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Commissioners, Future Foundations for Giving Inquiry
Productivity Commission

Online Lodgement

Dear Commissioners

PRODUCTIVITY COMMISSION (COMMISSION)
FUTURE FOUNDATIONS FOR GIVING (INQUIRY): RESPONSE TO DRAFT REPORT

1. Carroll & O'Dea Lawyers (**Firm**) welcomes the opportunity to respond to the Commission's draft report of the Inquiry (**Draft Report**).

2. The Firm's Community & Associations Team has a century-long track record of service to Australian charities and not-for-profit organisations. The Firm's clients include many religious organisations, educational institutions, social welfare organisations and other charities. The Firm's charities and education lawyers have significant experience in private legal practice, in community organisations (serving as Board members), in professional associations (the Charity Law Association of Australia and New Zealand, the Australian Charities and Not-for-profits Commission's Adviser Forum, the Australia and New Zealand Education Law Association), and in academia.

3. We note that the Terms of Reference provided by Treasurer Chalmers for the Inquiry, dated 11 February 2023 (**Terms of Reference**), state that the purpose of the Inquiry is to "*understand trends in philanthropic giving in Australia, the underlying drivers of these trends, and to identify opportunities and obstacles to increasing such giving.*". In addition, the Terms of Reference state that the Inquiry "*should make recommendations to Government to address barriers to giving and harness opportunities to grow it further*". We encourage the Commission's final Report (and accompanying recommendations) to focus on this scope of inquiry as provided in the Terms of Reference, with a view to:

   (a) streamlining and simplifying the regulatory regime applying to Australian charities and not-for-profit organisations; and

(b) increasing avenues for giving by individuals and organisations, to achieve the Commonwealth Government's goal of doubling philanthropy by 2030.

We have identified several instances within the Draft Report where the Commission has drifted from its remit, and deal separately below with those instances.

4. We agree that the current DGR eligibility framework must be reformed, as it is unnecessarily complicated, overly technical and administratively burdensome for the Australian charity and not-for-profit sector.

We agree that any updated DGR eligibility framework should be restricted only to charities registered with the ACNC. This would be consistent with the approach taken by other jurisdictions.[1] We agree that other activities (for example, 'advancing community sport') should not fall within the DGR eligibility framework.

However, we do not support the Commission's proposals to:

(a) include certain charities, which currently do not have DGR status, in the DGR framework;

(b) exclude certain charities, which currently do not have DGR status, from the DGR eligibility framework; and

(c) remove the existing DGR status of certain entities,

by reason of 'equity' and particular policy criterion. Instead, the Commission should recognise and respect the public benefit of the Australian charity sector as a whole in developing any proposals to reform the DGR eligibility framework. In this regard, the Commission would be acknowledging centuries of law and practice which underlie motivations for giving and the flexibility of facilitating that as public needs appear.

If 'equity' and particular policy criterion motivate any reform to the DGR eligibility framework, the Commonwealth Government risks encouraging future Governments to influence the DGR eligibility framework in a similar fashion. This would be a bad outcome for the Australian charity sector.[2]

If the Commission wishes to encourage giving (in line with the Terms of Reference), and wishes to simplify and streamline the DGR eligibility framework, we recommend that the Commission give generous consideration to recommending all charities have DGR status.[3] If this proposal is not acceptable to the Commissioners, we would caution the Commission against developing any other significant proposals to reform the DGR

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[1] For example, charitable contribution deductions in the United States under Internal Revenue Code section 170 are restricted to United States charities (that are exempt from income tax under Internal Revenue Code section 501(c)(3)).

[2] We would caution against adopting in Australia the policy-driven approach of the Supreme Court of New Zealand in excluding certain charities from the charitable 'public square' in New Zealand (for example, in *Attorney-General v Family First New Zealand* [2022] NZSC 80; affirmed in *Better Public Media Trust v Attorney-General* [2023] NZCA 553). In our view, this policy-driven approach does not reflect Australian law.

[3] This would be consistent with approaches taken by the United States (with its charitable contribution deductions), Canada (with its qualified donee deduction program) and England and Wales (with its Gift Aid matched giving program).

eligibility framework at this stage without first engaging in broad community consultation, as required in the Terms of Reference.[4]

5. We support the Commission in its efforts to change the rules governing Public Ancillary Funds and Private Ancillary Funds.

   We agree with the Commission's proposal to 'smooth' out the minimum annual distribution rate for Ancillary Funds to encourage large one-off distributions, so that a minimum annual distribution rate can in fact be averaged out over three years.

   The Commission should also consider whether similar international (English common law jurisdiction) proposals to accelerate philanthropic giving should be proposed in Australia for Ancillary Funds.[5]

   We do not support the Commission's proposal to remove the concept of 'basic religious charity' and associated exemptions from the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**). Apart from our observation that this proposal from the Commission is beyond the scope of the Terms of Reference (which require focus on how to increase giving), we echo other sector representatives' concerns that any attempts to abolish the basic religious charity would run counter to religious freedom protections both in Australian and international law. By way of example, attempts to have the ACNC Act regulate the internal conduct of unincorporated religious organisations – including through the ACNC Governance Standards, and especially if such regulation were to be motivated by policy reasons of the Government of the day – would interfere with the free exercise of religion that is constitutionally available to these organisations.

6. We do not support the Commission's proposal to legislate a definition of 'Public Benevolent Institution' (**PBI**). Apart from our observation that this proposal from the Commission is again beyond the scope of the Terms of Reference, the law recognises that the PBI concept is a concept whose common understanding changes, evolves and expands over time.[6] Legislating the PBI concept would detract from this 'common understanding'.

7. We support the Commission's recommendation to provide test case funding to the ACNC, to distribute to charities for the purpose of developing the law in matters of public interest. While we again consider that this recommendation is beyond the scope of the Terms of Reference, we note that it does align with final recommendation 20 of the Commonwealth Government's 2018 review of the ACNC legislative framework, and in our view would allow greater certainty to charities for their fundraising activities.

   Since 2021, a number of Administrative Appeals Tribunal and Federal Court of Australia cases have helped clarify and develop Australian charity law, as it relates to the ACNC.

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[4] See the Terms of Reference at 'Process': "*The Commission should consult broadly, including with Commonwealth, state and territory governments, and the philanthropic, not-for-profit and business sectors.*"

[5] See, e.g., the Accelerating Charitable Efforts Act in the United States, which would have introduced certain restrictions on tax deductions, asset value limits, minimum annual distribution rates and payout time limits for Donor Advised Funds.

[6] See, e.g., *Federal Commissioner of Taxation v The Hunger Project Australia* [2014] FCAFC 69 at [38]-[39].

This recommendation, if agreed to and implemented by the Commonwealth Government, will supplement existing developments in the case law – to the benefit of charity sector executives, advisors and regulators.

8. We support the Commission's proposal to introduce a private binding rulings scheme into the ACNC Act. We again consider that this recommendation is beyond the scope of the Terms of Reference. However, and given that the ACNC has already started publishing de-identified charity registration decisions, this proposal will support the ACNC's work in that respect and provide greater guidance regarding ACNC regulatory outcomes – also to the benefit of charity sector executives, advisors and regulators.

9. We would be pleased to discuss our response to the Draft Report with the Commissioners. Please contact us if you wish to discuss further.

Yours faithfully
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