FUNDRAISING INSTITUTE AUSTRALIA

SUBMISSION

SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE:

AUSTRALIAN CHARITIES AND NOT FOR PROFITS COMMISSION EXPOSURE BILL 2012; AUSTRALIAN CHARITIES AND NOT FOR PROFITS COMMISSION (CONSEQUENTIAL AND TRANSITIONAL) BILL 2012; TAX LAWS AMENDMENT (SPECIAL CONDITIONS FOR NOT FOR PROFIT CONCESSIONS) BILL 2012

SUBMISSION COVER SHEET

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FUNDRAISING INSTITUTE AUSTRALIA SUBMISSION

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS:

INQUIRY INTO THE AUSTRALIAN CHARITIES AND NOT FOR PROFITS COMMISSION EXPOSURE DRAFT BILL

ABOUT FUNDRAISING INSTITUTE AUSTRALIA (FIA)

Established in 1968, FIA's purpose is to make the world a better place by advancing professional fundraising through promotion of standards, professional development pathways and measurable credentials so that our members achieve best practice.

The FIA has developed the Principles & Standards of Fundraising Practice as the professional fundraiser's guide to ethical, accountable and transparent fundraising. The Principles & Standards are vital to how the fundraising profession is viewed by donors, government, the community and fundraisers.

In order to achieve its mission, FIA conducts the following activities:

- Promote and enhance education, training and professional development of fundraisers.
- Provide a resource of fundraising information.
- Advocate for fundraising practice to Government, industry and the community.
- Support and promote certification of fundraisers.
- Develop standards and codes of practice.
- Promote and enhance fundraising as a profession.
- Promote and encourage research into fundraising and philanthropic giving.

Executive Summary

FIA has long called for national regulation for charities and not for profit organisations and harmonisation of State and Federal legislation. However, it expresses concern that, given the imminent implementation of the ACNC on 1 October 2012, the draft Bill lacks detailed content requirements of financial reports and not for profit governance requirements. FIA anticipates that these may be included in the regulations when drafted. Furthermore, any reporting for the sector needs to be streamlined between Commonwealth and State governments in order to ensure the sector is not burdened with duplicated reporting,

FIA is also concerned at the emphasis placed on enforcement in the draft Bill. Research shows that the vast majority of charities and not for profits do carry out their missions and fulfil the objects of their constitutions. Where there have been cases of fraud or embezzlement, it has been found that the organisation has had a weak Board which has failed to insist on standard compliance measures, such as two signatories for all transactions. Where compliance is implemented properly, the risk of such offences is minimal. Therefore, FIA recommends an emphasis on compliance, rather than enforcement.

In relation to the Tax Laws (Special Conditions for Not for Profit Concessions) Bill 2012, FIA recommends that rather than removing or limiting tax exemptions for NFPs, Treasury define its priorities for tax collection. To assess whether a NFP should be tax exempt, FIA supports the purpose test as determined by the High Court of Australia, rather than the activity test, as preferred by the Commissioner of Taxation. In relation to the 'in Australia" test for tax exemption, FIA is of the view that the "in Australia' test as interpreted by the Commissioner of Taxation is unduly narrow and does not align with the public expectation that Australia will actively involve itself in global society, in particular for the alleviation of poverty and suffering. FIA opposes the amendment.

FIA sets out its comments in detail below.

AUSTRALIAN CHARITIES AND NOT FOR PROFITS COMMISSION EXPOSURE BILL 2012; AUSTRALIAN CHARITIES AND NOT FOR PROFITS COMMISSION (CONSEQUENTIAL AND TRANSITIONAL) BILL 2012;

Definition of charities (Draft Bill, section 25 – 5 (6))

FIA supports the common law definition of charity now restored to the Bill. In particular, the public benefit test covers most modern charities and ensures that charities can develop in ways beneficial to the community without the limits of a narrow definition.

Entities (Draft Bill, Core Concepts, subdivision 205-A)

FIA supports the reporting requirements for the different tiers of small, medium and large entities which sufficiently differentiate between these entities. FIA notes that these requirements accord with recommendations made by FIA in previous submissions to Treasury.

Governance standards (Draft Bill, Division 45)

FIA finds it difficult to comment on governance standards as the details will be included in regulations yet to be drafted.

Both NSW and Victoria provide model rules for incorporated associations, which include detailed provisions for the relationship with members, including registration, liabilities, discipline and dispute resolution. These are satisfactory and FIA submits that they provide a template for the ACNC .

As the peak body for fundraisers, FIA also supports self-regulation to ensure that professional conduct and practice is maintained. FIA has developed the Principles and Standards of Fundraising Practice http://www.fia.org.au/pages/principles-standards-of-fundraising-practice.html FIA is the only peak organisation in Australia which has developed such an extensive body of Standards covering all aspects of fundraising practice. They were developed with the assistance of FIA senior members with current expertise in the area of each Standard.

The Principles and Standards have an educational role, and exist to guide fundraising professionals on best practice. The Principles are the overarching ethical codes that apply to all fundraisers and the Standards focus on specific disciplines of fundraising practice. The Principles and Standards cover the following:

Principles of Fundraising Practice

- Code of Ethics and Professional Conduct
- Fundraiser's Promise to Donors
- Code of Acceptance and Refusal of Donations
- FIA Complaints Process

Standards of Fundraising Practice

- Standard of Bequest Fundraising Practice
- Standard of Charitable Gaming Fundraising Practice
- Standard of Charitable Telemarketing Fundraising Practice
- Standard of Direct Mail Fundraising Practice
- Standard of Electronic Fundraising Practice
- Standard of Events Fundraising Practice
- Standard of Face to Face Fundraising Practice
- Standard of Grants Fundraising Practice
- Standard of Overseas Aid Fundraising Practice
- Standard of School Fundraising Practice
- Standard of Workplace Giving Fundraising Practice
- Standard of Social Media Fundraising Practice

Any person may contact FIA with a query in relation to the Principles and Standards of Fundraising Practice without resorting to the Complaints Process. Such an inquiry may clarify whether a complaint is warranted in relation to particular activities or actions of an FIA member and whether these activities or actions constitute a possible breach of the Principles and Standards of Fundraising Practice. Where breaches of FIA's Principles and Standards of Fundraising Practice have occurred, written complaints are directed to the FIA CEO in confidence.

FIA submits that the Australian government should facilitate all forms of fundraising practice by:

- streamlining regulation,
- facilitating compliance and reducing compliance costs, and
- encouraging compliance with fundraising professional standards of fundraising practice.

External conduct standards - anti terrorism and money laundering (Draft Bill, Division 50)

FIA requires its members to comply with the existing legislation concerning anti-terrorism and money laundering together with the AusAid and ATO guidelines on overseas donations in its Standard of Overseas Aid Fundraising Practice.

As pointed out in the submission by National Roundtable of Nonprofit Organisations, there is minimal evidence that Australian charities and NFPs are being exploited by such criminals or participating in such criminal activity, and the risk of such involvement is low. This being the case, and given that there are other government departments (ie Department of Foreign Affairs and ATO) who are able to monitor and prevent such activity, FIA agrees with the submission by National Roundtable of Nonprofit Organisations (pp5,6) that it is unnecessary

duplication of function for ACNC to have investigative powers in connection with international aid donations or charities who organise and/or distribute them.

Reports (Draft Bill, Division 60)

The reporting requirements are generally sound, and accord with FIA's recommendations to Treasury. The longer reporting time of 6 months is important to allow charities to properly organise their financial records.

Section 60-60 concerning basic religious charities is confusing as subsection (1) conflicts with subsection (2). Is it intended that basic religious charities be exempt from reporting, or are they able to do so voluntarily and then come under the jurisdiction of the ACNC?

Regulatory powers of the ACNC Commissioner (Draft Bill, Chapter 4)

While FIA recognises the need to ensure compliance with the draft Bill, FIA is disappointed and expresses concern that the Bill emphasises investigation of NFPs and enforcement of compliance with the Bill by criminal sanctions, rather than risk management and education for charities and NFPs about compliance and government. Section 110-10 is the only section covering education and does not provide any information about how the ACNC will assist "registered entities by providing them with guidance or education" (subsection (1)) or "the public in understanding the work of the not for profit sector" (subsection (2)) . FIA assumes that these functions will be developed by the Commissioner. The understatement in section 110-10 contrasts strongly with the extensive preceding sections concerning regulation, investigation and enforcement in Chapter 4 and indicates that the education and information role of the ACNC may be subordinated to its investigative and enforcement role.

FIA urges ACNC to prefer the educational and guidance approach to compliance and governance over the punitive approach set out in Chapter 4.

The most recent research shows that the majority of NFPs are aware of risk management practices and actively implement them. Failure to comply is more likely to be related to limitations on administration and systems caused by low budgets, rather than criminal activity. Even where criminal activity has taken place, it has been enabled by poor compliance and governance (eg failure to require two signatories for financial transactions). Such risk management issues are easily rectifiable without resort to enforcement.

The new Australian and New Zealand Standard of Risk Management AU NZ ISO 31000:2009 provides authoritative guidance on risk management practice. In 2010, FIA and National Roundtable of Nonprofit Organisations sponsored the PPB not for profit risk survey 2010 http://www.appichar.com.au/pages/risksurvey.html. PPB surveyed the risk management practices of not for profit organisations and compared them to the key components of the recently introduced Standard, as there were several significant differences between the 2009 Standard and its predecessor.

The survey is the most recent available survey of risk management practice in NFPs. The outcome was encouraging; over 70% of respondents indicated they placed a high level of importance on risk management practices and understood the link between risk management and the organisation's ability to achieve its outcomes. Larger NFPs had a more corporate structure with more sophisticated and mature systems in place to identify and

manage risk, which is to be expected, especially in view of the survey finding that implementation of risk management practices had a significant relationship to a NFP's budget; smaller organisations did not have sufficient capacity to devote resources to risk management policy and practice.

Less than half the survey participants have had risk management identification and training. This fact indicates an area where the ACNC has the opportunity to provide practical guidance and assistance, in particular to smaller, under-resourced NFPs, who would benefit from risk management guidance being included in the ACNC information portal and possibly other education programs as well. An educational focus is more appropriate than an enforcement focus, as the survey showed that smaller NFPs pay less attention to formal risk management policy and practices because of budgetary constraints, rather than ignorance of compliance issues.

FIA supports:

- the inclusion of risk management guidance in the ACNC information portal; and
- the application of Standard of Risk Management AU NZ ISO 31000:2009 to NFPs.

TAX LAWS AMENDMENT (SPECIAL CONDITIONS FOR NOT FOR PROFIT CONCESSIONS) BILL 2012

Income Tax Concessions

Australian charities follow a fee dominant model, ie 63% of funds are privately raised, although, surprisingly, not from private philanthropy, but from fees and payments, rather than reliance on government funding (Salamon and Anheir, 1999, The emerging sector revisited, Baltimore, Centre for Civil Society Studies, Institute for Policy Studies, Johns Hopkins University). While the market in Australia for not-for-profit services is large, further growth is limited because of the dependence on private fundraising. As only about 30% of funding in Australia comes from government, with the remainder raised privately, further support by government will increase the not-for-profit sector's efficiency and effectiveness.

One way of doing this is by increasing the available range of Deductible Gift Recipients (DGRs). Gifts to charities have been deductible in Australia since the introduction of Commonwealth income tax legislation in 1915 (O'Connell, The tax position of charities in Australia – why does it have to be so complicated (2008) AT Rev 17 at 21.) Treasury has estimated that the cost of providing gift deductibility was $710 million in 2007-2008 (O'Connell, 2008, citing Treasury, Tax Expenditure Statement 2006, item A64). By contrast, the general level of giving in Australia is around $11 billion (Giving Australia, Research on Philanthropy in Australia, Summary of Findings, 2005). Given the value of revenue from charities in Australia, this is a very modest level of subsidy, being much less than 1 per cent of all giving.

Given the small cost of gift deductibility compared to the productivity of the not-for-profit sector, there is no good economic reason to reduce this level of subsidy; or waive tax deductibility; or reduce the number of DGRs. Rather, there is a solid argument for government support to be increased for a sector which is so valuable to the Australian community, both economically and socially.

Rather than removing tax exemptions for NFPs, it is recommended that Treasury define its priorities for tax collection. For example, the fringe benefits tax exemptions can be amended, which would prevent exploitation of certain packages, such as media and entertainment.

Purpose or activity as guideline for exemption

FIA supports the current legislation as interpreted by the High Court, in particular the exemption provisions of the Income Tax Assessment Act 1997 (Cth).

Treasury is referred to the Henry Report 2010, para B 32. Income tax concessions for NFPs are not detrimental to charities or the economy. Income tax exemption is not necessarily a concession, as implied in the Treasury paper. For example, churches, religious organisations and charities have never been subject to payment of income tax. Therefore, the tax has not been foregone or conceded; it has never been collected. Mutuality is not equivalent to tax expenditure.

As both the High Court of Australia and Full Federal Court of Australia has pointed out in several recent cases, the correct test is what is the purpose of the NFP, not what is the activity of the NFP. Both the High Court and Full Federal Court have consistently applied this test, which is not an invention of the courts, but is grounded in the exemption provisions of the Income Tax Assessment Act 1997 (Cth). The courts' interpretation has not extended or stretched the meaning of these exemptions, but has applied their ordinary meaning to modern methods of fundraising and activities carried out by NFPs.

It is too limiting in a rapidly and continuously changing economic environment to specify what activities an NFP is allowed to conduct in pursuit of its objects, as this may cause the NFP to miss a valuable opportunity to raise funds for its cause. It is simply common sense that an NFP may engage in practical activities to raise funds, rather than relying solely on donations or other passive forms of fundraising such as bequests.

Commissioner of Taxation v Word Investments Ltd [2008] HCA 55 is discussed in the next section under the "in Australia" test heading.

Commissioner of Taxation v Wentworth District Capital Ltd [2011] FCAFC 42. The Full Federal Court agreed with the trial judge that a bank established in the town of **Wentworth** was exempt from paying income tax under ss 50-1 and 50-10 of the Income Tax Assessment Act 1997 (Cth) because the main or dominant purpose for which it was established was a community service, ie the facilitation of face-to-face banking services which provided a substantial benefit to the community of Wentworth that was both real and tangible. As the Commissioner agreed, "service imports delivery of some practical help, benefit or advantage", in this case, operation of a community bank on a not-for-profit basis.

Commissioner of Taxation v Co-operative Bulk Handling Ltd [2010] FCAFC 155

In effect, the Full Federal Court decided that financial success alone does not disqualify a NFP for claiming a tax exemption. The Full Federal Court acknowledged that Co-operative Bulk Handling had grown and expanded considerably since its inception in 1933, but it still remained a co-operative dedicated to the purpose of promoting the development of agricultural resources in Australia and was therefore entitled to exemption under s 50-1 of

the Income Tax Assessment Act 1997 (Cth). By retaining its co-operative structure, it fulfilled the special condition that it was not carried on for the profit or gain of its individual members.

"In Australia" test

Commissioner of Taxation v Word Investments Ltd [2008] HCA 55. It is worth noting that the arguments of the Commissioner of Taxation were rejected at every jurisdictional level from the Administrative Appeals Tribunal to the High Court of Australia. This indicates the Commissioner of Taxation was not applying a recognised definition of "in Australia" .

The assertion in para 1.10 of the explanatory memorandum that prior to the Word Investments case about the 'in Australia' test is an incorrect interpretation of the law before the Word Investments decision, which was simply a restatement - not a reinterpretation - of the meaning of the relevant provisions of the Income tax Assessment Act 1987 (Cth). There is no valid policy reason as to why charities should be prevented from raising money in Australia for charities or other entities such as the United Nations relief agencies. AusAid, the Federal government aid agency in fact provides taxpayers' money to many of the same recipient. There are numerous public benefits for allowing charities which raise funds for overseas purposes to have the benefit of tax deductibility in Australia. Private aid agencies can go into areas which government sponsored agencies are prevented for political reasons and conduct activities to relieve poverty and suffering among disadvantaged and often dispossessed groups. By attempting to restrict an activity that may be disapproved by current government policy (eg the distribution of translated Bibles in foreign countries by organisations such as Wycliffe Bible Translators (International)), the Australian government runs the risk of preventing charities devoted to alleviation of poverty and suffering in foreign countries from carrying out their mission.

Australian donors, by giving for overseas activities, can show their support for such activities and feel that they are helping in a practical way to alleviate poverty and suffering, rather than simply helplessly watching news reports about these places. Australia is now a multicultural society, and many of its residents originate from countries where Australian aid and charitable activity has alleviated poverty and suffering; this can only be to the benefit of Australia in generating goodwill and closer international relations with such countries.

It is not possible for any country, including Australia, to generate enough taxpayers' funds through the government to do the work carried out by modern charities and non government organisations operating in the field. To restrict their activities would be to restrict unnecessarily the alleviation of poverty and suffering and creation of better relations in a global society. Numerous major charities which donate money and carry out large scale activities outside Australia such as World Vision, Red Cross Australia, Medecins sans Frontiers, WWF, WSPA, could be adversely affected by this amendment. Not all such organisations operate under the Overseas Aid Gift Deductibility Scheme as they may send funds to international agencies such as UN agencies, rather than charities. The exemptions for overseas aid organisations and environmental organisations in the explanatory memorandum (para 1.131 – 1.151) are unduly restrictive as they apply to entities that have been pre-approved, which will adversely affect the development of new entities for such purposes.

There is no research that shows that, if such funds are restricted from distribution overseas, they will be instead distributed in the Australian community, as they are raised for a particular purpose that has no application in a wealthy country such as Australia. Australian already give generously to Australian charities, in particular disaster relief, and the funds spent overseas do not diminish the funds available to domestic charities. In fact, research shows that tax deductibility of donations is little if any cost to the Australian public, and is more than balanced by the value of charitable work conducted that otherwise would fall to the government to carry out.

As stated elsewhere in this paper, there is no documented evidence that charities raising funds to be spent outside Australia are either deliberately or inadvertently allowing those funds to be used for money laundering or terrorism. This fear is unfounded.

The most important part of the Word Investments judgment was the High Court's emphasis on purpose, ie that the goal of making a profit was not an end in itself, but was incidental to its charitable purposes. The profits were not distributed to shareholders, but to charities supported by Wycliffe Bible Translators (International). If the public benefit test is applied to this activity, there is no doubt that the Australian public receives a benefit from the activities of Wycliffe Bible Translators (International) in raising awareness of Australia in foreign countries, creating goodwill for Australia and Australians in foreign countries, and supporting charitable activities in foreign countries.

FIA is of the view that the 'in Australia' test as interpreted by the Commissioner of Taxation is unduly narrow and does not align with the public expectation that Australia will actively involve itself in global society, in particular for the alleviation of poverty and suffering. FIA opposes the amendment.

Structure of business

There is no need to create a level playing field among NFPs. The proper distinction is not between large and small NFPs, or charities and other non-charitable NFPs, but between for-profit companies and NFPs. This is because of the fundamental difference in the way in which NFPs operate compared to for-profits. All NFPs, whether charities, clubs or other interest groups, are responsible to their members; cannot trade in shares in themselves, as they have no shares; and cannot distribute their surpluses to their members, but must apply them to the objects set out in their constitutions or rules. By contrast, for-profits are responsible to their shareholders, who are permitted to buy and sell shares; and for-profits must distribute profits to their shareholders in proportion to their respective shareholdings.

The courts clearly consider that the form of NFP is not material. Word Investments and Wentworth District Capital are both public companies limited by guarantee, a structure used by NFPs which wish to operate nationally as it assists them to attract greater amounts of funds. Co-operative Bulk Handling is a co-operative established under WA law. These structures are better suited to operating large scale enterprises than the incorporated association at State level.

With a separate business, a key difficulty would be in distributing 100% of profits by the end of each financial year, as these would not be quantified until after the close of the financial year, in accordance with standard accounting practice. Therefore, it would be inevitable that NFPs would have to pay some tax each year.

Recommendations for reform – UK experience

In 2002, the UK Government's Strategy Unit, in its report "Private Action, Public Benefit" made the following recommendations for reform to the charitable sector:

- Amend charity law to allow charities to trade within the entity of the charity, without the need for separation. The power to undertake trade would be subject to a specific duty of care.
- The duty of care to be exercised by charities is similar to the fiduciary duty of trustees under the old UK Trust Act, ie the following duties should be included:
  - Duty of care to give proper consideration to minimise the risk of trading;
  - Duty to take independent legal or financial advice.
  - Duty to consider the form of income generation and whether it is both legally and ethically acceptable for an NFP to be trading in.
  - Duty to compare the economies of the trade with the purpose of the charity.

FIA is of the view that these recommendations could be applied to Australian NFPs, in particular companies limited by guarantee and co-operatives. With the introduction of the Australian Charities and Not-for-Profit Commission, it is anticipated that the incorporated association will be developed into a structure more suitable for national use. At the time of these submissions, no further details have been forthcoming.

Conclusion

FIA appreciates the opportunity to comment on the draft Bills and looks forward to the outcome of this consultation. FIA would appreciate the opportunity to represent its members at any hearings on the draft Bill that may eventuate.