

3 December 2024

Not-for-profits Unit
Treasury
Langton Cres
Parkes ACT 2600

By email: charitiesconsultation@treasury.gov.au

Dear Treasury,

Taxation Administration (Community Charity) Guidelines 2024 Exposure Draft

About APS

APS is the leading supplier of structured philanthropic support services in Australia:

- We support 350 private ancillary funds and a small number of charitable trusts and charitable companies
- We manage the fastest growing public ancillary fund in the country with over \$360M in funds
- We support our 960+ clients with their giving needs
- APS clients collectively gave \$200M to charities during FY2024
- APS clients collectively have \$2.4B dedicated to the future use of charities.
- APS was launched by Chris Cuffe 14 years ago and has been supported since then by a stellar board including Chris Cuffe AO (Founder and Chair) David Gonski AC (recently retired but still Patron and Member), Michael Traill AM, David Ward, Gail Kelly, Belinda Hutchinson AC, Jan Swinhoe, John McMurdo, Graeme McKenzie.

Importantly, APS is a charity itself, is registered with the Australian Charities and Not for Profits Commission (ACNC) and has Item 1 Deductible Gift Recipient (DGR) Status. Its purpose is to grow structured philanthropy in Australia.

Summary

The draft Guidelines are welcomed as an important step to the development of Community Foundations (CFs) in Australia. We support the proposal and the detail of the current draft Guidelines.

APS particularly welcomes the ability of Community Foundations to be able to pursue DGR aligned purposes in their local community either directly or through entities that may not have DGR status - which we know can be few and far between in some geographic areas, particularly in rural and regional Australia. This will allow increased delivery of philanthropic intent to grass roots entities in

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some communities which can be difficult to achieve in the current framework - notwithstanding the excellent work of FRRR active programs.

There are, however, some key issues in the draft Guidelines which need addressing. We trust the following comments are helpful in improving the Guidelines and providing clarity to the sector and its supporters.

Key issues:

There are three key issues:

- There is no clear definition of a Community Foundation
- There is no geographical definition or limitation for a Community Foundation
- There is no clear pathway for approval of a Community Foundation beyond the initial 28.

Definition of a Community Foundation

It would be helpful if there was a clear definition of the term Community Foundation and the purposes for which this new category is being established. The definition used by Community Foundations Australia is widely recognised “Community foundations build permanent financial assets and are catalysts for place-based change, in rural areas, regional towns and major cities alike”. Having heard the Minister speak on the subject of CFs a number of times it would be sensible to capture the concepts he mentions in the Explanatory Memorandum and the Guidelines themselves. Chief amongst these is the concept of geographic location and place based giving.

Geographical limitation

Discussion of the need for Community Foundations has been ongoing for a number of years and the context for those discussions has been focused on place based giving and providing a solution to specific, often regional or remote, geographic areas. The intentions of the new category of Community Foundation appeared to be to take some aspects of ancillary funds and some aspects of Item 1 DGR service provision charities:

- To allow these areas to raise and hold funds for local causes (as Item 2 DGRs do).
- And to engage in the provision of services (as Item 1 DGRs do) potentially in a number of Item 1 DGR categories – thus removing the need for the local area to try and sustain a number of different DGR Item 1 charities doing work in different DGR cause areas.
- The new Community Foundations would also be able to receive funds from PAFs and PuAFs which has not been possible when most community based Foundations have previously been established as PuAFs.

APS supports these concepts, providing as they would, a gateway to local giving, place based giving, collective giving and community engagement. All excellent aims, all mentioned by the Minister many times and all important to building a culture of increased philanthropy in Australia.

We were therefore surprised to find no reference to geographic location or place or community in the draft Guidelines.

What flows from this?

Without a strong geographical limitation what is proposed in the draft Guidelines is a new DGR category that is a mash-up of existing DGR categories with potentially unforeseen results.

Without a geographical definition in the Guidelines, a Community Foundation would quickly become the entity of choice for all legal firms establishing:

- philanthropic entities because they (CFs) could give to both DGR and non-DGR entities;
- and service provision charities because they could operate in multiple DGR categories and run commercial activities.

Under the draft Guidelines, approval of the “Katherine Community Foundation” as an example, would not require any reference to the town of Katherine and its surrounds, nor would the funds raised be required to be distributed to charities working in Katherine or expended on programs in Katherine, there would be no requirement for any of the trustees or directors to be associated with Katherine, or even to qualify as Responsible Persons under the ancillary fund guidelines. The directors could all be members of the same family with no relationship at all to Katherine but they would have created a philanthropic entity with an all encompassing list of DGR categories in their governing document that allows them to grant to DGR or non-DGR charities anywhere, to grant to programs outside Australia, to run programs anywhere in any causal area or geographic area and to run commercial activities.

While this extreme flexibility might be appropriate in a limited geographic area that would otherwise be in need, it has the potential to quickly become the default approach by lawyers for all new philanthropic entities and service provision charities everywhere and therefore, potentially be used beyond the intended place based purpose. This in turn could undermine public trust and confidence in the charitable sector.

We note the preference for Public Benevolent Institutions (PBIs) once they became known as an avenue to provide additional flexibility and the work required since to define and refine the purposes for which they can be used. Community Foundations would become the new PBIs.

We also note the significant work recently undertaken by the Productivity Commission in its ***Future foundations for giving*** report and support its recommendation that the DGR framework is no longer fit for purpose and should be reviewed.

Such a review should be thorough, detailed and considered with input from the sector and the community.

Without the geographical limitation, CFs could break the current DGR framework. If that is the intention the sector should be alerted to the possibility and have the opportunity to participate in serious discussion about how this new approach would work. If it is not the intention, then a geographical limitation should be inserted into the draft Guidelines that makes the purpose of CFs very clear. Place based, community engagement.

In the unfortunate circumstance that the DGR framework has not been reviewed and improved in the near future then, perhaps after a period of time, the operation of CFs might have something to offer in reforming the DGR framework.

We recognise that leakage from the tax system is a concern for Treasury and that a new category of DGR, with full tax deductibility for donations, that is able to give to charities without DGR will be an issue for Treasury to manage. No doubt Treasury has considered this in relation to the 28 community foundations in the initial pool but has any modelling been done around the impact on the tax system if CFs become the default entity for all new charities?

Having appropriately concentrated on the geographic aspect of CFs it is important to say we support the current draft Guidelines allowing CFs to give to overseas causes through other DGRs to enable support for natural disasters and other causes. It is acknowledged that generous Australians from all parts of the country are inclined to offer such support and it is reasonable to expect CFs from rural and regional areas to do so. We have a different view to Philanthropy Australia around expanding overseas giving to non-DGRs. If, as Philanthropy Australia suggests, that most CFs will be small organisations with limited staff then relying on the staff (or volunteers) to audit overseas recipient charities' compliance with the External Conduct Standards is unlikely to be successful.

Access to Community Foundation Status

While we understand the rationale for an initial limited approval list, we are of the view that there needs to be a clear pathway to reasonable approval for Community Foundations (CF) with a geographically defined region beyond the initial 28. This we see as a priority.

We note Philanthropy Australia's submission promoting the pathway to approval be through the Minister's office but we believe this to be counter productive for a variety of reasons including:

- It runs counter to the trend away from the Special Listing/ lobbying route to approval.
- It lacks transparency.
- It will seriously impact the Minister's office in terms of workload; particularly with the Guidelines as currently drafted. As mentioned above, we have concerns that without geographical limitation, this new CF DGR category may become a "Super" DGR status given its capacity to run programs and disburse funds across a broad range of geographical and cause areas. Why would anyone apply for any other entity structure - DGR Item 1 or Item 2 if becoming a Community Foundation is a reasonable prospect? This would result in several hundred applications or more per annum. Potentially **all DGR applications** would come back to Ministerial approval.

In this regard we believe there should be some explicit guidance of the (easy) process for geographically defined CFs beyond the 28 named to move quickly to gain access to CF status. We would not want to see legitimate CF applications from small communities languishing in the queue of a lot of other applications which lack the geographic delivery aspect and simply want the broad scope offered under the CF Guidelines.

Portability

APS is strong supporter of portability framework for ancillary funds. We have made submissions previously on this point to Treasury and to the Productivity Commission. Portability provides donors with some influence over the philanthropic structure that suits their needs and the provider of sub-fund services. It is consistent with principles of consumer choice. It works where both source and recipient entities are DGR Item 2 philanthropic funders. Funder to funder portability is good and should be improved.

However, we see there would be issues with DGR 1 to DGR 2 portability, so we support the approach the draft Guidelines has taken on portability between CFs only and disagree with Philanthropy Australia's view on this issue.

As currently drafted, allowing porting of a CF into another CF – perhaps serving a slightly wider community - makes absolute sense. Similar structure to similar structure. Perhaps even allowing a split into two separate CFs with smaller geographic footprints might also be considered. However, allowing donor driven porting from CF we don't believe fits the intended CF model of local service delivery. So, we support the current drafting of the Guidelines in this aspect and would not want any change.

Allowing porting from a DGR Item 1 entity to a DGR Item 2 entity would be a substantial change to the current broader framework. While allowing funding support of Community Foundations and their local programs by PAFs and PuAFs is one of the central objectives of the CF framework, having sub-fund portability between Community Foundations and ancillary funds would add serious complexity.

Ports are not part of ancillary fund minimum distribution calculation but allow transfers between DGR Item 2 entities for a variety of reasons. This works well as it's from one funder to another. But a distribution to a DGR Item 1 entity which would include CFs, is part of an ancillary fund's distributions. Differentiating between ports and distributions becomes complex when potentially dealing with the same recipient entity. Furthermore, potential integrity issues arise with the capacity to distribute from a PAF/PuAF to a CF which then in a subsequent year ports the funds back. The cleanest solution is as contained in the current draft allowing CF to CF porting but nothing wider.

Conclusion

We see a distinct difference between meeting local community needs with flexibility around how community services are funded and delivered, through a geographically defined community foundation and enabling a potentially an all-encompassing new 'Super' DGR category without allowing sufficient time to consider all the potential consequences.

We strongly support the advent of CFs with sufficient guardrails and look forward to amended Guidelines that deliver on the years of discussion around local community and place based giving through:

- the addition of a clear definition of Community Foundations and their purpose
- the addition of a geographic limitation that precludes CFs from becoming the default entity for all new charities and philanthropic entities causing unforeseen issues

- adoption of a clear pathway to approval through the usual regulators rather than Ministerial discretion
- maintaining the current proposed ability for CFs to support similar communities overseas as an ancillary, not primary purpose, via other DGRs.
- maintaining the limitation of porting options solely from CF to CF.

If you would like to discuss any of the matters raised here please contact David Ward, Technical Director on 043 399 954 or Judith Fiander, CEO on 0415 474 624.

Kind regards,

Judith Fiander, CEO