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Dear Sir/Madam

### **Consultation Paper – “A Definition of Charity” October 2011**

Thank you for the opportunity to provide the Not-for-Profit (NFP) industry's views on the definition of charity proposed in the Treasury Consultation Paper released on 28 October 2011.

#### **1 About Moore Stephens**

We are writing on behalf of the Moore Stephens Australia network of eight independent firms of business advisors and chartered accountants. Moore Stephens have a real understanding of the environment in which our clients operate. We currently service a diverse range of entities within the sector and specialise in providing assurance, accounting, tax and advisory services to our NFP clients. We provide a national service offering to a number of key clients operating in the Not-For-Profit sector, including the following:

- Religious organisations
- Large charities
- Football clubs and sporting associations; and
- Universities and many TAFE colleges in Australia.

We have had a long standing commitment and involvement for the past 50 years in this sector. We have been active in recent years in providing submissions to the Government's various committees and consultations to support the sector through this reform phase.

#### **2 Feedback and Comments**

The process of developing a definition of charity in the Australian context has occurred over a number of years as outlined in the consultation paper. It is not appropriate for us to comment on any of the legalistic aspects of the proposed definition. Our primary observations are limited to questions within the consultation paper which we have relevant expertise and viewed as having a significant impact on the characteristics of Charities.

##### **2.1 *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?***

We refer you to our previous submissions in relation to the “better targeting of tax concessions” in which we highlight the complexity and diversity of a range of not for profits and charities within Australia. We support the concept that in order to have charitable status an entity should have a dominant purpose which is charitable. However, in the context of the removal of the presumption of the public benefit test for certain charitable activities; we would recommend that consideration is given

to large charitable or religious organisations, who for a variety of commercial, risk and cultural reasons have separate and distinct entities which in isolation may not meet the dominant purpose.

For example, this issue may arise where an organisation undertakes an administrative or financial support role in a separate entity which in isolation would not satisfy the dominant purpose but clearly exists to support the charitable role of the larger organisation.

**2.2 Does the decision of the New South Wales Administrative Tribunal provide sufficient clarification of the circumstances when a peak body can be a charity is of further clarification needed?**

No comment.

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

We support the Board of Taxation's recommendation that 'sufficient section' be defined as one which is not 'numerically negligible' *compared with the size of that part of the community to whom the purpose would be relevant* (emphasis added). This will ensure that organisations which are 'charitable' (in the popularly understood meaning of the word rather than the strict technical meaning) are not prevented from satisfying the definition simply because they target the delivery of their services to those most in need.

We also support the definition or explanatory material clarifying that limiting beneficiaries to large groups of the community – residents of a particular geographical area, the adherents of a particular religion, those following a particular calling or profession or suffers of a particular disability or condition – is not inconsistent with the public requirement, unless the limits are incompatible with the nature of the benefit.

**2.4 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 the comments in relation to native title holders and traditional owners. We would recommend that Treasury also consider extending these exemptions to charities that address the needs of those with rare genetic diseases in which it may be only those with familial ties who would consider providing support.

**2.5 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?**

We suggest that the common law has historically provided a definition of 'public benefit' that is relatively user friendly and reasonably easy for most charities to engage with. Further, it provides flexibility which might not exist in any statutory clarification. Consequently we do not believe that additional clarification of the terms is necessary.

If the Government does decide to provide additional clarification, we suggest that this be done through the inclusion of examples, either in the explanatory memorandum to the amending bill or as notes in the legislation. To alleviate specific concerns of religious bodies those examples should include mention of social, mental and spiritual benefits. This will support the acknowledged view in paragraph 74 of the consultation paper that practical utility can be broader than material benefits.

**2.6 *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?***

For the reasons noted above, we believe that this would be a preferable approach.

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

We accept that it is reasonable to require a charity to have a public benefit, and hence support the inclusion of this requirement in any statutory definition. However in our experience most organisations seeking charitable endorsement clearly satisfy this requirement, and have no difficulty evidencing this if pressed. For this reason we support the continued presumption of public benefit afforded to organisations falling within the first three of 'Pemsel's' charitable heads. We have elaborated on this in response to question 9 below.

**2.8 *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?***

Given that the ACNC is to act as the independent regulator for the Not-for-Profit sector, we believe it should not have an assisting role in order to avoid potential conflicts of interest. However, guidelines and information materials would be useful to inform the public of the ACNC's position in assessing eligibility, and would avoid any potential conflict of interest arising.

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

Given that the "Pemsel's case" four heads have been the basis for definitional guidance for some time we would recommend that the presumption of public benefit remain for those entities seeking to fall within the first three heads of this definition in its statutory form.

We suggest that the removal of this presumption would increase compliance costs for organisations falling within these heads without achieving any practical change in the types of organisations satisfying the definition. As we noted above, in our experience most organisations seeking charitable endorsement clearly satisfy this requirement. This is arguably not surprising given the types of organisations falling within these charitable heads. For instance, organisations which 'advance education' are likely to exist for the public benefit in part because education is an activity almost always carried on for the public benefit.

We note that paragraph 84 of the consultation paper suggested that some charities may incur minor initial compliance costs. We believe that while this may be the case with some charities, there is a significant level of potential changes and complex matters to be grappled with by these organisations during this period of reform. We see little value to the sector and the community in placing additional burdens on these entities to demonstrate their public benefit as a whole.

If there is a concern that this presumption could be at risk of abuse, we note that the presumption is rebuttable. It does not prevent the regulator from demonstrating that an organisation does not exist for the public benefit if that is indeed the case.

We are aware of the specific concerns of religious bodies over the removal of the presumption. These concerns can be expressed as:

- an increase in compliance costs without achieving any practical change (as noted above),
- the practical difficulty in evidencing non-material (and intangible) public benefits and the possibility that this may lead to a focus only on the tangible benefits or by-products of religion when evidencing public benefit, and
- the view that the presumption helped preserve religious neutrality by avoiding the worth of a particular religion being the subject of judicial decision.

The consultation paper has pointed to overseas experience and noted that this has not resulted in any particular difficulties for most religions. However, we suggest that if the presumption is removed the overseas experience be utilised to alleviate the concerns of religious bodies by including in the explanatory memorandum comments that highlight the relevance of non-material benefits such as the development of spirituality and morality.

We further suggest that aspects of section D2 in the Charities Commission booklet "*The Advancement of Religion for the Public Benefit*" be drawn upon in drafting the explanatory memorandum, thereby alleviating some uncertainties and providing guidance to the ACNC.

In summary, we support a rebuttable presumption of public benefit for the advancement of religion and education (and also relief of poverty). If the presumption is removed, we suggest the explanatory material provide discussion and examples of the public benefits of both the advancement religion and the advancement of education.

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

We do not believe there are any issues with this requirement. However we believe that any statutory expression of the requirement should ensure that an isolated or insignificant activity which is inconsistent with an organisation's charitable purpose should not prevent it from satisfying the definition. It would be helpful to include examples in an explanatory memorandum clarifying this requirement.

We also welcome the Government's acceptance of the High Court's decision in *Commissioner of Taxation v Word Investments*<sup>1</sup> that activities need not be intrinsically charitable in order to be in furtherance of an organisation's charitable purpose. Any statutory definition should also adopt this approach.

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

We believe that there is no need to clarify the role of activities when determining an entity's charitable status. We suggest that the common law has provided sufficient clarity on the role of activities when determining an entity's status.

However, if any statutory clarification is provided, we believe that an entity's purpose should remain the primary, critical factor, provided its activities are not inconsistent with its purpose. This is because an entity's purpose arguably provides a clearer, more objective outline of an entity's *raison d'être* than a 'snapshot' examination of its activities at any given time.

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<sup>1</sup> [2008] HCA 42.

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

We welcome the proposed changes to the Charities Bill 2003 prohibition on engaging in political activities. In our view this prohibition placed an unwarranted restriction on the activities of organisations with charitable purposes.

However we suggest that the appropriate test be one which examines whether the political activities undertaken by an organisation fall within a charitable purpose for which they are established. So, for example, a university lecturer specialising in taxation could author academic articles calling for changes to the taxation system without impacting on the University's charitable status. This would be because the activity involved in authoring an article falls squarely within the educational purpose for which the University was established.

We consider that if the test is expressed in this way it is unnecessary to restrict the political activities to 'paragraph c' activities. Such a restriction is arguably somewhat arbitrary and misplaced, as we outline below.

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

We suspect that the motivation for this prohibition is to prevent charities from providing benefits to political candidates. However the prohibition as outlined would capture a wider range of activities. For example, the prohibition could potentially capture a charity whose employees attended a political function as part of a lobbying/fact-finding exercise in furtherance of its charitable purpose. We suggest a better test is to ensure that the activity falls within an entity's charitable purpose. We also highlight that donations/gifts to political parties and candidates are already regulated by other legislation.<sup>2</sup> In our view it is not appropriate to include such regulation in the charities legislation.

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

We do not believe additional clarification is required.

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

In general we support the definition of 'government body' in the Charities Bill 2003. However it may be necessary to further clarify that certain entities, such as universities, are not government bodies even though they may be established by an Australian statute and considered to be government related entity under the GST law.

In particular, we suggest that it may be necessary to amend to definition of government body contained in the Charities Bill 2003 to clarify when a government body is 'controlled' by the Commonwealth, a State or Territory. An entity should not be controlled by one of these simply because it was established by statute, as this would capture entities such as universities. We suggest that a test for control could look at factors such as whether the Commonwealth, a State or a Territory has the ability to appoint more than fifty-percent of board members, and whether its operations are controlled 'in fact'.

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<sup>2</sup> See for example, *Commonwealth Electoral Act 1918* (Cth) ss 303-314.

We suggest that, if there is no change to the wording in the definition, a clear explanation, and/or examples are given in the explanatory memorandum.

**2.16 *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?***

We generally support the list of charitable purposes contained in the Charities Bill 2003 as it will maintain a reasonable level of flexibility in the definition. However, an expanded list may provide greater certainty and removes some confusion on the application of the law.

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

We suggest that the list of charitable purposes consider the impact of *Bicycle Victoria Inc v Commissioner of Taxation* [2011] ATA 444, where the Administrative Appeals Tribunal clarified that sporting, recreational or social purposes could be charitable. We recommend that the Government consider including sporting, recreational or social purposes that are promoting fitness or health as charitable purposes.

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

We believe that it is crucial to ensure any definition of charity is applied consistently across all Commonwealth, State and Territory sectors. Currently different Commonwealth, State and Territory regulators approach the definition in different ways, increasing the compliance burden on the sector.

**2.19 *What are the current problems and limitation with ADRFs?***

No comment.

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

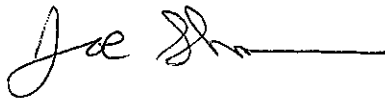
We recommend that consideration be given to one or more of the following approaches to transitional issues. These approaches would provide clarity for the sector. Further, they would enable sufficient time to plan and review current arrangements should there be a determination that an entity no longer meets the charitable definition;

- a) a grandfathering provision to be included in the definition that could be applied for by charities with specific conditions going forward to enable certainty.
- b) clear transitional provisions for fundraising, taxation and disbursement of funds where an entity loses its status.
- c) indication of a timeframe for when ACNC will be reviewing registrations to enable sufficient time for charities to be able to self assess and address any issues that may arise.
- d) provision of guidelines, guidance notes and Public rulings to assist in interpretation.
- e) protection from administrative penalties and interest charges when a charity fails to self-assess its charitable status correctly due to genuine mistakes.

If you have any queries please contact me or any of the contributors to this submission:

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Yours faithfully



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