



THE TAX INSTITUTE

14 August 2020

Ms Rosheen Garnon – Chair
Dr Julianne Jaques – Board Member
Board of Taxation
C/- The Treasury
Langton Crescent
PARKES ACT 2600

By email: taxboard@treasury.gov.au

CC: Ms Jacky Rowbotham, Principal Adviser, Individuals and Indirect Tax Division, Treasury:
jacky.rowbotham@treasury.gov.au

Dear Ms Garnon and Dr Jaques,

Proposal for a generally accepted definition of ‘charity’ for Federal and State taxation purposes

The Tax Institute has identified an issue which we are seeking the Board of Taxation’s assistance to have addressed. The Tax Institute considers that a generally accepted definition of ‘charity’ for Federal and State taxation purposes would greatly assist charities to meet their Federal and State tax and revenue compliance requirements. We consider that the Board of Taxation is well-positioned to review this issue and provide advice to the Federal Government as to how this issue could be addressed.

We believe it is timely to consider this issue in light of the government’s response to the ACNC Review released on 6 March this year, which said, in relation to recommendation 28, that

..the Government is consulting with states and territories on the development of a common statutory definition of charity across jurisdictions to replace 45 existing definitions. This will reduce complexity and regulatory burden for charities when seeking tax concessions¹.

Discussion

1. General

Currently, the differences between Federal and State definitions of a ‘charity’ for revenue purposes, and indeed between State jurisdictions as well, cause compliance difficulties for many charities. A not-for-profit entity (**NFP**) may meet the definition of a ‘charity’ for Federal tax law purposes but not for State revenue law

¹ *Government response to the Australian Charities and Not-For-Profits Sector Commission Legislation Review 20186* March 2020, p21 <https://treasury.gov.au/sites/default/files/2020-03/p2020-61958-govt-response.pdf>

purposes. In other cases, the NFP may meet the definition of 'charity' for some States' revenue law purposes and not for other States' revenue law purposes.

We set out a number of scenarios in the Appendix which demonstrate the compliance issues that certain NFPs face due to the lack of a consistent definition of 'charity' for tax purposes between the Federal and the State jurisdictions as well as among the States and Territories.

As you will see from these scenarios the current system leads to inefficiency, frustration, uncertainty, complexity and, at its worst, unnecessary and costly litigation.

2. Proposed solution

The Tax Institute proposes that where an NFP has been accepted as a 'charity' by the Australian Charities and Not-for-profits Commission (**ACNC**), the States and Territories should also accept the NFP as a charity for their own tax and revenue laws. We acknowledge that, while there are additional requirements under some State / Territory laws regarding charities, there should be consistency regarding the basic definition of a charity across all jurisdictions.

There are reasons both for and against adopting a common definition of 'charity'. The Tax Institute believes the Board of Taxation is well-positioned to undertake a review into whether a common definition of charity is able to be achieved and provide advice to Government accordingly.

The Tax Institute will be happy to be involved in any such review.

If you would like to discuss any of the above, please contact either myself or Tax Counsel Angie Ananda on 02 8223 0000.

Yours faithfully,



Peter Godber
President

APPENDIX

Scenarios experienced by charities that meet the common law and/or statutory definition of charity

The following situations have arisen (in the interests of preserving anonymity organisation names have not been provided). These examples do not include matters where the courts have reached a published decision, and therefore provide insights beyond publicly available information:

- **Organisation 1:** NFP operates in 4 States and is found to be a charity under a common law definition in 3 States only. The one remaining State concluded it was not a charity. It is registered as a charity by the ACNC (in accordance with the *Charities Act 2013* (Cth)) and is endorsed by the ATO with effect from 3 December 2012 onwards. The ATO initially concluded that the NFP was not able to be endorsed as a charity for the purposes of Division 50 of the *Income Tax Assessment Act 1997* (Cth) (with reference to the common law) prior to 3 December 2012, but then subsequently agreed to endorsement once the matter was escalated to the ATO's Tax Counsel Network.
 - **Outcome – NFP was ultimately recognised as a charity at Federal and State level (but not all States). The process took over 3 years.**
- **Organisation 2:** NFP operated in one State only, did not claim a payroll tax exemption, and self-assessed as tax exempt for income tax purposes at a Federal level under Division 50. The ATO then undertook a review process and threatened to impose tax. The NFP was eventually correctly registered as a charity with the ACNC (they were previously unaware that they met the charity definition because of prior comments made by the ACNC). During this process, the ACNC made an incorrect finding that the NFP was not a charity, asserting the organisation's winding up clause did not match the ACNC's example constitution and winding up clause. The NFP then successfully claimed a payroll tax exemption.
 - **Outcome – ultimately recognised as a charity at Federal and State level. Process took over 12 months.**
- **Organisation 3:** The NFP that was operating for over a decade applied for registration with the ACNC, but was asked by the ACNC to change the order of powers listed in the objects clause of its constitution. Registration was then granted with effect from the date of the new constitution (notwithstanding the NFP's purpose, powers and activities had not changed). It is anticipated that the State revenue offices will contend that the NFP is not a charity for the purposes of payroll tax.
 - **Outcome – recognised as a charity at a Federal level, but a contrary position was taken at a State level. The process took 4+ years. In the end the organisation decided not to pursue their legal entitlements through the courts at a state level due to concerns about inaccurate press coverage. They remain appropriately registered as a charity at a federal level.**
- **Organisation 4:** The NFP's charitable endorsement was investigated by the ATO in the late 2000's, with the ATO concluding in writing that the NFP was appropriately endorsed as a charity at the conclusion of the review. The NFP was registered with the ACNC with effect from 3 December 2012. The NFP then sought payroll tax exemption at a State level and was rejected (despite the inconsistency with the ATO and the ACNC). The NFP objected on points of law raised in the OSR's decision, noting that facts were not raised as an issue by the OSR. The objection was disallowed

stating that the applicant had not provided sufficient evidence on the facts. The NFP was then required to litigate, despite requesting alternative dispute resolution (still ongoing).

- **Outcome – recognised as a charity at a Federal level, litigation at a State level. The process has been ongoing for over 12 months.**
- **Organisation 5:** The NFP had not paid income tax on the basis of applying the principle of mutuality and making losses. The ATO started an investigation into the losses of the NFP. The NFP then reviewed its eligibility as a charity at a Federal level and was successfully registered as a charity by the ACNC. The NFP had previously applied for a payroll tax exemption many years ago and was erroneously found to be non-charitable, but the NFP did not appeal through the courts. Since the ACNC registration was approved, they have made a new application to the relevant State revenue office, but have been told there is no ability to consider the new application because it would require the State revenue office to reconsider the previous payroll tax decision (despite the new application relating to different income years).
 - **Outcome – ultimately recognised as a charity at a Federal level, but there is an ongoing application process at the State level. The process has been on and off for 5+ years.**
- **Organisation 6:** The NFP was registered as a charity with the ACNC from inception and had been operating for over 3 years. The NFP was unaware of the payroll tax exemption for charities at a State level, and ultimately received the exemption.
 - **Outcome – ultimately recognised as a charity at a Federal and State level.**

We make the following observations on these examples:

- State revenue officers often fail to recognise the Federal application of the same common law principles by the ATO and the ACNC (prior to 1 January 2014).
- State revenue officers often fail to understand the relevance of the same common law principles to the ACNC when registering an NFP with reference to item 7 of Schedule 2 to the *Charities (Consequential Amendments and Transitional Provisions) Act 2013*. Confusion on this aspect may arise in the context of views raised at paragraph 130 of the *Law Institute of Victoria*² case:

“In my view the [ACNC] recognition and registration referred to in the last preceding paragraph provides no assistance to me in relation to the task of interpreting the provision of s 48 of the PT Act³ because that recognition and registration was achieved pursuant to a separate and distinct framework and criteria”.

² *Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC 604

³ *Payroll Tax Act 2007* (Vic)