will in all probability occur in a significant number of instances. An example could be a direction in the Trust Deed for a Will Trust currently active following the death of a Testator that the income of the ongoing trust is directed for the benefit of A, B and C entities provided they are endorsed as charities. If there are no other members of the beneficial class the Trust may well become void for uncertainty. It is possible that just saying "charity" may be sufficient to create the anomaly once the word is specifically defined. This would be all the more serious if the Will Trust had become a Charitable Trust in Perpetuity with TCC endorsement itself. These are serious concerns that need to be provided for.

L R Green FCA MBA BBus (Acc)

N E Harding FCPA (Taxation) FCIS

Chairman

Vice-Chairman