

# Catherine Brown & Associates Pty Ltd

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## **SUBMISSION TO INQUIRY INTO THE DISCLOSURE REGIMES FOR CHARITITES AND NOT-FOR-PROFTI ORGANISATIONS**

### **INTRODUCTION**

This brief submission is provided at the request of the Hon Senator Ursula Stephens following a meeting between Alice Macdougall of Freehills and myself with the Senator on Wednesday 27 August 2008.

We would be pleased to provide further details about any aspect of this submission. My own expertise has been gained over 20 years working within the not for profit sector as a lawyer (including as in house solicitor with three not for profits), CEO, consultant and/or Board Member. A brief resume is attached (Attachment 1).

### **a) DISCLOSURE REGIMES**

The efficiency of the not for profit sector would improve if there was a more consistent approach to disclosure and reporting, particularly for those that have the benefit of tax exemptions and deductible gift recipient status. Any disclosure regime needs to be simple to apply so that it does not add to the administrative burden already carried by not-for-profit organisations. It must result in information that is meaningful to policy makers and donors.

### **b) MODELS OF REGULATION AND LEGAL FORMS**

#### **i) A Simpler Legal Structure and Tax Reform to enable Community Foundations**

Over the last decade, community foundations have begun to emerge in Australia, as they have in the UK, Canada, US and many other parts of the world, as independent community organisations that build the capacity of communities to both respond to current social and environmental problems and plan for their future. Community foundations act as both grantmakers and as convenors and catalysts, usually within a defined geographic area. They aim to build stronger communities through the use and involvement of local people, local ideas and local solutions to meet local needs. They lead flexible and responsive community philanthropy. Community foundations in Australia are now in a position to become important partners in improving social inclusion but are impeded from achieving their full potential because of current lack of a suitable DGR category for the full range of activities of community foundations.

Alice Macdougall of Freehills, Lawyers, and I undertook extensive work with the former Prime Minister's Community Business Partnership (PMCBP) to develop a model which would overcome some of the barriers facing community foundations, especially in regional Australia. This work was based on a report I prepared for the Foundation for Rural and Regional Renewal in 2003 (see overview in Attachment 2)

After much deliberation and research, a proposal to establish a Register of Community Foundations as a new DGR category under the ITAA was supported by the former PMCBP and referred to the Assistant Treasurer. Rather than this proposal being implemented, Treasury chose to announce the *Enhanced Community Support through FRRR Budget Measure 2006/07*, which increased FRRR's ability to accept donations from rural areas and return them to that region. While this measure provides some opportunities, it does not achieve all the outcomes of the initial proposal.

The proposal supported by the former PMCBP used a much simpler legal form than is currently used by community foundations and enabled community foundations to carry out a range of approved objectives (linked to other existing DGR categories or specially listed organisations), provided that eligibility and reporting requirements were met (see Attachment 3).

Community Foundations are currently established using a more complicated structure than is desirable because the law relating to Deductible Gift Recipients (DGR) is not designed for foundations that are active in grantmaking, fundraising and community development. At present, the most common legal structure of a community foundation is a non-profit incorporated body, usually a company limited by guarantee with Tax Concession Charity (TCC) status, which carries out local community building activities and acts as the trustee of one or more community trusts. The range of trusts includes:

- A Public Fund with DGR status (most common)
- A Charitable Fund with TCC status
- An Educational Scholarship Fund with DGR status
- A Necessitous Circumstances Fund; and/or
- A Disaster Relief Fund.

Many community foundation practitioners have indicated to us that they would appreciate if it the Federal Government could revisit this area of tax reform work. We could provide more details of the earlier proposal to establish a Register of Community Foundations within the ITAA.

## **ii). Tax Reform to encourage Volunteer Organisations**

There are a number of organisations seeking to assist community organisations and individuals connect through volunteering. It is consistent with Government policy to encourage and support volunteering and also to build the capacity and capabilities of community organisations. The tax categories for this area do not assist and may act to the detriment of sourcing skilled volunteers for capacity building of community organisations. There is no suitable DGR category for general or skilled purpose volunteering organisations.

A volunteering organisation can restrict its purposes and activities to predominantly helping welfare organisations which are endorsed as PBIs with volunteers who will

undertake the hands on benevolent activities. In this way, the volunteering organisation can be eligible for DGR endorsement as a PBI on the basis the volunteers are agents of the volunteering organisation. Alternatively, the volunteering organisation can restrict its provision of volunteers to other DGRs and seek endorsement as a public ancillary trust. This requires a company and a trust to be set up.

It seems possible to combine the policy of encouraging volunteering across the community sector, and increasing the capacity of community organisations, by assisting the organisations whose principal purpose is to encourage and assist volunteering, by creating a new DGR category for volunteering organisations.

This will assist those organisations placing skilled volunteers, older experienced workers, and business people into any community organisation. Alice Macdougall could provide additional information on this area.

### **iii) Multiple DGR endorsement for Indigenous and Other Not-for-Profit Organisations**

Many indigenous not-for-profit organisations carry out a range of activities to assist their communities. The range of activities generally consist of activities that are covered by different categories of DGR (such as Harm Prevention Charity, Environmental, Cultural and/or PBI activities), but the organisation is not eligible for DGR endorsement if there is not one principal purpose and activity.

There is generally only the capacity in an indigenous community to operate one non-profit organisation and this organisation wishes to address as many of the issues in the community as possible, such as poor health, abusive behaviours, lack of training opportunities, lack of employment, low school attendance, lack of cultural understanding/belonging, and environmental issues. These issues all interrelate and need to be addressed with a co-ordinated holistic approach. The activities are generally in part direct assistance, but also preventative and aimed at addressing causes rather than symptoms.

The current requirement for DGR classification to have one principal purpose and activity does not assist smaller communities with a range of issues and with limited people to operate non-profit organisations. A solution is for tax reform to allow one organisation to have multiple purposes and activities and provided they are all under the existing categories of DGR, it will be eligible for DGR endorsement.

This recommendation could apply to a number of not for profit organisations, not only those serving Indigenous communities. Organisations that received endorsement under a number of DGR categories for a variety of charitable activities should then report on their activities in each category.

### **iv) Legal Structure**

The company limited by guarantee is the most appropriate legal structure for most not-for profits. The costs of audit are the main barrier to smaller organisations and this could be addressed by less frequent or less onerous reporting below a determined level of income and/or asset.

The use of incorporated associations is often unhelpful for a number of reasons:

1. Inconsistency in legislation across the Australian States and Territories;
2. Poor understanding of governance by many members of Associations because of confusion between “Committees of Management”, “Councils”, “Executive Committees” and other committees in which members are unclear about whether they should be operating as a Board or whether they should be operating as members at a general meeting;
3. A company structure is better understood by corporate donors and by Board Members from the private sector.

### **c) Improving Governance, Standards, Accountability and Transparency**

Establishing a Charities Commission (or similar entity) would assist the development of the not-for-profit sector, provided that the organisation aimed to build the capacity of the sector as well as regulate it. A Charities Commission should add value to not-for-profits and be a repository of helpful information and sample documents to help improve Board and organisational effectiveness. I could expand on this area if required.

Catherine Brown  
28 August 2008

## **Attachment 1**

### **BRIEF RESUME**

**Catherine Brown**

**LLB, BA, Grad Dip Bus Admin, FAICD**

Catherine is a lawyer, management consultant and director with extensive experience in the not for profit sector. She established Catherine Brown & Associates Pty Ltd in 1999 with the objective of adding value to not for profit organisations. Catherine has a special interest in not for profit governance, organisational development and all aspects of philanthropy. Prior to becoming a consultant, Catherine spent 11 years as a solicitor and senior executive within non-government human service organisations, including the MS Society of Victoria, Wesley Mission and three years as CEO of the Brain Foundation Victoria.

Catherine currently works mainly with many philanthropic foundations on all aspects of their work and with Boards of not for profit organisations from a wide range of sectors. Catherine is Chair of the Queen Victoria Women’s Centre, Deputy Chair of the Royal Victorian Eye and Ear Hospital and a former Chair of ACROD Victoria. She has presented at the Our Community Board Builder Conference and at several international conferences on philanthropy.

## **Attachment 2**

### **MAKING COMMUNITY FOUNDATIONS WORK**

***Overcoming legal and regulatory barriers facing community foundations in Australia, Catherine Brown & Associates Pty Ltd, 2003***

#### **Overview**

Community foundations are the fastest growing form of philanthropy in the United States, Canada and parts of Europe, such as the United Kingdom and Germany. In time, community foundations become a major source of long term philanthropic funding to help communities help themselves. They also become active community leaders and can help a community plan for its future. Since its establishment in 2000, the Foundation for Rural and Regional Renewal has provided seed funding for eleven community foundations in regional Australia and more groups are carrying out FRRR funded feasibility studies. Philanthropy Australia has also funded a number of feasibility studies and special projects and is supporting the emergence of community foundations in Australia.

Despite this funding and support, there are a number of legal and regulatory impediments facing new community foundations that need to be resolved. A simpler legal and tax structure will enable donors to realise their desire to give tax-deductible donations to benefit their local community and will enable volunteer Boards of directors and staff to focus on donor development and addressing community needs, rather than on the legal and tax complexities which are currently causing delays and confusion.

In particular, the legal structure of community foundations is complex. Currently, community foundations in Australia are, for the most part, a company and one or two trusts. It is recommended that using one legal entity created following a Constitution with key clauses agreed by the Australian Tax Office would be much less administratively cumbersome. The Recommendations in this submission draw on successful models in other countries, especially the United Kingdom and Canada, and on some of the requirements of the Register of Environmental Organisations under the Income Tax Assessment Act 1997.

Secondly, the different components of the legal structure have different tax status. The company is an income tax exempt charity and the Public Fund (trust) is both an income tax exempt charity and a deductible gift recipient. Hence, only gifts made to the Public Fund provide donors with a tax deduction.

Thirdly, the community foundation under the current structure can create management accounts, also known as subfunds, within the Public Fund for particular donors. However, the Trustee of the Public Fund (usually the company) may not fetter its discretion (decision-making power) as trustee and hence donors may only make recommendations about the use of their donation. In some other jurisdictions such as the United Kingdom, the Constitution of a community foundation provides a power to create trusts for particular donors.

Finally, and very importantly, donations that are tax deductible and made to the Public Fund may only be given to organisations that also have Deductible Gift Recipient Status. While this may be workable in a large metropolitan capital city because of the large

numbers of organisations with DGR status, in rural and regional areas of Australia, there is often a lack of suitable grant recipients. In addition, sport and education organisations are often central to a rural community's community and youth development (capacity building) but are either charitable but not DGRs (education) or not even charitable (sport) in the Australia context. Community Foundations need to be able to fund charitable organisations, or even charitable activities, which meet the objectives of the community foundation. A more specific objects clause is recommended than is currently in use.

Creating community foundations which are one legal entity, have DGR status and can make gifts for charitable purposes within their objects, will give community foundations a much better opportunity of becoming a critical source of community capacity building and philanthropic support for many communities, especially those based in rural and regional Australia.

### **Attachment 3**

#### **Proposed Register of Community Foundations**

#### **Eligibility and Reporting Requirements**

The following suggested requirements complement the Submission to the Prime Minister's Community Business Partnership in relation to the need for a Register of Community Foundations.

#### Application requirements

1. Use of an approved Model Constitution would be required. This would include clauses relating to charitable status and the management of a Public Fund. The Constitution would also include clauses which relate to Board composition and terms:
  - a) The majority of members of a Board of a community foundation will need to meet the existing ATO test for demonstrating community responsibility; and
  - b) Directors will be appointed for three years, will rotate and will be eligible for reappointment for one or two further terms (i.e. total of six or nine years). The Constitution could specify the length of time that would have to elapse (at least three years) before a director became eligible for appointment for a further term.
2. The applicant would need to demonstrate, as part of an initial feasibility study to establish a community foundation within the specified region or city and then every three years:
  - a) Consultation with existing local community and philanthropic groups; and
  - b) An informed understanding of the social, cultural and environmental needs of the community.

#### Annual reporting requirements

1. Statistical return of tax deductible donations.
2. Audited annual accounts.
3. Projects and organisations funded:  
Project details would include amount, type of project, objects and a short paragraph of description.  
Organisation details would include name, address, tax endorsements and organisational objectives.
4. Community meetings held:  
Details would include topic of meeting, participants, outcome or recommendations. Impact of meeting eg improved service coordination, new partnership, change of grant priorities etc.
5. Research into community needs (social, cultural and environmental) undertaken:  
Details would include any projects funded or undertaken and outcomes or recommendations. Impact on the activities of the community foundation eg changes to grant priorities etc.

6/8/04