



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

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

By email: charities@treasury.gov.au

Dear Treasury

***Charities Bill 2013 and the Charities (Consequential
Amendments and Transitional Provisions) Bill 2013***

Chartered Secretaries Australia (CSA) is the peak body for over 7,000 governance and risk professionals. It is the leading independent authority on best practice in board and organisational governance and risk management. Our accredited and internationally recognised education and training offerings are focused on giving governance and risk practitioners the skills they need to improve their organisations' performance.

Our Members are all involved in governance, corporate administration and compliance with the *Corporations Act* (the Act). Many of our Members serve as officers of not-for-profit (NFP) organisations, or work for or are involved with companies limited by guarantee. CSA itself is a company limited by guarantee, established to promote and advance the efficient governance, management and administration of commerce, industry and public affairs and the development of secretaryship of organisations through education, training and the dissemination of information for the benefit of Members, applicants for membership and the public generally.

CSA welcomes the opportunity to comment on the Charities Bill 2013 (the bill) and the (Consequential Amendments and Transitional Provisions) Bill 2013.

General comments

CSA Members are of the view that the bill provides a statutory definition of charity that is broad and flexible, and in alignment with the common law.

We are very pleased to see that the bill does not attempt to provide a wholesale codification of the common law position for all purposes, but rather seeks to provide a common definition of the terms 'charity' and 'charitable purpose' as these terms are used across all Commonwealth legislation.

CSA is of the view that this is very helpful, given that at present these same terms have different meanings depending on their use and definition in different legislation. This is one of the main factors causing uncertainty and complexity in the sector.

CSA Members believe that it is appropriate that the legislation preserves the common law definition of charity. Indeed, aspects of the common law may be helpful to charities trying to establish the public benefit of their purposes. The Charities Bill will also provide greater clarity and certainty for the Australian Charities and Not-for-profit Commission (ACNC) as regulator and administrator and likewise should be beneficial for most organisations when they assess whether they meet the requirements for charitable status.

We support the manner in which the Charities Bill appears to have been responsive not only to difficulties that have arisen in case law in Australia concerning the common law definition of charity and consequent legislative amendments designed to address those difficulties, but also to the many submissions made to date in the public consultation process. The bill appears to have considered the implications of previous attempts to codify the definition of charity in other common law jurisdictions, for example, it takes a different approach to the concept of 'public benefit' by including a rebuttable presumption that public benefit exists in relation to specifically identified purposes.

As a result, the definitions in the bill are wide, inclusive and reflective of current contemporary Australian thinking of what is charitable.

There are some instances where we believe further work is required to ensure that the bill's provisions align with policy objectives and do not introduce additional compliance obligations for the sector. Our detailed comments on the bill are set out below.

Detailed comments

Interaction of 'charitable purpose' and 'public benefit'

We note that the bill addresses both the 'charitable purpose' and the 'public benefit' aspect of charities.

If a charity has a purpose (which does not have a presumption of public benefit under s 7 of the Charities Bill) then it will need to establish the public benefit of its purposes having regard to the provisions of s 6 of the Charities Bill. Section 6 is a codification of the common law concept of 'public benefit' and, given common law is not replaced by the legislation, that reference to case law will be valid when interpreting the meaning of s 6 and such charities need to consider how to demonstrate the public benefit aspect of their purposes.

A charity must, therefore, satisfy both the charitable purpose (under part 3) and the public benefit test (under division 2) in order to be granted the status of charity. This is not a new requirement, as the public benefit element is included within the existing common law definition of what is charitable. However, while the underlying concept is not new, the way it is expressed in the legislation is new.

This change in the expression of the underlying concept could prove confusing to charities.

CSA recommends that Treasury issue clarification that a charity must satisfy both the charitable purpose and public benefits tests to be granted the status of charity, providing further clarity that the concept is not new, although the expression of it has changed.

Clause 1.36 in the explanatory memorandum

CSA notes that Clause 1.36 on p 17 of the explanatory memorandum points to a new requirement that will have considerable implications for charities and which has not been subject to public debate in the earlier consultation on the statutory definition of charity.

The explanatory memorandum states that:

An entity carrying on a business or commercial enterprise will not be charitable simply because it is controlled by another entity that is charitable. It is the purpose of the entity itself that must be charitable. Where an entity undertakes commercial activities, those activities must be only to further its charitable purpose.

This appears to state that any charity that sets up a separate entity must ensure that the separate entity also satisfies the charitable purpose and public benefit test.

It appears that it is not sufficient that the separate entity, controlled by the charity, has been set up deliberately to carry on business or commercial activities for the sole purpose of generating income to assist the furtherance of the charitable purpose and public benefit work undertaken by the controlling entity.

CSA notes that many charities have been advised to set up separate entities to carry on their commercial activities, with the surplus funds from commercial activities of the separate entity generated on behalf of the controlling entity to assist the furtherance of the charitable purpose, as this was the model preferred by the Australian Tax Office. However, the new requirement in the Charities Bill seems to indicate that Treasury has in mind a preferred model whereby no commercial activity is undertaken by a charity through a separate entity.

It will be confusing and certainly add to the compliance obligations of charities for them to unravel arrangements set up to meet the expectations of a regulator, the Australian Tax Office, in order to now not be in conflict with the requirements of the Charities Bill. CSA does not support charities being forced to reorder their administrative arrangements in this way.

We note that the final sentence in this paragraph states that:

[Where an entity undertakes commercial activities, those activities must be only to further its charitable purpose.] It may do this by providing funds to other institutions that advance that charitable purpose.

This final sentence makes it extremely difficult to ascertain if the intent of the Charities Bill is to stop charities from setting up separate entities to undertake commercial activities, in order that they generate funds on behalf of the controlling entity so that it may further its charitable purpose. This final sentence appears to be in conflict with the earlier part of Clause 1.36.

CSA recommends that if a charity has set up a separate entity to undertake commercial activities and the funds generated from those commercial activities are for the furtherance of the charitable purpose of the controlling entity, then providing the funds to the controlling entity means that the separate entity meets the charitable purpose test.

If the Charities Bill is not intended to be read in the manner we set out here, then further clarification is required as to the position of separate entities set up to undertake commercial activities, with the funds generated on behalf of the controlling entity to assist in the furtherance of its charitable purpose.

Definition of not-for-profit

Clause 1.23 states that 'The term not-for-profit currently takes its ordinary meaning.' The explanatory memorandum then refers to the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 which inserts a definition of 'not-for-profit' in subsection 995-1 of *the Income Tax Assessment Act 1997*.

Charities should not have to refer to the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 or seek expensive legal advice in order to understand if the definition proposed in that bill expands or conflicts with the ordinary meaning of not-for-profit. The Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 has not passed through the House of Representatives at this stage.

Without clarity as to the definition of not-for-profit, it is extremely confusing for charities to assess if they will meet the definition of charity as set out in the bill.

CSA recommends that, given the importance of the concept of not-for-profit to the definition of charity, it should be included as a defined term in the Charities Bill.

Table setting out comparison of key features of new law and current law

We commend Treasury for providing the table in the explanatory memorandum on pp 12-15 that sets out the comparison of the new law and the current law. The table is very helpful.

However, we note that the content of the table must be read line-by-line in order to comprehend any differences between the current law and the new law. Given that the majority of those needing to understand the differences are unlikely to be lawyers, and given the under-resourced nature of this sector, it would be of even more assistance if this table was to highlight the key differences. This would make the changes immediately clear, which in turn means understanding of the changes is likely to be improved.

The content of the table would also be enhanced if it included a row setting out that a charity must satisfy both the charitable purpose (under part 3) and the public benefit test (under division 2) in order to be granted the status of charity. The new content should explain that this is not a new requirement, as the public benefit element is included within the existing common law definition of what is charitable, but the way it is expressed in the legislation is new.

We also note that the reform process for the charity and NFP sector has been challenging, given the amount of change that has been introduced and the pace of reform. This particular bill will be of vital interest to charities throughout Australia, but, as noted above, given that the majority of those who need to understand it are unlikely to come from a legal background and are often volunteers seeking to further the charitable purposes of their organisations in their own time, CSA is of the view that it could be difficult for many in the sector to assess the implications for their charities of this bill. CSA strongly believes that charities should be able to readily understand their statutory obligations without recourse to expensive legal advice.

We are of the view that it would be of great assistance to the sector for Treasury to issue the table as a stand-alone document, that charities can easily download from Treasury's website. To ensure that charities can readily understand how the new law differs from the current law, it would also be of immense practical assistance to the sector to include a fourth column setting out the implications for charities of the changes in the law.

The content of this fourth column could set out any changed compliance obligations and whether charities need to take action in response to the changes in the law. For example, this fourth column could note that charities will need to put in place strategies to deal with reserves to ensure that the charity can show that the accumulation of funds is still consistent with the entity having a charitable purpose.¹ Treasury issued a Factsheet in conjunction with the bill and the explanatory memorandum, which states:

¹ We note that guiding charities to consider strategies to deal with reserves to ensure the charity can show that the accumulation of funds is still consistent with the entity having a charitable purpose interacts with

Charities will not need to re-register when the definition takes effect from 1 January 2014. The ACNC will assist charities if their registration needs to be adjusted to come under a purpose now mentioned specifically in the legislation.

CSA is of the view that this information could be included in the fourth column, rather than in a separate document that charities may or may not discover.

CSA recommends that Treasury:

- highlight the key changes in the table setting out the changes between the current law and the proposed new law
- include a new row clarifying that a charity must satisfy both the charitable purpose and public benefits tests to be granted the status of charity, and explaining that this concept is not new, although the expression of it has changed
- include a fourth column in the table titled 'Implications for charities' which addresses any changed compliance obligations and whether charities need to take action in response to the changes in the law
- issue the table as a stand-alone document that charities can easily download from Treasury's website
- provide a copy of the document to the ACNC to post to its website, as many charities are likely to go to the ACNC website rather than Treasury's website when seeking information about how the bill affects their status.

CSA would welcome the opportunity to discuss any of our views in greater detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Sheehy', written in a cursive style.

Tim Sheehy
CHIEF EXECUTIVE

the proposal from the ACNC that the 2014 Annual Information Statement the proposal that only three types of reserves should be disclosed.