

8 December 2011

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam,

Please find attached a submission from the Australian Communities Foundation in response to the Consultation Paper on a Definition of Charity. This submission highlights issues confronting community foundations across Australia as well as difficulties that specifically impact on our Foundation's day-to-day activities.

Australian Communities Foundation is strongly supportive of a single, uniform definition of charity and charitable purpose for all purposes and all levels of government. The existing inconsistencies between States and Territories, and uncertainties over the definition of charity under common law, has been a source of confusion for many of our donors and the organisations they wish to support, as well as the general public. We support changes which ensure that the system is fair, clear and simple and that there are no unintended negative consequences to the charitable sector.

Australian Communities Foundation would be happy to discuss in detail any aspect of our submission regarding changes to the definition of charity. We believe that this is a great opportunity to modernise the definition of charity which will enable greater flexibility and clarity for organisations and donors to meet the needs of community more effectively in the future.

Yours Sincerely



Marion Webster OAM
Chair

For discussion and further information please contact:

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1. About Community Foundations

Community Foundations are independent charitable organisations which over time, aim to build up a collection of endowed funds from many donors in the community.

It provides services to the community and its donors, makes grants and undertakes community leadership and partnership activities to address a wide variety of needs in its service area. (Adapted from a statement by Suzanne Feurt)

A community foundation builds capacity within the community to address local needs and opportunities. It builds available funds from which grants are made to charitable organisations¹.

2. About Australian Communities Foundation

The Australian Communities Foundation was originally established in 1997 as the Melbourne Community Foundation. In July 2011 it changed its name to more accurately reflect the current work of the Foundation which continues to grow nationally and reach globally. Australian Communities Foundation uses its grantmaking expertise and in-depth knowledge of community issues to assist donors to develop strategic giving plans. The Foundation makes grants that meet donors' charitable requests and goals and addresses needs in the community.

Australian Communities Foundation partner with our donors to build permanent endowments and other funds, from which to support community projects, and we provide leadership on issues of broad community concern.

Australian Communities Foundation runs a number of different education and information events and activities for donors to engage and learn about community, and to develop their philanthropy and grantmaking skills and interests. Where requested, Australian Communities Foundation also helps donors form a relationship with community organisations beyond the grantmaking, to include volunteering and other pro-bono contributions.

Currently Australian Communities Foundation has over 180 sub funds managing approximately \$35 million dollars and distributing about \$2.5 million dollars annually. Australian Community Foundation operates five charitable trust funds under its Trustee, Australian Communities Foundation Limited. These are Australian Communities Foundation (DGR Public Fund), the Australian Communities Foundation Extension Fund (Charitable Trust), the Australian Communities Foundation Scholarship Fund (DGR Scholarship Trust), the National Community Foundation Fund and the National Community Foundation Extension Fund.

¹ Taken from information on <http://communityfoundations.philanthropy.org.au/about-community-foundations/what-is-a-community-foundation/>

3. Issues facing Community Foundations

3.1 Overview of issues

There are a number of issues facing community foundations relevant to the Definition of Charity. These are:

- a) Lack of clarity on the meaning of charity. How to identify charitable purposes or entities.
- b) Lack of organisations endorsed as charitable by the ATO in rural areas (they may be eligible for endorsement but have not done so) or new organisations set up to address emerging needs.
- c) Confusion in relation to the process of 'opting in' under State law to enable the public ancillary fund (but not the charitable company or trust) to make grants to item 1 DGRs without charitable status.

Appendix A contains some examples² of activities a community foundation may want to pursue or fund, and would like to ensure the definition and the guidance material from ACNC cover these types of activities.

3.2 Clarity as to meaning of charity

In order to maximise the potential and capacity of community foundations it is essential that there is clarity readily available as to the range of activities and the projects that can be funded or pursued directly, while operating within its charitable status.

Community foundations are also in the perfect position within communities to provide advice and demonstrate best practice relevant to all not for profit community organisations. Ideally a community foundation should be able to access and understand the requirements for recognition as a charity in order to be able to assist community organisations seek further funding.

For these reasons, community foundations support a full list of charitable purposes in the proposed legislation. Australian Communities Foundation's recommendations are outlined in **Appendix B**.

Consultation question 16: Is the list of charitable purposes in the Charities Bill 2003 and the extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes?

Consultation question 17: If not, what other charitable purposes have strong public recognition that is charitable which would improve clarity if listed?

The following should be included in the list for particular relevance to community foundations:

- a) Community capacity building - including developing the ability, skills and confidence of members of a community in ways that enable them to participate in and benefit the community, or and improves the effectiveness and level of participation in community organisations;
- b) Community development – building a community in response to the needs of the members of the community – this may include:
 - 1) retraining, finding employment, providing work experience, skills development, business incubation in disadvantaged areas or for people who have or are likely to experience difficulty in obtaining and maintaining employment;

² Adapted from Catherine Brown's submission to PMC on Community Foundations, structure and DGR status 23 June 2004.

- 2) providing facilities for meeting and holding events;
 - 3) preservation or restoration of the natural and built environment, including community gardens, erecting statues, providing historical information;
 - 4) providing health and community services information;
 - 5) improving community facilities and access, including community transport;
 - 6) supporting non profit community groups with open entry requirements, including clubs and interest groups, which help in reducing social isolation or promote a sense of community.
- c) Improving the effectiveness or providing support and benefits to charitable organisations;
- d) Promoting volunteering, giving and involvement in the community.

Community foundations support a full list including the areas which have been accepted as charitable, for ease of understanding, similar to other jurisdictions. Australian Communities Foundation has attached our suggested list of charitable purposes in Appendix A of this submission.

3.3 Sufficient section of the public

Consultation question 3: Are any changes required to the Charities Bill 2003 to clarify the meaning of “public” or “a sufficient section of the general community”?

There should be further clarification of a ‘sufficient section of the public’ to a section which is not numerically negligible compared with the size of that part of the community to whom the purpose would be relevant. To ensure that charities in geographically isolated or other small rural communities continue to meet the public benefit requirement.

3.4 Inclusion of sport and government entities

It will be seen as a significant step to modernising the definition of charity in Australia in line with public opinion if the following two areas are included in the list of charitable purposes. These two areas cause much frustration and lack of understanding within the community when community foundations are unable to provide support:

- amateur sports programs and facilities; and
- government controlled entities such state schools, hospitals, community halls/centres, public pools, art galleries, museums, libraries, etc.

Across Australia, sporting clubs and government owned facilities are often the centre of the community, particularly in rural areas. Sporting clubs can provide much more than sport for sport’s sake, in terms of community building, reducing social isolation, providing a meeting point and facilities that often available to other community groups.

State schools are also often the hub of a community and in disadvantaged areas can be very much in need of additional support for building or ground maintenance and development or for equipment and additional programs, counsellors, tutors, etc. The public consider education is charitable so find it hard to distinguish between non charitable State schools and private non profit schools which are charitable.

Local government often seeks to run programs and provide vital infrastructure to the community which community foundations often want to support.

Not being able to support and fund these excluded groups in all areas is confusing and frustrating to most communities and seen as being unfair given the often vital role these institutions play in these communities.

The Australian Communities Foundation believes however that caution should be exercised in the inclusion of sporting clubs in the definition of charity. Sporting purpose needs to be restricted to sports which promote health and wellbeing by involving physical or mental skill or exertion and **are open to all, regardless of ability**. Sports for sports sake and sporting clubs which restrict membership or are exclusive should remain non charitable.

These changes would be consistent with the provision and support of recreational facilities similar to overseas and some State jurisdictions.

These issues are of particular importance in rural and regional Australia but also have relevance in disadvantaged urban Australia, particularly where community foundations are responding to new and/or emerging needs or working with new communities such as newly arrived migrants.

3.5 Simplification of issues relating to government entities

Consultation question 15: In the light of the *Central Bayside* decision is the existing definition of “government body” in the Charities Bill 2003 adequate?

Consultation question 18: What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?

The issue of whether an entity is a government body or controlled by government is of material importance in determining eligibility to charitable status. But is this distinction still relevant and should it be continued in the legislative definition?

This exclusion causes confusion in the community and frustration that organisations that the community considers charitable, are in fact not charitable due to their connection with government (examples of this include State schools, hospitals, community halls/centres, public pools, art galleries, museums, libraries, etc – see discussion in the point above). This affects the organisation’s ability to receive funding from charitable foundations.

Currently under some State Acts, trusts are given the power to “opt in” to make grants to non-charitable entities which are DGRs. [In Victoria there is an additional requirement that the entity would be charitable but for its connection with government.]

These provisions cause considerable confusion and complexity for the boards of the trustees of charitable trusts both in understanding the divergence between Commonwealth and State laws and in the complexity of the application. As a result very few community foundations have exercised this power in respect of their public ancillary funds.

There may be a further concern once the Australian Charities and Not for profit Commission (ACNC) commences its register of charities as those trusts which have opted in will not appear on the register unless they are specifically included in the proposed list of charitable purposes. Not appearing on the register could be seen as a marketing disadvantage to those trusts raising money from the public.

In addition to the confusion, the charitable trusts of community foundations which are not public ancillary funds would also wish to take advantage of the State law enabling them to “opt in” but are unable to do so. This is complicated to understand why the public ancillary fund can give to non charitable item 1 DGRs but the charitable trust can’t.

In summary:

- Charitable trusts which are not private or public ancillary funds cannot make grants to government entities (including government controlled entities) for their general operations or for infrastructure;
- Charitable trusts which are not private or public ancillary funds can make grants to government entities (including government controlled entities) for charitable purposes over and above their usual operations (*Re Cain* and discussion in 279 and 280 in TR 2011/4);
- Charitable private or public ancillary funds cannot make grants to non-charitable item 1 DGRs;
- Private or public ancillary funds in States where there is State legislation which enables them to opt in by making a declaration and changing tax status from a charitable fund to an income tax exempt fund, can make grants to non-charitable item 1 DGRs, provided the trust makes the declaration and ceases to be charitable under *ITAA 97* and presumably under the proposed legislation on the definition of charity.

The complex issues created by the divergence in State and Commonwealth laws and the confusion surrounding entities 'controlled by government' could be simplified by (in decreasing order of preference):

- a. allowing a government body to be a charity;
- b. inserting in the proposed list of charitable purposes:
 - 1) providing money, property or benefits to government bodies which would be charitable but for their connection with government;
 - 2) providing money, property or benefits to Item 1 DGRs which are exempt bodies even if they are not charitable.

3.6 Restrictions in the event of a disaster

Consultation question 19: What are the current problems and limitations with ADRFs?

Reacting to natural disasters is a real and on-going concern of community foundations, regardless of their location. A large amount of money can be raised immediately after a disaster, without the need for a tax deduction, and this is best to be received in the charitable not tax deductible entity of the community foundation to maximise possible recipients and application.

There are two issues for community foundations which arise in the event of a disaster:

- a) Understanding how the money can be applied for charitable purposes; and
- b) Where the funds are from tax deductible donations to the public ancillary fund, how to distribute this money and whether in order to respond to the needs of the community and the expectations of the donors it is necessary to set up a separate Australian Disaster Relief Fund (ADRF).

In the context of the proposed legislation regarding the definition of charity, it would be of assistance to communities in rural and regional areas recovering from a disaster for:

- a) the suggestion above that government bodies are included as charities; and
- b) the issues listed in the December 2009 legislation as a consequence of the Victorian bushfires are specifically deemed as charitable.

Many of the community assets and infrastructure (such as community halls, community centres, sports and recreational centres, theatre halls, playgrounds) will normally be owned by the local government or owned and operated by sporting or other recreational clubs. In most respects these will not come within the definition of charitable. Additionally the community foundation may want to

fund the local state schools or health centres for additional counsellors or for other goods and services.

The affected community and the donors do not understand why charities and charitable foundations who have received money for these communities cannot then fund what the community needs and wants. These issues severely hamper the community's access to funding as well as severely limiting the ability of community and other foundations wishing to support disaster recovery. It also leads to frustration and annoyance for donors and supporters as well as the general public.

Appendix A: Examples of community building/development activities:

Some sample projects are described below which show the type of charitable project that a community foundation might want to fund or facilitate in their local area.

1. *Skate Park:* The youth of EC region lack constructive activities. Many are partly or wholly unemployed, often having left school early. The community foundation wants to raise funds for a skate park, which will provide young people with a venue and an interest. It will provide them with opportunities to create new social contacts and to create some community events and competitions. Recognition for their achievements in event managing and skateboarding will develop their self-esteem and possibly lead to other opportunities within the community.
2. *Internet Café:* The community leaders want to set up not-for-profit Internet café. The café will be operated to provide employment and training opportunities for the young people with policies to encourage turn over to maximise the opportunities for training and experience for all in need. The cafe will also act as a drop in centre for the area. Eventually the community hopes to run computer courses for all members of the community from the café.
3. *Opportunities Program:* The community of XXX want to set up a program that encourages disadvantaged children to stay in school or be able to follow their dream or talent. The project will offer 'scholarships' which will fund basic provisions required to stay at school and participate fully eg for books, uniforms, equipment, stationery, excursions, breakfast, lunch and travel; or to follow their dream eg music tuition, instruments, music, transport to competitions or sporting clothes and equipment, transport to competitions, coaching.
4. *Festival:* The community of YYY want to run a community festival highlighting the arts and culture of both white and indigenous people from the area. The festival will attract tourists to the area and provide many local artists opportunities to show their art and young people with opportunities to gain skills in organising an arts event and other associated activities. The festival will be educational and also bring the region together as a community. It will encourage racial acceptance and diversity.
5. *Women's Enterprise Program:* Some of the women who have been out of the workforce (or underemployed) are keen to establish small businesses based on skills they have developed such as soap making, gourmet food production, website design for community groups, organic gardening and so on. The Community Foundation is aware there are a large number of long term unemployed women and youth and believes the public benefit in supporting a time limited business incubator outweighs any private benefit to the women or youth involved. There will also be a social welfare and economic benefit in the community potentially generating a flow on effect in employment. It wants to fund a program of small grants, revolving loans, and expert mentors to support this work and a Centre where this program could be promoted and where the small business could be located (a business incubator).
6. *Community Leadership:* A Community Foundation has contact with many different community groups who are keen to improve their organisational and volunteer management and fundraising skills. The Board of the community foundation would like to develop and run a series of workshops around the region.
7. *Indigenous Arts:* The SSS Community Foundation wants to help raise funds to support the local aboriginal community develop a Arts Precinct in a central township where indigenous artists, mainly women, can work, display and sell their products. Many of the women need start up grants for materials. A coordinator position is also required, at least until the project is self-sustaining.
8. *Sport for health:* The community foundation wants to support the building of a new clubhouse for the local football club. The football club is a big focus of the community and provides the basis of many community events. The clubhouse plans include a gym for public use which will offer reduced rates for disadvantaged people and actively encourage community groups, particularly the elderly, to join. It will provide health and fitness education and information. The new clubhouse will also include a meeting room which will be available for a wide range of community groups and events for a modest or no rent. The community needs both a fitness centre and a place for meetings and events.
9. *Kids for Conservation:* Local school students in a seaside area want to carry out an erosion control planting program on the foreshore. The foreshore is at risk of major environmental degradation if works are not undertaken. The local Foreshore Conservation Association is seeking funding to work with local schools on this project.
10. *Seniors Community Gardens Project:* A Senior Citizens group has approached the community foundation. The Group wants to expand its activities creating and maintaining gardens around the towns in areas which are accessed by the community some of which may be owned by local government. Sites such as Senior Citizens Clubs and Neighbourhood Houses have been identified. The group needs funds to purchase plants, seeds and mulching materials. Labour is voluntary.

Appendix B: Suggested list of charitable purposes

- the advancement of education;
- the advancement of religion;
- the advancement of health and the saving of lives, which includes;
 - the prevention and relief of sickness, disease, disability or human suffering
- the advancement of social or community welfare, which includes:
 - the prevention and relief of poverty, distress or disadvantage of individuals or families;
 - the care, protection and support of those in need by reason of youth, age, ill health, disability, financial hardship or other disadvantage;
 - the care and support of members or former members of the armed forces, emergency services and the civil defence forces and their families;
- the advancement of community development, which includes:
 - retraining, finding employment, providing work experience, skills development,
 - business incubation in disadvantaged areas or for people who have or are likely to experience difficulty in obtaining and maintaining employment;
 - providing facilities for meeting and holding events;
 - preservation or restoration of the natural and built environment, including community gardens, erecting statues, providing historical information;
 - providing health and community services information;
 - improving community facilities and access, including community transport;
 - supporting not-for-profit community groups with open entry requirements, including clubs and interest groups, which help in reducing social isolation or promote a sense of community, in rural and regional areas;
- the advancement of the arts, culture, heritage or science;
- the advancement of amateur sport, which includes:
 - the provision of sporting or recreational activities or facilities with the object of improving the conditions of life for persons who are in need by reason of youth, age, infirmity, disability, poverty, geographic isolation, or social and economic circumstances;
- the advancement of human rights, which includes:
- the promotion and advancement of conflict resolution or reconciliation, and the
 - promotion of equality, diversity and religious or racial harmony;
- the advancement of animal welfare including prevention and relief of suffering of animals;
- the advancement of the natural environment, which includes:
 - the advancement of environmental protection or improvement;
- the advancement of volunteering and the advancement of philanthropy;
- improving the efficiencies of, and supporting, charities;
- the provision of finance exclusively to organisations recognised as charities;
- activities or organisations that “but for its connection to Government” would be charitable;
- the provision of money, property or benefits to Item 1 DGRs which are exempt bodies even if they are not charitable;
- the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the
 - police, fire and rescue services or ambulance services; and
 - any other purpose that is beneficial to the community.