

Submission – Review of Philanthropy Productivity Commission Inquiry

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Thank you for the opportunity to contribute to the Productivity Commission’s Review of Philanthropy in response to the Call for Submissions Paper.

I am a charity law academic with a research interest in the regulation of charities:
I write in that capacity and note that this submission reflects my personal views and not those of the University of Western Australia.

1. Information Requests 2 and 8 - Trend Toward Restricted Donations

Information request 2 seeks information on trends and motivations for giving, while information request 8 seeks views on other measures to support potential donors. I have recently led a research project that conducted doctrinal and empirical research to consider restricted donations to charities (the project report and guidance materials for charities and advisors can be found in the Appendix). The project focused on Western Australian charities, but the results are relevant to other Australian jurisdictions, as the regulatory settings are broadly similar.

The research highlighted a trend toward greater imposition of restrictions by donors, but in circumstances where charities and donors appeared unclear on the legal effects of those restrictions and (therefore) as to the means by which restrictions could be amended over time to ensure that donated funds are put to good use. As noted in the report, there were numerous instances where inability to deal with restrictions meant donations sat unused for many years.

The report and guidance materials are intended to help charities, donors and their advisors to anticipate the potential legal effects of restricted donations and to select the appropriate legal form for new donations, as well as providing education on processes and policies that charities can put in place to help ensure the usefulness of donations.

In addition to that research, to the extent that donors are increasing their imposition of restrictions, this raises the risk that donors impose their own values and worldviews on charities and their ultimate benefit recipients. Those values and worldviews are likely to belong predominantly to wealthier Australians and hence have the potential to detract from the achievement of pluralism.² There may thus be both efficiency reasons and support of democracy reasons for liberalising the circumstances in which charities can access cy-pres and administrative schemes to reform the conditions of a gift.

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² See, eg, Ian Murray, ‘The Donor Control/Public Benefit Balance Underlying Philanthropic Tax Concessions’ in Henry Peter and Giedre Lideikyte Huber (eds) *The Routledge Handbook of Taxation and Philanthropy* 138.

England and Wales has already implemented reform along these lines, with the *Charities Act 2011* (UK) permitting the responsible persons of charities to replace the original purposes with new charitable purposes where satisfied that it is expedient in the interests of the charity, but with some similarity of purpose restrictions.³ I acknowledge that making changes such as those in England and Wales may require a referral of powers by the states, or coordination with state legislatures.

2. Information Request 2 – Potential Trend towards Donor Advised Fund Philanthropic Intermediaries

North America has seen an explosion in the number of donor advised fund (DAF) sponsors as philanthropic intermediaries. Financial institutions and professional trustees have also recently been offering DAFs in a range of Asia-Pacific jurisdictions, including Australia. DAFs are essentially management accounts within public charity intermediaries that involve the provision of advisory privileges to donors. They have caused significant concern about whether funds donated to a DAF are then on-distributed in a sufficiently timely fashion, as well as concerns over transparency and circularity of distributions. Some of these concerns do not apply in the same way given current Australian regulatory settings.

However, the timeliness of ultimate distributions is likely to be relevant, despite minimum distribution requirements for public ancillary funds. If philanthropic intermediaries in the form of DAF sponsors are going to be further encouraged, then consideration ought to be given to ensuring that regulatory settings encourage timely distributions while also ensuring a degree of independence for DAF sponsors and donors. I have explored some ideas for how this might be achieved through ensuring appropriate DAF sponsor-level policies.⁴

3. Information Request 6 - ACNC Rulings to Enhance Certainty

Previous research in the context of First Nations charities and deductible gift recipients has highlighted that there are some activities that philanthropists may wish to fund that cannot clearly be undertaken by First Nations Public Benevolent Institutions or charities. In particular, economic development activities.⁵ If it was possible for the ACNC to issue binding rulings in the same fashion as the ATO, this has the potential to materially reduce uncertainty around the activities that can be funded by philanthropy. These benefits would apply in many other grey areas as well,

³ *Charities Act 2011* (UK) s 275 (applying only to small trusts). The Law Commission (UK) recommended adopting a similar approach more broadly: *Technical Issues in Charity Law*, Report No 375 (September 2017) pp 42–50, 355–7. That approach has been enacted (*Charities Act 2022* (UK) c 6) but had not yet commenced at the time of writing and would replace section 275 with the slightly broader section 280A.

⁴ Ian Murray, 'Donor Advised Funds & Delay: An Intergenerational Justice Solution?' (2023) 14(1) *Nonprofit Policy Forum* 51.

⁵ See, eg, Ian Murray, 'Indigenous benefits management structures as social enterprises: key challenges for economic development' (2021) 39(2) *Journal of Energy and Natural Resources Law* 137.

such as permissible political activities. I note that the Productivity Commission has previously already suggested providing a binding ruling power to the ACNC.⁶

These comments are relevant to information request 6 relating to unnecessary regulatory barriers to philanthropic giving.

⁶ Recommendation 11.1 of the Resources Sector Regulation Study Report (November 2020)
<https://www.pc.gov.au/inquiries/completed/resources/report/resources.pdf>

Appendix - Restricted Donations Report & Guidance Materials