THE LAW SOCIETY
OF NEW SOUTH WALES

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6 May 2013

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

Email: charities@treasury.gov.au

Dear Sir/Madam,

Consultation – A Statutory Definition of Charity

Thank you for the opportunity to comment on the proposed statutory definition of charity in the Exposure Draft Charities Bill 2013 (Exposure Draft Bill) and Charities (Consequential Amendments and Transitional Provisions) Bill 2013.

The Law Society's Business Law Committee (Committee) has reviewed the Exposure Draft Bill and the submission made by the Law Council of Australia (LCA) dated 2 May 2013. The Committee shares the concerns expressed in the LCA submission, a copy of which is enclosed, particularly in relation to section 6 (Purposes for the public benefit) and section 11 (Definition of charitable purpose).

General comments

The Committee notes that the purpose of providing a statutory definition to replace reliance on common law principles is to codify those principles and to provide clarity, an accessible, succinct format and structure. The Committee is concerned that the Exposure Draft Bill, as currently drafted, does not achieve these objectives.

The Government intends that the statutory definition "preserve the common law principles with minor modifications to provide greater clarity and certainty" (Explanatory Memorandum (EM), paragraph 1.3). The Committee considers that it is necessary for this to be expressly stated in the legislation. It is not clear that some charitable purposes that are currently recognised under common law principles are included in the statutory definition under section 11. The LCA submission notes that paragraphs 1.60 and 1.106 of the EM state that the "advancement of industry, commerce or agriculture can be charitable purposes", but such purposes are currently not explicitly included under section 11. In order to avoid uncertainty and the need to examine explanatory material to determine the relevance of common law principles, the Committee suggests incorporating common law principles in the definition. This may also allow future charitable endeavours in industrial sectors to be included.

Advancements in industry, science, medicine and engineering engaged in by the not for profit sector, such as stand-alone research centres should not be precluded from being considered as charities on the basis of their commercial activities. Charities are generally engaged in commercial activities, incidentally to their core activities. This should be explicitly recognised in the legislation so that provided the "overall" activities are of a charitable nature, then the fact that any commercial activities are secondary to this core purpose does not disqualify the entity from inclusion.

Purposes for the public benefit (section 6)

The Committee recommends the deletion of the requirement in paragraph 6(1)(b) that "the benefit is a universal or common good". This introduces a concept that is both novel and uncertain. The additional layer of definition in subsection 6(5) requiring a consideration of "real overall value" is unnecessary as the measure should not be quantitative but rather whether an endeavour has an objective to promote public welfare should suffice.

The Committee suggests that subsection 6(2) is unhelpful and should be deleted.

Subsections 6(3) and (4) should be amended by including the preface suggested in the LCA submission.

The Committee considers that the reference in paragraph 6(3)(b) to " a member of the general public" does not add to the public benefit test and should be deleted. It should not be possible for one disgruntled citizen to object to an entity being defined as a charity by arguing that its existence offends others and it is therefore not in the public interest. It may be that not every citizen agrees with all of the endeavours of current charities, which may deal with areas of contention such as abortion, drug rehabilitation or other such issues.

The Committee also sees difficulties with the drafting of section 7 as noted in the LCA submission.

Charitable purpose (section 11)

The Committee considers that paragraph 11(1)(k) as currently drafted is too restrictive; the words "any other purpose beneficial to the general public" should not be limited by reference to the preceding paragraphs.

As a matter of drafting, the words "advancing" and "promoting" appear to be used interchangeably and the Committee suggests that one only of these terms be adopted to avoid any confusion over whether there is intended to be a distinction between the terms.

The Committee also supports the express inclusion of peak bodies in the definition of charitable purpose. The Committee understands that many charities work through a national federation structure and such bodies should be automatically covered under the legislation.

Please contact Liza Booth, Policy Lawyer for the Committee, should you require any further information on (02) 9926 0212 or via email: liza.booth@lawsociety.com.au

Yours faithfully,

John Dobson
President

716809

Law Council
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Business Law Section

2 May 2013

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Dear Sir or Madam

Consultation – A Statutory Definition of Charity

1. The Taxation Committee of the Business Law Section of the Law Council of Australia (**the Committee**) again welcomes the opportunity to provide a submission to Treasury concerning ongoing work toward a statutory definition of charity, in the Exposure Draft Charities Bill (Exposure Draft Bill) and Charities (Consequential Amendments and Transitional Provisions) Bill 2013.

2. The Committee provided its submission on your consultation paper, on 9 December 2011. The Committee does not restate that submission, but trusts that the submission will be of continuing value to you at this time.

3. Indeed, elements of the Committee's 2011 submission are most material, given the way the drafting has been realised in the Exposure Draft Bill.

4. The Committee is concerned that:

   (1) the way charity is to be defined in the Exposure Draft Bill may well be confusing and difficult to navigate for not for profit (**NFP**) organisations, as the concepts used interlock in a complex way; and

   (2) the drafting of the Exposure Draft Bill is circuitous and in many places unclear; and

   (3) many of the critical concepts underlying the proposed definition are in the Explanatory Material (**EM**) rather than in the body of the legislation.

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5. For these reasons (and the more particular reasons set out below) the Committee is of the view that the Exposure Draft Bill ought to be reconsidered in its entirety.

6. The Committee is further concerned that the Exposure Draft Bill does not achieve the Government's intention stated in the EM that the draft statutory definition "preserves the common law principles with minor modifications to provide greater clarity and certainty" (paragraph 1.3). The Committee submits that it is imperative that this is made clear in the body of the legislation itself. The following paragraph should be inserted into clause **11(1)** immediately before paragraph **(k)**:

   "any other purpose which is charitable under common law principles."

7. It should not be necessary to go to explanatory material in order to determine whether the common law does remain relevant: there is a likelihood that the Court will not do so. As recently as yesterday the High Court yet again has reiterated the primacy of the text of the statute: See *Commissioner of Taxation* v *Unit Trend Services Pty Ltd* [2013] HCA 16 at [47].

8. For example, the EM states in paragraphs 1.60 and 1.106 that the "advancement of industry, commerce or agriculture can be charitable purposes". However, it is not apparent to the Committee that these purposes, which are currently recognised at common law, are included in any of the categories in clause **11** as it stands.

Purposes for the Public Benefit (Clause 6)

9. The Committee is concerned that the replacement of the settled common law position in relation to public benefit with the proposed prescriptive and novel test in clause **6** will lead to confusion and unintended consequences.

10. The Committee recommends deletion of the requirement in clause **6(1)(b)** that "the benefit is a universal or common good". As a consequence, clause **6(2)** should be deleted, as should be the definition of "universal or common good" in clause **3(1)**. The Committee is concerned, in any event, that clause **6(2)** adds nothing of substance, over-complicates the process of assessment and invites, in any judicial proceeding, a contest of potentially conflicting, time-wasting, and expensive expert evidence.

11. The concept of "universal or common good" is not a requirement at common law and would thus represent new territory, with unforeseeable consequences, in terms of law reform. The inclusion of this concept, and the additional layer of definition requiring a decision-maker to ascertain "real overall value", exceed the remit for this project and add unnecessary complexity to the clear, basic elements of "public" and "benefit" that are at the core of the "public benefit" aspect of charity law.

12. For example, the *Statute of Elizabeth's* Preamble speaks of the repair of bridges, causeways, and sea banks (amongst other things). But it might be said that such objects are of local, not universal, significance. It might also be said that such works in one part of the country are too local to have been for the common good.

13. Clause **6(2)(a)** in essence defines a benefit as being "tangible or intangible" for the purposes of the Act as a whole. The Committee supports this clarification and suggests that this would be better placed as a definition in clause **3**. The Committee does not see the necessity for clause **6(2)(b),** as a Court or a decision-maker would be faced with the logical impossibility of having to disregard only those benefits which cannot be identified.

14. The requirements in clause **6(3)** and **(4)** are presumably intended to aid a decision-maker in determining whether a purpose is "for the public benefit" under clause **6(1)**. However, this is not stated in those provisions. The Committee suggests that in clause **6(3)**, the opening words be replaced with the words:

    "for the purposes of ascertaining that a purpose is for the public benefit, have regard to."

15. This will make the weighing exercise, and the relevant factors, clear to a decision-maker.

16. Clause **6(3)(a)** does not say what weight is to be given to a possible benefit to the classes of persons identified. Further, the definition of "associate", in section 318 of the *Income Tax Assessment Act* 1936, is employed, rather than more targeted drafting. Whilst presumably appropriate for business operating across borders, and well understood by the specialist advisers they engage to advise them, such a definition will not assist an NFP, with limited resources, in understanding the meaning of "public benefit".

17. There is a better way of addressing the issue in clause **6(3)(a).** The real test should be expressed simply in terms of any *private* benefit from the purpose, as to which see Dal Pont *Law of Charity* paragraph 11.4 at footnote 25. Thus a simple standard is set, in a less prescriptive and more comprehensible way, which has stood the test of time.

18. It is also important to be clear that private (for example, member) benefits that are merely incidental or ancillary to the main charitable purpose of an entity will not now breach this requirement, as confirmed in *Victorian Women Lawyers' Association Inc v FCT* (2008) 170 FCR 318. The Committee suggests that a possible way to achieve this is by inserting the phrase:

    "that are not merely ancillary or incidental"

in clause **6(3)(a)**.

19. The Committee also sees difficulties with the way clause **6(3)(b)** is framed. It is not clear why "possible" detriment, from the purpose, to the public, a section of it, or a single member of the general public, is truly relevant in this context. The use of the term "possible" appears over-broad.

20. More specifically, the reference to "a member of the general public" in clause **6(3)(b)** should be deleted. One difficulty is, again, that no indication is given as to the weight to be attributed to clause 6(3) in making an assessment of public benefit.

21. For example, a lone, aggrieved member of the general public, who holds a strong but offensive view concerning a group of fellow citizens, really ought not to have personal hurt feelings taken into account as a "possible detriment from the purpose". This example takes on a hard edge if one is assessing a group, established for the purpose of promoting reconciliation and mutual respect between groups of individuals that are in Australia, under the "public benefit" test. Presumption of Public Benefit (Clause 7).

22. Clause **7** appears to go beyond the common law by now exposing a charity, which is for the purpose of relieving poverty, to the necessity of showing that it is for the public benefit. This is caused by the introductory words "in the absence of evidence to the contrary", as a qualification to the presumption of public benefit.

23. If that is intended, it should not be achieved as an unexpressed consequence of the form of language chosen. Rather, such a change should be flagged. The kind of cases, typically found charitable here, were trusts for "my poor relatives" and the like.

24. If it is intended that existing funds of that kind are no longer to be regarded as charities, they must be grandfathered as well.

25. The Committee is concerned that, in terms of drafting, **clauses 7(a)-(e)** may not neatly be derived from the definition of "charitable purpose".

26. However, the Committee understands the drafter is perhaps relying on the revision to section 13 *Acts Interpretation Act 1901*, which elevates the status of a note to an operative provision. The concern remains that there is a potential for conflict between a note and another operative provision. That could be overcome by instead deeming the listed purposes in **clause 7** to be charitable purposes for the purposes of **clause 11.**

27. Clause **7** also appears to extend the presumption beyond the common law in two respects. At paragraph 1.65 of the EM,[1] this extension is acknowledged

[1] And the observations at paragraph 4 to 8 above are noted.

but not explained. First clause **7** presumes both "public" and "benefit", whereas the common law presumes only the "benefit" aspect of this test. This may have unintended consequences. For example, the administrative burden of disproving "public benefit" may be increased by requiring the decision-maker to find evidence to apply the tests in clause **6**, such as in the case of a trust for the advancement of education of family members.

28. Second, clause **7** applies to purposes (a) and (b) which are not currently presumed to be of benefit at common law. While this extension is a matter for government policy, the reasons for choosing these purposes, and not others, is not made clear in the Exposure Draft Bill.

Native title benefits (Clause 8)

29. **Clause 8** refers to concepts in the *Tax Laws Amendment (2012 Measures No. 6) Bill* 2012, which is still before Parliament. The Committee thus points to the need to revisit this clause in the event that that Bill is delayed.

30. The Committee is concerned at the limitation of this provision to specific kinds of legal entity in clause **8(1)(a)**. A particular entity form is not required for charities either at common law or in the proposed statutory definition. In particular, the concept of "Indigenous holding entity", as defined by cross-referencing to multiple other statutes, may not encompass ordinary charitable trusts for purposes; if so, this seems directly to contradict the policy intent.

31. **Clause 8(1)(a)** does not deal with the situation where such an entity has ceased to receive native title benefits, perhaps after mining has ceased; nor does it deal with such an entity set up in anticipation of receipt of such benefits.

Charitable purpose (Clause 11)

32. As set out in paragraph 7 above, clause **11(1)** must be modified to include an express reference to common law principles.

33. **Clause 11(1)(k)** may tend to stultify the development of the law of charity, unless amended by deleting all words after "general public".

34. As a matter of drafting, some clauses of the definition of "charitable purpose" use the term "advancing" and others include the term "promoting", which invites query as to whether the drafter intends a distinction.

35. The Committee understands that particular significance is attached by clause **13** to the idea of "advancing" social or public welfare, but this is simply by way of adding examples. The term dealt with there is "purpose of advancing social public welfare". There could be no harm in introducing uniform

language, using either "advancing" or "promoting" but not using the two different words in different parts of the definition.

36. The Exposure Draft Bill does not mention the position of peak bodies in the definition of charitable purpose. While there is a brief reference to such bodies in paragraphs 1.38 and 1.39 of the EM, the wrong place to find operative rules,[2] the Committee suggests that clarifying this issue, which has long been of concern, would be better dealt with by an express provision in the legislation. As discussed in our 9 December 2011 submission on your consultation paper, this could be simply achieved by adding a reference to the promotion of the 'effectiveness or efficiency of charities' in the list of charitable purposes in clause **11** (as indeed has been done in the United Kingdom).

37. While the Exposure Draft Bill does not explicitly deal with the carrying on of commercial activities by charities, there is a brief reference to that issue in paragraphs 1.36 and 1.37 of the EM.[3] The Committee observes that those paragraphs are inconsistent with the judgment of the High Court in *FCT v Word Investments Ltd* (2008) 236 CLR 204. In particular, the suggestion that business operations may 'become an end in themselves' was expressly rejected as involving a 'false dichotomy' by the High Court (at paragraph 24 of the judgement). Those paragraphs should therefore be removed from the EM and the treatment of commercial activities left to the 'Better Targeting of Not-for-profit Tax Concessions' measure that is proposed to apply from 1 July 2014.

38. The Law Institute of Victoria shares similar concerns to those expressed above.

39. The Committee would be glad to expand on the above or to meet with you. Please contact Mark Friezer, the Committee Chair, at Clayton Utz on 02-9353 4129 or via email: mfriezer@claytonutz.com to facilitate further discussions.

Yours faithfully,

Frank O'Loughlin

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2 See paragraphs 4 to 8 above.
3 See paragraphs 4 to 8 above.