THE UNIVERSITY OF SYDNEY

19 May 2023

Ms Karen Godfrey
Productivity Commission
GPO Box 1428
CANBERRA ACT 2601

By email: philanthropy@pc.gov.au

Productivity Commission: Review of Philanthropy

Dear Ms Godfrey,

Thank you for the opportunity to provide a submission to the Productivity Commission's Review of Philanthropy. In this submission, I will focus on two issues that arise under the Review's topic of removing unnecessary regulatory and tax barriers to philanthropy that serve to limit the choice and flexibility of Australian donors in making gifts to charity. The first is removing tax barriers to cross-border philanthropy; and the second is removing regulatory and tax barriers for superannuation bequests to charities.

1. Removing tax barriers to cross-border philanthropy

Australian cross-border philanthropy represented 0.05% of gross national income in 2020, ranking Australia 12th in terms of cross-border philanthropic outflows out of 26 high-income countries. [1] In contrast, both the United States and the United Kingdom donated more than 0.20% of GNI abroad.[2] Given that the Australian Government has committed to doubling philanthropic giving by 2030, removing the existing barriers to cross-border philanthropy will assist in meeting this commitment, while enabling Australian donors to have greater choice in making tax deductible donations directed overseas.

Australian donors have historically been subject to one of the most restrictive legal regimes among OECD donor countries for the tax treatment of cross-border philanthropy.[3] This was largely due to the ATO's strict interpretation of the 'in

[1] Indiana University Lilly Family School of Philanthropy, *Global Philanthropic Tracker 2023*, p 35, available at https://globalindices.iupui.edu/tracker/index.html.
[2] Ibid.
[3] Silver, N. (2021) 'Removing Tax Barriers to Cross-border Philanthropy: Lessons from Australia' in Peter, H. and Lideikyte Huber. G. (Eds), *The Routledge Handbook of International Philanthropy*

Sydney Law School
Room 407, New Law Building
The University of Sydney
NSW 2006 Australia

T +61 2 8627 6018
F +61 2 9351 0200

sydney.edu.au

ABN 15 211 513 464
CRICOS 00026A

Australia' residency requirement for DGR status.[4] An unintended outcome of this restrictive approach was to enable largely unregulated tax deductible cross-border giving to take place through giving intermediaries that served as conduits, creating difficulties for the Government in monitoring cross-border charitable flows and increasing the risk that these funds may be used for tax abuse and terrorist financing purposes.[5]

With a new tax ruling issued in 2019, the ATO signaled a more permissive approach to the tax treatment of cross-border donations.[6] Pursuant to this ruling, donations to a qualified Australian DGR for use in its own programs and those of eligible related entities outside Australia are now tax deductible, provided that the organisation's operational or strategic decisions occur 'mainly in Australia'.[7] At the same time, the Government has increased regulation of cross-border charitable activities through the external conduct standards, providing greater transparency of cross-border charitable activities and facilitating legitimate cross-border charitable flows.[8]

While the new tax ruling has given Australian donors more choice in making tax efficient gifts overseas, donations made directly to a charity outside Australia are still not tax deductible. As a result, there remains further scope for reducing the geographic barriers around charitable tax relief for donors. For example, the Netherlands provides equal tax treatment of domestic and foreign charities that register with the Dutch tax authority.[9] This allows Dutch donors to claim a deduction for donations made directly to foreign charities, provided those charities are registered in the Netherlands. Registered foreign charities are then subject to registration and reporting requirements, enabling the Dutch tax authority to monitor foreign charities to the same extent as domestic charities.[10] Similarly, the Australian Government's external conduct standards provide a supervisory framework which would allow for the monitoring cross-border charitable activities of foreign charities.

The Australian Government's commitment to doubling philanthropy by 2030 provides a unique opportunity to further reform the legal regime governing cross-border giving. Adopting the equivalency model of the Netherlands would allow Australian donors to have greater flexibility in making tax effective contributions to support the wider global community by funding organisations overseas involved in the production of global public goods and the development of solutions for global challenges.

(Routledge, Abingdon), p 449. See also Silver, N. and Buijze, R. (2020) 'Tax Incentives for Cross-border Giving in an Era of Philanthropic Globalization: A Comparative Perspective,' *Canadian Journal of Comparative and Contemporary Law*, p 109.

[4] *Income Tax Assessment Act 1997* (Cth), s 30-15.

[5] Silver, N., McGregor-Lowndes, M. and Tarr, J. (2016) 'Should Tax Incentives for Charitable Giving Stop at Australia's Borders?' *Sydney Law Review* 38(1), p 85.

[6] Australian Taxation Office (2019) Taxation Ruling TR 2019/6, 'Income Tax: The 'in Australia' Requirement for Certain Deductible Gift Recipients and Income Tax Exempt Entities'.

[7] Ibid, paras 19, 35.

[8] *Australian Charities and Not-for-profits Commission Amendment (2018 Measures No. 2) Regulations 2018*.

[9] Silver, N. and Buijze, R, above n 3, p 17.

[10] Ibid.

2. Removing regulatory and tax barriers for superannuation bequests to charities

While Australia's compulsory superannuation system was originally conceived as a vehicle for retirement savings, superannuation has now become a significant form of inheritance. The Productivity Commission noted that the compulsory superannuation system is fueling the unprecedented intergenerational wealth transfer that is currently taking place in Australia.[11] This is because many Australians die with the vast majority of their superannuation balances intact.[12] Upon death, these excess balances are passed on to others through superannuation death benefit nominations. Treasury estimates that the total amount of superannuation inheritances in Australia will grow from $17 billion in 2019 to $130 billion in 2059.[13]

In February 2023, the Government identified the need for immediate reform to the Australia's compulsory superannuation system.[14] One area in which reform is desperately needed is superannuation inheritance law; in particular, removing the two significant barriers that exist for making bequests to charities using superannuation death benefits.

The first barrier is that while Australians can include a charity in their will, it is not possible to do so through a superannuation death benefit nomination. This is because under current superannuation law, a death benefit nomination can only be made in favour of a member's 'dependants' or the legal personal representative of their deceased estate.[15] Charities are not considered 'dependants' under the tax law and therefore are excluded from being direct recipients of death benefits. Instead, to make a superannuation bequest to a charity, Australians must nominate the legal personal representative of their estate in a binding death benefit nomination, and separately include the charity in their will. This indirect process requires that the superannuation fund distribute the death benefits to the member's estate, which is only then passed on to the charity.

The exclusion of charities as direct recipients of superannuation death benefit nominations is inconsistent with the ability of Australians to directly make charitable bequests through a will and has the effect of limiting the financial benefits to charities (and their beneficiaries) that could flow from superannuation inheritances.

In addition to this regulatory barrier, a further tax barrier exists for Australians making superannuation bequests to charities. This is because where a superannuation death benefit nomination is made indirectly to a charity through the member's legal personal representative, any funds distributed to the charity are subject to a penalty under the tax

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[11] Productivity Commission 2021, Wealth Transfers and their Economic Effects, available at https://www.pc.gov.au/research/completed/wealth-transfers/wealth-transfers.pdf.
[12] Treasury 2020, Retirement Income Review, available at https://treasury.gov.au/sites/default/files/2021-02/p2020-100554-udcomplete-report.pdf.
[13] Ibid, p 432.
[14] Treasury 2023, Legislating the Objective of Superannuation, available at https://treasury.gov.au/sites/default/files/2023-02/c2023-361383.pdf.
[15] *Superannuation Industry (Supervision) Act 1993* (Cth) Div 2, s 10; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A.

law.[16] In comparison, other forms of charitable bequests are not taxed.[17] The result of this tax penalty is that superannuation bequests to charities are more costly to Australians than other forms of bequests.

Removing these barriers and allowing Australians to make superannuation bequests directly to charities without adverse tax implications is likely to encourage philanthropic giving using superannuation inheritances. This represents additional tangible reforms the Government can adopt in order to meet its commitment to double philanthropic giving by 2030.

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Thank you for the opportunity to submit comments in relation to the Productivity Commission's Review of Philanthropy. I am happy to be contacted to discuss my comments.

Sincerely,

Dr Natalie Silver
University of Sydney Law School

[16] *Income Tax Assessment Act 1997* (Cth), s 302.195.
[17] Productivity Commission, above n 11, p 13.