

November 2011

## A definition of charity – consultation paper

The Federal Government has released a consultation paper that will form the basis of the definition of charity. The paper, and the review that it will lead, will have wide ranging implications for charities and public benevolent institutions.

### A review of charities

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In the 2011 Federal Budget, the government announced it intended to review charities and the taxation concessions extended to charities.

In response, the government has released a consultation paper *A Definition of Charity*. The aim of this process is to produce a standard definition of *charity* throughout Australia, including in the areas of state and federal taxation.

The government is requesting feedback from interested parties, with submissions due by 9 December 2011.

### Where are we at?

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The paper identifies a number of definitions of *charity* and charitable purposes throughout the taxation statutes. The paper concludes there are inconsistencies across these definitions which make it difficult for all parties involved, including charities and the Tax Office.

The first attempt at drafting a definition of *charity* came in 2003 as part of a Federal Government review. This draft definition did not proceed into legislation and it is the aim of this paper to develop a more workable definition of *charity* using the 2003 framework as a foundation.

### What has happened since 2003?

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There have been several significant developments since the initial attempt to drafting a definition of *charity* in 2003.

A number of key jurisdictions, including the UK and NZ, have legislated definitions of *charity* as part of an overall charities act. The basis of the definition proposed in this paper draws from key areas identified in the definitions applied in these other countries.

Further, the Australian courts have heard a number of cases which have changed the way in which entities are classified as charities. Key cases include *Aid Watch*, *Word Investments* and *Central Bayside*.

### The 2003 definition

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The definition of *charity* contained in the 2003 Charities Act was founded on the following key principles:

- the entity must be a not-for-profit entity;
- it has a dominant purpose that is charitable;
- it is for the public benefit;
- it does not engage in activities that do not further, or are not in aid of, its dominant purpose;
- it does not have a disqualifying purpose;
- it does not engage in, and has not engaged in, conduct that constitutes a serious offence; and
- is not an individual, partnership, a political party, a superannuation fund or a government body.

### Extending that definition

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The paper canvasses ways in which these principles may need to be modified in light of the recent court decisions, the position of the Tax Office in TR 2011/D2, and the common or general perception of what would constitute a *charity*.

Some of the key areas discussed include:

- *Not-for-profit* – subject to a separate consultation involving the special “in Australia” conditions also announced in the 2011 Federal Budget;
- *Dominant purpose* – proposing that the entity’s purpose be exclusively charitable;
- *Peak bodies* – can a peak body be charitable?;
- *For the public benefit* – create a public benefit test and define what is meant by the public (a broader segment of the community);
- *Religious and educational organisations* – how do these fit in with the public benefit test?
- *Commercial activities* – How do these fit in with a *charity’s* purpose (citing *Word Investments*)?

- *Advocacy bodies* – how do these fit in with the public benefit test (citing Aid Watch)?
- *Charitable purposes* – what are charitable purposes?
- *Australian Disaster Relief Funds (ADRF)* - do ADRF fall within the realm of charities?

## Consultation

As noted, the government is calling for submissions from interested parties on the issues canvassed in this paper.

In particular, the government poses 20 questions they would like interested parties to consider.

If you would like to make a submission on any of the areas identified in the report, please contact your local PKF Adviser for further assistance.

Submissions close on 9 December 2011.

## Consultation questions

1. Are there any issues with amending the 2003 definition to replace the “dominant purpose” requirement with the requirement that a *charity* has an exclusively charitable purpose?
2. Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a *charity* or is further clarification required?
3. Are any changes required to the Charities Bill 2003 to clarify the meaning of “public” or “sufficient section of the general community”?
4. Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?
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?
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?
7. What are the issues with requiring an existing *charity* or an entity seeking approval as a *charity* to demonstrate they are for the public benefit?
8. What role should the Australian Charities and Not-for-profits Commission have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?
9. What are the issues surrounding entities established for the advancement of religion or education if the presumption of benefit is overturned?
10. Are there any issues with the requirement that the activities of a *charity* must be there to further or in aid of its charitable purpose?
11. Should the role of activities, in determining an entity’s status as a *charity*, be further clarified in the definition?
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?
13. Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?
14. Is any further clarification required in the definition on the types of legal entity which can be used to operate a *charity*?
15. In the light of the Central Bayside decision is the existing definition of “government body” in the Charities Bill 2003 adequate?
16. Is the list of charitable purposes in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes?
17. If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?
18. What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of *charity*?
19. What are the current problems and limitations with ADRFs?
20. Are there any other transitional issues with enacting a statutory definition of *charity*?

Should you require assistance or additional information, please contact your PKF Tax Adviser

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