Australian Philanthropic Services

Productivity Commission: Review of Philanthropy

Response to Draft Report made by: Australian Philanthropic Services 9 February 2024

Authored by:
David Ward, Technical Director &
Judith Fiander, Chief Executive Officer

Australian Philanthropic Services Limited
ACN 155 905 829
Level 7, 130 Pitt Street Sydney NSW 2000
hello@australianphilanthropicservices.com.au 02 9779 6300
australianphilanthropicservices.com.au

1. Introduction

Australian Philanthropic Services (APS) welcomes the opportunity to comment on the Productivity Commission's Draft report. In alignment with our submission, this commentary concentrates on the area of structured philanthropy, where APS is the leading supplier of structured giving services to over 800 clients who support charities via ancillary funds.

We will make some general comments and move swiftly to detailed comment on the Productivity Commission's draft recommendations and data requests.

2. Goal to doubling giving by 2030

While the draft report references the context of the Government's commitment to double giving by 2030 – it is implied rather than explicitly stated, that the Commission considers current momentum and the changes it is proposing will be sufficient to meet this objective.

The Commission's analysis of giving trends is extensive but we believe there is some fragility there in that:

- 18% of total donations in 2021 are attributable to only 15 high income earners essentially donating their entire taxable incomes (we know some of this has been to PAFs but the numbers don't fully reconcile)
- Earlier years' mass giving was very much motivated by natural disasters of bush fires and floods.

While much more could be, and should be, contributed by the relatively small number of billionaires in Australia, there are inherent risks in relying on a small number of individuals to meet the goal; nor would increased giving by a small number of large donors signal the change in cultural expectations around giving that the Draft report mentions.

A more sustainable approach to meeting the goal would result from increased giving by the comfortably wealthy. This is a much larger pool of Australians who have the means to give or to increase their giving.

One would expect that billionaires have sufficient good, trusted advisers around them to raise philanthropy as a potential use of their large amount of capital, but for many comfortably wealthy Australians that is not the case. Their awareness of the benefits of structured philanthropy and their trusted adviser's awareness of structured philanthropy is low; particularly in the more accessible area of Public Ancillary Funds (PuAFS). The level of giving in response to natural disasters indicates that capacity to give when awareness and the pathway to give is clear.

This is why we believe a structured giving campaign targeting key advisers – Financial Advisers, Accountants and Lawyers – would be beneficial.

Potentially, another campaign could target employers with significant numbers of high salary staff on the wide benefits of "giving/giving back". How to best achieve the maximum giving outcome in a cost-effective way within the current policy environment is more challenging.

Importantly, the economic principle of consumer choice fostering innovation and efficiency could be more widely applied to philanthropy. Portability was introduced for Public Ancillary Funds (PuAFs) in 2011 and extended to include Private Ancillary Funds (PAFs) in 2016. It provides donor flexibility and greater transparency of performance and consequences for unsatisfactory performance and service. There are however some areas of the sector where portability is near impossible in a practical sense.

3. No change to tax deduction arrangements

"In contrast, the personal income tax deduction for giving does not need substantive reform. Preliminary estimates by the Commission show the personal income tax deduction is likely to be an effective mechanism for encouraging donations of money and other assets." Draft Report Overview.

APS Comment: We concur with the Commission's draft finding. Given the importance of large donations in the overall volume of donations to charity, a change away from income tax deduction risks diminishing rather than enhancing giving levels in Australia.

The current structural settings for tax funded support of giving we believe are about right – what is missing is a better awareness and understanding of the current arrangements and clarity around the motivation of those who don't give, particularly those with capacity to do so. If, as we believe is the case, it is substantially because of a general misperception of the benefits and incentives available a targeted campaign would reap rewards.

Furthermore, a stable regulatory environment has been very important in the positive growing trend in philanthropy highlighted by the Productivity Commission. Philanthropy has benefitted significantly from the absence of continuous Government regulatory change. This has been a major positive for the sector as it has contributed to the stable environment conducive to long term philanthropic endeavour. Major initiatives such as the introduction of Prescribed Private Funds in 2001, Private Ancillary Funds in 2009, the ACNC in 2012 and the Charities Acts 2012 and 2013 (Cwlth) have all featured significant detailed consultation to ensure measures have been well founded and broadly supported. This has meant ongoing changes in subsequent years have not been required.

Philanthropy by definition is long term, so broad community endorsement and absence of political point scoring is essential to creating the right environment. Thankfully this has generally been the case and we hope the Commission's report remains in this paradigm.

Any consideration of changes – even what might be seen as relatively small, such as increasing the Minimum Distribution Rate by 1% - must be considered in the wider picture of the importance of system stability as well as the detail of the change itself. A detail change while perhaps being justifiable on microeconomic criteria might in an overall context be counterproductive because of the system uncertainty created by the change.

This does not mean there is not scope for small regulatory tweaks here and there (we listed some suggestions in our original submission) but any small adjustments should be in the service of making structured giving simpler, more accessible and supporting consumer rights.

4. Who gives

We commend the Productivity Commission on its analysis of donations in Fig 3.3 (page 97) of the Draft report. This shows that while the proportion of Australians giving increases as incomes rise – the value of donations (and hence the ability for charities to address community issues) also increases dramatically as incomes rise.

As noted above, we concur with the Commission's conclusion that there is no argument for a change to the tax incentives to give. Change may risk adversely impact the 3.4% of taxpayers, with gross incomes over $250,000 (and therefore in the top marginal tax bracket, who account for 54.8% of total donations).

However, this leaves open the question of how to address the 51% of income earners over $500,000 who do not currently give. This is where we believe a targeted campaign to raise awareness of the benefits and tax considerations of giving either directly or through a philanthropic structure would be helpful.

5. Portability

Since its introduction in 2012 for PuAFs and 2016 for PAFs in 2016, portability has increased options for donors and flexibility to react to changed circumstances. This encourages giving as it reduces the "not sure which structure is quite right, so too hard I will default and do nothing" excuse. Portability has worked, why not introduce it for other forms of charitable trusts as well?

If the Trustee decides not to embrace full portability for Public Ancillary Funds (some current restrictions include: timing, amounts and only considering founder and not successor requests) then such restrictions should be publicly disclosed in all marketing material around establishing charitable trusts so those setting them up are fully informed prior to establishment.

6. Draft findings and information requests

Draft finding 3.1 - Rising income and wealth are the major reasons behind rising tax-deductible donations.

Tax-deductible donations by individuals made directly to charities have increased in value, but fewer people are making such donations. From 2000-01 to 2020-21, tax-deductible donations tripled (in real terms) despite the number of taxpayers increasing by only 38%. The available evidence indicates that this coincided with individuals' financial capacity to donate increasing.

The Australian Government also made policy changes that provided additional or more flexible financial incentives to give, which likely also played a role in increasing giving. Giving into private and public ancillary funds has grown in value (from $692 million in 2011-12 to $2.4 billion in 2020-21). The relative importance of private ancillary funds has also grown from 15% to 27% of individual giving.

APS Comment: We agree. Data analysis should also include not only PAF share of individual deductible donations but also PAF distributions as share of receipts by DGR Item 1 charities.

Australian Philanthropic Services

(although it's not totally clear that all charities distinguish between donations and Foundation Grants).

Giving Incentives Information Request 4.2

"Some studies suggest that overall donations would fall under a flat tax credit as the increase in donations by people with lower incomes would be more than offset by the reduction in donations by people with higher incomes (IC 1995a; Johnson 1981; PC 2010, p.175). This would be dependent on how people with different incomes respond to changes in the price of giving. The Commission will use final modelling results discussed in section 4.2 to explore the likely implications of such a change in Australia in the final report."

APS Comment: As noted above, in terms of dollars donated to the community, funds come disproportionately from those facing higher marginal tax rates. As the Commission concludes, change to a flat rate or tax credit could potentially substantially impact on the dollars given to the community, contrary to the expressed intention of increasing giving.

Information request 4.2 - Government policies to support giving

The Commission is seeking feedback on the advantages and disadvantages of using alternative government policies to support giving, including a tax credit and matched giving, as opposed to a tax deduction.

• How would donors likely change their giving behaviour under different types of tax incentives, such as a tax credit, and what would drive those changes?

• What would be the effect on charities of moving to a tax credit if more people were likely to give smaller amounts, but the overall amount of giving decreases?

• If it were to be adopted, how should a tax credit be designed?

• What would be the effect on donations of moving to a matched giving scheme, like Gift Aid, given it does not provide a direct personal benefit to encourage all taxpayers to give?

• Would such a matched giving scheme be an improvement compared to a tax deduction and, if so, how should it be designed?

APS Comment: Based on discussions with our clients, tax deductibility is a particularly important factor in their decision of when to establish an ancillary fund and how much to donate to it. They are often already givers driven by values and belief in the importance of committing money to the community. Ancillary fund donors generally are in the higher brackets of income earners. This is particularly important for years of significant income uplift (such as sale of an investment property or significant annual bonus or vesting of employee shares).

From our experience we agree with the Commission's draft conclusion that policy change that would reduce the deductibility of donations for high income earners (such as moving to a tax credit system at a lower rate) would adversely impact on the overall level of donations.

If the objective is to double the level of giving by 2030, the "low hanging fruit" appears to be

- motivating the 50% of Income earners who have gross Income over $500,000 and currently don't give
- motivating 40 of the other 50% to give more (while remaining in the top income tax bracket to maximise the value of their donations).

Reducing the level of deductibility in this income group from the current 45% plus Medicare by virtue of replacing deductibility with Tax Credit to something less will not only make this harder but potentially reduce the generosity of the current peak donors (as you reference on p147).

Draft recommendation 8.1 - Enabling distributions of funds to be smoothed over three years

The Australian Government should increase the flexibility of the regulatory regime by amending the private ancillary fund and public ancillary fund guidelines to enable smoothing of the distribution rate over a period of up to three years, with integrity measures to ensure the resulting distributions are at least equal to (or higher than) the amount that would have otherwise been payable under existing rules.

APS Comment: We agree smoothing has some attraction for some PAFs. Integrity measures would be important to ensure public trust remains in the Guidelines to ensure the expected flow to DGR 1 charities. Rolling forward part of an extraordinary large distribution should be straight forward and within the parameters of the existing ATO discretion to approve a reduced minimum distribution in particular circumstances. Under- distributing in expectation of a larger distribution in future years has greater integrity risks and potential for abuse. The giving incentive introduced in response to COVID and the Bushfires was too complicated to encourage wide uptake among APS clients (and only had a 50% "carry forward" benefit).

Figure 8.1 and Section 8.3 (page 247)

Figure 8.1 identifies the three major structured giving vehicles in a similar way as used elsewhere including in the Philanthropy Australia Trustee Handbook.

The point of difference is that this analysis notes that 26% of Non-Ancillary Fund charitable trusts actually have DGR status. A percentage based on an ACNC report in 2018. We do not doubt the accuracy of the figure but its use here is potentially confusing as it is not comparing "apples with apples".

The non ancillary fund charitable trusts with DGR are likely:

- Necessitous circumstance funds
- School building funds
- Environmental and Arts Trusts
- Other DGR charities that have chosen the Trust structure rather than Company Limited by Guarantee.

Reference ATO DGR Data: https://data.gov.au/data/dataset/07b51b39-254a-4177-8b4c-497f17eddb80/resource/62f53ac6-2334-4174-a43d-c8e77fccf8ea/download/ts21charities03deductiblegiftrecipients.xlsx

These charities are "doing charities" rather than "giving vehicles" supporting a range of other charities. There is also often additional reporting that is required for instance under the Register of Cultural Organisations (ROCO) and Register of Environmental Organisations (ROEO).

While the table is correct in discussing who they can grant to, noting in brackets "in accordance with the Trust Deed" after "Anyone", it is potentially misleading to the extent that those charitable trusts with DGR status will have varied but highly restrictive beneficiary requirements (actually more restrictive than PAFs or PuAFs). So they are generally not an option for an individual or family seeking a giving vehicle to support a range of charitable causes (which is the context in which Figure 8.1 is presented).

In summary, as a giving vehicle the main advantage of standard Charitable Trusts is they can grant for any Charitable Purpose, with the main disadvantage being donations are not tax deductible. On the other hand, donors to a PAF/PUAF do get a tax deduction for donations but the PAFs/PuAFs can only grant to DGR Item1 charities. This is the major choice variable for many donors and I think it is this key point in any discussion on giving structures which is missing in the analysis.

An interesting statistic, if the data is available, would be to understand how many charitable trusts have been established in last 5 years compared to PAFs and PuAF sub funds.

Information request 8.1 - Effect of changes to the minimum distribution rate for ancillary funds:

The Commission is considering whether the current minimum distribution rate for ancillary funds maximises the net benefit to the community. The Commission is seeking views on the likely response to a change in the minimum distribution rate (higher or lower) for public or private ancillary funds, including how it would affect:

- *decisions faced by donors about whether to use a structured giving vehicle, which giving vehicle to use including alternatives, such as setting up or donating to an existing charity or giving vehicle, and whether to donate at all*

- *decisions made by trustees of existing public and private ancillary funds about how much to distribute and when. The Commission welcomes views on how the distribution rate for public and private ancillary funds should be determined and the advantages and disadvantages of different methods.*

APS Comment: We see no evidence that the current minimum distribution levels should be changed. We note the Commission's draft finding that Ancillary Funds have contributed positively to the growth in philanthropy and that is absolutely the APS experience. APS client base distributed $165m to charities in 2023, up from $23.4M in 2015 and zero in 2012. We believe the old adage "if it ain't broke, don't fix it" should prevail in the absence of compelling evidence. The benefit that flows from regulatory certainty also suggests maintaining the status quo. This is supported anecdotally by potential clients commonly asking "how often do the rules change?" or "can we rely on the rules staying as they are now?".

Aligning the PAF and PuAF Guidelines by making minimum distributions 4% for both would save confusion but other than that we see no reason for change.

Information request 8.2 - Timely distributions of donated funds for charitable purposes

The Commission is seeking views on whether, and in what circumstances, the regulatory framework for entities that have deductible gift recipient status should encourage timely distributions for charitable purposes, and whether there should be regulatory consistency between giving vehicles to encourage distributions.

APS Comment: Charity Law and the founding document of every charity is to apply resources for the charitable purposes for which it has been established. Trust Law often distinguished between Current Beneficiaries, who receive income, and Future Beneficiaries who will receive capital on the Trust vesting. Only Charitable Trusts can be perpetual, giving away annual income while corpus growth ensures capacity for maintaining the real value of annual distributions over decades (to treat all beneficiaries equally).

Current annual returns to ACNC should be sufficient for regulators or others to take a view whether charity resources are being sufficiently applied to their purpose for continuation of their charitable status. Loss of charitable status would be a serious issue for any Trustee with potential financial consequences.

We also note there is a growing discussion in the sector particularly among younger donors to ancillary funds, that perpetuity is not an aim in itself and more donors are intending to spend down corpuses within a defined timeframe. This decision properly rests with trustees as they consider the purpose of the ancillary fund.

Information request 8.3 - Regulatory arrangements for charitable trusts by licensed trustee companies (LTCs)

The Commission is seeking further evidence regarding the administration of charitable trusts by trustee companies, given changes over the past 10 years that have led to further concentration in the market for LTCs. This includes information about arrangements for switching providers or charging fees, particularly for funds held in perpetuity. The Commission invites views on whether there is a need for policy reforms in relation to the administration of charitable trusts by LTCs, and if so:

- *the nature and rationale for any proposed changes*
- *accompanying evidence, such as data or case studies*
- *any potential role or implications for Australian regulators.*

APS Comment: Trust Law determines the Trustee's ownership of Trustee assets to benefit beneficiaries or charitable purposes. Portability has been introduced into the Ancillary Fund framework through the respective Guidelines in 2011 and 2016. Portability is entirely consistent with wider economic principles of consumer choice enhancing innovation, driving cost efficiency and performance. While not extensively used it has provided donors with choice of structure and change of Administrator/Investment Manager as circumstances change. In particular, from our wide discussions with potential donors, knowing options are available if the right initial choice of structure is not made or circumstances change, provides a significant incentive to act and give now rather than delay.

Portability is determined by three factors:

1. Legislation/Regulation allowance
2. Trust Deed allowance
3. Trustee decision

Donors to charitable trusts are driven by a desire to support community rather than provide Trustees with a perpetual income source. The portability concept should be expanded across a wider range of charitable trusts. At a minimum, potential Trustees of any charitable trust, including Public Ancillary Funds, should be required to disclose in marketing material and client documentation their willingness (or not) to consider portability and the terms on which that portability may be granted or not (in addition to full fee disclosure). This is not so much a Trust Law issue but basic consumer protection.

Of particular importance is clarity and transparency around fees and increasing the ease of portability in two scenarios:

- when there are no survivors of the donor generation. Subsequent generations have, and can be, denied any rights; and
- so-called orphan trusts where there is no-one outside the LTC involved in any decision making.

Information request 8.5 - Barriers and opportunities for innovative giving vehicles

The Commission invites evidence such as data or case studies on the use of innovative giving vehicles. The Commission is seeking further evidence on the extent to which the existing regulatory framework and tax arrangements impose barriers or facilitate the development of innovative giving vehicles.

APS Comment: Consistent with the Commission's overall finding APS believes current regulatory framework and tax arrangements provide significant and sufficient encouragement to giving and philanthropy. However, we continuously find that many potential donors have no idea of the flexibility inherent in the current framework, particularly Public Ancillary Funds, the options for portability between structures and the capacity to spread a donation across multiple tax years. Making more information more widely available we believe will facilitate greater giving by those currently not engaged. Commissioning a survey of both givers and non-givers across income ranges to identify whether it is values or knowledge differences that are driving giving outcomes might be useful.

Draft recommendation 9.1

Creating more value from the data held by Australian Government agencies The Australian Charities and Not-for-profits Commission (ACNC) and the Australian Taxation Office (ATO) should work together to enhance the utility of Australian Government sources of information on charities and giving for donors and the public. The ACNC should:

• present data on the ACNC charity register in ways that are more meaningful and accessible to donors and the public (such as more prominently presenting charities' deductible gift recipient

status), where it is enabled to do so by the Australian Government. The ACNC and the ATO should work together to:

• publish additional information on distributions by ancillary funds, including collecting and publishing additional information by sub-funds within public ancillary funds

• raise public awareness of government sources of information on charities, including the ACNC charity register. The Australian Government should:

• implement reforms to enable the ACNC to publish circumstances and reasons for referrals made to other government agencies (draft recommendation 7.2)

• address regulatory impediments to the ACNC presenting more meaningful information on the ACNC charity register, where necessary.

APS Comment: We agree that there should be more information available on Public Ancillary Funds offering giving/sub funds to donors. Providing more information through the AIS is one option and would be consistent with the purpose of the Charity Register providing relevant information for donors. An alternative approach would be to foster sector agreement/mandate around what is included in marketing material. There should be wider discussion before finalising, but we would envisage including:

- Prominent disclosure of all fees
- Disclosure of approach to portability and any restrictions
- Historic investment returns after all fees.

Given most PuAFs distribute well in excess of the minimum distribution level, and many giving/sub funds are of a modest size, we are not convinced there is benefit in requiring disclosure of detailed information about giving/sub fund distributions.

There is an opportunity for increasing the flexibility of sub-fund portability from Public Ancillary Funds by requiring that sub-fund to have met the minimum distribution requirement rather than the total Public Ancillary Fund. There are two reasons for this. Firstly, the Public Ancillary Fund must meet the minimum distribution requirement before 30 June anyway and allowing only the sub-fund to meet the requirement before approach the ATO for approval will allow earlier porting rather than concentrating activity in June.

Draft finding 9.1 - Administrative expenses are not an accurate reflection of the performance of a charity

An overemphasis, amongst donors and other stakeholders, on the amount of revenue that charities spend on administrative expenses can lead to incorrect conclusions about charity effectiveness and create perverse incentives for charities. For example, it can result in the underreporting of administrative costs or underinvesting in core capabilities and capacity, such as staff training, which undermines long-term capacity to further charitable purposes and benefit the community.

Charities have incentives to provide information about effectiveness to donors, and this information is shared in various ways. Introducing additional requirements, including standardised quantitative measures, would be impractical and may lead to significant unintended consequences.

APS Comment: We are pleased to see this conclusion as it has been a view APS Giving Services specialists have advocated for in the past. Outcomes and impact should be the primary charity KPIs. But equally not all programs will be successful, and charities need to be encouraged to share all information including what has not worked to the extent expected so that others may learn from the failures. As Brest and Canales said "Reinventing potholes is not a good use of scarce philanthropic resources." (The Chronicle of Philanthropy August 2007).

Draft recommendation 9.4 - Improving data on charitable bequests:

To provide more information about giving through charitable bequests, including trends over time, the Australian Charities and Not-for-profits Commission should: require registered charities to separately report income from bequests in their annual information statement; and publicly report the aggregate data.

APS Comment: Agreed.

Information request 10.1 - Supporting charities to engage with different sources of philanthropy

Some charities may face greater challenges accessing philanthropy because of their size, location or the nature of their services. The Commission is seeking information on possible measures to assist charities to access philanthropy.

- *Examples of government-funded programs in Australia or overseas that help charities access philanthropy or volunteer networks, and any related evaluations.*
- *The role of intermediaries, such as community foundations, and opportunities to enhance this role.*
- *What additional support governments could provide to help charities access philanthropy or volunteer networks, and the reasons why this support is needed.*
- *Further ideas and perspectives on options to support Aboriginal and Torres Strait Islander organisations that are seeking to access philanthropy, where they wish to do so, including feedback on draft recommendation 10.1.*

APS Comment: There is more demand for the philanthropic dollar than there are dollars available. The current proposals for changing DGR status of geographically defined community foundations should address specific issues relating to community support in regional and remote communities. Similarly, the proposal for a specific Aboriginal and Torres Straight Island Foundation, along the lines of the very successful FRRR should help in addressing Aboriginal disadvantage. In terms of outcomes, we believe that any limited government funding should be focused on increasing the supply of philanthropic funding rather than trying to "cut the current pie differently".

Information request 10.2 - Accessing professional advice on philanthropy:

The inability to access high-quality professional advice on philanthropy could prevent some people from identifying giving opportunities or making decisions that align with their preferences. The Commission is seeking information on professional advice on philanthropy.

- *Evidence that people who use professional financial services would value and are willing to pay for professional advice on philanthropy but are unable to source that advice.*
- *Information on specific regulatory or other impediments (if any) to people accessing advice on philanthropy and ways to address them.*
- *Evidence that an inability to access professional advice is materially affecting giving or resulting in harm to donors.*

APS Comment: We see the major opportunity for additional advice in promoting the broad benefits of philanthropy rather than specific "giving advice'. It is getting more started that is the issue. Many APS clients have come to us some way down their journey to "give back". Sometimes this is only just before the point of frustration and giving up as believing it is "way too hard and expensive". There is still more work to be done with financial services, accounting and legal sectors to understand the satisfaction and community benefits of giving. In this regard there is a role for geographically specific community foundations to enhance community building in smaller communities where range of DGR charities may not always be present.

7 Conclusions

Thank you for the opportunity to comment on the Draft report. The commentary can be summarised into three clear principles:

- **Stability and consistency of regulation and tax arrangements:**
  Any changes to tax deductibility could seriously impact the amount of giving from those in the top tax backets who give the most. Any changes to the minimum granting amounts from ancillary funds would have the unintended consequence of unsettling potential donors who wish to give, and make plans, under the existing rules.

- **Consumer rights:**
  A simple change to the guidelines for portability between public ancillary funds would unblock the practical difficulties around timing where some large public ancillary funds do not meet the minimum 4% until close to 30 June each year.
  In addition to improving portability, transparency of all fees, past investment performance and any limitations on portability should be available to all considering the establishment of a trust.

  Extending portability to other charitable trusts should extend consumer rights to the successors of founders and the provision of a mechanism for extending that same portability to orphan trusts would potentially be a great benefit to the community in increasing funds getting to charities.

- **Increased awareness and education:**
  Through public campaigns promoting:
    - the joy of giving
    - the tax benefits
    - the accessibility of structured giving via PuAFS
    - understanding impact as opposed to simply looking at admin costs.

  And through increased education of professional advisers including accountants, financial advisers and lawyers.

We believe that the combination of the above will build a sustainable culture of giving in Australia.

David Ward, Technical Director
Judith Fiander, Chief Executive Officer