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General Manager  
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The Treasury  
Langton Crescent  
PARKES ACT 2600

By Email: [TaxLawDesign@treasury.gov.au](mailto:TaxLawDesign@treasury.gov.au)

Dear Sir/Madam,

**Consultation on Restating and Centralising the Special Conditions for Tax Concession Entities.**

*Introduction*

Thank you for the opportunity to comment on the draft legislation, draft regulations and explanatory materials to implement the 2009-10 Budget measure to 'restate and centralise the special conditions for tax concession entities' ('draft legislation').

Philanthropy Australia is the national peak body for philanthropy and is a not-for-profit membership organisation comprising more than 700 Members and Associates. These include trusts and foundations, businesses, families and individuals who want to make a difference through their own philanthropy and to encourage others with their giving. Our vision is for 'A More Giving Australia' and our mission is to 'Lead an innovative, growing, influential and high performing philanthropic sector in Australia.'

The taxation framework for philanthropy is critical to supporting a vibrant and growing culture of giving in Australia. Therefore Philanthropy Australia believes that this taxation framework should be based around principles of simplicity, clarity, certainty and ensuring there are appropriate incentives to encourage giving. We welcome legislative proposals that seek to achieve this objective.

Philanthropy Australia's comments on the draft legislation are divided into two parts. The first provides specific comments on the draft legislation and the second makes broader comments on barriers to cross-border philanthropy and the impact of the draft legislation.

*Specific Comments on the Draft Legislation*

Philanthropy Australia has assessed the draft legislation, and is of the view that it is unlikely to have any direct adverse impacts on Philanthropy Australia's Members.

Charitable trusts and foundations will either give to deductible gift recipients, or tax exempt entities, and therefore would already conduct their activities in a manner that is consistent with the provisions of this draft legislation. Some charitable trusts and foundations may give to non-exempt entities in order to further specific charitable purposes. However, this is likely to be limited and directing these amounts overseas is unlikely to be a principle activity for these charitable trusts or foundations.

In such cases, Philanthropy Australia believes that the requirements in Sections 50-50 (4) and (4A) are satisfactory and workable. In particular, Philanthropy Australia welcomes the inclusion of a reasonableness test under Section 50-50 (4A), which recognises the impracticality of exempt entities being able to trace the use of their funds without limit when they are provided to a non-exempt entity.

Philanthropy Australia also presumes that there will be no change to the current grandfathering provision contained in Section 50-50 of the *Income Tax (Transitional Provisions) Act 1997*, regarding amounts to be disregarded for the purposes of determining whether a fund established before 1 July 1997 operates and pursues its purposes in Australia.

Philanthropy Australia notes that although the draft legislation is unlikely to have any direct adverse impacts on Philanthropy Australia's Members, it may have an indirect impact. This is because it may restrict the activities of entities with charitable causes that are not subject to an exemption under the draft legislation. Whilst these entities may not be Members of Philanthropy Australia, they may be supported by our Members.

In this regard, Philanthropy Australia notes the exemptions for certain types of entities such as International Affairs deductible gift recipients (including organisations approved under the Overseas Aid Gift Deduction Scheme) and organisations on the Register of Environmental Organisations.

Philanthropy Australia thanks the Australian Government for responding to the concerns raised by stakeholders regarding previous versions of this draft legislation, and welcomes revisions to the draft legislation in response to issues raised by medical research institutes and arts organisations in particular, given the considerable support for these causes by Philanthropy Australia's Members. Philanthropy Australia will defer to submissions prepared by these organisations and their representative bodies for more detailed analysis of these revisions, and asks that any additional concerns raised in those submissions be given due consideration.

Philanthropy Australia notes that despite the amendments proposed to Subdivisions 30-A and 30-B of the *Income Tax Assessment Act 1997* to allow for overseas activities by medical research institutes and touring arts organisations, there are other types of entities whose ability to undertake overseas activities may be restricted by the provisions of s30-18 (1). Examples could include some non-medical scientific research institutes and health promotion charities.

Given that Philanthropy Australia's Members support a diverse range of charitable causes, Philanthropy Australia requests that further consideration be given to any such wider impacts.

### *Broader Comments on Barriers to Cross-Border Philanthropy*

Although Philanthropy Australia is of the view that this draft legislation is unlikely to have any direct adverse impacts on Philanthropy Australia's Members, Philanthropy Australia believes that it is important to consider the draft legislation's policy intent and impact with reference to the broader context of cross-border philanthropy.

A submission by Not-for-profit Project at the University of Melbourne Law School<sup>1</sup>, prepared in response to a previous version of this draft legislation, points out that it imposes some of the highest barriers to cross-border philanthropy in the world.<sup>2</sup>

Appendix C<sup>3</sup> to that submission provides a comparison of how overseas activities by domestic charitable entities are regulated in jurisdictions such as Canada, New Zealand, the United States, and Europe. The comparison shows that the proposals contained in the draft legislation are relatively restrictive compared with approaches in these other jurisdictions.

The Council on Foundations, which is a major philanthropic peak body in the United States that represents 1,700 grant makers, corporations, and philanthropic service providers, commissioned a paper<sup>4</sup> on the legal framework for global philanthropy as a contribution to Global Philanthropy Leadership Initiative, which is a joint project of the Council on Foundations, the European Foundation Centre, and the Worldwide Initiative for Grantmaker Support. This paper pointed out that:

*While the growth of cross-border philanthropy is impressive, the legal environment and other factors have limited global philanthropy from reaching its full potential.*<sup>5</sup>

The paper identified donor country constraints including significant limitations on foreign grant making by tax-exempt entities, as a barrier to the growth of cross-border philanthropy. The framework then applying in Australia was specifically cited as an example of one that is particularly restrictive.<sup>6</sup>

Further, the paper also identified limited tax incentives as a barrier to the growth of cross-border philanthropy. Australia's deductible gift recipient framework and the 'In Australia' requirement were highlighted as examples of this.<sup>7</sup>

The draft legislation would affirm this particularly restrictive approach to cross-border philanthropy in Australia, and therefore, maintain the limitations on cross-border

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<sup>1</sup> *Submission to the Treasury, Restating and Standardising the Special Conditions for Tax Concession Entities (Including the 'In-Australia' Conditions)*, The Not-for-profit Project, University of Melbourne Law School, 14 September 2012. Accessible at:

<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=4bf9171f-2fd2-4e44-8174-5788a4f74f09>

<sup>2</sup> *Ibid*, p.5.

<sup>3</sup> *Ibid*, p.29.

<sup>4</sup> Moore, D and Rutzen, D; *Legal Framework for Global Philanthropy: Barriers and Opportunities*; *International Journal of Not-for-Profit Law*; vol. 13, nos. 1-2, April 2011. Accessible at:

[http://www.icnl.org/research/journal/vol13iss1/special\\_1.htm](http://www.icnl.org/research/journal/vol13iss1/special_1.htm)

<sup>5</sup> *Ibid*, p.6

<sup>6</sup> *Ibid*, p.9

<sup>7</sup> *Ibid*, p.11

philanthropy in Australia and inhibit the wider contribution that Australian philanthropy could make beyond our borders.

Although this may reflect the policy intent of the draft legislation, Philanthropy Australia would welcome a broader examination of how the Australian philanthropic sector could be supported to make a contribution not only in Australia, but also globally.

In this regard, there would be merit in considering approaches adopted in jurisdictions such as Canada, New Zealand, the United States and Europe, and how these support cross-border philanthropy whilst maintaining mechanisms to ensure appropriate application of funds for charitable purposes. This would reflect the increasingly global nature of the challenges philanthropy seeks to address, and help increase the impact and reach of Australian philanthropy.

*Conclusion*

Once again, Philanthropy Australia appreciates the opportunity to comment on this draft legislation. If you wish to discuss the matters raised in this submission further, please do not hesitate to contact Krystian Seibert, Policy & Research Manager, on 0457 239 197.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Louise Walsh', with a small dot at the end.

Louise Walsh

**Chief Executive Officer**