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Our ref RKH:IZB:096714

9 December 2011

The Manager
Philanthropy & Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir

Re: Consultation Paper (2011) - A new statutory definition of Charity

TressCox Lawyers and its dedicated National Pro Bono legal team, are strongly committed to providing legal services and on-going support, to a diverse range of not-for-profit clients and charities.

We welcome the opportunity to respond to Treasury's 2011, Consultation on the proposed statutory definition of *charity*.

1. The enactment of a statutory definition, in its current form will in our view, have a significant adverse impact on new and existing charities under the proposed 2013 re-assessment regime¹.
2. We are concerned that Treasury has failed to address in any meaningful way, how the proposed legislative definition of *charity*, is consistent with the vision of the Government's *National Compact: Working Together*². In particular, there is no explanation of how the proposed new legislative definition will:

¹ The Federal Government announced in the 2011 – 12 Budget that funding would be allocated to the Commission to re-assess the charitable status of entities on the basis of the new definition.

² The National Compact sets out: shared principles; shared aspirations on the relationship between the parties, on the *achievement* of better results, and for a more sustainable non-profit sector; and priorities in the development of joint action plans, including for the reduction of red tape and streamlined reporting. Commonwealth of Australia (2010), *National Compact: working together*. http://www.nationalcompact.gov.au/wordpress/wp-content/uploads/Nat_compact.pdf

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- create increased certainty and consistency on the meaning of *charity*, without restricting the existing common law definition;
 - improve transparent, accountable and responsive decision-making: What mechanisms will be established for administering the definition, publicising reasons for the decision if denied, review or appeal of administrative decisions?
 - reduce red-tape and costly legal disputes: How will the proposed regime, reduce overall administrative costs to the sector³?
3. The foreword to the consultation paper explains that a primary reason for the proposal to introduce a statutory definition of 'charity', is because of indications of strong support among stakeholders and a general consensus, that the public understanding of 'charities' would be improved, if the general principles underpinning the meaning of 'charity' and 'charitable purposes' were set out in statute.
4. We submit, that the basis for this assertion lacks credibility, has not been arrived at from informed, sectoral participation and the Treasury relies upon a selective construction of the published recommendations, for reform to the not-for-profit sector.
5. In particular, in support of its proposal, the Treasury defers to enquiries which pre-date two of the most recent, significant High Court decisions: *AidWatch* and *Word Investments* as the basis for the proposition, that there is strong sectoral support for a statutory definition of *charity*. In addition, of the two other reports that the Treasury claims, strongly support the need for a definitional reform, neither of these publications specifically record findings which support a consistent sectoral view⁴. In contrast to Treasury's claims, the Final Report states (at page 33):

"During the consultation there was concern with the proposal of a statutory definition of charity. The concerns were generally confined to specific sectors, and overall, the submissions were varied in their view of the introduction of a definition of charity, with most not voicing an opinion, one way or the other".

³ "The ATO's Non Profit Centre has argued that the DGR assessment of endorsements has increased in risk and complexity, which in turn has increased work loads, citing greater use of specialist lawyers representing applicants and court cases such as the High Court decision on *Word Investments Ltd*". See ANAO Audit on the Australian Taxation Office Administration of Deductible Gift Recipients (Non-profit Sector) - High risk and complex applications p2.27.

⁴ 2010 Productivity Commission Research Report, Contribution of the Not-for-profit sector ("Productivity Report") and 2011 The Final Report of the Scoping Study for a National Not-for-profit Regulator ("the Final Report").

6. What is the underlying rationale for a legislative definition of charity?

TressCox Lawyers act for numerous charitable organisations on a Pro Bono basis. Of the issues arising from our work, of greatest concern and of greater significance than the common law definition of 'charity,' are:

- 6.1. *reform of the existing tax concession and deductible gift status regime ("DGR"), applicable to the sector; and*
- 6.2. *removal of the existing complexity and duplication of the current regulatory regime; and*
- 6.3. *improved governance of the sector, which could well be addressed, by the appointment of a 'responsible person' majority, to all not-for-profit boards.*
- 6.4. We note that one of the consistent themes arising from each of the reviews and enquiries, is that the current tax endorsement requirements contribute to a complex, inequitable and inconsistent system⁵.
- 6.5. The *Productivity Report* recommended that there be established a National, one-stop-shop for the non-profit sector, which would oversee the regulation and reporting obligations of the sector, including administering the endorsements currently undertaken by the Australian Taxation Office (ATO).
- 6.6. Notwithstanding this important recommendation (which would instil a level of cohesion and assist governmental independence), the government's approach is to establish a new regulatory body, with sole responsibility for determining charitable status⁶. However, the ATO will retain responsibility for administering tax concessions for the not-for-profit sector. Under this approach, applicants seeking DGR endorsement will have their charity status determined by the new regulator, prior to DGR endorsement assessment by the ATO.
- 6.7. We consider that one of the more pertinent motivations for the government's proposed legislative definition of 'charity', is the influence of fiscal considerations. When an organisation or fund, is held to have a valid 'charitable purpose', that organisation or fund, is then entitled to enjoy certain tax relief

⁵ 2010 Productivity Commission Final Report, Contribution of the Not-for-profit sector ("Productivity Report"), at 163.

⁶ Ibid 4 above. The Productivity report's key proposals included: "to establish a separate, national one-stop-shop for regulation and tax endorsement of non-profit organisations" (Recommendation 6.5). The implementation of this recommendation would see the registration and regulation of non-profit entities move from the ATO and the Australian Securities and Investment Commission to a new statutory body, the National Registrar for Community and Charitable Purpose Organisations;

benefits, which whilst providing tax relief to the charity and its donors, impacts the government's consolidated revenue⁷.

7. The recent performance audit conducted by the ANAO Audit on the Australian Taxation Office Administration of *Deductible Gift Recipients (Non-profit Sector)* states at paragraph 20:

"For many taxpayers the focus of their philanthropy is through donations to charities with DGR status, which is subsequently claimed as tax deductions against their gross income. For the 2008 – 09 financial year, some 4.6 million taxpayers claimed deductions for donations to DGR's totalling \$2.1 billion. Whilst the proportion of taxpayers making such claims has remained largely static, the amount claimed as donations has increased dramatically in recent times".

8. We strongly urge the Treasury to suspend further legislative intervention, regarding a statutory definition of *charity*, which despite the current law being tied to Elizabethan statute, has continued to evolve satisfactorily under the aegis of the High Court.

Yours faithfully

TressCox



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⁷ As at July 2010, there were 24,290 DGR organisations. The estimated value of tax deductible donations to these entities was \$2.1 billion for 2008 – 09. See: Australian Taxation Office (2011), *Taxation Statistics 2008 – 09* (NAT 101-03.2011), p 17.