



Law Council
OF AUSTRALIA

Legal Practice Section

3 December 2024

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

By email: charitiesconsultation@treasury.gov.au

Dear Sir/Madam

**Building Community – ministerial guidelines for community foundations
Submission in relation to the Taxation Administration (Community Charity)
Guidelines 2024**

1. This submission has been prepared by the Charities and Not-for-profits Committee of the Law Council of Australia's Legal Practice Section (the **Committee**). The Committee welcomes the opportunity to make a submission to the Treasury about the exposure draft of the Taxation Administration (Community Charity) Guidelines 2024 (the **draft Guidelines**), the explanatory statement for the draft Guidelines, and the Factsheet on Community Charity Deductible Gift Recipient Framework (the **Factsheet**).
2. On 14 July 2023, the Committee made a submission to Treasury in response to the exposure drafts of the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: New class of deductible gift recipients* (the **draft Bill**) and the explanatory memorandum to the draft Bill (**Annexed** to this submission for ease of reference). While the Committee welcomed the introduction of the new deductible gift recipient (**DGR**) category for community charities, we recommended addressing fundamental issues within the draft bill and its practical implications to achieve its policy objectives.
3. The Committee welcomes the draft Guidelines as required to give effect to the measures contained in the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024* (Cth), assented to on 28 June 2024 (the **Community Charities DGR Legislation**).
4. However, there are some fundamental issues with the draft Guidelines, which will impede the effective implementation of the policy intent of the Community Charities DGR Legislation. The Committee's comments, as set out in this letter, are respectfully provided as matters for consideration to improve what is proposed in the draft Guidelines.
5. The Committee comments on the draft Guidelines are as follows:

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Philanthropic character

- (a) Proposed section 8(b) and (c) require a community charity to follow the principles of being ‘philanthropic in character’ and ‘a vehicle for philanthropy’. Whereas the term ‘charity’ and ‘charitable purpose’ are defined in legislation (the *Charities Act 2013* (Cth)), this is not the case for ‘philanthropy’, nor is there any explanation of these terms or their policy basis under proposed section 8 of the draft Guidelines. Not only does this create uncertainty but it is also inaccurate and could lead to confusion in the application of charitable funds for the purpose of community charities or the carrying out of their activities. In particular, there is a clear difference between community charities, which are permitted to expend funds directly on certain activities, and ancillary funds, which must distribute funds to item 1 DGRs (and are, in that sense, philanthropic).

To prevent confusion and mischaracterisation, we recommend deleting proposed section 8(b) and (c).

Objects within governing rules

- (b) Proposed subsection 9(3)(a) of the draft Guidelines requires the governing rules of a community charity to ‘include objects that clearly set out the purposes of the charity’. It is not clear from the current drafting how precisely the purposes of a charity need to be set out to be compliant with the draft Guidelines.

It is permissible for a community charity to draft its objects within the governing documents to broadly to reflect the purposes permissible under section 30-110 and the *Charities Act 2013* (Cth). Drafting objects broadly provides a community charity with flexibility and agility to address various challenges experienced within the community.

Paradoxically the word ‘clearly’ creates uncertainty in the interpretation of subsection 9(3)(a) of the draft Guidelines and potentially requires community charities to select and set out specific purposes which imposes a more onerous requirement than is imposed on charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**).

Currently, ACNC registered charities must comply with Governance Standard 1, requiring a charity to “*demonstrate, by reference to the governing rules of the entity or by other means, its purposes and its character as a not-for-profit entity*”.¹

We recommend redrafting proposed section 9(3)(a) of the Guidelines to remove the word ‘clearly’ and state that a community charity’s governing rules ‘include objects that set out the purposes of the charity’.

Winding up Requirements

- (c) Proposed sections 9(3)(b) and 24 refer to the winding up or cessation of a community charity, requiring that it must provide all its net assets to a DGR in accordance with the purposes of the charity. This is inconsistent with, and stricter than, the requirement for other DGRs for whom the requirement is that

¹ Australian Charities and Not-for-profits Commission Regulations 2022 (Cth), regulation 45.5(2)(a).

any surplus assets of the gift fund or surplus deductible gifts and contributions (and money earned from such gifts and contributions) be transferred to another DGR that is a not-for-profit with charitable purposes, similar to the community charity as outlined in section 30-125 of the *Income Tax Assessment Act 1997* (Cth).

This is confusing and inconsistent with the requirements for other DGRs, and contains no policy justification.

We recommend deleting proposed sections 9(3)(b) and 24 (or else limiting them to the pool of assets received as deductible donations).

'Only in Australia' requirement

- (d) Proposed subsection 10(1) of the draft Guidelines requires a community charity to be established and to operate 'only in Australia'. The Explanatory Memorandum provides no policy basis for restricting the operations of a community charity to 'only in Australia'. Unlike ancillary funds that cannot pursue charitable purposes or activities themselves, we consider that it is inappropriate to put stringent geographical limitations to the broad charitable purposes and activities undertaken by community charities.

We recommend that subsection 10(1) be amended to replicate the 'in Australia' requirements consistent with a fund, authority or institution entitled on DGR endorsement under Division 30-B of the *Income Tax Assessment Act 1997* (Cth).

Minimum annual distribution

- (e) Proposed section 13 requires a community charity to make minimum annual distributions of at least 4 percent of the market value of the charity's net assets. The provision is drawn from the ancillary fund requirements, although the term 'distribution' as defined in proposed subsection 13(4) is somewhat broadened to include provision of money, property or benefits to eligible DGRs or expenditure incurred by the charity in the direct course or furtherance of a purpose of the charity. However, the definition does not account for the expenses incurred in undertaking activities, nor where assets are used to pursue purposes and not for investment.

The terminology of expenditure being 'in the direct course or furtherance of a purpose' is also unclear and should be deleted. Example 2 refers to the provision of clothes, furniture and food, so presumably expenditure on these items is sufficiently direct. Would the salary of the employee who arranges the distribution of clothes, furniture and food also be sufficiently direct? What about the salary of the back-office staff (or a relevant proportion of that salary) who carry out accounting and finance functions in relation to the provision of these items? Do *Equality Australia Ltd v Commissioner of the ACNC*² and *Global Citizen Ltd and Commissioner of the ACNC*³ set the dividing line of what is sufficiently direct? Those decisions come from a PBI context, but suggest that even some advocacy activities may be directly connected with a purpose. Indeed, if a community charity had the charitable purpose of encouraging public

² [2024] FCAFC 115

³ [2021] AATA 3313

debate on government policies related to the relief of poverty in a geographic area, it would seem that the charity might potentially be a community charity and that all advocacy related to poverty relief would be directly connected to its purpose.

It is difficult to see why this requirement assists in delivering the policy intent of ensuring the integrity of the DGR system when section 50-50(2) of the *Income Tax Assessment Act 1997 (ITAA)* already applies to all registered charities. That is, all community charities will be required to comply with all the substantive requirements in their governing rules, and must apply their income and assets for the purpose for which the entity was established. Likewise, governance standard 1 under the ACNC legislation already requires every registered charity to comply with its purposes and its character as a not-for-profit entity.

It is not appropriate for charities, including charitable trusts to be subject to minimum distribution requirements. There seems to be a lack of a policy basis for minimum annual distributions to apply to community charities.⁴

Liability of corporate directors

- (f) Draft Guideline 12(c) is vague and should be amended. The phrase “a breach that may result in loss or liability” does not identify what the breach is of, neither is it said which entity would be inflicted with loss or liability. Both of these matters should be clarified. In addition, we recommend that the reference to “may result” be replaced with “which resulted in” as the draft Guideline relates to not providing an indemnity for a loss or liability which has already occurred.

Further, the draft Guidelines are quite onerous on directors of the corporate community charities. In a number of places, the draft Guidelines inappropriately place the obligation on the director of a community charity, but the responsibility should be on the corporation – for example sections 7, 11(1), 13(11)(h), 19(2) and 23. We recommend the reference to the corporate director be removed in each instance.

Duplication of Requirements

- (g) Community charities must register as a charity with the ACNC, but the draft Guidelines introduce duplicate requirements as follows:
- (i) Proposed section 9(2)(a) – should be deleted as it confusingly repeats both the ACNC regulations and s 50-50(2) of ITAA.
 - (ii) Proposed section 13(4)(a) – a registered charity is required to pursue activities that are in furtherance of its charitable purposes or is ancillary or incidental to its charitable purposes. It is unclear what ‘in the direct course’ means and how it is different to ‘furtherance of a purpose’, and it adds unnecessary complexity.
 - (iii) Proposed sections 15 to 17 – ACNC registered charities are required to manage the financial affairs of the charity responsibly under ACNC Governance Standards 5. A charity may be required to have its financial

⁴ Budget Measures, Budget Paper No. 2 2022-23, page 25.

report reviewed or audited, based on the size of the charity. While a small charity does not need to have its financial report reviewed or audited, a large charity must have their reports audited. A medium-sized charity can have their financial reports audited or reviewed.

- (iv) Proposed section 19(4) and 20 – The provisions refer to restrictions on providing benefit for personal gain or benefit to particular people. This is already a requirement for a charity registered with the ACNC to be a not-for-profit entity that pursues charitable purposes for the public benefit. Registered charities are also required to comply with Governance Standard 1 which relates to operating as a not-for-profit and pursuing its charitable purposes.

While not all ancillary funds are required to be registered with the ACNC, and accordingly these provisions may be relevant to ancillary funds, there is no policy rationale provided for this duplicate regulation, and regulators, for community charities. It is entirely inappropriate and inconsistent with a red-tape reduction agenda. We recommend deleting the above proposed sections as they are onerous and burdensome to community charities.

- 6. The Committee notes, with regard to the Factsheet, the statement that community charities must meet '*any requirements or special conditions that are tied directly, or act as a precondition*', to the principal activity or principal purpose in the DGR categories is confusing and appears incorrect. This statement seems to go beyond the actual wording of ITAA section 30-110(4) as well as the Explanatory Memorandum, both of which say that the principal activity 'must be for a purpose consistent with general DGR categories'. We recommend removing the words in question.
- 7. We welcome the opportunity to discuss this submission with the Treasury. In the first instance, please contact the Chair of the Committee, Bridgid Cowling, at [REDACTED].

Yours sincerely



Greg McIntyre SC
Chair, Legal Practice Section