

The Manager
Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Submission – Definition of Charity

Charities Aid Foundation Australia (**CAF**) Australia welcomes the opportunity to participate in this consultation regarding the definition of charity.

Charities Aid Foundation is an international not-for-profit organisation with over 80 years experience. Through CAF Australia which was established in 1999, it provides Australian-based charitable organisations with the necessary knowledge, infrastructure, back-office administration and management services, which increases the efficiency of those organisations and the flow of funds to the community.

General comments

CAF welcomes the government's decision to enact a single, uniform definition of charity and charitable purpose that will modernise the definition and provide consistency amongst all levels of government.

CAF agrees with the government's approach contained within the Consultation Paper, which is based on the draft *Charities Bill 2003 (Charities Bill)* that was produced after the Sheppard Inquiry. However, it is submitted that further improvements can be made to the draft Charities Bill that will result in a new legislative definition that appropriately reflects contemporary norms, practices and law.

The primary interest of CAF is ensuring that the meaning of 'public benefit' is not limited by statute, rather remains flexible to best allow for the different contexts in which charities, such as CAF Australia, operate and changing circumstances of what may be legitimately viewed as for the public benefit.

Responses to specific questions

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?

CAF submits that, generally, a charitable entity should have an exclusively charitable purpose, as contained within the common law rule, and therefore supports the proposal to amend the definition of charity as proposed in the Charities Bill. However, CAF supports the view that the new definition should provide that incidental or ancillary purposes that are non-charitable are still permitted. This is particularly important in a situation where activities may not be, when viewed in isolation, strictly charitable, but seen in context clearly furthering a charitable purpose.

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?

CAF submits that it is in the interest of clarity that the definition of charity specifically include indirect services, including "improving the efficiencies of, and supporting, charities" within the list of charitable purposes. As the charitable sector grows in size, complexity and funds under management, it is important that administration and cost is not unnecessarily duplicated and that development and application of best practice is encouraged.

The above view is consistent with the *Social Ventures* decision¹ in which it was decided that the provision of direct assistance to charitable entities to help them meet their goals and increase their sustainability, was sufficient for an entity to be defined as a charitable institution.

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

CAF submits that, although the word "public", or the phrase, "sufficient section of the general community", can contribute to uncertainty in the application of the legislation, any attempt to strictly define the concepts would be inappropriate and overly prescriptive. CAF supports the Board of Taxation's recommendations, that flexibility should remain, as the concepts largely rely on the context of the benefit provided, and such context will vary and ultimately change over time.

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?

CAF does not support the 2003 definition of public benefit being adopted as it is unnecessarily restrictive. The concept of public benefit is dynamic in nature and dependent on both context and public perception, that is, its meaning will gradually change over time. This position was usefully demonstrated in *Wentworth District Capital*,² in which the Full Federal Court held that a community bank, opened in response to the closure of a major bank branch, had as its dominant purpose, a community service, which was the provision community beneficial banking services, and such service was a substantial benefit.

In light of this, CAF favours a non-statutory approach as it would provide flexibility and a capacity to accommodate diversity. In further submission, CAF would call on the proposed, Australian Charities and Not-for-profits Commission (**ACNC**), to provide a similar service as the Charity Commission for England and Wales, and provide guidance on the meaning of public benefit as it evolves over time.

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 test?

CAF submits the proposed ACNC should provide a similar service as the Charity Commission for England and Wales, and provide guidance on the meaning of public benefit as it evolves over time to ensure that existing charities continue to demonstrate a public benefit and new charities are able to attain charitable status in reference to the public benefit demonstrated, which is dependent upon the context and particular circumstances.

¹ *Social Ventures Australia Limited v Chief Commissioner of State Revenue* [2008] NSWADT 331.

² *Commissioner of Taxation v Wentworth District Capital Limited* [2011] FCAFC 42.

A reporting process could be established focusing on exceptions reporting, for instance disclosures of material changes in circumstances or activities that might impact on the public benefit criteria. CAF also submits, that if the ACNC were to find an entity does not demonstrate a public benefit, an appropriate review procedure should be available including by way of tribunal or court process if necessary.

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

CAF supports the requirement that the activities of a charity be in furtherance or in aid of its charitable purposes, so long as this is judged by the way the purpose is furthered, not by the activity. This view is consistent with the *Words Investment* decision,³ in which the High Court held that the key consideration when considering the commercial activities of a charity, is whether the commercial dealings are carried on in the furtherance of a charitable purpose. That particular issue is obviously the focus of the Government's recent consultation on commercial activities in the charitable sector.

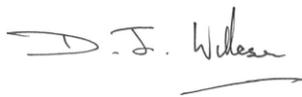
11. Should the role of activities in determining an entity's status as a charity be further clarified in the definition?

CAF submits that the activities undertaken by a charitable entity should not be a basis for the entity's status as charity and therefore do not require further clarification. In this regard, if a charity engages in business or trade, or for example, provides consultancy or management services, and derives income, provided such income is contributed towards the entity's charitable purpose, the source of such income should not be particularly relevant in determining an entity's status as a charity. It is submitted that in most cases, if a charity engages in fundraising or commercial activities that are not appropriate to or consistent with its purpose, it risks losing the support of the community and its donors.

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.

Subject to the comments in this submission, CAF submits that the lists are appropriate, provided the concepts within the definitions remain flexible and dependant on the circumstances.

Yours sincerely



Don Willesee
Chief Executive

³ *Federal Commissioner of Taxation v Words Investments Limited* [2008] HCA 55.