
From:

To the House of Representatives Standing Committee on Economics

The following comments are made to supplement the written submission and subsequent verbal evidence provided on behalf of the Anglican Church Diocese of Sydney at the public hearing on Friday 27 July 2012. They relate to -

1. The need to tighten the language used in the Explanatory Materials in relation to the relevance of the activities of an entity in determining its entitlement to registration as a charity and as one or more sub-types.
2. The need to reflect the common law concept of dominant purpose when providing for an entity's entitlement to registration as one or more sub-types.

As indicated in the verbal evidence given last Friday, we consider there is a problem with the "loose" language used in the Explanatory Materials to describe the basis on which entities are entitled to register as a particular sub-type. In particular our concern is that the references in paragraphs 3.46, 3.79 and 3.89 to the activities of an entity might be taken to suggest that the activities of an entity are the primary basis for determining its entitlement to registration as a particular sub-type. With the possible exception of the sub-type at item 5 of the table in section 25-5 of the Bill (institution whose principal activity is to promote the prevention or control of diseases in human beings), the fundamental question to ask is whether an entity has a purpose (rather than pursues certain activities) which entitles it to registration as a sub-type.

The place of an entity's activities in determining whether it has a charitable purpose is explained in the 2001 Report of the Inquiry into the Definition of Charities and Related Organisations (at page 108) -

"An examination of an entity's activities should continue to be a factor in determining that the charitable purpose is being given effect to. It is appropriate to consider an entity's activities in order to substantiate - that is, confirm or corroborate or demonstrate - the entity's charitable purpose. It is not the nature of the activity that is relevant, but its role in supporting the charitable purpose.

The Committee wishes to stress that, where it is looked at, activity by itself should not determine charitable status because activity by itself is not a sufficient guide to the overall character of an entity. Nor should an activity be assessed as to whether it is efficacious in achieving an entity's charitable purpose. The exercise is conducted to ascertain the entity's dominant purpose, not to judge the best way for it to achieve its purpose. The test is that the activity must further the charity's purpose."

We also think that the Bill should provide that an entity is not entitled to register as a sub-type under item 1, 2, 3 or 4 of the table in section 25-5(5) merely because it has a purpose which is incidental or ancillary to its dominant charitable purpose or purposes. This ensures that the common law concept of "dominant purpose" is given proper recognition in any entitlement to registration as a sub-type. A failure to give the concept of dominant purpose recognition would put the process of registering sub-types at odds with the common law meaning of charity.

The following is an illustration of the difficulties that might arise if an improper focus is placed on the activities and incidental purposes of an entity in determining its entitlement to registration as a subtype.

The dominant purpose of an Anglican parish is undoubtedly the advancement of religion. However the activities that give effect to this dominant purpose are quite diverse and may not always look "religious". In addition to the provision of services of worship, parishes will usually engage in a range of other activities to advance religion in the Anglican context. For example some parishes may seek to provide relief to those in the area who are struggling with poverty. Some may provide activities for senior citizens. Many will provide activities relating to youth. However in the context of an Anglican parish, the dominant purpose behind each of these activities is the advancement of religion. Helping

the poor, providing support to senior citizens and providing a venue for youth activities are not ends in themselves and, at best, such activities will translate to purposes which are merely incidental or ancillary to the dominant purpose.

The distinctions between dominant and incidental purpose and the activities which give effect to them both are of utmost importance in determining whether an entity is a charity and therefore entitled to be registered as such by the ACNC. They are also of importance in determining whether an entity is entitled to be registered as a sub-type of entity under the table in section 25-5(5), particularly for the purposes of section 205-35(1)(c) of the Bill which provides that an entity is a basic religious charity if the entity is not entitled to be registered as any other subtype of entity.

At present the Explanatory Materials seem to suggest in places that the activities of an entity are the primary basis for determining its entitlement to registration as a sub-type. We think this is unhelpful. Conversely, we think it would be helpful if the Bill made it clear that a purpose which is merely incidental or ancillary to the dominant purpose or purposes of an entity should not give rise to an entitlement of the entity to registration as a sub-type based on that incidental or ancillary purpose.

Accordingly we think that the following changes should be made to the Bill and the Explanatory Materials to clarify these matters -

1. The words "their activities" in paragraph 3.46 of the Explanatory Materials should be omitted and the word "they" inserted instead.
2. The words "is no longer undertaking charitable activities and is not " in Example 3.5 in paragraph 3.79 of the Explanatory Materials be omitted and the word "ceases" be inserted instead.
3. The word "activities" in the fourth line of Example 3.9 in paragraph 3.89 of the Explanatory Materials be omitted and the word "purposes" be inserted instead.
4. Substitute the following for the existing section 25-5(4) of the Bill -

(4) To avoid doubt -

(a) an entity may be entitled to registration as more than one subtype of entity, and

(b) a reference in Column 2 of the table in subsection (5) to "a purpose" or "another purpose" of an entity does not include a reference to a purpose or another purpose which is incidental or ancillary to the dominant purpose or purposes of the entity.

5. If the changes referred to in 1- 4 above are made, it would then be possible to omit section 205-35(1)(c) of the Bill on the basis that all basic religious charities registered as a sub-type under item 3 of the table in section 25-5(5) would, by definition, have the advancement of religion as the or a dominant charitable purpose.

We would be happy to discuss these matters with you further as necessary.

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