

Submission

To: The Manager
Philanthropy and Exemptions Unit
Indirect Philanthropy and Resource Tax Division
The Treasury

From: Helen Rowe and Tabitha Lovett
Philanthropy Services
Equity Trustees Limited

Date: 2 May 2013

Subject: **The Exposure Draft to the *Charities Bill 2013***

1 Introduction

1.1 Preliminary

Equity Trustees Limited (**EQT**) welcomes the opportunity to make a submission to Treasury on the Exposure Draft to the *Charities Bill 2013* (the **Exposure Draft**).

EQT was established in 1888 by an Act of the Victorian Parliament to provide trustee and executor services. At present, EQT acts as trustee for over 200 charitable trusts which have primarily been settled in Victoria. In light of this, EQT has been an ongoing participant in Treasury's consultation process around the introduction of a legislative definition of the term 'charity'.

To provide context to this submission, we have **attached** EQT's 2011 memorandum provided to Philanthropy Australia and the Trustee Corporations Association of Australia outlining EQT's views on the questions raised in Treasury's Consultation Paper titled 'A Definition of Charity'.

1.2 The scope of this submission

This submission is confined to the proposed section 12 of the Charities Bill, which relates to the funding of charity-like government entities, a matter of very significant concern to EQT.

By way of brief background, many of the charitable trusts EQT administers have been settled to benefit charity-like government entities, either as a 'named' beneficiary with a specified entitlement to gifts from the income or capital of the charitable trust or as one of a 'class' of beneficiaries to which discretionary gifts can be made by the charitable trust.

In some cases, EQT has been able to rely on the 'savings provisions' in section 7K of the *Charities Act 1978 (Vic)* because the relevant charity-like government entity has been endorsed by the Commissioner of Taxation (**Commissioner**) as a deductible gift recipient (**DGR**). The making of the section 7K election has also meant that, for the purposes of

EQT Submission

Draft Legislation and Exposure Draft Consultation: A Statutory Definition of Charity

Federal taxation law, the charitable trust is eligible to be endorsed as an ‘income tax exempt fund’; while this gives the charitable trust income tax endorsement, it also restricts it from making distributions to entities other than DGRs.

However, in some cases a section 7K election cannot be made for a charitable trust because the charity-like government entities that it has been established to benefit do not have DGR status. In order to preserve the ‘charitable’ status of these charitable trusts and their income tax exemption, EQT has adopted an administrative approach approved by the Commissioner which is based on the decision of the Victorian Supreme Court in *Re Cain (Deceased); The National Trustees Executors and Agency Co of Australasia Ltd v Jeffrey* [1950] VLR 382 (**Re Cain**). This administrative approach is highly complex and costly.

A more comprehensive explanation about the issues summarised in this part is set out in the **attached** memorandum.

2 Key observations

2.1 The proposed approach to dealing with charity-like government entities

At a broad level, EQT is very supportive of the stated policy intention to address the issues arising for charitable trusts that benefit charity-like government entities as a part of the legislative definition of ‘charity’ which will apply for the purposes of all Commonwealth law.

Moreover, EQT is pleased that the proposed section 12 does not propose to introduce a requirement that a charitable trust that has charity-like government entities as beneficiaries may be deemed under the proposed legislation to be ‘charitable’ only if the charity-like government entity is DGR endorsed.

EQT’s hope is that the approach that is proposed in the Exposure Draft is adopted for Victorian state law purposes, or if Victorian state law regarding charities was ‘harmonised’ so that it interacted seamlessly with the Commonwealth law. This would mean that those charitable trusts for which a section 7K election cannot be made (and which EQT is currently required to administer under the *Re Cain* approach) would be deemed to be ‘charitable’ by the simple operation of the law and, in practical terms, much easier to administer.

EQT understands that, at this stage, there is no certainty about the approach that the state governments will take to the question of adoption or harmonisation of the Commonwealth and state law on charity.

EQT urges Treasury to give consideration to the impact that a lack of harmonisation on the definition of what qualifies as a ‘charity’ for Commonwealth and state law purposes will have on the effectiveness of the proposed statutory definition of charity and aim to provide additional certainty about this matter to Australian taxpayers.

EQT Submission

Draft Legislation and Exposure Draft Consultation: A Statutory Definition of Charity

2.2 The definition of ‘government entity’

The proposed section 12 adopts the term ‘Government Entity’, which under the definitional section of the proposed *Charities Bill 2013* refers back to the definition of that term in other legislation (the *A New Tax System (Australian Business Number) Act 1999*).

EQT appreciates that it is convenient and common for parliamentary draftspersons to refer back to existing statutory definitions when drafting new legislation, particularly where the existing statutory definition is objective and leaves no scope for administrative discretion (as this definition does).

However, EQT submits that the adoption of this definition of ‘government entity’ for the purposes of section 12 of the Exposure Draft undermines the intention of the proposed reforms because it is overly restrictive and does not reflect that matters that the courts have ruled should be taken into account to determine if an entity has a ‘connection to government’.

EQT therefore submits that the definition be re-cast in terms that are consistent with what has been stated in case law as giving rise to a ‘connection to government’ and which are better reflected in the definition introduced by the *Charities (Amendment) Act 2006*, amending section 7K, which states:

‘For the purposes only of this section the factors that may be taken into account in determining whether an eligible entity may be taken to be connected to government include—

(a) the extent to which the eligible entity is under government direction or control; or

(b) the extent to which the eligible entity is required to implement government policy; or

(c) the extent to which a government can appoint, or direct or control the appointment of, the members of the governing body of the eligible entity—

whether or not the eligible entity receives government funding.’

EQT submits that a definition along these lines focuses the inquiry more clearly on whether or not the relevant government connected beneficiary is a ‘charity’ or has ‘charitable purposes’ rather than on whether it is a ‘government entity’, which we see as being more consistent with the intention of the Exposure Draft.

EQT Submission

Draft Legislation and Exposure Draft Consultation: A Statutory Definition of Charity

2.3 Section 12, part (a)

EQT submits that the requirement in section 12, part (a) is likely to cause confusion among trustees about whether the stated purposes of the trust must provide for the provision of ‘money, property or benefits to the government entity or for the establishment of the government entity’ and consequently, about whether there is a need to amend the terms of the trust instrument via court application: this would be costly to the trusts and present a significant administrative burden.

EQT submits that the proposed section 12 would achieve the intended outcome with more clarity if it stated that:

‘In determining whether a purpose that a fund has is a charitable purpose, treat an entity as not being a government entity, if:

(a) either:

(i) the purpose includes the purpose of providing money, property or benefits to the government entity, or for the establishment of the government entity; or

(ii) it is consistent with the purposes of the fund to provide money, property or benefits to the government entity or to establish the government entity, and

(b) the government entity would be a charity were it not a government entity’

Also, EQT submits that the proposed section could be clarified further if it made it clear that the purposes of the fund include, or it is consistent with the purposes of the fund, to provide money etc to the government entity as a specified beneficiary or as a member of the class of beneficiaries to whom the trustee may provide money etc. Without this clarification, we see the use of the singular tense in section 12, part (a) as being a potential source of confusion.

* * * * *

If you wish to discuss any aspect of this submission please contact Helen Rowe by email at hrowe@eqt.com.au or phone (03) 8623 5000 or Tabitha Lovett on 0438 288 682.