

Background to Respondent

Australian Community Philanthropy (ACP) is a not-for-profit organisation, that aims to build and support Community Foundations and the communities that support them across Australia.

The areas we have commented on and for which we have suggested changes are from the perspective of Community Foundations.

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

The structure of most Community Foundation includes a corporate trustee that is also an operating charitable institution and sometimes a number of other philanthropic trusts such as a Charitable Fund (not DGR), a Public Ancillary Fund (DGR), an Educational Scholarship Fund (DGR) and a Disaster Relief Fund (DGR). This structure is not ideal for community foundations wishing to undertake both grant making and community building projects.

Consultation Paper - A Definition of Charity

Thank you for the opportunity to comment on "A Definition of Charity", issued October 2011. This comment reflects the opinion of the Board of Directors of Australian Community Philanthropy and its members.

The areas we have commented on are from the perspective of Community Foundations.

Overview of issues

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

- Lack of clarity on the meaning of charity. How to identify charitable purposes or entities.
- Lack of organisations endorsed as charitable by the ATO in rural areas (they may be eligible for endorsement but have not done so).
- 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.

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, Australian Community Philanthropy, supports a full list of charitable purposes in the proposed legislation, as identified in Appendix A.

1. Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose?

We support the core definition as it stands and would like to see 'dominant purpose' retained and allow incidental or ancillary non charitable purposes to be undertaken as opposed to 'exclusively charitable purpose'.

Many Community Foundations provide additional incidental services for which they may receive income. For example, they generate fee for service consulting income from other organisations in return for providing specialist advice, undertaking research or preparing grant applications. This is part of a Community Foundation's remit and is essential in providing additional income on which they survive.

2. Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?

Yes the New South Wales Administrative Tribunal provides sufficient clarification on the circumstances when a peak body can be a charity. No further clarification is required.

3. Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?

We support the Board of Taxation's recommendations in its review of the Charities Bill 2003, that 'sufficient section' be defined as one which is not 'numerically negligible' compared with the size of that part of the community to whom the purpose would be relevant.

Community Foundations often give grants to small rural communities therefore it is important that the definition of 'public' or 'sufficient' not discriminate against these communities and their ability to receive support from charitable institutions or make it difficult for these communities to establish their own charitable institutions.

4. Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?

We have no comments or experience with respect to this question.

5. Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?

We are definitely in support of the draft ruling that the charging of fees to members is unlikely of itself to prevent a purpose being charitable.

In rural areas many people join membership organisations as it is their way to contribute to their community, the membership fee is a donation to the community rather than resulting in a benefit to the 'member'. For example small rural community development organisations are usually membership based but the members derive little individual benefit rather the benefit that is derived is the overall improvement of the community for the benefit of the whole community.

6. Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?

Australian Community Philanthropy supports Philanthropy Australia's position that urges against adoption of the 2003 definition of public benefit as we feel this is unnecessarily complicated and restrictive. Greater flexibility would be provided by providing guidance on the meaning of public benefit such as that included in TR 2011/4 rather than the extensive and complicated guidance provided by England and Wales.

7. What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?

We would like to see consistency across all heads of charity, so that all heads of charity are presumed to provide a public benefit.

Australian Community Philanthropy supports Philanthropy Australia's position that there are significant issues with charities being required to demonstrate that they are for the public benefit. Community Foundations come under the fourth head of charity, which does not presume public benefit, but ATO has not required, in practice, any explicit information to prove public benefit at this time.

If the new legislative definition requires charitable trusts to prove that they are for the public benefit, this may result in an onerous administrative burden for very limited gain. The public has an interest in ensuring that foundations are run efficiently at low costs, ensuring the maximum level of funding goes to charitable projects. Australian Community Philanthropy supports Philanthropy Australia's view that an explicit requirement for trusts to prove their public benefit would be a drain on time and resources.

Australian Community Philanthropy supports Philanthropy Australia's comment that a number of charities, particularly those located in regional areas, are small with relatively low turnover, have few or no paid staff and rely extensively on volunteers. Proving public benefit is also likely to be a burden on these organisations.

Scholarships to educational institutes and prizes for artistic competitions have long been recognised as being charitable as long as they are open to application and are awarded on merit or basis of disadvantage. However, these may ultimately be awarded to only one recipient. It is crucial that such practice is not eroded by a public benefit test.

8. **What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?**
9. **What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?**

We have no comments or experience with respect to this question.

10. **Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?**

We support the Government's acceptance that a charity can undertake activities that are unrelated, or not intrinsically charitable, so long as those activities are in furtherance or in aid of its charitable purpose. A charity needs to be able to undertake fundraising activities that may not be charitable in order to raise funds to undertake its charitable purposes.

Even though point 96 is being considered through a separate consultation process we would like to express our extreme concern regarding this point. The Government announcement in the 2011-2012 Budget that it will reform the tax law so that concessions provided to NFP entities are better targeted at those activities of a NFP that directly further its altruistic purpose is likely to add compliance, accounting and administration costs to NFPs.

11. **Should the role of activities in determining an entity's status as a charity be further clarified in the definition?**

We see no need for the role of activities in determining an entity's status as a charity be further clarified in the definition. The High Court ruling for the Word Investment decision and the Government's acceptance that a charity can undertake activities that are unrelated, or not intrinsically charitable, so long as those activities are in furtherance or in aid of its charitable purpose provides sufficient clarification.

12. **Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?**

We support the suggested changes to the Charities Bill 2003 that charities be able to engage in political activities, so long as those activities are in furtherance and in aid of its charitable purpose and that charities be allowed to engage in political activities that attempt to change the law or government policy and generate public debate by lawful means.

13. **Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?**

While the suggested changes to section 8.2 of the Charities Bill 2003, dealing with advocacy and political activities, will strengthen the ability of charities to engage in advocacy activities, the proposed changes may raise some issues. Australian Community Philanthropy supports Philanthropy Australia's statement that they cannot see any reason why a charity should not be permitted to advocate support of a particular candidate for public office if the candidate's policies will directly further the charity's

charitable purposes - or equally to oppose a candidate whose policies would run counter to the charitable purpose of the organisation.

Australian Community Philanthropy supports, Philanthropy Australia's suggestion that the concept of "disqualifying purposes" is superfluous and should be removed altogether and that the definition of charity would be simplified and clarified to a far greater extent by removing reference to "disqualifying purposes" altogether.

14. Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?

We believe that no further clarification is required in the definition on the types of legal entity which can be used to operate a charity.

15. In the light of the Central Bayside decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?

Australian Community Philanthropy is of the view that the definition of 'government body' in the Charities Bill 2003 lacks clarity and does not resolve the uncertainty on the issue for organisations that, because of their connection to government, may not be considered "charitable".

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 and volunteer service organisations such as ambulance, state emergency service and country fire service). This affects the organisation's ability to receive funding from charitable foundations.

It will be seen as a significant step to modernising the definition of charity in Australia in line with public opinion if the following area was included in the list of charitable purposes

- government controlled entities such as state schools, hospitals, community halls/centres, public pools, art galleries, museums, libraries and volunteer service organisations such as ambulance, state emergency service and country fire service etc.

In rural and regional Australia, government owned facilities are often the centre of the community. State schools, particularly in rural Australia, are often the hub of a community and in disadvantaged or low population areas (particularly as government funding is tied to enrolment numbers) 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 as 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, but particularly in a rural and regional context, is confusing and frustrating to most communities and seen as being unfair given the often vital role these institutions play in these communities.

The confusion surrounding entities 'controlled by government' could be simplified by (in decreasing order of preference):

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

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?

Australian Community Philanthropy submits that the list of charitable purposes in the Charities Bill 2003 is inadequate.

We believe that far greater clarity could be achieved by expanding it. If the purpose of the legislative definition of charity is to provide a clear framework for determining charitable status, it is better to be more explicit rather than less so.

A longer list of charitable purposes will lessen the need for organisations to seek advice (either from the ACNC or from independent advisors) about whether they are in fact charitable. This would also bring Australia further in line with other jurisdictions where the list of charitable purposes has been expanded.

17. If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?

We particularly believe that the following has strong public recognition as being charitable in contemporary Australia and are particularly important to rural communities:

- amateur sports programs and facilities;
- government controlled entities such state schools, hospitals, community halls/centres, public pools, art galleries, museums, libraries, and volunteer fire, rescue or ambulance services and
- the advancement of community development.

In rural and regional Australia, sporting clubs are often the centre of the community. The sporting clubs provide much more than sport for sport's sake, in terms of community building, reducing social isolation, providing a meeting point and facilities that are often available to other community groups.

As pointed out above state schools are also often the hub of a community and in disadvantaged and low population 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 as charitable so find it hard to distinguish between non charitable State schools and private non profit schools which are charitable.

Generally contemporary Australian society sees public schools, public hospitals and volunteer service organisations such as the Country Fire Service and State Emergency Service, that are operated by government, as charitable for the following reasons:

- they provide a public benefit
- often the community has significant involvement in their operations through School Governing Councils, Hospital Boards and volunteer fire brigades,
- they rely on volunteers to undertake aspects of their operations and raise funds
- their purposes and activities are listed in the Charities Bill 2003

Australian society does not see these organisations as governmental rather they are seen as community organisations. These organisations may receive government funding but also receive significant support from their community particularly in rural areas where schools and hospitals are essential to the survival of a rural community.

The educational, welfare and health purposes that are charitable and provide public benefit outweigh the disqualifying purpose of being governmental. For these reasons we believed that public schools, public hospitals and volunteer service organisations have strong public recognition as charitable and support the addition of governmental organisations that would be charitable if they were not government entities being added to the list of charitable purposes.

Amateur sport has strong public recognition as being charitable particularly those organisations providing sporting opportunities for children and sporting organisations in rural communities. Often in rural communities sporting organisations are the only organisations that provide opportunities for children to participate in after school activities.

In rural and regional Australia, the sporting clubs are often the centre of the community, reducing social isolation, providing a meeting point, a bridge among cultures and facilities that are often available to other community groups and contributing to healthy lifestyles across all socioeconomic levels.

Sport plays an important role in rural communities, providing benefits that are economic, recreational, health promoting and cultural. Sport is critical to the identity of rural communities, it brings people together, builds community pride and even provides a valued source of local tradition and history.

Cost is often a barrier to participating in sport and in rural areas the cost of travelling to and from sporting facilities is a barrier to participation. In rural areas often talented sportsmen and women are denied the opportunity of competing at a higher level of competition due to financial hardship. As sport is a "disqualifying purpose" it is difficult for Community Foundations to help in these situations.

Similarly often amateur sporting clubs experience financial hardship due to circumstances beyond their control, once again as sport is a "disqualifying purpose" it is difficult for Community Foundations to help in these situations.

Not being able to support and fund sporting groups in a rural and regional context is often confusing and frustrating to many communities and seen as being unfair given the often vital role they play in these communities.

The Australian Government by establishing the Australian Sports Foundation and listing it as a Deductible Gift Recipient has recognised that sport is a contemporary Australian societal need and expectation. The Australian Sports Foundation assists community organisations raise funds for the development of Australian sport and increase opportunities for Australians to participate in sport, and/or excel in sports performance.

If sport were listed as a charitable purpose the activities undertaken by the Australian Sports Foundation could be undertaken by Community Foundations. Community Foundations have a greater understanding of the societal needs in their communities than a national body.

Australian Community Philanthropy supports Philanthropy Australia's suggested list of charitable purposes as listed in Appendix A.

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

We support a statutory definition of charity for Commonwealth purposes which will provide a platform to a harmonised definition for all levels of government.

We support a single statutory definition of charity across Commonwealth, State and Territory jurisdictions. This will simplify compliance issues for charities and reduce the administrative burden on charities and will provide consistency of treatment for a range of purposes.

19. What are the current problems and limitations with ADRFs?

We have no comments or experience with respect to this question.

20. Are there any other transitional issues with enacting a statutory definition of charity?

Once a statutory definition of charity is enacted it would be beneficial to apply this definition to all levels of government and then to implement one law with respect to fundraising licenses. Currently fundraising licenses are controlled by State Government. This means multiple licenses are required if fundraising across Australia or fundraising on the internet.

Currently under some State Acts, trusts are given the power to “opt in” to make grants to non-charitable entities which are DGRs.

These provisions are inconsistent across States and 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):

- allowing a government body to be a charity;
- inserting in the proposed list of charitable purposes:
- providing money, property or benefits to government bodies which would be charitable but for their connection with government;

- providing money, property or benefits to Item 1 DGRs which are exempt bodies even if they are not charitable.

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Written by Sally Klose, Company Secretary, Australian Community Philanthropy for and on behalf of the Board of Directors of Australian Community Philanthropy and its members.

Appendix A: 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;
- 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 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.