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Manager
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The Treasury
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We will not be posting the original of this communication
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By Email: NFPReform@treasury.gov.au

Dear Manager

SUBMISSION BY AUSTRALIAN CHRISTIAN CHURCHES

TO THE REVIEW OF NOT FOR PROFIT GOVERNANCE ARRANGEMENTS CONSULTATION PAPER

AND THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION EXPOSURE DRAFT LEGISLATION

AND THE STATUTORY DEFINITION OF CHARITY

1. We make this Submission on behalf of Australian Christian Churches.

2. Thank you for the opportunity to provide a submission in respect of the Not-For-Profit Governance Arrangements Consultation Paper and the ACNC Exposure Draft Legislation (and associated consultation papers).

WHO IS "AUSTRALIAN CHRISTIAN CHURCHES"?

3. Australian Christian Churches, (ACC), formerly Assemblies of God in Australia, is a movement of Pentecostal Churches in voluntary cooperation. It consists of approximately 1100 churches across Australia, comprising of approximately 250,000 constituents. Each individual church is self-governing, but commits itself to work together with other churches in the movement for the purpose of mutual support and the spread of the gospel in Australia and the world. Our churches all exist for the advancement of the Christian religion, and are entitled to endorsement as charitable institutions on this basis.

4. This submission is written on behalf of member churches of ACC and their constituents.

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SPEED OF REFORM

5. At the outset, we must indicate that our churches are not opposed to reform, where it is genuinely necessary and will be of benefit to the broader Australian community.

6. However, we express our concern with the pace of reform being brought upon the not-for-profit sector. It must be remembered that not-for-profit bodies are generally resourced through volunteers. The pace of the Government's not-for-profit reform agenda, and the sheer scale of this agenda, is causing considerable difficulty and angst for our churches (and probably many other not-for-profit entities).

7. We therefore urge the Government to slow down the pace of reform to the not-for-profit sector, so that the not-for-profit sector can be given sufficient opportunity to properly consider and respond to the proposed changes.

8. We make further comment about this at paragraph 28.

STATUTORY DEFINITION OF CHARITY AND THE REMOVAL OF THE PRESUMPTION OF PUBLIC BENEFIT

Presumption of Public Benefit

9. While we understand that the time for submissions on the "Statutory Definition of Charity" consultation has formally closed, those matters are necessarily inter-related with the current consultations and therefore we request that these further submissions be considered.

10. We raise concern about the proposal to remove the presumption of public benefit for charities that exist for the *advancement of religion* (and indeed also for other well accepted heads of Charity).

11. As you would be aware, historically charities that exist for the *advancement of religion* have been presumed to be of public benefit. The courts have traditionally presumed that the *advancement of religion* is beneficial to the community, in the absence of evidence to the contrary. [1]

12. Professor Dal Pont suggests that there is good reason for this presumption, including:

- The curial disdain for inquiring into the comparative worth of different religions; and
- Religion, in and of itself, generates a benefit to the public.

13. Whilst this presumption exists, there is always the ability for a regulator to rebut the presumption, should there be evidence to justify such a rebuttal (such as there being evidence that the entity is causing detriment or harm to the public or its adherents).

14. If the presumption were to be removed, and a test similar to that used in the UK is adopted, then churches would need to demonstrate that:

- The pursuit of their purposes is capable of producing a benefit which can be demonstrated and which is regarded by law as beneficial; and

[1] Refer to Professor Dal Pont (2010), *Law of Charity*, Lexis Nexis Butterworths, Australia, page 275; Re Watson (deceased) [1937] 3 All ER 678

- The benefit is provided for, or available to, the public or a significant section of it. [2]

15. This create an unnecessary burden on churches (who, as mentioned above, are usually resourced through volunteers). This burden is particularly heightened on smaller churches (smaller churches are also often located in regional or remote areas).

16. We note the commitment of the Government to relieve pressure and red-tape, and to encourage regional and remote areas, and query how this would be achieved with the removal of the presumption of public benefit?

17. We note the sentiment that for most charities the burden of having to prove public benefit not be onerous, however these questions remain:

(a) Why entities for the *advancement of religion,* who have always historically enjoyed this presumption, are now to be denied it?

Bodies coming within the well recognized heads of charity have enjoyed the presumption so that they can focus their often limited resources on the very charitable purpose they were founded to advance rather than convincing others that they are doing so.

(b) If it is accepted that "most" or we would submit, "almost all", entities that exist for the *advancement of religion* would satisfy the test, why should those "most" or "almost all" be denied the presumption on the basis of a minority or a few who may not satisfy a public benefit test?

For those few, surely the well resourced regulator should be able to show that the entity does not exist for the public benefit.

(c) Who determines in a multi-cultural and multi-faith society what religions may be of benefit or what religions may not be of benefit? And if some are "in" and some are "out" will that not offend some basic tenants of our society and be a catalyst for division rather than cohesion? (See also paragraph 56).

In our Submission, a removal of the presumption may see us more quickly being taken down that path.

Benefit

18. There is also a difficulty in defining "benefit". Particularly in the area of religion, benefit is often *intangible*, and means different things to different people rather than being of measurable "practical utility" or "identifiable benefit". What constitutes a benefit to an ACC parishioner will undoubtedly be criticized by an atheist. However does that mean that the benefit is any less real or significant?

Evidence of Benefit

19. In this regard, one should not discount the evidence of the "benefit" that religion brings to the Australian community. We refer to:

[2] Morris, Debra (2010), Public Benefit, the long and winding road to reforming the public benefit test for charity: a worthwhile trip or "Is your journey really necessary", in McGregor-Lowndes and O'Halloran (ed), *Modernising Charity Law: Recent Developments and Directions*, Edward Elgar Publishing Limited, UK, page 106

- the comment by Professor McGregor-Lowndes, who stated that "evidence is now overwhelming that adherence to a faith, and more importantly worship attendance, is the best predictor of high and regular giving, and volunteering to any cause, not just to those which are religious". [3]

- It has been shown that 23 of the 25 largest Australian charities have Christian foundations. [4]

- The reality is that private worship services are for the public benefit, in that such services equip adherents to apply religious principles in their role in society. [5]

20. In short, religious belief generally gives birth to *good*. If the opposite is manifest by the evidence in a particular circumstance (that the particular beliefs of a particular entity are resulting in detriment or harm) well then on that basis the regulator is entitled to rebut the presumption and remove the endorsements of that entity. The regulator will be resourced and equipped to do so (as it currently is) and should not fear the success or otherwise of doing so just because it bears the burden of proof. The fact that some religious belief systems may give birth to detriment or harm does not logically provide a basis for the denial of the "benefit" that usually results from religious belief. In this regard the historical evidence is in our submission, clear.

21. Religious belief usually gives birth to a sense of wellbeing, place, belonging and purpose for its adherents. Our society is allocating increasing amounts of public purse resource to building - mental health, emotional resilience and a sense of community. The church has, for a long time, generally been making significant positive contributions to these - with little impact on consolidated revenue. Is this not further public policy rationale for continuing to extend the church the courtesy of the continued presumption that it exists for the public benefit?

The problem of proof

22. The courts have cautioned us about whether intangible benefits in the context of charities are even capable of proof. [6]

23. Leading academics have also cautioned about the problem of proof of religious benefit:

> "It is difficult to provide sufficient evidence that a charity contributes, for example, to 'moral improvement'. In relation to religious trusts, it is especially difficult to assume intangible public benefit in a community characterised by religious diversity. If expert evidence was brought in relation to the intangible public benefit, difficulties would arise. Most importantly, it would be difficult for those who do not share the religious beliefs of the expert to accept the decision, violating the liberal principle that a judge must provide reasons for a decision that must be accepted regardless of differing religious beliefs. **A test of 'public benefit' for religious organisations is therefore likely to prove problematic in the context of a diverse community sharing different religious beliefs."** [7]

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[3] McGregor-Lowndes and O'Halloran (ed), *Modernising Charity Law: Recent Developments and Directions*, Edward Elgar Publishing Limited, UK, page 7

[4] Robinson and Lucas (2010), Religion as a head of charity", in McGregor-Lowndes and O'Halloran (ed), *Modernising Charity Law: Recent Developments and Directions*, Edward Elgar Publishing Limited, UK, page 190

[5] Robinson and Lucas, et al, page 191

[6] *Gilmour v Coats [1949] A.C. 426*

[7] Submission to the Senate Economics Committee, *Tax Laws Amendment (Public Benefit Test) Bill 2010*, The Not-for-Profit Project, University of Melbourne Law School. Relying on the

24. Given this problem of proof of intangible benefit, which is at the heart of why religious bodies exist, to deny them a presumption that they exist for the public benefit, by logical extension, ultimately means that they are effectively being denied charitable status.

25. We accept that entities that exist for the advancement of religion ought, like other charitable bodies, to still be subject to a loss of their charitable status if the regulator can prove that such a body does not exist for the public benefit. Yes this would require evidence but this would be evidence "by exception", for example evidence of "detriment or harm" which we submit would be more readily able to be to put before a decision maker than evidence of benefit.

Submissions in summary

26. If religious belief has public benefit, which the evidence clearly points to, religious entities must, we submit, enjoy the benefit of the presumption of public benefit.

27. We also submit that "benefit" must include *intangible benefit*.

28. In our Submission and experience of advising this sector on a daily basis, not for profits and in particular those entities that exist for the advancement of religion, simply do not yet comprehend the significance of the proposed removal of the presumption. At the very least more time for considered debate on this aspect must be allowed.

29. We are not opposed to religious entities needing to provide some public reporting on the public benefit that they provide, but that needs to be in a context where "religious belief" is in and of itself, presumed to be of public benefit.

REVIEW OF NOT-FOR-PROFIT GOVERNANCE ARRANGEMENTS – CONSULTATION PAPER

Responsible Individuals' duties

30. The Consultation Paper suggests that *Responsible Individuals'* will include:

- Directors/officers of the entity;
- Trustees for the entity;
- Individuals involved in making decisions that affect the whole or a substantial part of the entity's activities/financial standing; and
- Receivers, liquidators or administrators.

31. We do not see any concerns with this proposed definition of Responsible Individuals. We would express concern should Responsible Individuals be broadened to include all other persons involved in the management of the Not-For-Profit entity.

32. It is suggested that Responsible Individuals should owe duties to not just the entity (and its charitable objects), but also donors, beneficiaries, volunteers, government, members and the public at large.

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reasoning of Matthew Harding, "Trusts for Religious Purposes and the Question of Public Benefit," *Modern Law Review* 71, no. 2 (2008): 159–182

33. With respect, it is unreasonable and *practically unworkable*[8] to expect Responsible Individuals to owe duties to such a large group, particularly given the competing interests and priorities of this group.

34. As we have already stated, many Responsible Individuals of charitable entities will be performing their role on a volunteer basis, without remuneration. To introduce duties to such a wide group will simply make it impossible for Responsible Individuals to fulfill their overarching role, and dissuade competent persons from volunteering to fulfill such roles. It will also inevitably lead to Responsible Individuals seeking remuneration for the performance of their roles, similar to what currently occurs in the For Profit sector. This will result in a diminution of resources being devoted to charitable activities.

35. In our submission, duties owed by Responsible Individuals should simply be owed to the Not-For-Profit entity, and the charitable objects it pursues. It is unnecessary to broaden these duties beyond the entity and its charitable objects.

36. The reality is that by requiring Responsible Individuals to owe duties to the Not-For-Profit entity and the charitable objects will still adequately satisfy the public policy position being pursued. Namely, such an approach will adequately address the following duties:

- Duty of care and diligence;
- Duty to act in good faith in the best interests of the entity;
- Duty not to misuse position;
- Duty not to misuse information; and
- Duty to disclose material personal interests.

37. We accept that, where an entity is receiving government funding or grants, it would be appropriate for the entity to owe duties to relevant government in respect of the expenditure of those funds or grants. However these duties can be adequately addressed in the terms of the funding or grant, and do not need to be specifically incorporated into legislation.

38. Finally, should there be a right of complaint in respect of a breach of duty (which we accept would be necessary), such a right of complaint should only vest in a Responsible Individual, member of the charity or the ACNC.

39. A right of complaint should not extend to any person within the public, as this could effectively be used by persons who have an "axe to grind" with the church. If a person had a legitimate complaint, it could be made to the ACNC who could then decide whether to take the matter further.

40. We caution against "Responsible Individuals" of religious entities needing to hold certain minimal recognized standing in the community generally or qualifications. In the context of a religious body, qualifications for leadership of such a body are usually based on the religious beliefs of that body. In the context of our churches such qualifications often include being a servant, above reproach, temperate, self-controlled, respected, and able to teach.

41. We have no objection to a set of disqualifying factors that might apply (e.g. that which may prevent a person from being a company director) but to insist on qualifying factors places an unreasonable fetter on the freedom of religious bodies being able to appoint their leaders based on their religious beliefs. (See paragraph 56).

[8] Ultimately decision making is driven by where the benefit of the decision is to be delivered.

Disclosure Requirements / Managing conflicts of interest / Internal and external reviews

42. Whilst we appreciate that some form of reporting will be inevitable under the proposed reforms, we agree that this reporting should be tiered depending on the size of the entity.

43. In particular, many churches are simply not resourced to fulfill complex reporting, and it would be unfair to expect these churches to report information in a manner similar to larger Not-For-Profit entities.

44. We note that the proposed Tiers are:

- Tier One - Up to $250,000 annual/consolidated revenue (excluding DGR entities);
- Tier Two - $250,000 to $1,000,000 annual/consolidated revenue (including DGR entities); and
- Tier Three - $1,000,000 plus annual/consolidated revenue.

45. We suggest that the allowable annual/consolidated revenue should be higher for each Tier and a minimum indexation mechanism built in, in the absence of regulation to the contrary. It is not uncommon for our small or regional churches to have an annual/consolidated revenue exceeding $250,000.

46. It is also unnecessary to require public reporting of remuneration to staff and board members. The reality is that the imposition of duties on Responsible Individuals will inevitably include an obligation to only pay persons "reasonable remuneration for services rendered" (for example, the duty to act in good faith in the best interests of the entity would undoubtedly result in such a duty being imposed on Responsible Individuals). It is an unnecessary invasion of privacy to also require public reporting of this remuneration. If such reporting is considered necessary, in our Submission that reporting not be made public, as it will unnecessarily infringe the individual's right to privacy.

47. It should be realized that the vast majority of funds received by our churches come in the way of voluntary tithes or gifts (donations) from parishioners. These monies are of course, not "public monies", in the sense that they are sourced from the government or the wider public. The monies are simply voluntary donations from parishioners on the basis that parishioners are quite happy with existing governance arrangements in the leadership of the churches they give to. In this regard, it should be recognized, at least for entities that exist for the advancement of religion, that the Responsible Individuals are already highly accountable. Donations / gifts (tithes and offerings) are usually given on a weekly basis. If parishioners are dissatisfied with governance matters (including the level of disclosure of responsible individual remuneration) they will often reduce, stop and redirect their giving. This is a significant "built in self-regulation" governance safe-guard for the good governance of religious bodies.

48. If a religious body is to be in receipt of significant government grant fund (which would be unusual) it could be a condition of such a grant that they be certain minimal disclosure (even continual disclosure for a period of time) about responsible individual remuneration.

49. With respect to having a mandatory Conflict of Interest policy embedded in legislation, and stipulating the types of conflicts that should be disclosed, we appreciate that such educative material would be of assistance to the Not-For-Profit sector. However, we caution against specifically incorporating it into legislation (other than legislating a general duty to avoid Conflicts of Interest). It seems to us that information of this type would be better distributed through the ACNC's activities in educating the Not-For-Profit sector, rather than mandating the material in legislation or regulations.

50. We accept that public reporting of material is inevitable, however any such reporting must still respect the privacy of individuals.

51. We query the wisdom of imposing accounting standards for financial reports of small Not-for-Profits as often the account keeping is done by volunteers. Compliance will be an increased cost burden to small not-for-profits. If a small not-for-profit was in receipt of significant government funding it could be a condition of that funding that financial reporting complied with certain standards.

Risk management procedures

52. The Consultation Paper suggests that Not-For-Profit entities should have a Risk Management policy in place, to identify "fraud" or "mission drift", that it is operating in accordance with its rules and that it is complying with all relevant laws.

53. Whilst undoubtedly such a policy would benefit the Not-For-Profit Sector, we again would caution against making it mandatory. Our churches are often small, and may not have the resources to carry out such reviews on a regular basis. We suggest that this could be properly managed through the ACNC's educative activities.

54. It is also not appropriate to mandate minimum insurance requirements for Not-For-Profit entities. An entity must be allowed to select the insurance that it considers appropriate and necessary. We suggest that this could be properly managed through the ACNC's educative activities.

Minimum requirements for an Entity's governing rules

55. The Consultation Paper suggests that there should be minimum requirements for an Entity's governing rules.

56. With respect, we suggest that such an approach would infringe section 116 of the Commonwealth Constitution (Commonwealth not to legislate in respect of religion) and the international right of religious freedom (as expressed in Article 18 of the International Covenant on Civil and Political Rights, ratified by Australia on 13 August 1980).

57. How a religious entity chooses to express itself, and relate to its members, should be a matter for the religious entity depending on its religious beliefs and practices. To seek to mandate such an expression is an unreasonable infringement on such religious freedom.

58. We accept that rules need to be disclosed to the ACNC, and indeed made public, but do not accept that the content of the rules should be mandated by government.

59. For example, within ACC churches, there is a variety of beliefs regarding Church leadership and governance (such as whether the broader church should be involved in the government of the church, the position of Elders/Deacons/Apostles, etc). These views vary from church to church, and to seek to mandate minimum rules would inevitably infringe upon these views.

Relationships with members

60. Our comments above regarding "Religious Freedom" (paragraphs 56 and following) are equally valid with regarding to a church's relationships with its members.

Yours faithfully
CORNEY & LIND

per:

Andrew Lind
Partner

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