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Submission to a Statutory Definition of Charity

The Tasmanian Government welcomes the opportunity to make the following comments on the exposure draft legislation and explanatory materials for the consultation process for “A Statutory Definition of Charity”. Given the short time period allowed for the consultation process, this document collates comments from those Tasmanian Government departments that have an interest in, or might be affected by, the outcome of the consultation process, and is in place of each department submitting an individual response. Agencies contributing to this response include the Department of Premier and Cabinet and the Department of Justice – Consumer Affairs and Fair Trading.

Potential narrowing of state tax bases

The Department of Treasury and Finance notes that there may be potential for a narrowing of the state tax base should it adopt the proposed Commonwealth definition of charity, particularly with respect to a definition of ‘charity’ or ‘charitable purpose’ that applies to a commercial entity belonging to a charity. Should this be the case, Tasmania will review relevant taxation legislation to ensure that it continues to capture tax revenue in circumstances where a commercial arm of a charity engages in activities that produce income that is not fully directed back to the altruistic purposes of the charity.

Impact on existing organisations

The main issue regarding the proposal to introduce a statutory definition of ‘charity’ and ‘charitable purposes’ at a Commonwealth level is the impact that such a definition is likely to have on existing Tasmanian charities and not-for-profit organisations. This is a complex area and although it appears that the draft is broadening rather than restricting the common law, it may be necessary to comprehensively map its likely interaction with general disclosure requirements, deductible gift recipient status, and requirements of the Australian Tax Office.

It is important that the costs and benefits to Tasmania of the proposed legislation be clearly understood. In particular it should be clarified whether there are existing organisations receiving benefits or exemptions under State or Commonwealth legislation that would no longer receive those benefits or exemptions, and whether there are existing organisations that do not receive benefits or exemptions that would do so under the proposed definition. That is, it is not evident

whether any research or impact assessment has been completed as to what the legislative changes will mean to NFP charities in Tasmania. At one level, this is a C/W initiative and responsibility; at another, the State is being consulted, and as part of that consultation would be expected to form a view on these matters.

Consistency of State and Commonwealth laws and their Interaction

It is also noted that if the definition of ‘charity’ and ‘charitable purpose’ were different at a State level it may be inconsistent with the aims of national reforms in relation to not-for-profit entities, as those reforms are targeted at streamlining relevant processes. There may be an argument that to minimise the regulatory burden on charities and not-for-profit organisations, any definition of charity or charitable purpose that is to apply in State legislation should be consistent with any Commonwealth definition.

If a different definition is adopted or retained at a State level, the consequences of any conflict between the definitions need to be clarified. If the Commonwealth definition enables an organisation to register with the Australian Charities and Not-for-profits Commission (the ACNC) as a charity, it may introduce complexities and confusion if the organisation is not a charity or does not have charitable purposes for the purposes of any State legislation. Against this, there may be a loss of revenue if the definition of ‘charity’ is broadened beyond its current use in State legislation.

The words “charity” and “charitable purposes” are currently used in some State legislation, for example:

- section 87(1)(d) of the *Local Government Act 1993* exempts land or part of land “owned and occupied exclusively for charitable purposes” from paying rates, but does not define “charitable purposes”;
- the *Gaming Control Act 1993* contains a definition of charitable purposes and states that minor gaming for charitable purposes is lawful; and
- the *Land Tax Act 2000*, *Civil Liability Act 2002*, *Fire Services Act 1979*, *Associations Incorporation Act 1964*, *Trustee Act 1898*, *Industrial Relations Act 1984* and the *Adoption Act 1988*, to name a few, all refer to charitable purposes in some way and generally do not include a specific definition of charitable purposes.

It may be necessary to undertake a comprehensive audit to determine how consistently the definition of ‘charitable purpose’ is applied across these State enactments and to assess the potential impact (if any) of the proposed Commonwealth legislation on provisions such as these. This may be a matter where the advice of the Solicitor-General could be sought, in order to ensure the impacts are fully understood.

“Advancing social or public welfare”

It is possible that section 13(1) of the draft unduly broadens the existing law in relation to the purpose of advancing social or public welfare by stating that it includes “the purpose of caring for, supporting and protecting children and young people (and, in particular, providing child care services).” If the Bill is intended to replicate what is contained in the *Extension of Charitable Purpose Act 2004*, the wording should reflect that Act more closely. If the Bill is intended to broaden that law, it should include a definition of “supporting” in order to clarify the scope of the Bill.

Disaster Relief

In the 2011 Commonwealth consultation paper “A Definition of Charity” it was stated that eligibility for deductible gift recipient status under the Australian Disaster Relief Funds (ADRF) category is restricted to:

‘public funds established and maintained for charitable purposes solely to provide money for relief of people and re-establishing a community in distress as a result of declared disasters which occur in Australia’.

If a charity uses donations in a manner that is inconsistent with the existing ADRF framework they jeopardise their status as charitable.

In the wake of the Victorian bushfires in 2009, stakeholders raised concerns with the existing arrangements concerning disaster relief funds. The concern was that there is a lack of flexibility in the current charitable framework as to how donated funds can be applied.

Paragraph 151 of the consultation paper identified four issues in relation to ADRFs:

1. providing more flexibility in establishing funds, collecting donations, and distributing funds in response to a disaster;
2. increasing the scope of allowable activities;
3. encouraging the efficient and timely use of funds collected for a disaster; and
4. standardising the approach to triggering Commonwealth disaster-response tax concessions.

Issues

Tasmania has experienced similar issues to Victoria in relation to the issues identified in paragraph 151 of the discussion paper, principally:

1. providing more flexibility for distributing funds in response to a disaster;
2. the scope of allowable activities; and
3. the efficient and timely use of funds collected.

The draft ATO FAQs in relation to ADRF present a number of obstacles to the efficient and timely allocation of funds collected. We understand that the FAQs are based on the principle that providing benefits that are commercial or private are only “incidental and ancillary, if at all”. This principle is included in Section 13(2)(c) of the Bill.

Replacement of household contents

The draft ATO has provided FAQs that outline the issues that should be considered in distribution funds from and Australia Disaster Relief Fund (most tax deductible funds established to provide relief from a disaster). If taken literally, the FAQs present a number of significant difficulties for the reasonable distribution of appeal funds. For example, the FAQs state that:

- a) “If considering replacement of household contents as part of providing money for relief of distress by way of rebuilding a community, there must be a reasonable expectation that the resident of tenant remains in the affected area.”
- b) “the recipients must be in charitable need”
- c) “the replacement of luxury, high-end or decorative items may not be appropriate.”

Prima facie these restrictions appear reasonable but in application they unreasonably restrict flexibility and the efficient and timely use allocation of appeal funds. The reasonable expectation of both donors and recipients is that funds flow quickly and to those most in need.

Processes that require detailed examination of an individual's circumstances or intentions (such as "do you intend on staying the area", or "do you intend on spending the funds of luxury items") will generate significant tensions throughout the appeals distribution process (particularly during the first three to six months following a disaster). The charitable need of a resident of a home destroyed in a bushfire is not altered by whether the tenant or resident "remains in the affected area". At the time the funds are distributed the resident may not yet have made a decision regarding whether they will remain in the affected area.

Early distributions from appeal funds utilise broad indicators of "charitable need" –categories of people affected by the disaster that may receive assistance may include "people that have lost their primary residence". A more detailed means-testing requirement would introduce unnecessary delays to the distribution of much-needed funds as would any requirement to ensure that the funds are not used to acquire luxury or decorative items.

Primary Producers

The draft ATO FAQs state that "primary producers are businesses and it is not consistent with the charitable purposes of an ADRF to support a business...[in relation to] repair or replacement internal fences or boundary fences".

The January 2013 Tasmanian fires destroyed fences on a number of farms from which the owners were making a very moderate income. It introduces an unconscionable delay to the distribution of appeal funds for the Appeal Distribution Committee to have wait until the cost of replacing fences causes severe personal financial hardship and distress to the farmer as an individual before funds appeal funds can be allocated to that person. Some reasonable flexibility to relieve hardship by supporting the early replacement of items critical to business activity is considered to be well within the

Tasmania is concerned that the proposed legislative provision relating to ADRFs does not address issues identified in the consultation paper and experienced in relation to recent disasters.

It is possible that the requirement that commercial or private benefits are only "incidental and ancillary, if at all" contains adequate flexibility to meet the needs of those distributing appeal funds. This would require further investigation and discussion on how the provision is to be interpreted and applied. A more flexible interpretation would need to be applied compared to the current approach taken in the ATO FAQs.

Tasmania would support changes of this Section 13(2)(c) that are commercial or private are only "incidental and ancillary, if at all" of the Bill if required for clarity.

Other issues

As the ACNC will be responsible for determining whether an entity applying for registration as a charity falls within the statutory definition, it will be important that those determinations are made transparently and on a consistent basis.

The Department of Justice – Consumer Affairs and Fair Trading (CAFT) administers the *Collections for Charities Act 2001*. CAFT has no issues with the proposed charity definition and is of the view that some clarity would be helpful in administering this Act.

Yours sincerely


for Martin Wallace
Secretary

3 May 2013