

12 August 2011

Manager
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The Treasury
Langton Crescent
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RE: EXPOSURE DRAFT – ‘IN AUSTRALIA’ SPECIAL CONDITIONS FOR TAX CONCESSION ENTITIES

We refer to the Assistant Treasurer’s release for public consultation of the exposure draft of legislation of Tax Laws Amendment (2011 Miscellaneous Measures) Bill (No.1) 2011: tax exempt body ‘in Australia’ requirements.

We welcome the opportunity to contribute to the consultation process and wish to record our significant concern with the inclusion of the definition of ‘*Not For Profit Entity*’ as proposed in the exposure draft.

UCTAL submits that this definition should not be included in a Bill that is designed to address the issue as to whether or not charities are operating within or beyond Australia.

UCTAL also submits that the use of the ill defined phrase ‘for particular entities’ will generate significant confusion and the risk of inadvertent non compliance.

Finally, we submit that the blanket prohibition of distributions will have significant and adverse and unintended consequences.

As such, we recommend this definition be removed from this Bill. To the extent that a modified definition of ‘Not-for-profit Entity’ is deemed to be desirable, we submit that consideration of that issue should be addressed as part of the already announced ‘Better targeting of not-for-profit tax concessions’ (dated 27 May 2011) consultation process.



Background to the Uniting Church in Australia

The Uniting Church in Australia Act 1977 ('The Act') in each of the states of Australia formalised the union of the Presbyterian, Methodist and Congregational churches in each state.

The Act specifically deems the inaugurating Assembly of the church to have been validly convened and empowers the Assembly to adopt a Constitution for the church and to amend, repeal or replace the Constitution from time to time.

The Constitution currently and relevantly provides that 'the beneficial ownership of all property, whether real or personal, shall be vested in the church'. The church is defined as 'The Uniting Church in Australia' and its Constitution has directed it to establish the Uniting Church in Australia Synod of NSW and the Australian Capital Territory ('the Synod').

In each state, the Act also establishes a Property Trust under the control of the Synod to hold all property of the church, whether real or personal. Each Property Trust is a body corporate.

The Uniting Church (NSW) Trust Association Limited – UCTAL

The **Uniting Church (NSW) Trust Association Limited ('UCTAL')** ACN 000 022 480 ABN 89 725 654 978 is a charitable institution endorsed by the Australian Taxation Office, and recognised as such by the Australian Securities and Investment Commission and the Office of State Revenue in New South Wales. UCTAL is exempt from income tax under section 50-5 of the Income Tax Assessment Act 1997.

UCTAL is an incorporated entity (a company limited by guarantee) governed by a Board, elected because of their skills, experience and acumen. The members and the majority of the Board of UCTAL are all individual Uniting Church members, appointed by the Synod which ensures that UCTAL ultimately can be controlled by the Synod.

Uniting Financial Services ('UFS') is the trading name of The Uniting Church (NSW) Trust Association Limited and The Uniting Church in Australia Property Trust (NSW), a registered charitable scheme by the Australian Securities and Investment Commission operating under relief afforded to it by ASIC CO 02/184.

UCTAL provides financial leadership and support to the Synod and all the Uniting Church activities in NSW and the ACT. As the sole and designated treasury of the Synod, UCTAL is charged with the responsibility for the management and investment of all 'investment' funds.

UCTAL undertakes the treasury management functions on an aggregated basis on behalf of all Uniting Church entities and activities in NSW and the ACT. The Synod has designated that the investment fund of all Synod entities are to be aggregated under the management and control of **UCTAL** in order that this vital activity can be prudently managed.

UCTAL is charged with the responsibility to manage funds professionally and prudently with due attention to the management of both risk and reward as well as maintaining a focus on growing its capital base to ensure the continuing financial well being of the Synod.

Annual distributions from **UCTAL** are made to the Synod in order to enable inter alia:

- the religious activities and programs of the Synod
- theological training and education
- Community Service Programs; and
- Aged Care and Child Care Services.

UCTAL derives income from making passive investments. The only distributions from **UCTAL** are to the Synod.

By aggregating investment funds under the management of **UCTAL** the Synod is able to prudently manage its financial affairs and to give due attention to the attendant risks. The treasury management activities that are undertaken by **UCTAL** are, in effect, no different from those that would otherwise be undertaken by each individual entity, but through aggregation, improved management and oversight is assured.

Proposed Exposure Draft

The proposed miscellaneous amendments in the exposure draft relate to *Income Tax Assessment Act 1997*, **Subsection 995-1(1)** and state:

Not-for-profit entity means an entity that:

(a) does not carry on its activities for the purposes of profit or gain for particular entities, including its owners or members, either while it is operating or upon winding up; and

(b) Does not distribute its profits or assets to particular entities, including its owners or members, either while it is operating or upon winding up.

We are concerned that in the attempt to provide clarity and certainty as to what constitutes an entity being 'in Australia' for tax concession purposes, the proposed amendments would, in effect, redefine the entire concept of a Not-for-profit entity.

We are extremely concerned that if the proposed definition is legislated, UCTAL will be significantly and adversely impacted in its capacity to perform as the treasury management function for the Synod, which is the sole purpose for which it was created.

We note, also, that the proposed definition of Not-for-profit entity appears to be in direct contradiction to the Australian Taxation Office's (ATO) recently released draft taxation ruling TR2011/D2 Income tax and fringe benefits tax: charities (TR2011/D2).

In TR2011/D2, the ATO identifies scenarios where charities are permitted to make certain distributions providing that such distributions are in accordance with the charitable organisation's sole charitable purpose. UCTAL submits that the circumstances outlined in that TR2011/D2 are appropriate and of continuing relevance.

UCTAL has particular concern with the following aspects of the draft definition:

1. The proposed restriction on the ability of a Not-for-profit entity to create a profit or gain for its owners or members essentially constrains the entity to a year by year operating cycle and essentially prohibits the entity from establishing ongoing and inter year fund raising activities i.e. it would no longer be possible to have a situation where funds raised in Year 1 are greater than the expenses in Year 1 and are recorded in accounting terms as surplus or gain, notwithstanding that those funds are specifically earmarked for the Not-for-profit's activities in Year 2.
2. The phrase '*to particular entities, including its owners or members*' is so wide in its scope for interpretation that it would be impossible for entities to be certain that they were complying with the law during the normal course of their operations.
3. The use of such expansive wording 'for particular entities' arguably prevents the entity from prudently setting aside funds for its own use and for growth in subsequent years – for example, by way of incrementing reserves or provisions for depreciation or building maintenance.
4. The blanket prohibition on distribution 'to particular entities' carries in our view the undesirable impact of preventing a not for profit entity from structuring its activities in a manner that best suits its own administration e.g. on a state by state basis, or on a functional basis. Such arrangements may reflect matters of administrative convenience; local/state legislative obligations or longstanding practice. We submit that such structural arrangements do not, of themselves, impact upon the integrity of the entity's not for profit purpose or intent.

On behalf of UCTAL I would welcome the opportunity to amplify these matters.
Please do not hesitate to contact me on either tdimauro@unitingfinancial.com.au or
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Yours sincerely



Tony DiMauro
Company Secretary and Chief Executive
The Uniting Church (NSW) Trust Association Limited