



**Australian Conservation Foundation**

**Submission on Consultation Paper**  
*A Definition of Charity*

**(October 2011)**

**Australian Government**

**December 2011**

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**1. Background**

ACF welcomes the opportunity to make this submission on the Consultation Paper on A Definition of Charity.

ACF is a national, community-based environmental organisation that has been a strong voice for the environment for over 40 years, promoting solutions through research, consultation, education and partnerships. We work with the community, business and government to protect, restore and sustain our environment.

ACF has a longstanding interest in the policy setting affecting the Charitable and Not-for-Profit (NFP) Sector and has been a regular contributor to the debate on these issues.

ACF notes the Consultation Paper refers to the 2010 Productivity Commission Research Report, *Contribution of the Not-for-profit Sector* which recommended that a statutory definition of charity be legislated and based on the Report of the *Inquiry into the Definition of Charities and Related Organisations 2001*.

The Consultation Paper looks at the 2003 definition that was based on that 2001 Report, and developments since 2003, both in Australia and in comparable jurisdictions.

The Consultation Paper contends that a statutory definition of charity will allow Parliament to more easily alter the definition over time to ensure that it remains appropriate and reflects modern society and community needs, rather than having the common law being developed only by the courts as an ad hoc, costly and time consuming process.

ACF has responded to a selection of the Consultation Paper questions.

## 2. ACF Submission

**ACF's primary submission is that in view of considerable advances in Australian case law as a result of recent judgments since the *Charities Bill 2003*, and in view of the potential disadvantages associated with a statutory definition the need for a statutory definition of charity may now be unnecessary.**

However, if a definition is to be implemented, and subject to the release of any exposure drafts of a Charities Bill in 2012 ACF's comments on the Consultation paper are:

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?

ACF questions whether or not 'exclusive' adds greater clarity to a definition. 'Exclusive' conveys a narrower meaning than the word 'dominant' and ACF's concern with a statutory definition is that it may narrow common law flexibility without adding clarity or transparency or without otherwise improving workability.

ACF reserves its position on the replacement of the word 'dominant' with 'exclusively charitable' until the full text of a proposed draft definition can be considered.

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

ACF activities include working with Northern Australian communities. In principle, ACF agrees with a modification that could clarify the meaning of 'public' or 'sufficient section of the general community' where such modification is aimed at including organisations in geographically isolated communities with responsibilities for an area of national significance, or which cater for the care of a small group of people with significant needs.

ACF would also support a definition that would allow charitable institutions or funds to confer "private benefit" in the context of community development or financing activities in recognised lower socio-economic areas. ACF would consider as welcome, changes that foster the establishment of organisations that could be piloted in remote and regional communities. For example, ventures that trial sustainable and renewable energies and, in turn, provide services back to that small community. The model, however, may have broader potential, for example, it could be replicated by communities in many other areas, and could therefore be considered in its pilot phase as beneficial to a much wider community.

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?

ACF activities include programs to support Northern Australian communities and it endorses efforts to recognise an entity as charitable even though its beneficiaries are related in circumstances such as the example given in paragraph 68 (ie. in relation to the *Native Title Act 1993*, the *Aboriginal Land Rights (Northern Territory) Act 1976* that provide for payments to be made to native title holders and traditional owners).

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?

Of the three options described, ACF considers the Charities Commission of England and Wales Guidance section as providing a workable example with appropriate educative and awareness raising responsibilities for its Commission.

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?

ACF's concern is that any approach should not narrow the existing common law position. As stated by the Tribunal in *ACF v Commissioner of State Revenue*<sup>1</sup> "Times and ideas change." The position adopted by Charities Commission of England and Wales is preferred given its capacity to respond to common law.

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?

In principle ACF agrees with the proposition that an entity seeking approval as a charity should demonstrate that it is for the public benefit as this is consistent with case law.

Requiring an existing entity to repeatedly demonstrate that it is for the public benefit places an unnecessary burden on the administrative resources of lean organisations; there is no apparent benefit especially when balanced against other measures that are proposed and which are aimed at increased disclosure in charitable and NFP reporting.

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?

ACNC must have a adequate resources to be able to provide guidance or opinions to organisations which are seeking to understand the test and seeking to establish ways in which charities can demonstrate their continued meeting of the test (if such guidance is required).

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

Any such proposal for inclusion in a statutory definition should be approached with caution. The 2003 Bill gave rise to an ambiguous definition that blended a focus on purpose with a focus on activities of the entity.

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<sup>1</sup> *Australian Conservation Foundation Inc v Commissioner of State Revenue* [2002] VCAT 1491

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

No, if to do so were to lead to a narrowing of the flexibility afforded by common law. ACF considers the common law position, with potential for guidance notes, to be sufficient.

ACF is also concerned that a focus on listing activities, such as disqualifying activities, could subsequently be used inappropriately for the purposes of stifling the charitable sector's voices and advocacy. The risk is present that subsequent amendment through subordinate regulation could result in government focusing on disapproved 'activities' that call government to account or question the equity in government policy or raise awareness of systemic reasons that contribute to disadvantage. These activities, if undertaken by charities, could potentially jeopardize their status and therefore discourage and restrict, rather than promote, advocacy and interaction between charities, government and business.

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?

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

ACF does not support an approach that restricts the position established by the High Court in *Aid/Watch*<sup>2</sup>. A constructive approach would be a Bill that expressly provides that a charity may be permitted to engage in political activities without compromising its charitable endorsement.

To reference the *Aid/Watch*<sup>3</sup> case "Communication between electors and legislators and the officers of the executive, and between the electors themselves, on matters of government and politics is 'an indispensable incident' ..." of the Australian constitutional system.

ACF's position in relation to a statutory definition prior to the *Aid/Watch* case was that it must recognise the legitimacy of a broad range of non-partisan engagement with governments, policy and decision makers by organisations in furtherance of their charitable purposes. Activities recognised as legitimately in support of a charitable purpose should include promoting or opposing changes to laws, presenting views on issues during elections, participating in government processes (eg. submissions to parliamentary inquiries and meeting with members of parliament or other processes) and critically analysing and evaluating the policies of governments and political parties<sup>4</sup>.

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

In view of the increasing role of local government in providing services or community bodies that engage in otherwise charitable activities, ACF agrees that there is a need to review the legal entity definitions to address the 'but for connection to government' circumstances facing otherwise eligible entities.

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<sup>2</sup> *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42

<sup>3</sup> *Ibid* at page 11, paragraph 44.

<sup>4</sup> ACF Submission on Draft Research Report *Contribution of the Not-for-Profit Sector* Productivity Commission (October 2009) Australian Government (Julian Chenoweth, November 2009)

As mentioned in our response to Discussion Question 3., ACF would support a clarification to the types of legal entity that would facilitate innovative business models. In addition, ACF supports the recognition of entities that can foster collaboration amongst charities or collaborations between charities and the business sector, to achieve common goals that are founded on charitable purpose.

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?

ACF would support broadening the list.

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

A statutory definition poses the risk of narrowing the common law, or alternatively, provoking litigation – rather than clarifying or improving the workability of the law. If a statutory definition is adopted, the Charities Commission of England and Wales approach is constructive, in that it incorporates by statutory reference, evolving charity law as determined under common law.

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

Attention must be paid to mutual recognition of definitions. A common standard must be identified, in much the same way as was the case for product safety under the then State based consumer laws. ACF's involvement in the ACF VCAT case referenced above illustrates the extraordinary position where a recognised Commonwealth charity had to incur administrative and legal costs in order to demonstrate its eligibility as a charity under State based taxation laws.

Modern Australian charities regularly work at a national level and in ACF's case, the differing definition of charities (and the consequences) is evident in State and Territory laws for fundraising and stamp duty. The annual scan of compliance and changes to these laws places an unnecessary administrative burden on an organisation with scarce resources.

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

ACF agrees with the need to have a expanded flexibility and broader scope of allowable activities in relation to the use of funds raised for disaster relief especially in view of the likely increased severity of impact.

**[END]**

#### **Reference list**

ACF reference the documents included in the Consultation Paper List of References at page v and the following additional references:

ACF v Commissioner of State Revenue [2002] VCAT 1491

ACF Submission on Draft Research Report *Contribution of the Not-for-Profit Sector* Productivity Commission (October 2009) Australian Government (Julian Chenoweth, November 2009)

Arnold Bloch Liebler on behalf of ACF & Ors: Submission to Board of Taxation on *Charities Bill 2003* (3 October 2003)

**Sari Baird,**

**ACF General Counsel, 9 December 2011**