



Submission by

Ipswich Jets Rugby League Football Club

Magpies Sporting Club

Northern Suburbs 'Devils' Rugby League Club

Norths Leagues and Services Club

Queensland Lions Football Club

on the *Charities Bill 2013 and Charities (Consequential Amendments and Transitional Provisions) Bill 2013* Exposure Drafts

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Executive Summary

Australian and international caselaw has moved away from the principle that sport and charity are mutually exclusive. It can therefore be included in the restatement of the common law set out in the draft *Charities Bill 2013*. Arguments for its inclusion are fortified when statutory responses both in Australia and overseas are considered. The policy reasons for including the advancement of amateur sport as a charitable purpose are also compelling

Furthermore, excluding amateur soccer whilst including 'advancing of culture' as a charitable purpose is an outdated value judgment laden with cultural prejudices.

Taxation consequences for inclusion of amateur sport are unlikely to be substantial, as some amateur sporting bodies are already exempt under section 50-45 of the *Income Tax Assessment Act 1997*, and most others enjoy exemption from tax for most of their income by operation of the mutuality principle.

About the Contributors

The Contributors to this submission are all sporting clubs engaged in various activities intended to advance amateur sport.

Ipswich Jets Rugby League Football Club Inc ('Jets') is located in Ipswich, Queensland and operates for the purpose of fundraising for and developing the local Jets Rugby League club, which enters teams in various levels of competition ranging from its junior rugby league program through to the Intrust Super Cup. Jets provides its facilities for use of its members and free of charge to the local community.

Magpies Sporting Club Ltd ('Magpies') is located in the suburb of Glenella, in Mackay, Queensland. Magpies operates for the purpose of fundraising for and holding and maintaining property for 11 local sporting clubs. Magpies also provides administrative services for Magpies Rugby League Football Club Inc. Magpies provides its facilities for the use of its members and affiliates.

Northern Suburbs 'Devils' Rugby League Football Club ('Devils') is located in Nundah on the north side of Brisbane. Devils enters rugby league teams in various levels of competition ranging from its junior rugby league programs to the Intrust Super Cup. Devils provides playing fields and amenities as well as a clubhouse for the use of players.

Norths Leagues and Services Club Ltd ('Norths') is located in Kallangur, on the north side of Brisbane. Norths amalgamates the Northern Suburbs Leagues Club Ltd and the former Kallangur RSL. Norths operates for the purpose of fundraising for Devils and is concerned with the advancement of Rugby League football.

Queensland Lions Football Club Ltd ('Lions') is located at Richlands in Brisbane, and has operated as an amateur soccer club for over 20 years. In 2012, Lions has entered teams in most of the established levels of local competition, ranging from its junior soccer programs all the way through to the Premier League (one tier below the Hyundai A-League).

1. Introduction

This is a collaborative submission, prepared jointly by Ipswich Jets Leagues Club Ltd, Mackay Magpies Sporting Club Ltd, Norths Devils Rugby League Football Club, Norths Leagues and Services Club Ltd and Queensland Lions Football Club Ltd ('the Clubs'). The stories of how and why the Clubs operate and the positive role that the Clubs play in their communities are told throughout the submission. The purpose of these stories is not to boast of the contribution of these particular clubs, but to illustrate the unique and essential role that sporting clubs like ours play in Australian society. They are increasingly called upon to maintain and develop the social and physical health of the Australian community. Amateur sporting clubs are different from professional or commercial clubs, and should be treated differently when considering their claim to be classed as charities.

Currently, the advancement of amateur sport is not considered a charitable purpose in Australia. However, courts have increasingly shown a willingness to work around this principle to accommodate modern circumstances. Where the courts have stopped short, legislators have continued the reform. Remaining inconsistencies in the common law are anachronistic and ought to be resolved by the inclusion of advancing amateur sport as a head of charity in the *Charities Bill*.

In summary, it is submitted that Clubs:

- (a) That exist for the purpose of advancement amateur sport or for the encouragement of sport; and
- (b) With constituent documents preventing any distribution, whether in money, property or otherwise, to the members;¹

should be included in the concept of charity in Australia. This ought to include clubs which provide ancillary benefits to members, and clubs which undertake substantial commercial activity to fund pursuit of their sporting purpose.

Each of the Clubs making this submission has a different approach but the same ultimate purpose. The High Court of Australia in *Federal Commissioner of Taxation v Word Investments*² ('*Word Investments*') confirmed that the overall purpose of an organisation is determined by reference to purpose and not merely by recourse to its activities. It is a holistic inquiry, where the mere fact that the principal or even the sole activity is commercial does not mean that an entity cannot exist for a charitable purpose. By parity of reasoning, commercial activities do not mean that an organisation cannot be pursuing a sporting purpose. In fact, the High Court in *Word Investments* specifically referred to cases on the encouragement of sport and recreation in what was a case concerning how charitable purpose is to be determined.³

Whilst the activities of each of the Clubs differ, the central feature common to all is that they are built on a pool of shared resources contributed specifically for a shared purpose: the encouragement and advancement of amateur sport. As each club is constituted as a not-for-profit entity (NFP), irrespective of the activities engaged in, it is guaranteed that resources cannot ultimately be directed to benefit members.

¹ Based on the *Income Tax Assessment Act 1997* s 59-35.

² *Word Investments Ltd v Federal Commissioner of Taxation* (2008) 236 CLR 234.

³ For example, *Internal Revenue Commissioners v Baddeley* [1955] AC 572.

The Magpies, Jets and Norths clubs each promote and facilitate sport in a way akin to the *Word Investments* arrangement. Each club functions as a mutual, and consolidates its shared pool of resources through various social activities, gaming and hospitality. Each club then directs surpluses – usually several hundred thousands of dollars each year – to sporting clubs which are dependent on those funds to deliver amateur sport. Jets and Norths exist exclusively to raise funds for their affiliated sporting clubs. Magpies not only raises funds, but also holds, manages and maintains property and facilities for the use of its affiliates.

Magpies, Jets and Norths are formed from a social membership; however, membership is conditional on a commitment to participate in, facilitate or otherwise support the objective of the advancement of amateur sport. Members make contributions to the club with the expectation that the funds will be used to either fund or otherwise advance amateur sport.

The Devils club is an affiliate of Norths. Devils fields teams in varying levels of semi-professional, amateur and junior competitions and mainly directs its activities towards managing and promoting its teams and development programs. Whilst Devils runs its own licensed clubhouse and social activities (centred on its teams), it relies heavily on funding and grants from Norths. The main reason for its reliance on grants from Norths is the significant overheads required to provide sporting facilities and field amateur sporting teams. Members simply cannot carry the costs. This is particularly the case for amateur sport, which has the greatest participation levels for children and young adults, where families may have multiple children involved in sporting activities simultaneously.

Lions runs all of its activities within the one organisation. Lions divides its members between those who play soccer for the club (sporting members) and those who have an interest in soccer and wish to see soccer advanced (social members). The ratio of sporting to social members is roughly 1:10. Lions provides and maintains at significant expense two properties which are used for soccer, including the necessary amenities. Lions also runs and facilitates teams, fixtures and competitions. In order to ensure that participation by amateur and junior players is affordable, the soccer program in and of itself relies on subsidies of over \$310,000.00 from Lions' other activities. Without these subsidies, Lions would be faced with the choice of demanding unbearable fees from its sporting members or running its programs at a loss. Like the other clubs, the mutuality principle is of significance to Lions because it provides an avenue for like-minded people to pool resources for the advancement of its sporting activities. Lions runs its own hospitality, social and gaming activities as part of the mutual fund, for the purpose of maintaining the surplus of its asset pool to cover the shortfall from its soccer operations.

It would be of great benefit to the Clubs and the general community for amateur sport to be recognised in the *Charities Bill* as a legitimate potential source of public benefit.

1.1 The Exposure Draft

The Explanatory Material to the draft *Charities Bill 2013* ('the draft Bill') quite properly identifies a number of interests as charitable which advance or contribute to:

1. A cohesive and functional society;
2. Communal participation and association;
3. The building or accumulation of civic pride and public capital; and

4. Fostering and preserving a just and equitable society.

It is laudable that interests such as 'advancing culture' or the 'promotion of reconciliation, mutual respect and tolerance between groups of individuals that are in Australia' should be included within a statutory definition of charity. There are clear public benefits in these ends, particularly at a time in Australia's history when participation in the collective life of the community is declining.⁴ By allowing these interests to form heads of charity, the government confirms social support for them and provides the greatest democratic incentive for their establishment and civic participation.

However, the Explanatory Material to the draft Bill ('EM') explicitly notes that the line has been drawn short of sporting interests. There is no direct reason given for this, but there is a conspicuous link throughout the EM between sport and recreation. Given that multiple Australian states provide in their trusts legislation that providing facilities for public recreation is charitable purpose (see further below), the insistence in the EM that this will not be the case for Commonwealth purposes⁵ seems incongruous. It is also submitted that the social interests served by amateur sporting clubs in the Australian community are inherently worthy of receiving charitable status.

The community interests served by amateur sporting clubs are, at a grass-roots level, thoroughly compatible with the high ideals expressed by the EM. Parallel to advancing culture and promoting mutual respect runs the local sporting club, as a site at which a diverse and diffuse cross-section of the community is able to gather around a shared interest.

The ideals underlying the draft Bill find simple and workable expression in the contribution and worth of the local community sports club. Accordingly, an amateur sporting club ought to be given equal treatment to the academic, religious, cultural or welfare institution. Sport has enormous social appeal and cultural significance in Australia. The benefits provided by sport to the four goals enumerated above is already known and accepted by the community in Australia. A significant proportion of the community is only too happy to participate in, support and donate to sporting causes despite those causes not yet having legal recognition as a charitable cause. Including sport as a charitable purpose is a step which will only enhance the concept of charity.

Finally, amateur sporting clubs are already fully engaged in charity. This is inherent in the social function of an amateur sporting club. Amateur sporting clubs encourage and enhance volunteerism at the local level by establishing and maintaining social networks that can easily be mobilised in times of community need. The social networks developed and enhanced by local amateur sporting clubs provide a significant pool of social capital from which participants in any community can draw. An amateur sporting club is not merely a site for recreation and enjoyment, it is an established means by which a number of charitable ends are pursued and advanced.

⁴ A typical example would be the declining participation in political parties.

⁵ Explanatory Material to *Charities Bill 2013* Exposure Draft, 1.109 – 1.110.

1.2A definition of ‘amateur sport’

It is important to clarify what is meant by ‘amateur sport’. While there is no set definition of ‘amateur’ sport even in the UK, where amateur sport is included in the statutory definition of charity, the Clubs submit that Hubert Picarda QC’s working definition of ‘non professional’ is a suitable place to begin.⁶

The Clubs submit that a possible definition for inclusion in the draft Bill could be sporting activities which promote participation and recreational enjoyment rather than paid professional engagements. Amateur sporting clubs also typically exist as part of, or represent, a local community, with membership open to the general public and participation limited only by merit for involvement in a particular team. An amateur sporting club is distinct from, for example, a local gym, as the purpose of an amateur sporting club is not commercial.

It may be necessary and appropriate to set out the limits of amateur sport in the draft Bill as has been done with ‘advancing social or public welfare’ in section 13.

2. The Australian common law

Historically, sporting activities were not considered to be of sufficient benefit to the public to warrant their inclusion in the concept of charity. However, this bright line has become considerably blurred over the more than 110 years since its introduction. Courts and legislatures have developed multiple exceptions and interpretative strategies to overcome what is an increasingly uncomfortable distinction between ‘mere’ sport and public benefit.

The ‘mere sport’ principle originated in an 1895 trusts case, *Re Nottage*, which concerned the validity of a gift to support the pursuit of ocean yacht racing.⁷ *Re Nottage* has been accepted as part of the law of Australia since the 1974 decision in *Royal National Agricultural and Industrial Association v Chester*; but even then, the High Court noted:

It is our opinion that here the Court should not go beyond the decisions of the House of Lords and of this Court to which reference has been made, notwithstanding our sympathetic understanding of any lack of enthusiasm that there may be for what now appears as an unnecessary restriction imposed by law upon the capacity of a testator...[this] may well be thought out of keeping with the sentiments prevailing in the days of Elizabeth II. Perhaps the law is in need of reform.⁸

Over time, courts both in Australia and in other common law jurisdictions have found that ‘mere sport’ can be considered charitable when linked to another charitable purpose, especially the advancement of education.⁹ The most recent Australian example is the 2011 Administrative Appeals Tribunal decision in *Bicycle Victoria Inc v Commissioner of*

⁶ Hubert Picarda QC, *The Law and Practice Relating to Charities* (2010, 4th ed), 164.

⁷ *Re Nottage* [1895] 2 Ch 649.

⁸ *Royal National Agricultural and Industrial Association v Chester* (1974) 3 ALR 486.

⁹ See, for example, *Kearins v Kearins* [1957] SRNSW 286, where a trust to promote rugby league at Sydney University was suitable because, per McLelland J at 291: ‘Participation in the sporting facilities of the Universities has always been recognised as an important element in the development of the men and women at the University...as part of the training of a well-balanced student’.

Taxation,¹⁰ where the Tribunal decided that Bicycle Victoria's extensive activities in promoting cycling were linked to a primary purpose of promoting fitness.¹¹

Parliaments have also acted to dilute the application of the *Re Nottage* principle. As early as 1958, the UK enacted a *Recreational Charities Act* in response to a number of cases deciding that 'purely recreational pastimes' could not be charitable.¹² Most of the Australian states followed suit, including similar provisions in trusts legislation, such that the 'provision of, facilities for recreation or other leisure-time occupation' is charitable if 'provided in the interests of social welfare'.¹³ 'Social welfare' is a public benefit requirement, whether the general public or a specially deserving section of the public.¹⁴ Tasmania's *Variation of Trusts Act 1994* is the most recent, and perhaps accordingly, the most wide-ranging. Under section 4(1), providing property for facilities for sport, recreation or leisure is charitable – there is no need to prove public benefit, as it is presumed.

Under these statutory modifications, facilities for public recreation have been regularly found to be charitable under the fourth head in *Pemsel's* case, of 'other purposes beneficial to the community'.¹⁵

3. Original reasons for exclusion no longer apply

The Clubs submit that these changes illustrate that the reasons given by the English Court of Appeal in *Re Nottage* for refusing charitable status to 'mere sport' no longer apply in the modern context, and therefore there is no good reason to continue to exclude the advancement of at least amateur sport from being a charitable purpose.

3.1 Insufficient benefit

In *Re Nottage*, the Court decided that the promotion of 'mere sport' could not be charitable for two reasons. Firstly, the Court decided that the primary purpose and result of the sport was enjoyment alone rather than any substantive benefit. Lord Justice Lindley acknowledged that:

...every healthy sport is good for the nation – cricket, football, fending, yachting, or any other healthy exercise and recreation', but thought that if 'the encouragement of such exercises [were] therefore charitable, we should have heard of it before now'.¹⁶

Under statutory modifications to the common law, and also independently under the fourth head of charity, public recreation facilities are routinely recognised by courts as charitable. In *Strathalbyn Show Jumping Club Inc v Mayes*, Justice Bleby of the Supreme Court of South Australia reviewed relevant authorities and found that the purpose of providing recreation facilities could be charitable as 'beneficial to the community' when sufficiently

¹⁰ *Bicycle Victoria Inc v Commissioner of Taxation* (2011) 127 ALD 553.

¹¹ *Bicycle Victoria Inc v Commissioner of Taxation* (2011) 127 ALD 553 at [194] – [195].

¹² *Internal Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] 1 All ER 747; *Internal Revenue Commissioners v Baddeley* [1955] AC 572.

¹³ Compare *Recreational Charities Act 1958* s 1 with, for example, *Trusts Act 1973* (Qld) s 103(2).

¹⁴ *Trusts Act 1973* (Qld) s 103(2), *Charitable Trusts Act 1962* (WA) s 5(1).

¹⁵ Gino dal Pont, *Law of Charity* (2010) [12.8].

¹⁶ *Re Nottage* [1895] 2 Ch 649 at 655-656.

available to the public, without the need to resort to the statutory modification of the common law in the *Trusts Act 1936*.¹⁷

The fact that sport may involve ‘amusement’ or enjoyment should not be a continued bar to its receiving recognition as beneficial to the community, especially when there is no equivalent concern in the case of cultural pursuits. It seems absurd that providing a sporting and recreation facility open to the public can be charitable, but activities conducted in the facilities are not.¹⁸ It has been argued that there is a distinction between sport on the one hand and recreation on the other, with sport involving a ‘competitive’ element. This distinction, to the extent it still exists, is neither relevant nor useful in the modern context.

3.2 Benefit to insufficient number

The second reason given by the Lords in *Re Nottage* was that any benefit resulting from the sport was confined to a small number of people and could not be said to benefit the public. ‘Mere sport’ could not, therefore, be under the category of general public benefit.¹⁹ This idea is also increasingly irrelevant.

Sport and recreation is now recognised as beneficial to the community both in terms of physical health and mental health, as well as social benefits and promotion of community spirit.²⁰ Sporting clubs regularly receive government grants of public money, and are eligible for income tax exemption.

In Canada and the US, promotion of amateur sport so far as it promotes physical fitness has been found to meet the charity test.²¹ A key element of one of these cases, *Re Laidlaw Foundation*, was the decision that in the modern environment, promotion of amateur sport could clearly be considered to provide a general public benefit.²²

Many, if not most amateur sporting clubs, have membership which is open to the public. It is well known that to be considered a charity, an entity must not only have a charitable purpose, but must also operate for the benefit of the public or a sufficient section of the public. Where this test is not met, as in the case of the polo club in *Strathalbyn Show Jumping Club Inc v Mayes*, the entity is not charitable. This element of the common law is preserved in the draft Bill in section 6. There is therefore no reason to continue to exclude the advancement of sport from the list of charitable purposes on the basis of insufficient public benefit.

3.3 Revenue implications

The Court in *Re Nottage* was also concerned about the potential ramifications of ‘opening the floodgates’ by allowing sport to be considered charitable. Lord Justice Lopes said:

If we were to hold the gift before us to be charitable we should open a very wide door, for it would then be difficult to say that gifts for promoting bicycling, cricket, football, lawn tennis, or any other

¹⁷ *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54, [88], [112]-[113].

¹⁸ Dal Pont, above n 16, [12.5].

¹⁹ Picarda, above n 5, 176-77.

²⁰ Dal Pont, above n 16 [11.22]

²¹ *Hutchinson Baseball Enterprises Inc v Commissioner of Internal Revenue* (1982) 696 F 2d 757; *Re Laidlaw Foundation* (1984) 13 DLR (4th) 491 (HCJ (Ont)).

²² *Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217.

outdoor game were not charitable **for they promote the health and bodily well-being of the community.**²³ [emphasis added]

It is true that in Australia, charitable status is tied to tax favours, but granting charitable status to the purpose of advancing amateur sport will not create a revenue burden. In reality, NFP sports clubs already access income tax exemption and benefit from the exemption of income earned from members under the mutuality principle.

4. Statutory intervention to resolve remaining anomalies

Despite the courts' gradual movement towards recognising sport's legitimate claim to meaningful public benefit, they appear to have reached a point, at least for the time being, beyond which they will not go. The primary reason for this appears to be the doctrine of precedent, rather than any inherent judicial conviction that the 'mere sport' principle remains relevant. Dal Pont states that 'the judiciary appears to be awaiting statutory change.'²⁴

For example, the New South Wales Administration Decisions Tribunal decided in *Northern NSW Football Ltd v Chief Commissioner of State Revenue*²⁵ that a soccer club with multiple objects had a general purpose of improving health, wellbeing and promoting a healthy lifestyle, rather than promoting 'mere sport'. Accordingly, the Tribunal found it charitable. The New South Wales Court of Appeal overturned this decision, but not on the basis that sport could never of itself be considered charitable or of public benefit. Instead, the court found that the Tribunal had construed the club's purpose overly generously, as promoting a healthy lifestyle. In fact, the court said, the club's purpose was to promote football. The charitable status granted by the Tribunal for a purpose of promoting a healthy lifestyle could not follow under the current state of the law.

Re Laidlaw found that the promotion of amateur sport so far as it promoted fitness was for the public benefit and therefore charitable. In *Amateur Youth Soccer Association v Canada (Revenue Agency)*,²⁶ the court hastened to explain that the reason this decision had been possible was a particular statutory provision that had required the judge to assess 'public benefit', rather than public benefit as recognised under the common law.

In fact, in *Strathalbyn*, Justice Bleby said:

Public benefit is an elusive quality...in [some] cases the benefit may be...indirect, such as the provision of community facilities which might otherwise have to be provided out of some form of taxation...It seems to me that there are two ways in which the test of public benefit is satisfied in respect of [a purpose of providing land to be used as a 'recreation ground' or for 'any sport']. One is the promotion of the physical health, well-being and recreation of those who participate in such activities...The second way is the relief on the public purse by the provision of such facilities, being facilities which might otherwise have to be provided out of rate revenue...²⁷

²³ *Re Nottage* [1895] 2 Ch 649 at 656.

²⁴ Dal Pont above n 16, [12.7].

²⁵ *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2009] NSWADT 113.

²⁶ *Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217, per Rothstein J at [37] – [38].

²⁷ *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54, [97], [115].

The UK intervened in the form of the *Charities Act 2006* (now replaced by the *Charities Act 2011*) to speed up the process of recognising advancement of amateur sport as a charitable purpose. The government's view was that sports clubs 'play an important role in society' and 'provide health benefits to participants, giving them a better quality of life, and they can be effective in encouraging participation and forging stronger communities'.²⁸ This change was also introduced in Northern Ireland with its *Charities Act 2008* and in Scotland in the *Charities and Trustee Investment (Scotland) Act 2005*.²⁹

In Singapore, the Charities Commissioner recognises 'the advancement of sport, where the sport promotes health through physical skill and exertion' as a charitable purpose under the fourth common law head of charity.³⁰

The categories of charity have continued to expand over time, and change according to perceptions of community need. For example, child-care organisations were included by the 2004 *Extension of Charitable Purposes Act*, whereas 'the repair of bridges, ports, havens, causeways...sea-banks and highways' considered charitable under the *Statute of Charitable Uses 1601* is now seen as a government responsibility.

There has been a clear movement in the common law around the world since *Re Nottage* was decided in the late 1800s towards recognising the important part that sport now plays in community life. The statutory definition of charity presents an ideal opportunity to continue this trajectory, rather than waiting another 100 years for courts to be comfortable overturning what was already recognised in 1974 as an outdated principle. To ignore this opportunity is to continue to favour a historic English bias towards arts and cultural organisations that has no place in modern Australia.

5. Policy reasons for including sport

The law must stay in step with its contemporary social context. Social cohesion, participation and association have been taken for granted. At present, remoteness and isolation are becoming the norm. The draft Bill seeks to address this in terms of advancing culture and developing social welfare programs. The draft Bill also takes into account the necessity of advancing, promoting and improving community health.

As is outlined below, these causes are naturally fostered and developed by amateur sporting clubs. As amateur sporting clubs are already carrying the aims of the draft Bill into effect, it seems sensible to recognise their efforts in carrying out charitable purposes despite not having been recognised as charities.

This also means that there are sound policy reasons for including the advancement of amateur sport as a charitable purpose.

²⁸ UK Cabinet Office, *Private Action, Public Benefit, A Review of Charities and the Wider Not-for-profit Sector*, September 2002, Strategy Unit report, London, para 4.35, quoted in dal Pont at [12.7].

²⁹ Scotland's provisions are slightly different but very similar, including 'the advancement of public participation in sport' as a charitable purpose: s 7(2)(h).

³⁰ Singapore Charities Commissioner 'Charities', *Charity Portal*
<<https://www.charities.gov.sg/charity/index.do>>

5.1 Public Support for Charity Status

In the words of the 2001 Charities Definition Inquiry Report, 'it is undeniable that the Australian population generally exhibits considerable enthusiasm for sport.³¹ In fact, sport is integral to the psyche of Australians; being sporting is a mark of being Australian – it crosses cultural lines.

There is evidence of strong community support for the acceptance of the advancement and encouragement of sport as a charitable purpose and this intent is reflected, it would seem, in legislation. The Explanatory Memorandum to the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) makes it clear that 'the advancement of amateur sport' has been anticipated as a possible inclusion into the definition of charitable purpose. In the Act at section 100-20, the example is given of the ACNC removing a person from the office of director but their continuing as club captain. The note provides:

1. Note: Suspension or removal of an individual as a responsible entity does not necessarily affect the rights or duties of the individual in other capacities.
2. For example, under the governing rules of an incorporated sporting club an individual may be a director of the club (and therefore a responsible entity) because he or she is the club captain. Removal of the individual as a responsible entity may not in itself remove the individual from the office of club captain.

At present, the Australian Charities and Not-for-Profits Commission ('ACNC') only supervises charities, so this suggests that the government anticipates adding sporting clubs to the list of charities. This view is fortified by the Explanatory Memorandum to that Act, which identifies the 'provision of sport' as one way in which contribution is made to 'community wellbeing'.³² The clubs acknowledge the possibility that the ACNC may regulate sports clubs as NFPs at a future time, but the construction submitted here seems the more likely construction.

A strong signal of public support is participation. Lions, for example, had over 20,000 sporting and social members in the 2012 reporting period. This membership is formed around the common objective of advancing and encouraging amateur soccer. Many of Lions' members live locally to the club and renew their membership annually. Magpies requires any member who does not play for a sporting team to support the overall sporting purpose of the club. Magpies attracted a membership of over 10,500 (including over 1,000 members of affiliate sports teams) in the 2012 reporting period. This is in a region which is less densely populated than Lions' local community. These membership numbers suggest strong public support and broad community support not just for the clubs, but more importantly for the advancement of amateur sport.

The Federal Government's anti-siphoning list also demonstrates the strength of public support for the advancement and encouragement of sport. The 2010 'Keep Sport Free' campaign attracted 127,854 signatures to its petition to the Federal Government to preserve free-to-air viewing of certain sporting events determined to be of public interest.³³ This resulted in the publication of the *Broadcasting Services (Events) Notice 2010*, which preserves the free-to-air licensing of sporting events which, in the Minister's opinion

³¹ The Treasury, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), 200.

³² Explanatory Memorandum to *Australian Charities and Not-for-Profits Commission Act 2012*, 265.

³³ Keep Sport Free <<http://www.keepsportfree.com.au>>

'should... be available free to the general public'.³⁴ It is accepted by the Federal Government that sport is a significant part of Australia's culture and is worthy of pursuit and protection.

Including the advancement of amateur sport as a head of charity is a more efficient way of recognising the charitable contribution of amateur sports clubs than a system of grants. The Canadian legislature sought to encourage the development of amateur sport by providing direct grants to amateur sport. This methodology ultimately proved inefficient because it was politically difficult for government to decide which amateur sports should be the recipients.³⁵ Charitable status and voluntary donations are to be preferred.

Including the advancement of amateur sport as a head of charity makes charity and philanthropy more democratic – it allows people to choose which sports they will support. A direct approach also avoids the wasteful expense of tax 'churn' and provides opportunities for efficient economic stimulus. This would accord, in part, with the England and Wales model which endows organisations operating for the purpose of advancing amateur sport with charitable status, which brings with it the equivalent of deductibility through the gift aid process.³⁶

To summarise, it is evident that sport holds strong cultural and communal significance for the Australian public. There is considerable community support for utilising public resources for sport's advancement and encouragement. This, considered in addition to the health benefits discussed below, demonstrates that the purpose of advancing and encouraging amateur sport provides benefit to the community and conceptually satisfies the test for charity.

5.2 Community Spirit and Social Capital

Beyond facilitating sport, sports clubs serve as a focal point for community and civic engagement. The grass roots nature of sports clubs in a community tends to generate an affinity between the sports club and the local community which builds community spirit in a social context where it is breaking down. Lonely people go to local sporting clubs and make friends. This makes all the difference to a community, and those individuals, as the now famous research of Robert Putnam published as *Bowling Alone* demonstrated. In that book Putnam tells the story of two people who met and started bowling together at a Bowling Club. They became friends; one donated a kidney to the other and in so doing saved his life.³⁷ Putnam's thesis is that if people do not participate in sporting and other community activities, they do not form the extended networks they need to help them when a crisis arises.³⁸

The notion of community spirit is problematised by the overall impossibility of quantifying its contribution to Australian society. It is often overlooked for that reason, but it cannot be ignored. Notice must be taken of this vital component of a functional community and the critical role local amateur sports clubs play in fostering that social capital.

³⁴ *Broadcasting Services (Events) Notice (No. 1) 2010* (Cth).

³⁵ S Eckert, *High Performance Sport versus Participatory Sport and Physical Activity: an Examination of Canadian Government Priorities in Bill C-12, the Physical Activity and Sport Act*, 13.

³⁶ *Charities Act 2011 (England & Wales)* s 3(1)(g).

³⁷ Robert D Putnam *Bowling Alone - The Collapse and Revival of American Community* (2001, 1st ed) 100.

³⁸ See also Anthony Giddens 'Arnold Goodman Charity Lecture' (Speech delivered at the 16th Arnold Goodman Lecture, London, 15th June 1999).

Though community spirit and social capital cannot be directly measured, the Clubs contribute to the development of social capital in at least the following ways:

- All of the Clubs specifically advance and encourage sport as a unifying idea and as activities that people can congregate around and participate in together;
- Lions provides free social membership to the parents of its junior players to encourage greater involvement in both junior sport and the greater community of members;
- The Clubs all provide facilities which the local community is able to make use of. Jets provides the use of its facilities for community purposes free of charge;
- Norths originally formed around both the Northern Suburbs Rugby League Club and the Kallangur Services Club and provides a broad opportunity for social engagement across the two interests;
- Magpies provides facilities for and organises the interaction of a large number of different sporting clubs across different sports and codes; and
- Devils arranges functions and social events for its players and their guests and relatives outside of the usual practice and match times.

Amateur sports clubs are inherently local, social and conducive to community building. They provide excellent opportunities for people in today's society to gather as a community. Putnam points out that in terms of social capital development, the modern proliferation of NFPs does not necessarily equate with an equivalent increase in social capital. It is the sporting clubs, the choirs, the churches and the other community groups that bring people together in person that build social cohesion and develop social inclusion. Mailing list lobby groups may have large memberships, but contribute little to the development of an inclusive Australian society.³⁹ In an increasingly lonely nation, amateur sporting clubs are becoming integral to our social cohesion and our social inclusion. To use the words attributed to track athlete Jessie Owens, "friendships born on the field of athletic strife are the real gold of competition. Awards become corroded, friends gather no dust."

It seems implied by the EM that sport is less deserving of charitable status because it is recreational in character. However dal Pont observes the injustice inherent in the proposition that sporting interests should be excluded from the definition of charity because they are recreational or provide enjoyment:

...the notion that enjoyment or amusement precludes charity in the sporting context sits poorly with the charitable status of promoting the arts in practically all their forms...[i]t can hardly be said that the arts generate no amusement or enjoyment to patrons, who frequently number far fewer than patrons and participants in sporting and recreational activities generally.⁴⁰

The core purpose and outcomes of the activity is what defines it. The *Word Investments* principle provides a reasonable analogy. Amateur sports clubs are in the fortunate position that the achievement of their charitable purpose involves the enjoyment or amusement of members. However, like the commercial character of the activity engaged by Word

³⁹ Robert D Putnam above n 51, 49, 51.

⁴⁰ Dal Pont, above n 16, [12.5].

Investments, the enjoyable character of the activities of amateur sports clubs is only incidental to the deep communal and social public benefits of amateur sport.

It will be evident from the submission so far that there is not necessarily an objection to clubs such as the five making this submission meeting the public benefit requirement of charities. This should be treated in a manner akin to advancement of education, the advancement of culture and the promotion of reconciliation, mutual respect or tolerance.

5.3 Public Health Issues

Given the inclusion of purposes in the draft Bill of promoting 'social and public welfare', and 'mutual respect and tolerance', the Clubs submit that it is not appropriate to arbitrarily continue to exclude advancing amateur sport, which is a major vehicle by which the former purposes are achieved. Advancing sport is a simple and popular way in which to improve and advance public health and wellbeing. Government is particularly concerned with the prevalence of obesity. It is submitted that including amateur sport as a charitable purpose is a superior and more efficient way to address the problem of obesity than other methods.

Several controversial calls for political intervention have achieved significant media attention recently, including calls for the imposition of a 'fat tax'.⁴¹ The debate developed to the point where there was a suggestion that a child's weight could be displayed on his or her school report card.⁴² There was a proposal to offer \$3,000.00 tax concessions to people who installed an exercise application on their smartphone.⁴³ In 2011, Deputy President Forgie of the Administrative Appeals Tribunal observed:

One of the greatest public health challenges facing Australia is obesity... Obesity is responsible for, or operates as a predictor for, many lifestyle diseases such as diabetes, osteoarthritis, cardiovascular disease, colorectal, breast, uterine and kidney cancer.⁴⁴

Sporting clubs provide an essential contribution to public health by promoting engagement in physical exercise. It is a matter of public knowledge that physical activity promotes health and fitness, but studies also show that physical activity lowers levels of depression and other debilitating illnesses.⁴⁵

Amateur sporting clubs can actively encourage these health benefits in a way that is likely to reach communities in possibly a more effective manner than any other alternative. This is one area where the not-for-profit sector might be much better than government at achieving the desired social policy objective of a healthier population.

⁴¹ Jacqueline Williams, 'Call for a Fat Tax to Encourage Health' *Sydney Morning Herald* (17 May 2012) <<http://www.smh.com.au/national/health/call-for-fat-tax-to-encourage-health-20120516-1yrh3.html>>

⁴² Dan Harrison, 'F for Fat: Obesity on Report Cards?' *The Age* (7 December 2012) <<http://www.theage.com.au/national/f-for-fat-obesity-on-report-cards-20121206-2ayd2.html>>

⁴³ Clare Peddie, 'Tax Rebate worth up to \$3,000 could be an incentive to keep healthy' *The Advertiser* (6 December 2012) <<http://www.dailytelegraph.com.au/news/national/tax-rebate-worth-up-to-3000-could-be-an-incentive-to-keep-healthy/story-fndo2izk-1226531586205>>

⁴⁴ *Bicycle Victoria Inc v Commissioner of Taxation* (2011) 127 ALD 553 at [181].

⁴⁵ S Young, 'How to Increase Serotonin in the Human Brain without Drugs' (2007) 32(6) *Journal of Psychiatry and Neuroscience* 394.

5.3.1 'Sin Taxes' do not work

For hundreds of years, governments have attempted to impose disincentives on behaviour for public health reasons.⁴⁶ In Denmark, a 'fat tax' was introduced only to be repealed a year later because it was found not to work.⁴⁷ In Australia, the prominent present-day example of the 'Alcopops Tax' introduced in 2007 has been broadly acknowledged as less than successful. One 'fat tax' proposed in New York posed a real threat to employment and economic welfare.⁴⁸

The American Prohibition involved establishing an enforcement agency which could not be adequately resourced, and is well known to have created rampant crime and economic depression, and caused an eventual rise in alcoholism – the very social issue it sought to end. Conversely, accepting amateur sport as a charitable purpose seems more likely to encourage employment and enterprise by creating new opportunities for all relevant stakeholders as well as incentivising engagement in healthy activity.

A holistic approach to resolving the public health crisis of obesity should therefore be adopted. The first step is to recognise the contributions made by existing social and community groups like amateur sports clubs to the advancement and encouragement of public health. The inherent value of amateur sports clubs in promoting a healthy community ought to be recognised by giving advancement of amateur sports the status of a charitable purpose for the purpose of Commonwealth laws.

It should also be noted that, though this submission has focused on physical wellbeing, participation in social groups and amateur sport is also known to have a profound effect on mental and emotional health. The Clubs submit that there is a far better way to promote public health than resorting to inefficient taxes. It is to publicly endorse amateur sport as a charitable purpose.

6. Conclusion

In announcing the current consultation, the Assistant Treasurer spoke of the intent of the legislation being to allow development of the heads of charity to 'extend the definition to other charitable purposes beneficial to contemporary Australia' to 'ensure that the definition remains appropriate and reflects modern society and community needs as they evolve over time'.

The Clubs submit that including advancing amateur sport as a charitable purpose is exactly the kind of extension envisaged by the Assistant Treasurer.

⁴⁶ R Creighton, 'Fat Taxes' (2010) 31(1) Journal of Legal Medicine 123, 124.

⁴⁷ ABC News, 'Denmark to Scrap World's First Fat Tax' (11 November 2011)

<<http://www.abc.net.au/news/2012-11-11/denmark-to-scrap-world27s-first-fat-tax/4365176>>

⁴⁸ Creighton, above n 63, 134.