FSC FINANCIAL SERVICES COUNCIL

3 May 2013
Manager
Philanthropy and Exemptions Unit
Indirect Philanthropy and Resource Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam,

A Statutory Definition of Charity

The Financial Services Council (**FSC**) welcomes this opportunity to make a submission in relation to the proposed Statutory Definition of a Charity.

The FSC represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees.

Within the trustee sector of their businesses, trustee corporation members act as trustee or co-trustee for over 2,100 charitable trusts or foundations with assets of around $3.2b.

The FSC's main concern with the draft legislation is the provision around funding charity-like Government entities. In our view, this provision should be redrafted. We have set out below as Attachment 1 a short-form submission on the draft legislation.

If you have any questions regarding the FSC's submission, please do not hesitate to contact Martin Codina, Director of Policy, or myself on (02) 9299 3022.

Yours sincerely

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Attachment 1

1. Part 3, section 12 – Funding charity-like government entities

We generally endorse Philanthropy Australia's (PA) submission, on this point only. However, the PA submission only addresses non-charitable public and private ancillary funds that must distribute to Deductable Gift Recipient (DGR) charities. In our view, the issue equally extends to non-ancillary trusts, including will and inter-vivos trusts.

We assume that the intention of the provision is to enable charitable trusts to retain their own charitable status even if they fund charity-like government entities. The draft legislation adopts the definition of a 'Government entity' in the A New Tax System (Australian Business Number) Act 1999. This Act defines a government entity as a Department of the Commonwealth, a department of a State or Territory or an executive agency. It is problematic that the definition does not include entities that are created by statute and which are also controlled by the government. Such entities would include public hospitals and libraries.

Under the common law Governments and Government entities are charitable. Even gifts to the armed forces and for the purpose of reducing the National Debt, have been held to be charitable. If public hospitals and the like are not technically captured by the definition this will give rise to a requirement that these organisations be prescribed as a government entity under section 4 of the draft Bill. Accordingly, charitable trusts will not be able to continue to fund these entities until they have been prescribed. It is essential that if this definition of a Government Entity is to remain, some form of grandfathering of the existing common law position is put in place.

Alternatively, we suggest that this provision be redrafted so as to allow any type of charitable trust to maintain its charitable status where it distributes to any organisation that would be a charitable organisation but for a connection to government. The remedy should not be restricted to trusts that can only distribute to DGRs, as suggested by PA.

We also note that in respect of Will trusts, it must be specified with clarity that the new legislation will apply to wills that are signed after a certain date in the future.

Existing ITEFs are 'grandfathered' and will be able to continue to operate as they had before but, they will become registered entities with the ACNC from 1 January 2014 and will be subject to ACNC regulation and reporting. Apart from the lack of clarity as to the Government's intention, any broadening of the definition of charity will make no significant difference until such time as the States adopt the Commonwealth definition. Until that time, anything outside of the 'opting in' provisions will still be non-charitable for State purposes and therefore will be subject to a perpetuity period.

2. Part 2, Division 2, section 6 – Purposes for the public benefit

This section of the Bill contains new concepts that in our view will lead to confusion. Pursuant to this section, for an activity to be 'of public benefit' it is necessary that 'the benefit is a universal or common good'. This is further complicated by subsection 5 of section 6 which provides that the benefit must be of 'real overall value to the public'. These terms are not defined under the common law and there is no adequate explanation in the explanatory material as to how these terms will be measured. Accordingly, it is going to be difficult for an entity to know for certain that its purpose meets these criteria. In our view, these terms should be removed.

3. Part 2, Division 2, section 7 – Certain purposes presumed to be for the public benefit

In Part 2, Division 1, section 5, it would have been our preference that the definition of a charity explicitly include junior sport, youth development and environmental protection.

We acknowledge that the charitable nature of youth development and environmental protection may mean that they fall within the definition of a charity by implication, as per the definition of a charitable purpose under subsections 11 (a) health (b) education or (c) social or public welfare. However, this should be clarified.

We also make the point that the public benefit of youth development, both physically and socially, should have been included as one of the presumptions in section 7.

We do not support political endorsement as a charitable purpose.

4. Page 16, paragraph 1.26 and 1.27 Explanatory Material

Our final concern is in relation to accumulating profits. It is unclear how this provision would work in practise to ensure the entity retains its charitable status. For example, we ask who will monitor this requirement and will there be a maximum number of years over which profits may be accumulated?