

2 October 2020

Manager  
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By email [FIRBStakeholders@treasury.gov.au](mailto:FIRBStakeholders@treasury.gov.au)

Dear Sir/Madam

**Major reforms to the Foreign Investment Review Framework - September 2020  
Treatment of charities and not-for-profits under the *Foreign Acquisitions and Takeovers Act 1975 (Cth)***

We welcome the opportunity to make a submission for amendments to the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* (**FATA**) to clarify how it applies to charities and not-for-profit organisations.

**About Prolegis Lawyers**

Prolegis was established in 2001. We specialise and are focused on advising charities, not-for-profits and the philanthropic sector. Today our work also extends to social enterprise and social investments. Our purpose is to help enable and accelerate the good work of the people and organisations in this sector in Australia.

Our five Partners and twelve lawyers are located in our offices in Sydney and Melbourne working as one team. Our team is the largest gathering of lawyers who are focussed entirely on advising organisations and individuals of this sector in Australia.

Our clients range from the smallest of new and start-up organisations and aspiring individuals, to the most mature and largest charity, not-for-profit and philanthropic organisations in Australia, including:

- a wide range of institutions (covering a range of different needs (including aged care, the disability sector, and the special needs of indigenous people and communities) and those which promote health.
- a wide range of charitable or not-for-profit foundations including Australia's largest philanthropic charity and Australia's main sports foundation.
- a wide range of independent schools and educational institutions.
- a number of leading professional associations.
- churches and, Christian and other faith-based organisations.
- those involved in social housing and other social investment, impact investing, etc.
- a number of Australian listed public companies, multinationals and high net worth individuals and families (but only in relation to their charitable or other not-for-profit activities).

A significant part of the work we do is advising on mergers, collaborations and strategic alliances between charities and not-for-profit organisations. These often involve restructures of memberships and changes in governance of organisations. And it is in this area of our practice that we have encountered an issue under the FATA presently.

### ***The issue under FATA for charities and not-for-profit organisations***

The following describes the issue for charities and not-for-profit organisations under FATA:

- 1 Under the current framework, for an action to be a “notifiable action” for which Foreign Investment Review Board (**FIRB**) approval is necessary or a “significant action” for which FIRB approval is desirable, a relevant condition is that the entity which is the subject of the action is an Australian corporation that carries on an *Australian business* whether alone or together with one or more other persons, an Australian unit trust or the holding entity of a abovementioned corporation or trust (section 47(4) and s40(4) of FATA respectively).
- 2 “Australian business” is defined (under section 8 of the FATA) as “a business that is carried on wholly or partly in Australia *in anticipation of profit or gain*”.
- 3 Amongst Australian charities and not-for-profits, there are those who are carried on with a view to profit or gain but the common characteristic is that the profits or gains are not applied/ distributed for private benefit but are applied back into the organisation’s activities in pursuit of charitable or other not-for-profit purposes of the organisation. An example would be charities who make investments for the sole purpose of creating a revenue stream which will subsequently support their charitable activities.

The *Charities Act 2013* (Cth) defines “charity” as a not-for-profit entity (section 5) but while it offers no definition of “not-for-profit”, the Australian Charities and Not-for-Profits Commission (which is responsible for this legislation) explains that “a *not-for-profit is an organisation that does not operate for the profit, personal gain or other benefit of particular people (for example, its members, the people who run it or their friends or relatives). The definition of not-for-profit applies both while the organisation is operating and if it closes down*” (see <https://www.acnc.gov.au/for-charities/start-charity/not-profit>). This explanation reflects the common understanding of what is a “not-for-profit” we have described in the paragraph above. The issue is not whether the organisation operates with a view to making profits or gains but that the organisation does not operate for the profit, personal gain or other benefit of particular people.

There are similar explanations of “not-for-profit” and “non-profit” by the Australian Tax Office in different contexts:

- “*Not-for-profit (NFP) organisations are organisations that provide services to the community and do not operate to make a profit for its members (or shareholders, if applicable). ... All profits must go back into the services the organisation provides and must not be distributed to members, even if the organisation winds up.*” (<https://www.ato.gov.au/general/aboriginal-and-torres-strait-islander-people/not-for-profit-organisations/>)
- “*A body is a “non-profit body” if “by operation of law (for example, a statute governing a body’s activities) or by its constituent documents, the body is prevented from distributing its profits or assets amongst its members while the body is functional and on its winding-up.”* (GST Ruling 2012/2 – Goods and Services Tax: financial assistance payments”
- “*An organisation is non-profit if it is not carried on for the profit or gain of its individual members. This applies for direct and indirect gains, both while the organisation is being carried on and on its winding up. We accept an organisation as non-profit if its constitution or governing documents prohibit distribution of profits or gains to individual members and its actions are consistent with the prohibition.*” (<https://www.ato.gov.au/Definitions/>)
- “*A non-profit company ... is a company that is not run for the purposes of profit or gain to its individual members and is, by the terms of the company’s constituent*

*documents, prohibited from making any distribution, whether in money, property or otherwise, to its members” (<https://www.ato.gov.au/Definitions/>)*

4 There are two different views on how the definition of “Australian business” in section 8 of FATA applies to charities and not-for-profits:

(a) First, that a charity or not-for-profit is not an “Australian business” as defined because they are not carried on “in anticipation of profit or gain”.

This view would reflect the common understanding of the not-for-profit character of charities and not-for-profit organisations and is premised on the understanding of “not-for-profit” as set out in paragraph 3 above.

(b) Secondly, that the definition in section 8 is to be read plainly: any Australian business even a charity or not-for-profit if it is carried on “in anticipation of profit or gain”. The definition in section 8 focuses only on “anticipation of profit or gain” and no part of the definition focuses on how or to whom profits or gains may be applied. On this view, any Australian charity or not-for-profit which is carried on with even a modest a view to profit or gain would be an “Australian business” as defined.

### ***Our submission***

We submit that amendments as follows could be made to FATA and/or FATR to provide clarity for charities and not-for-profits:

1 The definition of “Australian business” in section 5 of FATA should explicitly exclude charities and not-for-profits. We believe that the intent of the words “in anticipation of profit or gain” is that the profit or gain be for private benefit (for example, distribution to shareholders of a for-profit company). This could be achieved by amending sub-section (1) to section 8 of FATA along the following lines:

*An **Australian business** is a business (other than a business carried on by a charity or not-for-profit) that is carried on wholly or partly in Australia in anticipation of profit or gain.*

2 Alternatively, the relevant provisions of FATA and/or could be amended to explicitly exempt charities and not-for-profits in specific transactions. There is already one such exemption in section 35(1) of the FATR which provides that the requirements under FATA do not apply in relation to an acquisition of an interest in Australian land “by a charity operating in Australia primarily for the benefit of persons ordinarily resident in Australia”.

If you have any questions, please do not hesitate to contact either of us.

Yours faithfully  
**Prolegis Lawyers**



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