

Via email: nfpreform@treasury.com.au

The Manager
Philanthropy and Exemptions Unit
The Treasury

9 December 2011

Dear Sir/Madam

A DEFINITION OF CHARITY

We refer to the Consultation Paper issued in October 2011 in relation to the Definition of Charity.

We attach our submission for consideration.

Yours faithfully

BDO (QLD) Pty Ltd



Russell Postle
Director

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A DEFINITION OF CHARITY – CONSULTATION PAPER

RESPONSE SUBMISSION FROM BDO (QLD) PTY LTD

Consultation questions

Are any changes required to the Charities Bill 2003 to clarify the meaning of ‘public’ or ‘sufficient section of the general community’?

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?

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?

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

Response to consultation questions

BDO submits that in respect of education, other than that provided by a private trust, the statutory definition of charity should continue to apply the presumption of public benefit, or the legislation should direct that in evaluating the test of public benefit of education, a broader society in general definition should apply.

This response is in respect of the not for profit providers of education. Those businesses who chose to provide education as a business for profit are outside the scope of this response.

The basis of this argument is as follows:

- Education is fundamental to the development and maintenance of society irrespective of location, language, background or prosperity of that society;
- Education is fundamental to the development and maintenance of Australian society;
- The importance of education to the Australian society is evidenced by the focus on education by the Rudd / Gillard governments
- The Federal government has a strong focus on indigenous education as evidenced on the website - *“Education is the foundation for our children’s future.”*¹

¹ www.indigenous.com.au

- Education is a prerequisite of almost every vocation highlighting that education is relevant to every person who may be seeking employment or a business, together with those people who depend on that person seeking that employment / vocation
- A benefit to society of and public benefit are one and the same

How to measure public benefit

When measuring public benefit, this can be tested by comparison to small sections of the public / society such as the poor or those disadvantaged (including by financial position, geographical location, etc) or by society and therefore the public as a collective broader group.

The Australian education system includes a wide spectrum of not for profit education providers including kindergartens, schools, universities all of which require funding in order to be able to deliver the education services.

It is recognised that only not for profit organisations can be charitable for the purposes of this legislation.

Not for profit education providers include:

- Universities
- TAFE colleges
- Government owned schools for primary and secondary levels
- Independent schools for primary and secondary levels that are sponsored by religious orders and currently endorsed as charities
- Independent schools for primary and secondary levels that are established by state legislation, and currently endorsed as charities
- Independent schools for primary and secondary levels that are secular and currently endorsed as charities

The provision of education services with choice of provider has been a fundamental platform of the Australian education system for more than 150 years.

The Government owned and operated education providers have been resourced in terms of location and number of students funded in parallel with the non government owned education providers.

The not for profit education providers obtain funding from a variety of sources including:

- Government grants for operational costs
- Government grants for capital improvements
- Parent contributions through fees
- Fundraising through parent bodies such as Parents & Friends Associations
- Donations and bequests

- Investment income

The consultation paper suggests that the presumption of public benefit should be withdrawn in respect of education and all education providers who seek to remain as charities need to apply for registration and to satisfy the public benefit test.

The consultation paper suggests that guidelines in respect of education providers should be established in Australia along similar lines to those in the United Kingdom subject to being “modified *where necessary to suit Australian conditions and laws*”.

The consultation paper does not advance any indication as to the extent that the adaption for those Australian conditions and laws might include.

The guidelines established in the United Kingdom by the Charity Commission of England included in the public benefit test a number of requirements including that

“2b - Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted

- *by geographical or other restrictions; or*
- *by ability to pay any fees charged*

“2c - People in poverty must not be excluded from the opportunity to benefit”.

In addition the manner in which the United Kingdom guidelines were administered could be argued that they reflected a particular view of the United Kingdom Charities Commission. This illustrates the establishment of guidelines can of themselves introduce greater levels of administrative uncertainty.

As a consequence of the application of the public benefit test in England for education providers in the United Kingdom where the services supplied required a contribution to costs by the attendee or those responsible for them, as a general outcome that education provider was not considered by the Commission to be charitable.

A decision to refuse charity status to an independent school was successfully challenged in the Courts in *The Independent Schools Commission v The Charity Commission for England and Wales*.²

² The Independent Schools Case referred to in Definition of Charity Consultation Paper paragraph 86

The decision handed down in October 2011 found the public benefit rules established by the Charities Commission to be wrong.³

The Australian courts have also had cause to consider the question of public benefit in recent cases covering the public benefits issue. Notes are in the attachment.

One of the stated objects of seeking to define the term Charity is: "Providing them (Charities) with greater certainty as to what is considered charitable will assist in reducing the compliance burden the sector currently faces".⁴

We respectfully suggest that the introduction of a public benefit test for education providers will not advance this objective of greater certainty. It is arguable that it will introduce a new layer of uncertainty.

The recent Independent Schools case in the United Kingdom referred to above is factual evidence of this uncertainty.

Fees charged by independent schools range in amount across the various providers. The fees should be regarded for what they are - a contribution to the costs incurred by the education provider in supplying benefits and are payable by the attendee or those responsible for them.

Many not for profits require contributions to their costs in order to be able to sustain their service levels. Consequently the need to recover those costs should not be a measure in itself of public benefit.

We respectfully suggest that for advancement of education and the providers of this who are not for profits, the presumption of public benefit should be retained.

Alternatively, the test of public benefit should be measured against the greater public rather than a particular segment.

The fact that a charity by necessity must require its users to contribute to its costs should not preclude that charity from being regarded as providing a public benefit and therefore being treated as charitable.

SUMMARY

³ Paragraph 235 -

⁴ Definition of Charity Consultation Paper, Summary paragraph 12. -

- Education is fundamental to the development and maintenance of Australian society;
- All of the Australian public do benefit from the diversity and opportunity of alternate education providers is available to the public;
- Not for profit education providers have been part of the Australian education system for over 150 years;
- Education providers need to obtain contributions to costs from parents and students, and it is only by degrees whether that contribution is made by the payment of fees, or other means such as through volunteer labour and / or through the Parents and Friends structures.
- Requiring education providers to prove the public benefit test in a format similar to that applied in the United Kingdom guidelines will introduce uncertainty where no such uncertainty exists under the current law;
- For those under the heading of advancement of education and the providers of this who are not for profits, the presumption of public benefit should be retained;
- The fact that a charity by necessity must require its users to contribute to its costs should not preclude that charity from being regarded as providing a public benefit and therefore being treated as charitable - this applies across all fields, not just education.
- It may be appropriate to define the term education in the charities legislation in a similar manner to how the term is defined for the purposes of the Goods and Services legislation⁵. This would allow the limitation of the public benefit concession to only those not for profits that provide qualifying education services, thus providing the requisite certainty that is being sought as an objective.

⁵ Section 38-85 A New Tax System (Goods and Services Tax) Act 1999

ATTACHMENT TO BDO RESPONSE SUBMISSION

AID WATCH INCORPORATED V FCT [2010] HCA 42

The High Court concluded that it was in no position to determine that promotion of one view rather than the other was for the public benefit.

“75. The law assumes that the purposes of the relief of poverty and the advancement of education, the first and second classes referred to in Pemsel, are for the public benefit.”

VICTORIAN WOMEN LAWYERS' ASSOCIATION INC v FC of T [2008] FCA 983

The Commissioner argued that if the main objects of an institution were the protection and advancement of persons practicing in a particular profession, the institution would not be regarded as charitable because the element of direct public benefit was lacking.

The Court concluded that VWL's principal purpose was to remove barriers and increase opportunities for participation by and advancement of women in the legal profession in Victoria. It was established to overcome a well-known social deficit, namely the substantial under-representation of women in the legal profession, in its upper reaches and in the judiciary; that objective was a purpose "beneficial to the community".

As in the above case, the Court concluded that there was a general society benefit from such a broad social purpose, so is the fact that society recognises the public benefit of education irrespective of who provides that education.