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# Submission to Treasury regarding the Exposure Draft for the *Tax Laws Amendment (2012 Measures No.4) Bill 2012: tax exempt body "in Australia" requirements*

## By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

## 1 Introduction

(a) The name of our organisation is the Anglican Church Diocese of Sydney. This submission is made by the Standing Committee of the Synod of the Diocese.

(b) We note the significant changes made to the previous form of Exposure Draft in response to submissions made by us and others. We appreciate the responsiveness of Treasury and Government in making these changes which address many of the sector's concerns with the previous Exposure Draft.

(c) However the revised Exposure Draft raises further concerns. Our comments and recommendations follow.

## 2 Gifts and Donations

(a) We note that the proscription on donations to entities that are not exempt entities in the previous Exposure Draft has been removed and replaced with proposed subsection 30-18(3) (for DGRs) and subsection 50-50(4) (for other exempt entities).

(b) These subsections require that if an exempt entity gives money or property to an entity that is not an exempt entity, the use of the money by the recipient (or any other entity) be taken into account in determining whether the giving entity satisfies the requisite test about operating and pursuing its purposes in Australia.

(c) These changes address previous concerns about the difficulties of not being able to make donations to other entities which are not deductible gift recipients or tax exempt, such as individuals in need. However the new provisions give rise to other concerns.

***Need for reasonable limits for determining subsequent use of money***

(d) We note there is no limit in either subsection 30-18(3) or subsection 50-50(4) on the inquiries or other steps that must be undertaken by the giving entity for determining how the recipient entity uses the given amount. The problem is increased with the inclusion of the words "or any other entity" in brackets in those subsections.

(e) We submit that this is an unreasonable compliance burden. In particular, it leaves exempt entities exposed to the possibility of disendorsement on the basis of misrepresentations by others about how its gifts will be used.

*Recommendation*

(f) We recommend that the legislation provide that where the use of money by recipient entities (whether or not the initial recipient) is to be taken into account for the purposes of subsections 30-18(3) and 50-50(4), the use should be determined by reference to what the entity giving the money or property knew or ought reasonably to have known about its use.

***Enquiries concerning tax status***

(g) In our submission on the initial exposure draft we made the point that the requirement that a tax exempt entity not donate money to any other entity unless the other entity is an exempt entity will require the tax status of all recipients of donations to be ascertained before any donations are made. The prohibition on gifts or donations to non-exempt entities has now been removed. However there will continue to be a need under the revised provisions to ascertain whether a recipient is a deductible gift recipient or an tax exempt entity for the purposes of subsections 30-18(3) and 50-50(4).

*Recommendation*

(h) We recommend that the legislation provide that the Australian Business Register (or public information portal of the ACNC once established) can be relied upon as conclusive evidence of whether an entity is a deductible gift recipient or tax exempt entity for the purposes of subsections 30-18(3) and 50-50(4).

## 3 Disregarded amounts

(a) We note the insertion of subsection 50-50(5)(b) which provides that use of gifts or contributions received by an entity are to be disregarded in determining whether that entity operates and pursues its purposes in Australia. The inclusion of this provision addresses concerns outlined in our submission on the previous Exposure Draft about the omission of a disregarded amounts provision.

(b) However we note that subsection 50-50(5) includes a proviso that "…the entity must comply with the conditions (if any) prescribed in the regulations for the purposes of this subsection…". The explanatory statement does not give any indication as to what conditions may be prescribed by regulation.

***Recommendations***

(c) We recommend either –

(i) the explanatory statement provide an outline of the types of issues that may need to be addressed by regulation under subsection 50-50(5), or

(ii) the reference to "conditions (if any) prescribed in the regulations for the purposes of this subsection" be removed from this subsection.

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## 4 Compliance with substantive governing rules

(a) We note that proposed subsection 50-50(3)(a) now requires compliance with "all the substantive requirements" in an entity's governing rules rather than "all requirements".

(b) While this change goes some way to addressing the concerns expression in our previous submission, we remain concerned about the potential for uncertainty about which requirements are substantive requirements. Most entities are likely to have substantive requirements in their governing rules which have little relevance to their tax status.

(c) We therefore submit that the legislation should define "substantive requirements" along the lines of paragraph 1.86 of the explanatory statement to mean those requirements "relating to an entity's object and purpose and those relating to an entity's not-for-profit" status.

(d) Further, we submit that a breach or failure of one person associated with a tax exempt organisation or an isolated instance of non-compliance by an organisation should usually not result in the immediate loss of entitlement of the organisation to income tax exemption. Unless the breach is very serious, the organisation should be given some ability to rectify the breach. As currently drafted this requirement is a continuing requirement and consequently a single breach would always be sufficient to disentitle an organisation to endorsement for its entire future.

***Recommendations***

(e) We recommend that a definition of "substantive requirements of governing rules" be inserted along the lines of that in paragraph 1.86 of the Explanatory Memorandum.

(e) We also recommend that a suitable process for affording an entity an opportunity to rectify a breach, prior to disendorsement being instituted, ought to be included in the Exposure Draft.

## 5 Use of income and assets

(a) We note that proposed section 50-50(3)(b) has been revised to require that an entity must "use its income and assets solely to pursue the purposes for which it was established *and for which it is entitled to be exempt from tax*."

(b) The additional words would appear to prevent an entity from applying any income or assets in furtherance of incidental or ancillary purposes since these are (perhaps) not the purposes for which it is entitled to be exempt from tax. Treasury's Consultation Paper on *The Definition of Charity* would seem to make clear that if there is to be a statutory definition of 'charity' then, regardless of whether the test is "exclusive charitable purpose" or "dominant charitable purpose", there will be allowance for non-charitable purposes which are ancillary or incidental to the charitable purpose or purposes, as the common law presently also allows. It would be anomalous if the definition of charity permitted a charity to have such ancillary or incidental purposes but the charity is not able to apply any resources in furtherance of those purposes.

(c) Further, it is not clear how section 50-50(3)(b) relates to the proposed measures to remove tax concessions in respect of unrelated business activities of charities. In particular, it is not clear at this stage whether the retention of profits from an unrelated business activity of a not-for-profit entity will be regarded as a failure to use its assets and income to pursue the purposes for which it was established and hence raise the prospect of disendorsement of the whole entity – rather than the removal of tax concessions just in respect of the retained profit from its unrelated business activities.

(d) In any event, we continue to question the need for this provision at all. In order to obtain endorsement, the Commissioner of Taxation already requires that the organisation have a non-profit clause requiring the income and assets of the organisation to be used in furtherance of its objects. Consequently, this section is unnecessary if section 50-50(3)(a) requires compliance with the objects and non-profit clause included in the governing rules of the entity.

***Recommendations***

(e) We recommend that proposed section 50-50(3)(b) be removed on the basis that it is unnecessary.

(f) We also recommend that proposed subsection 50-50(3)(b) be removed as it may be better addressed by the future reforms in respect of unrelated business activities and therefore the inclusion of this provision should be deferred until the consultation process in respect of such reforms has been completed.

(g) If subsection 50-50(3)(b) is not removed, we recommend that the words “and for which it is entitled to be exempt from tax” be omitted given that an entity may also have other ancillary or incidental purposes.

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