

General Manager
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The Treasury
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By email: TaxLawDesign@treasury.gov.au

Dear Treasury

Re: Tax and Superannuation Laws Amendment (2014 Measures No. 3) Bill 2014

Not-for-profit Law (**NFP Law**) (previously PilchConnect) is a program of Justice Connect, providing free and low cost legal assistance to not-for-profit community organisations in Victoria and New South Wales.

NFP Law 'helps the helpers' by providing tailored legal information, advice and training to not-for-profit community organisations. By relieving the burden of legal issues, organisations can better focus their time and energy on achieving their mission - whether that's supporting vulnerable people, delivering community services, enhancing diversity or bringing together the community.

We are focused on improving access to legal help for not-for-profit community organisations, and on improving the legal landscape in which they operate.

Our policy and law reform work is focused on reducing red tape for the not-for-profit sector, helping not-for-profits be more efficient and better run, and ensuring that reform takes into account impacts on the not-for-profit sector. Our policy and law reform objectives include:

- Better regulation for not-for-profits: promoting efficiency and effectiveness in the regulatory approach to the not-for-profit sector
- Improved legal structures: advocating for an improved approach to available legal structures for NFP organisations and social enterprises in Australia
- Simplified tax concessions: Addressing complexity and inaccessibility within the current application of tax concessions for the not-for-profit sector
- Oversight of reforms affecting not-for-profits: Ensuring that policy development has adequate regard to the potential impact on the not-for-profit sector

We welcome the opportunity to comment on the Tax and Superannuation Laws Amendment (2014 Measures No. 3) Bill 2014: in Australia Special Conditions (the **Exposure Draft**). Given the impact of the proposed reforms on the small not-for-profit organisations and charities that Not-for-profit Law regularly advises, we have been actively engaged in consultation and closely monitoring the passage of the measures since the original exposure draft was released in 2011.

Throughout this process, we have highlighted our concerns regarding the proposal - particularly the lack of a clear policy rationale to adequately justify what is a significant departure from the current law, as well as the uncertainty and vagueness of the proposed test for operating in Australia and pursuing purposes in Australia. These fundamental concerns remain largely unaddressed in the Exposure Draft, however we do note that there have been some

improvements made on earlier proposals. Our previous comments regarding the implications of the proposed measures from consultations in both 2011 and 2012 can be found on our website.¹

We do not intend to make technical submissions on the Exposure Draft on this occasion as we are aware of other stakeholders focussing on the mechanics of the proposals. Instead we have limited our brief submission to the broader policy behind the Exposure Draft, and the appropriateness of introducing these changes in a period of uncertainty for Australian charities and their regulatory framework.

The timing of the Exposure Draft gives rise to a number of additional concerns beyond those articulated in our earlier submissions. We urge The Treasury not to proceed further with the measures without first:

- having Government clearly outline the broader reform agenda proposed for charities and not-for-profits;
- clarifying the interaction of the proposed measures with this anticipated new regulatory framework; and
- identifying how the measures warrant a departure from the Government's stated policy intention to reduce red tape.

As we have mentioned in our previous submissions, the implications of the proposed measures have not, in our view, been adequately considered, and the uncertainty for those charities with elements of their activities outside of Australia will likely have a significant impact on their ability to continue delivering services to communities without fear of falling foul of the proposed 'in Australia' requirements.

A time of uncertainty for charities and not-for-profit organisations

The Government has stated its intention to abolish the Australian Charities and Not-for-profits Commission (**the ACNC**), and a desire to repeal the *Charities Act 2013*. An alternative regulatory framework for charities has yet to be clearly articulated, leading to significant uncertainty for charities and not-for-profits seeking to understand their current and future compliance obligations.

In the absence of a clear alternative to the current regulatory framework for charities and not-for-profit organisations, it is difficult (both for the Government and sector-based advisors) to adequately assess the impact of the Exposure. This is particularly the case given charitable endorsement is often a precursor to the application of the 'in Australia' special conditions, meaning that the lack of detail regarding how this endorsement is to be determined into the future is concerning.

In light of this, we consider it inappropriate to proceed with the proposed measures at this time. Adopting a piecemeal approach to the regulation of charities and not-for-profits serves only to increase uncertainty, and adds to the burden of groups already grappling to understand their compliance obligations, which are reportedly about to again change substantially.

In the event the Government is committed to proceeding with the 'in Australia' special conditions, we recommend that the passage of these measures be deferred until such time as the broader regulatory framework for charities and not-for-profit organisations has been settled and communicated.

Better regulation, not more regulation

In our view, the Exposure Draft is contrary to the Government's commitment to reducing red tape, and its stated *Ten principles for Australian Government policy makers*.² The Exposure Draft goes further than simply 'restating' the policy intent and centralising the 'in Australia' special condition. As outlined in our previous submissions, the proposed measures will introduce new regulation that will significantly impact on the ability of charities and not-for-profit organisations to undertake activities outside of Australia and create even more uncertainty for those organisations, with the ultimate impacts being felt by the communities that these charities serve.

We encourage the Treasury to give further consideration to the recently released principles for policy makers before proceeding with the Exposure Draft, taking note of the following policy principles:

¹ See <http://www.justiceconnect.org.au/our-programs/not-profit-law/law-and-policy-reform/previous-submissions>

² See <http://www.cuttingredtape.gov.au/handbook/ten-principles-australian-government-policy-makers>

- The cost burden of new regulation must be fully offset by reduction in existing regulatory burden.
- Regulation should only be imposed when it can be shown to offer an overall net benefit.
- Regulation should not be the default option for policy makers; the policy option offering the greatest net benefit should always be the recommended.
- Policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens.

Proceeding with the Exposure Draft in its current form, in this time of significant reform for the sector, would in our view be a departure from these stated principles and be unduly burdensome on the charitable sector. In the event the Government is committed to proceeding with the 'in Australia' special condition, we recommend this departure be adequately justified on policy grounds beyond that which is contained in the Exposure Draft.

Finally, while the Exposure Draft's Explanatory Material points to the potential 'loop hole through which tax avoidance arrangements, and other inappropriate conduct can be undertaken once again', it is difficult to reconcile this perceived mischief amongst charities with the stated Government policy to repeal the independent, dedicated regulator for the sector in the ACNC.

Concluding comments

We question whether the limited policy basis for the proposed measures is justified in our contemporary global world. We consider the proposal would produce results which are contrary to the Government's commitments to reducing regulatory complexity and encouraging innovation in the sector, and would result in significant uncertainty and confusion for those accessing charitable tax concessions.

In our view, it is inappropriate to introduce the proposals brought forward by the Exposure Draft in a time of regulatory uncertainty for the charitable sector, the majority of which is driven by a desire to reduce red tape and undue regulation. Without a compelling policy justification, these steps are unnecessary and will only serve to create uncertainty for those accessing or seeking to access charitable tax concessions, ultimately leading to a risk-averse approach from charities that will have flow on effects for the communities they serve.

Nevertheless, if the Government is committed to proceeding with the 'in Australia' special conditions, we strongly recommend that this proposal be presented as part of a broader package of reforms for the charitable sector. In the absence of clarity on the future of accessing charitable tax concessions, it is difficult to know how these proposals will interact with the incoming regulatory model and therefore challenging to provide substantive comments.

To ensure that those within the sector are better able to understand how these measures will operate as part of a Coalition-led regulatory model for the community sector, we urge the Treasury to defer the progress of the Exposure Draft.

Thank you for the opportunity to provide feedback on Exposure Draft, and please do not hesitate to contact us to discuss our views further.

Yours sincerely,



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