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Submission to Treasury on the Exposure Draft of the Charities Bill 2013

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INTRODUCTION

This submission focuses upon the proposed definitions of 'charity' (clause 5) and 'charitable purpose' (clause 11) in relation to the 'advancement of religion' and public benefit. In addition, one comment is made regarding the interaction of the proposed legislation with the general law of trusts.

THE PUBLIC BENEFIT PRESUMPTION FOR THE ADVANCEMENT OF RELIGION

The Bill maintains the common law of charity's favourable treatment of purposes for the advancement of religion. This is desirable on both policy and efficiency grounds and is extremely welcome. On the other hand, questions now arise as to the operation of the statutory presumption of public benefit. Here, the Bill and its Explanatory material could provide more guidance as to the circumstances in which an entity with purposes for the advancement of religion would be denied registration as a charity or would have its registration revoked.

Clause 7 of the Bill provides that '[i]n the absence of evidence to the contrary' a purpose 'of advancing religion' is 'presumed to be for the public benefit'. At least three questions arise from this. First, how strong is the presumption? Secondly, what will constitute 'evidence to the contrary'? And thirdly, who may challenge the presumption?

First, how strong is the presumption? That is, how much 'evidence to the contrary' is required and to what standard of proof? Although the Explanatory material at 1.63 refers to the common law having had a presumption of public benefit in relation to certain charitable purposes, this is contested. In any event, there is little explicit or consistent explanation of its operation in the case law on religious purposes.[1] Hence, it is not possible to gain much guidance from the common law as to how a *statutory* presumption should operate.

The Republic of Ireland in the *Charities Act 2009* (yet to come into operation) is more specific as to the strength of its presumption (which only operates in relation to advancement of religion). According to section 3(5) of the Irish legislation, a decision that there is no public benefit cannot be made without the Attorney General's consent. That is, in Ireland the presumption is intended to be very strong and not easily rebutted. I am not suggesting that this approach should be taken in Australia, nonetheless, on the current draft of the Bill, the strength of the presumption will need to be worked out on a case-by-case basis.

[1] See Pauline Ridge, 'Religious Charitable Status and Public Benefit in Australia' (2011) 35 *MULR* 1071, 1077.

Secondly, what will constitute the requisite 'evidence to the contrary' for the purposes of rebutting the presumption of public benefit? No direct guidance is given in the Bill or the Explanatory material, but presumably one can look to the Explanatory material at 1.50 which in the context of clause 6 (purposes for the public benefit) gives examples of what would constitute possible detriment to 'the general public, a section of the general public or a member of the general public'.[2] The definition of 'disqualifying purpose' in clause 10 also gives some guidance, but also is not directly applicable.[3] It would be helpful to both those opposing the registration of certain religious groups as charitable, as well as to religious groups seeking registration, to have direct guidance in either the Bill or the Explanatory material as to the nature of the evidence necessary to rebut the presumption of public benefit in clause 7. In doing so, the drafters of the Bill should be mindful of human rights protections in relation to freedom of religion, such as Article 18(3) of the *International Covenant on Civil and Political Rights*.[4]

Thirdly, who may challenge the presumption of public benefit? Clearly, the Commissioner of the ACNC has standing (see 1.14 Explanatory material). The Explanatory Material at [1.67] also states that

> The presumption may also be challenged by anyone with relevant legal standing such as taxation authorities, other Government regulators and *those entitled to receive distributions pursuant to a charitable trust*. In these cases the challenge would be considered in the courts. [italics added]

With respect, the italicised phrase does not make (legal) sense and should be redrafted. There are a number of problems. Which 'charitable trust'? A charitable trust which is under challenge? A charitable trust does not have beneficiaries as such, it is a trust for purposes, so does 'those entitled to receive distributions' refer to those designated to carry out the challenged purposes? If so, why would they challenge the presumption of public benefit? Does it mean those *otherwise* entitled to receive distributions if the particular purposes under challenge are found not to satisfy the statutory definition? But even if a trust is found to not to be charitable for the purposes of the Bill, it will not necessarily be invalid at common law unless its common law validity is also challenged (see my discussion below).

As noted in the Explanatory Material at 1.20 and 1.65, clause 7 (the presumption of public benefit) goes further than the common law because, when clause 7 is read in conjunction with clause 6, the presumption now clearly extends to the 'public' aspect of the public benefit requirement as well as

[2] These include 'damage to mental or physical health, damage to the environment, encouraging violence or hatred towards others, damaging community harmony, or engaging in illegal activities such as vandalism or restricting personal freedom.'

[3] According to clause 10: 'disqualifying purpose means: 'The purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or …The purpose of promoting or opposing a political party or a candidate for political office.'

[4] 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'

the ‘benefit’ aspect of the requirement. This was not the case at common law. But it is unclear to me how far such an ‘extension’ of the presumption will change the existing law because, presumably, it could be rebutted fairly readily by ‘evidence to the contrary’.

For example, purposes for the advancement of Chinese ancestor worship within the context of a specific family group are not charitable at common law because they do not meet the ‘public’ aspect of the public benefit requirement.[5] Although, such purposes would now be presumed to be for the public benefit pursuant to clause 7, there is clearly evidence to the contrary as, by definition, membership of such groups is limited by familial relationships and hence they do not meet the requirements in clause 6 as to ‘public’ benefit. Hence, it would seem that such purposes are still not saved by the Bill. (It would be possible to remedy this by the inclusion of a provision similar to clause 8(1)(c)). The extension of the presumption to the ‘public’ aspect of the public benefit requirement thus appears only to shift the onus of proof and thereby enhance the prospect of charitable status for religious groups that might otherwise experience some small difficulty in meeting the ‘public’ requirement (perhaps if there are restrictions on membership or public access to religious worship).

Closed or contemplative religious orders are treated as a separate category of charitable purpose to which no requirement — or even presumption — of public benefit applies (clause 9). The disqualifying purpose provision (clause 10) in the definition of charity will still apply and this is appropriate. Nonetheless, the effect of clause 9 is that such purposes are privileged far beyond other purposes for the advancement of religion given that it will be more difficult to challenge registration. Hypothetically, for example, a closed or contemplative religious order could cause considerable ‘damage to mental or physical health’ of its members, without necessarily having a disqualifying purpose ‘of engaging in, or promoting, activities that are unlawful or contrary to public policy’ (clause 10), at least according to the current Example appended to clause 10. Alternatively, a closed or contemplative religious order could engage in extreme financial exploitation of its members without necessarily coming within the terms of clause 10.

THE INTERACTION OF THE PROPOSED LEGISLATION WITH THE GENERAL LAW OF TRUSTS

The Bill’s generous approach concerning the presumption of public benefit in relation to certain categories of charitable purpose has no effect in relation to the general law of trusts because the Bill applies for the purposes of Commonwealth legislation only. Thus, in relation to trusts for purposes, the common law continues to determine prima facie validity. If the trust is not valid at common law (and is not ‘saved’ by relevant legislation), the undisposed-of property will be dealt with according to the general law. The proposed statutory definition of charity cannot validate the purported purposes because there is no trust and therefore no ‘entity’ for the purposes of the Bill or the *ACNC Act*. This is obviously not a criticism of the Bill, but it seems worth drawing attention to the necessarily limited impact of the proposed legislation in relation to trusts.

[5] *Yeap Chea Neo v Ong Cheng Neo* (1875) LR 6 PC 381.