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SUBMISSION

PRODUCTIVITY COMMISSION: DRAFT REPORT FUTURE FOUNDATIONS FOR GIVING

SCHOOL BUILDING FUNDS

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1. About OneSchool Australia

1.1. OneSchool Global Australia has 31 campuses across 6 states, servicing over 2,200 students and employing 609 teachers and support staff.

2. What this Submission is About

2.1. This submission relates to the recommendation put forward by the Productivity Commission in its draft report "Future foundations for giving" (the draft report) that school building funds be excluded from deductible gift recipient (DGR) status under the income tax law.

2.2. This submission is that school building funds must retain their DGR status. There are three reasons for this. Most basically, the draft recommendation rests on an assumption for which no evidence is provided. Secondly, even if the assumption were correct, the income tax law would deny a deduction for the amount in any event. Thirdly, the removal of DGR status from school building funds would result in a substantial reduction of funds available for the maintenance and development of non-government schools.

3. The Productivity Commission's Draft Recommendation

3.1. The Productivity Commission's draft recommendation in relation to the DGR status of school building funds states:

3.2. **Draft recommendation 6.1**

A simpler, refocused deductible gift recipient (DGR) system that creates fairer and more consistent outcomes for donors, charities and the community

…

In applying these principles, the Australian Government should:

- extend eligibility for DGR status to most classes of charitable activities, drawing on the charity subtype classification in the Australian Charities and Not for profits Commission Act 2012 (Cth) to classify which charitable activities are eligible for DGR status and which are not

- expressly exclude the following classes of charitable activities or subtypes:

  – primary, secondary, religious and other informal education activities, with an exception for activities that have a specific equity objective (such as activities undertaken by a public benevolent institution)

…"

4. The Importance of Education

4.1. The fundamental importance of education in Australia, whether provided by the government or non-government sectors and whether for the immediate or the longer term is, it is suggested, clearly a given.

4.2. Indeed, the draft report acknowledges that school education is a priority for governments and that there are sound economic and social reasons for government support.[1]

4.3. **Some data**

4.4. The schools data most recently published by the Australian Bureau of Statistics is for the 2022 period.[2] According to that data:

4.4.1 there were 4,042,512 students enrolled in Australia in 9,614 schools;

4.4.2 this represented an increase of 0.3% of students (11,795) which was wholly recorded in non-government schools, with enrolments in government schools falling by - 0.6% (16,929);

4.4.3 of the 4,042,512 enrolled students 64.5% (2,605,826) were enrolled in government schools and 35.5% (1,436,686) were enrolled in non-government schools; and

4.4.4 there was a net increase of 33 schools in Australia in 2022 and of these 7 were government schools and 26 were non-government schools.

Also, significantly, for the 2018-2022 period there was an increase of 1.86% in the number of students in government schools (an increase of 47,657 students) and an increase of 7.56% in the number of students in non-government schools (an increase of 101,021 students).

It is submitted that these figures clearly indicate not only (as could be expected) that there is an increasing education load in Australia but also that the increased burden is to a greater extent being borne by non-government schools. The abolition of the DGR status of school building funds would inevitably reduce the level of giving to such funds at a time when there is the need of increased funds.

It must be kept in mind that the benefit of education is a long-term benefit and potentially extends to a student's life well after the completion of their schooling. From the

[1] See page 188.
[2] https://www.abs.gov.au/statistics/people/education/schools/2022.

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perspective of a school the long-term perspective extends to the carrying on of the school in the longer term.

The benefits provided by a school building fund underlie the provision of both current benefits (the maintenance of buildings) and longer-term benefits (the acquisition or the construction of buildings).

The non-government schooling system relieves governments of what would otherwise be a substantial burden.

5. The DGR Regime: The Draft Report

5.1. The *Income Tax Assessment Act 1997* (as had its predecessor the *Income Tax Assessment Act 1936*) provides an income tax deduction for gifts of $2 or more that are made to certain entities, called deductible gift recipients (DGRs).

5.2. In the draft report the Productivity Commission expresses the view that the DGR system should be reformed with the number of DGR entity categories that could benefit increasing substantially.

5.3. But, on the other hand, under the Commission's draft proposals some categories of entities that at present can achieve DGR status would be denied DGR status. Most significantly for present purposes, the school building fund category of DGR would be removed under the Commission's draft recommendations.

6. The Draft Report: Reasoning

6.1. The Overview section of the draft report sets out the Commission's rationale for the suggested DGR changes as follows:[3]

"There are some classes of charitable activities where there is a material risk that donors could convert a tax-deductible donation into a private benefit. For example, where recipients of a good or service are charged (more than nominal) fees by a charity to access goods or services. The transaction here is closer to a market exchange of donations for lower fees and this could incentivise recipients to make tax-deductible donations to lower the non-tax-deductible price they are charged for the good or service. In these circumstances, it is unlikely that including that activity within the scope of the DGR system would provide net community benefits.

The Commission's view is that converting a tax-deductible donation into a private benefit is, in principle, a substantial risk for primary and secondary education, religious education, and other forms of informal education, including school building funds. The potential for a donor to be able to convert a tax-deductible donation into a private benefit is especially apparent for primary and secondary education, particularly where students are charged fees. Potential donors are most likely to be people directly involved with the school and benefit directly from donations, such as students, their parents or alumni. Most other classes of activities in the

[3] Page 18.

education charitable subtype, including formal higher education and research activities would remain within the scope of the DGR system."

6.2. The Overview later states:[4]

"School building funds for primary and secondary schools and religious education would be the main entities that would no longer be eligible for DGR status under the Commission's proposals. There are currently about 5,000 DGR endorsements for school building funds. Of these, three quarters are charities and the remaining quarter are government entities, such as public schools. Transitional arrangements so that schools can adjust would be required and are described below."

6.3. The draft report also states:[5]

"The likelihood of a close nexus between fees and donations means that there is a case for expressly excluding education activities related to primary, secondary and religious education, and other forms of informal education unless the activity has an explicit equity objective. This means that some school or informal education activities would still be eligible for support through the DGR system."

6.4. It will be seen that the basic rationale put forward by the Productivity Commission for making the draft recommendation to deny DGR status to school building funds is the "material risk", the "substantial risk" or the "potential" that a tax-deductible donation could be converted into a private benefit.

6.5. This point is also made in an article written by Deputy Chair Alex Robson and published in the Australian Financial Review on 6 December 2023:

"Deductible gift recipient eligibility should be guided by three simple economic principles: whether activities are expected to generate net community-wide benefits; whether subsidising donations is the best way to support those activities; and whether there is a material risk that tax-deductible donations can be converted to private benefits for donors.

6.6. For example, while there are sound economic and social reasons for government support for school infrastructure, there is a material risk that tax-deductible donations to school building funds could be converted to private benefits for donors."

6.7. However, the Commission in its draft report does not provide any evidence that the "risk" or the "potential" is in fact more than that.

6.8. And it is important to keep in mind that, as explained below, any attempt to exploit the suggested risk or potential would in fact be ineffective.

[4] Pages 18 and 19.
[5] Page 188.

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7. School Building Funds: DGR Status Must be Rretained

7.1. It is submitted that the DGR status of school building funds must continue.

7.2. If a school building fund should otherwise have DGR status, that status should not be denied because it may be perceived that there is a possibility that there is a material or substantial risk that a private benefit could be obtained by the donor that is reflected in the fees levied.

7.3. Importantly, as noted, the Productivity Commission's draft report does not refer to any evidence that would support its assertion of a material risk or a substantial risk of the relevant kind or that any attempts to exploit any such risk were being made.

7.4. But, most fundamentally, the reasoning in the Productivity Commission's draft report is, it is submitted, in fact not correct.

8. The Basic Issue

8.1. The reason why the approach taken by the Productivity Commission in its draft report in relation to the issues that arise in relation to school building funds is not correct is because it overlooks the way the relevant provisions of the income tax law in fact operate.

8.2. The essential point is that if a risk of the kind suggested were to materialise into more than a risk the amount paid to the school building fund would not be a gift for the purposes of the income tax law and would not be an allowable deduction to any extent.

8.3. Further, the gift provisions of the income tax law are supplemented by an anti-avoidance provision that is expressed in wide terms and which would operate to deny a deduction. This provision is s 78A of the *Income Tax Assessment Act 1936* (Certain gifts not to be allowable deductions). For its operations 78A turns on there being a relevant agreement which is defined in very wide terms. The ATO has stated its position in relation to the deductibility of gifts in a public taxation ruling (TR 2005/13 (Income tax: tax deductible gifts - what is a gift)). The Productivity Commission's draft report does not refer to or consider these income tax issues.

8.4. Thus it is submitted that, as a matter of law, there is no basis on which a donation to a school building fund could be converted (in whole or part) into a private benefit without the consequence that the amount of the alleged gift would not be an allowable deduction under the income tax law.

9. The Fund Rules

9.1. In the case of some building funds the governing rules contain an express provision which requires donations to be unfettered and prohibits any benefit or reward accruing to donors. This is the case of the OneSchool Australia Building Fund Rules.

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10. Reduced Giving

10.1. It is submitted that there would inevitably be a reduction in giving to school building funds if the DGR status of those funds were to be withdrawn and this under funding would need to be met in some way. The Productivity Commission does not provide any answer to this inevitable issue.

10.2. Importantly, however, as seen above the non-government schooling system is in fact playing an increasing role in education and any shortfall would have practical consequences for the operation of the particular school.

11. Transitional Provisions

11.1. If the Productivity Commission's proposal to deny tax deductible recipient status to school building funds were to be adopted, there would, as is recognised by the Productivity Commission in its draft report, need to be appropriate transitional provisions which could span some years.

11.2. Any transitional provisions would need to cover a range of issues and be such that they can be perceived on their face to be fair.

11.3. It is submitted that it is premature at this stage to canvass the possible transitional issues and that opportunity to make submissions on these issues be deferred to see whether the Productivity Commission maintains its recommendation as to the DGR status of school building funds in its final report and, if it does, whether the government accepts the recommendation.

12. Conclusion

12.1. It is submitted that, in view of the above, *even if* the Productivity Commission's concerns in relation to school building funds were assumed to be correct, the income tax law in fact operates appropriately to deny a deduction.

12.2. That means that there is no basis for withdrawing deductible gift recipient status for school building funds.

12.3. Also, the Productivity Commission has not considered the underfunding issues that would arise for schools if the DGR status of school building funds were withdrawn.

Thank you for your consideration of this submission.

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