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Dear Sir/Madam

SUBMISSION - A DEFINITION OF CHARITY

Grant Thornton Australia Limited (Grant Thornton Australia) appreciates the opportunity to provide comments to Treasury on the Consultation Paper 'A Definition of Charity' dated 28 October 2011.

Our comments in the form of responses to the questions posed in the Consultation Paper are attached to this letter.

In addition to those specific responses, there are five matters that we believe should be considered when developing a statutory definition of charity:

- The key message arising from the Productivity Commission Report 'Contribution of the Not-for Profit Sector' was the need for wide-ranging reforms to remove unnecessary burdens and costs faced by the NFP sector and improve accountability. This stated aim should be used as the filter through which decisions are made during the process for determining the statutory definition of charities ("the definition"). We believe there needs to be a high level of support accompanying the rollout of the definition through templates, guidance forms and supply of consistent information to assist entities in the registration process.
- We would strongly support a principles-based approach to the statutory definition of charity, which allows for continued development through the common law, rather than a prescriptive codification approach. We feel this approach will allow for flexibility in a constantly changing sector.
- We support the focus and the definition being on the purposes of the charity rather than the activities of the charity. Activities undertaken that are not intrinsically

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Our Ref: Grant Thornton Submission A Definition Of Charity Docx



charitable, should not prevent an organisation with a charitable purpose being defined as a charity. Flexibility should then be given to the treatment of the individual activities of a charity, whether that be taxation or other regulatory treatments.

- We note that the consultation paper does not address the definition of a not-for-profit, as this is currently under review through proposed taxation legislation. Given that charities must by definition be not-for-profit, and that the implications of the definition of not-for-profit extend beyond taxation, we believe that the definition of not-for-profit should also be determined by the Australian Charities and Not-for-Profits Commission ("ACNC").
- We note that the current tax consultation papers of 'Better targeting for not-for-profit tax concessions' introduces terms such as 'altruism' which are not considered within the statutory definition of a charity. We believe that due to the interaction between these pieces of legislation, there needs to be consistency and clarity as to the terms used. Further, we consider that legislative change regarding the tax treatment of not-for-profits and the definition of a charity should be effective from a similar date. Having a much later date for the application of the new definition of a charity would create confusion in terms of relevant tax treatment for relevant entities in the meantime.

Should have any queries in relations to these matters please do hesitate to contact me on 07 3222 0307 or Peter Berg on 02 8297 2509.

Yours faithfully
GRANT THORNTON AUSTRALIA LIMITED

Mr Simon Hancox
Partner - Audit & Assurance



Responses to Questions

1. *Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose?*

We would be in favour of maintaining the dominant purpose requirement, as we feel that this provides more flexibility to deal with unforeseen situations, without weakening the ultimate intentions of a charity. For example, it allows flexibility to allow a charity to have an ancillary purpose that may in nature appear charitable, however fail the public benefit test due to it not being directed to a sufficient section of the general community.

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?*

Based upon our preference for a principles-based definition supported by common law, we do not believe there needs to be codification of the decision of the New South Wales Administrative Tribunal. If further clarification was required, we consider guidance issued by the ACNC would be the appropriate mechanism to provide that clarification.

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

We would support the changes proposed by the 2010 Senate Inquiry to be adopted over those of the *Charities Bill 2003* excluding the reference to 'individuals with a material connection to the entity'. If 'individuals with a material connection' is seen as a significant issue, it would be more appropriately dealt with as guidance as to the meaning of a 'significant section of the community'.

Further guidance needs to be provided as to the definition of a 'sufficient section of the community' to recognise circumstances where the level of the charitable activities the organisation can undertake is limited by the size of their resources. The definition should not prevent small organisations providing benefits to a limited constituency from being defined as charities.

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?*

If the amended wording referred to in question 3 is adopted, we do not believe any modification is required to deal with beneficiaries with family ties.

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?*



As stated in question 3, we believe the definition of public benefit test should reflect the amended wording to the 2010 Senate Inquiry which reflects certain elements of the Charities Commission of England and Wales' guidance materials.

6. *Would the approach taken by England and Wales or relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?*

We would favour the non-statutory approach to the definition and further clarification should not be codified in the legislation.

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 major issue is the diversity of skill sets within the sector and their ability to provide the evidence needed to comply with the registration process. For a significant section of the sector this will lead to an additional financial burden if they require external consultants to complete these requirements. This will be particularly the case in relation to the interpretation of 'a sufficient section of the community' as this will be generally issue for smaller charitable organisations.

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 the test?*

The ACNC needs to develop a streamlined registration process with clear guidelines as to the information required and the format in which that information is to be provided. In addition, they need to provide a free consultation service to assist smaller charitable organisations in the registration process.

In relation to the continued demonstration of the public benefit, the ACNC would need to develop a risk-based monitoring program with audit powers to ensure compliance. To facilitate this monitoring process, the one-stop reporting process of the ACNC would need to include collection of the appropriate data. This should include an annual declaration by the organisation of its public benefit should be included. We do not believe requiring charitable organisations to undertake periodic reapplication or re-registration meets the prime recommendation of the Productivity Commission for reduction of red-tape within the sector.

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

We believe that the concerns outlined in our response to question 7, being those of the costs associated with compliance, are the primary concern for these entities.

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 agree with the proposition that the activities of a charity do not of themselves need to be charitable but should be in furtherance or in aid of its charitable purpose. However, there needs to be recognition that isolated or insignificant activities that are not in furtherance of the charitable purpose should not affect the charitable status of the entire organisation.

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

We believe that the purpose of the organisation should be the underlying determinant of the entity's status and do not believe that the role of activities requires further clarification 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?*

We believe that the *Charities Bill 2003* should be changed to allow charitable organisations to engage in political activities provided those activities are in the furtherance or aid of its charitable purpose.

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

We do not envisage 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?*

In the short-term we believe that the definition is appropriate, however we believe in the long-term the ACNC should be developing a standard entity structure for the operation of not-for-profit and charitable operations as recommended by the Productivity Commission.

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

We believe that there needs to be some clarification of the definition of 'government body', particularly in relation to local government. This definition should be consistent between the charity definition and that contained in the taxation legislation. This could perhaps draw on existing legislation and the concept of control that links related entities/associates.

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 believe that the list of charitable purposes in the *Charities Bill 2003* is appropriate and under a principles-based approach, the additional heads contained in the *Extensions of Charitable Purposes Act 2004* are not required. We feel that the list in the *Charities Bill 2003* is sufficiently broad to provide the flexibility of definition for the meaning to develop in accordance with societal needs and expectations.

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

Refer to our response to question 16.

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 are not aware of any cases where the proposed definition of a charity would be inconsistent with the intent of a Commonwealth, State or Territory law. We believe that the approach to be adopted should be to firstly define a charity and then work with other legislative groups to harmonise this concept in the individual legislature.

There will clearly be an interaction between proposed definition of charity and the current tax reform process in relation to not-for-profits under the banner of “Better targeting for not-for-profit tax concessions”. This tax reform process has introduced new terminology such as “altruism” and “unrelated commercial activity” which will require legislative and judicial clarification and create uncertainty for the sector. There must be consistency in the terminology used and the definitions applied in developing the many reforms currently being undertaken in the not-for-profit sector.

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

We consider the ability to suitably distribute surplus funds at the end of the relief effort to be a significant limitation with ADRFs. This issue could be addressed by allowing ADRFs to distribute funds remaining at the conclusion of the relief effort to an appropriately registered charity.

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

It is our strong recommendation that the definition of charity be put in place in advance of the not-for-profit tax reform measures as it is fundamental to those reforms.

There needs to be a period after the implementation of the definition of a charity before any not-for-profit tax reforms come into force, to allow the sector to absorb the changes and their practical implications. The not-for-profit tax reform measures, as described in the consultation paper titled “Better targeting for not-for-profit tax concessions”, may result in not-for-profit’s being required to restructure their activities by transferring activities between



legal entities. Such restructuring may take a considerable amount of time to implement given that many not-for-profit's have limited resources.

We believe there needs to be a high level of support accompanying the rollout of the definition through templates, guidance forms and supply of consistent information so as to assist entities in the registration process.