

Friday December 9th, 2011

Submission by Brian Page

May I first say, that I am totally favor of the general idea of a clearer set of definitions of charity and of a statutory kind but taking from the common law of the past and the present. Anything which assists or brings a harmonization across all forms and levels of Government in Australia, and which clarifies as best as possible what is charitable now and in the future is an idea that is applauded.

While I am not a lawyer or a professional in this field, I am actively involved in charitable bodies including a community foundation based on the invested capital model with three charitable trusts. These Not For Profit entities are involved in a regional area of South Australia, where services and support of the range of charities taken for granted in capital cities, are simply not available.

The ability to grow philanthropy and charitable support in regions (where populations might be regarded as small) but where socio-economic status is falling behind that in cities is important for social justice reasons. The uptake of further or advanced education is perhaps more than 20% below that in capital cities. Significantly reduced local availability of appropriate further and tertiary education facilities in regions is a core reason almost institutionalizing this social injustice with many of low socio-economic status having no chance or being unable to shift to capital cities not having the financial ability to do so.

Whatever can be done to add to certainty and harmonization of charities law within Australia, to assist regional Australia, is commended. Anything that enables a better understanding or better clarity of the definitions of charity and widening what might be defined as a charitable entity is to be encouraged.

In many small or isolated communities, community organizations with real corporate identity are limited often to the football and netball club, or the bowling club and churches (in decline). Well established bodies such as Meals on Wheels, Country Woman's Association, Scouts etc are declining reducing available bodies or entities, either in part, or totally engaged in charitable purposes.

CONSULTATION QUESTION 1. Re Dominant Purpose.

Obviously the current status of common law and its significance as it currently stands must be considered and legally cannot be ignored..

I support the core definition being retained as outlined in the paper. A "dominant purpose" as charitable gives some flexibility rather than an "exclusively charitable purpose".

Community Foundations for instance, might take on a variety of services for not for profit, Charitable and community bodies in regions lacking capability. Lack of capability is often a serious matter in regions. Thus advice, support, consulting on important matters etc can be vital to charitable outcomes regionally if the said Foundation is the only entity with real professional capacity and a reasonable fee is well justified.

The matter of major business activities carried on by charitable bodies, which may be much more than an incidental service, may be of concern.

Conditional on my support here, is that appropriate regulations or guidelines can be put in place to address matters of what is incidental, or unfair business competition against other businesses eg a separate ABN and adherence to normal business requirements of payroll tax, superannuation, GST, corporate tax and doing a tax return (even if any profit may be donated to a separate charitable body with DGR status and ABN). Sanitarium Foods might be one example and suitable ATO or ACNC guidelines can cover any such concerns with commercial bodies connected to Charities.

CONSULTATION QUESTION 2. NSW Tribunal Clarification.

I agree that it is sufficient clarification.

CONSULTATION QUESTION 3. CLARIFY THE MEANING OF "PUBLIC" OR SUFFICIENT SECTION OF THE COMMUNITY" CHARITIES BILL 2003.

The discussion paper gives a good and understandable cover of this matter. As said above, I am concerned that regional Australia and isolated communities are not to be disadvantaged and without fair social justice.

In general the various points in the discussion paper if taken as the basis of the Government's direction are endorsed.

Dot point 64 particularly mentions geographically isolated communities and it is supported that this section is a very important one to include and more than that, emphasize, in the definition or the Government's point of view and direction.

CONSULTATION QUESTION 4. BENEFICIARIES WITH FAMILY TIES, NATIVE TITLE ETC.

If one can credit the mass of media and other reports, it seems that many indigenous organizations are rife with benefits to family members, employment of etc. This may also apply to any closed organization and some or several closed religious sects.

Clearly the public benefit is a paramount issue and in the case of indigenous bodies in remote areas, familial persons has the potential to be more than helpful to meeting the public benefit test and in the general advancement of these societies.

There is the matter of financial benefit. ATSIC and the Framlingham indigenous group are examples where financial impropriety seemed rife. Proper corporate governance, oversight by auditors and accountants from the providers of funds is imperative. There is the need for education and qualifications being gained by indigenous people in the Law and Accounting professions.

There are matters such as alcohol abuse perhaps from alcohol sold by indigenous owned entities. There is indigenous violence and sexual abuse issues.

Any changes to the Charities Bill 2003 should address these issues with appropriate guidelines; proper governance, proper accounts and auditing, policies that address personal benefit, policies and policing to ensure that issues like violence etc are appropriately addressed by law enforcement, and in the constitutions or deeds of operation.

For for-profit bodies, the charitable issue is not relevant which may be the case of indigenous copprations..

Thus my support to changes in the charitable regulation are conditional on proper governance, accountability etc.

In regard to these questions, the matters discussed in the Consultation paper seem to cover the questions quite well and dot point 60, the Marae in New Zealand gives guidance to question 4. Any matters or needed changes could follow or consider the guidance from overseas such as New Zealand which seem practical.

CONSULTATION QUESTION 5. ADDITIONAL PRINCIPLES IN RULING TR 2011/02 AND IN UK RULINGS ETC.

The matter of charging of fees (dot point 73) is supported as and should not affect a body being charitable, Fees are a natural part of charitable activity and incidental to generation of income or to maximize the real support of a professional charitable body to the community.

In regional areas, many of the 'corporate entities' are membership based eg sporting clubs, meals on wheels, RSL etc. But the benefits are not simply exclusive to the membership but extend widely into the community and often where incidental activities are the raising of monies for charity. Organizations which have membership also include service clubs.

Conditional on this support would be the wording of constitutions as being not for profit, for the community good etc as part of the purposes of these bodies.

CONSULTATION QUESTION 6. RELIANCE ON COMMON LAW.

The situation in England and Wales is mentioned. A problem with common law is the cost factor! Changing needs of society being continually considered, is essential. Many matters today considered charitable, were not so in Elizabethan times when the basis of charitable law was enshrined. Environmental concern is just one issue.

The matter of statutory law, statutes set by governments is discussed in the paper and the role of this in charitable law. It appears that a balance is needed, a good dose of statutory law, also on current common law, consultations with the community over time as circumstances change, and regular surveillance of federal and state laws for harmonization, as common law at times may only apply to a single state.

CONSULTATION QUESTION 7. DEMONSTRATING A PUBLIC BENEFIT.

There should be consistency across all the four heads of charity either all are presumed to be charitable, in dot points 19 and 20 page 3, or all as for the 'other purposes etc Head 4, has the onus to prove that is indeed charitable and for the public benefit.

The discussion clearly presents the main issues eg the first three heads of charity are presumed to be charitable, and the fourth head has to prove that it has public benefit and is charitable. The discussion paper also addresses taxation issues. The granting of deductible gift recipient based on the definitions and other matters is also to be considered overall.

a) On balance, there is a strong case that each of the four heads of charity are considered equal and are treated the same. This is for simplicity, equality and what seems to me, a much easier legal and tax framework.

b) On the presumption of advance met of religion being charitable, this is based on the role of religion in Elizabethan times. Religious bodies were then the main source of charity and asylum from danger, In the early 1800's in England, Parishes had a legislated role in collecting rates and distributing relief to the poor and also in 'job' placement eg to farms as farm workers and for young women as servants in homes.

In the recession after the Napoleonic Wars, it was cheaper for the Parishes and economically battered rate payers to pay the way for the poor to go to the new world such as Australia.

But the role of religion is not this now and its role is much changed. The separate Care organizations such as Anglican Community Care, Centacare (Catholic), and of other churches, do separate charity and the DGR entities, from the actual advancement of religion.

In the case of sects like Scientology hiding under the charitable guise of a religion, one wonders if they could even closely meet the charitable purpose, and certainly do not meet the public benefit test! Hillsong for instance may also be quite dodgy, they apparently rorted the Job Support programs. The Plymouth Brethren in my region ran and run businesses clearly competing with other private enterprise and once had to return GST avoided under the tax free charitable guise, They still run businesses with unfair tax advantage. These matters might be sorted with a separate ABN etc as a condition mentioned before.

The issue of Religion being charitable thus cannot be presumed at all to be. And clearly, it is not always in the public benefit, thus on balance, it appears that the best outcome is to have the four heads of charity treated the same eg TO NOT BE PRESUMED AS BEING CHARITABLE, AND HAVING TO PASS A PUBLIC BENEFIT TEST.

Dot point 36 in the Consultation paper also advises that overseas legal developments have overturned the issue of presumption of a public benefit. This should be a clear lead to adopt a common practice.

c) In the issues of advancement of education and relief of poverty, one can maybe consider that this might more clearly have a case for presumption of being charitable. But in b) above eg Hillsong under the religious banner, but having a relief of the poor role seems to also cloud this. Often in large businesses roles, a blurring of business and charity is obvious. In the case of a closed sect like the Plymouth Brethren, their business enterprises under the guise as charitable gain funds it would seem, only for the Sect itself and not the general public, And some closed sects also run their closed private schools which blurs into education if employment is mainly of those of the sect..

Many of the modern evangelical and doctrinal religions particularly those based on the US model eg the TV Preachers are clearly a business model and a highly profitable one bringing great wealth to the principles, and their religious work with the poor seems very uncertain.

THUS, IT SEEMS BETTER THAT EDUCATION AND THE RELIEF OF THE POOR BOTH SHOULD ALSO MEET THE ONUS OF PROOF AS BEING A PUBLIC CHARITABLE ENTITY.

CONSULTATION QUESTION 8. ACNC ROLE.

The ACNC will obviously have an important role in determining what is charitable, what is for the public benefit, and the status given eg DGR. It is core to who meets the tests and the whole efficacy of the charitable sector..

CONSULTATION QUESTION 9. ISSUES IF PRESUMPTION OVERTURNED.

Clearly some entities currently presumed charitable will be affected. It is up to them to address their own Constitutions, or codes of operation to meet the reasonable tests of proof, eg being not for profit, not being involved in activities against the public good or the common good, nor activities against the legal rights of members or individuals, of transparency, of good corporate governance and of not providing excessive benefits for those listed as trustees or beneficial owners, etc.

Such requirements are of common expectation. Recent press has outlined very poor charitable performance or outcomes where for instance, the cash flows of an excessive number of charities is consumed by overheads and over 2/3's of cash flow or income. Expected outcomes for the public, and for the donors are not met. Staff and employees might receive excessive benefits.

Getting this under appropriate control and good governance is essential and a major task for the ACNC.

CONSULTATION QUESTION 10. ACTIVITIES FURTHERANCE TO CHARITABLE ACTIVITY.

A Charitable body undertaking activities which might not be charitable in themselves, is often essential to the outcomes obtained, the better performance to the entity and is simply good common sense.

The whole of section 2.1.4 raises important issues of the relation between charitable activity and purported business activity, which to some extent is covered or addressed previously in my submission.

Clearly, this is vexed issue and at the core is the need for the constitutions of the entities, as argued several times, as a condition to my opinion here. Stating that the entity is not for profit etc and core issues for constitutions or trust deeds a can be placed in guidelines that the ACNC will eventually set.

It is maybe an issue that every NFP or charitable body do a tax return. They must be properly audited and audits must not have qualifications which are excessive. In this way the Government and public will be satisfied that all is proper and that the outcomes of business type activities do enhance the charitable outcome.

CONSULTATION QUESTION 11. CLARIFICATION OF THE CHARITABLE ROLE IN DEFINITIONS.

There is probably no reason to further clarify this question. High Court rulings dot point 95 address this matter in a very full legal sense.

CONSULTATION QUESTION 12. POLITICAL ACTIVITY. ALSO QUESTION 14.

Party political activities should be absolutely determined as NOT being charitable. These might be construed to meet the public interest, but cannot be charitable as the end game of this is getting individual persons elected and these will receive substantial financial advantage from this. This cannot at all be seen as a not for profit. Politics is big business as is political lobbying.

I read in the press that in the UK that a body providing travel and meetings between politicians overseas lost its charitable status and DGR status. This was in the UK. This is a good example to consider.

Advocacy is another issue eg advocating the furtherance of any of the four heads of charity, and where it is for the common good, and is in the public interest and which is not for profit.

It is my opinion that the Charities Act be not be amended to allow clearly partisan politics or commercial lobbying, or advocating any political party, nor opposing individuals for office.

The ACNC can clearly settle this matter with clear guidelines under the current Charities Act particularly for advocacy and setting a severe test for anything that may be partisan politics.

CONSULTATION QUESTIONS 15 AND 16.

There is the matter of local government being included in the definitions as a government body which should be done..

Illegal activities is obviously enshrined in common and criminal law.

Whatever is set as to what are charitable purposes needs to be consistent with that set in the UK etc bearing in mind experience over time, the need to allow changes in society to be acknowledged, and where their experience in recent years has proven correct.

One must bear in mind that Australian law has its basis in British law, and commonality of Charities Law in Australia and with these is a good thing.

CONSULTATION QUESTIONS 16 AND 17.

The list of charitable definitions in the Charities Bill 2003 is a very good starting point and generally concurred with.

The Extension of Charitable Purpose Act No 107 of 2004 amended has added matters which need to be considered or included, eg

Provision of community child care services is a charitable purpose.

Provision of a rental dwelling under National Rental Affordability Scheme is a charitable purpose.

Self-help groups and closed or contemplative religious orders are for the public benefit

There is also the matter of charitable intent in State Legislations and Law. For instance Acts in the various States add some confusions. The Collections for Charitable Purposes Act 1939 in South Australia also adds some of their own definitions of charitable purpose and there are several and this act may not be in harmony with the Federal situation?

eg apart from relief of the poor etc, ADD

relief of distress occasioned by war, relief and assistance to support to members of the armed forces.

provision of welfare assistance to animals.

The items listed in the UK should be added eg

Advancement of community development. (In regions, building stonger communities, and stronger community institutions and structures is essential particularly in isolated Australia.

Efficiency of the police, fire and rescue services and ambulance services is very important in regions but adding the rider, provided by volunteers, is a valuable added statement.

Advancement of amateur sport (This is very important in regions).

Government organizations that would be charitable except that they are operated by government entities (including local government), should not be disqualified from being charitable and should be added to the list as being a charitable purpose and for the common good or public purpose and benefit. These include

Public Hospitals.

Art Galleries where educative advancement is the key reason why.

Public Schools.

Public Museums, etc.

Eg any such organization where any of the heads of charity are involved, or associated within such bodies. The general public is often or always or involved acting on boards, as volunteers or in fund raising. These bodes are essential to community fabric and viability.

I guess the key to all of these is being not for profit, being for the community and public benefit, being involved with volunteers, providing benefits to the public beyond the membership for bodies with a membership structure etc.

CONSULTATION QUESTION 18. CHANGES IN LAWS, STATE AND TERRITORY.

Statutory definitions of charity should be harmonized over all States and Territories, over the three tiers of Government, Federal State and Local. Harmonization over Australia is an essentially desirable outcome.

In SA for instance, the Charitable Collections Act needs to be amended or changed or replaced, as being narrower or out of touch with common law, and not consistent with the accepted four heads of charity or what these mean.

CONSULTATION QUESTION 19. ADRF's.

A main problem is often that they do not enable an organization to raise funds and to keep and invest these almost acting as a community insurance support. They should be able to act as invested capital charitable funds and when a disaster occurs, there is immediate funding to begin the task of renewal after disaster,

Additional to the massive fund raisings of flow donations immediately after the event, often when the immediate flow through funds are exhausted, much remains to be done, and in the light of day and when the full consequences are known.

ADRF's should be able to act as a capital invested fund, not releasing funds until a disaster occurs, and if say a PuAf, should be not required to meet annual distribution requirements eg in many years, no monies might be released from funds at hand but when needed, substantial funds can be released.

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CONSULTATION QUESTION 20. TRANSITIONAL ISSUES.

Transitional issues might be that legislations between the three levels of Government and particularly the States are not in synchronization and maybe Federal Legislation might take precedence but is probably a constitutional problem may be in the way of this..

All States should be able to allow the use of Tax Exempt Funds to benefit all DGR's and DGR's that are associated with government organizations which would be charitable except they are owned by government..

A charitable environment situation that encourages charitable and philanthropic growth and activity in this country will always be beneficial, and good legislation will encourage this, as will the widening of what are charitable causes as outlined.

There may be matters associated with corporate governance auditing etc which are different between the States but Commonwealth Corporate Law and ATO or Tax law should prevail.

There is also a need for an Accounting standard for Charities and Not For Profits which uses words like surplus and deficit and not profit and loss, and which distinguishes between donations and income and capital where a capital invested model is employed and donations are to be used as invested capital with income only to be spent. The Victorian Government is believed to be well advanced on such a standard

And the matter of capital Invested charitable funds and charities or foundations and philanthropic bodies needs to be properly recognized. The matter of distributions from PuAF's and PAF's should be made less restrictive particularly for Community Foundations or Trusts associated with Community Foundations..

Thank you for the opportunity to be able to make a submission as we move jointly together, government us ordinary citizens trying to make Australia a better place, and a more generous one, through Charitable and Philanthropic activity due to a better regulatory and more certain situation,

Respectfully

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