

Charity Can Begin Again:

Resolving the uncertainty of 'charity'

Ross Fox

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'Charity begins at home'. So wrote Charles Dickens in his *Bleak House* in 1852. But does this pithy account of human relations mean anything in the context of modern Australian society?

'Charity', as the legal status today stands in Australia, begins neither at home nor anywhere resembling it. As of the 21 December 2005, 'charity' or its Australian legal definition begins in a document enticingly entitled *Taxation Ruling 2005/21, Income tax and fringe benefits tax: charities* as issued by the Australian Taxation Office. 'TR 2005/21', as it is affectionately known, sets out the Tax Commissioner's views on the meaning of 'charity'.

What constitutes a charity and what it is permitted to do is an important question for Australian society. The Federal Treasury estimates that through DGR status, fringe benefits tax and income tax exemptions, charities and other not-for-profit organizations received benefits valued at close to \$1 billion in 2004-05. While many charities are widely admired for the important community work they undertake, others shun any suggestion of transparency and even break the law in pursuit of so-called charitable purposes. The definition of where charity begins and ends therefore determines whether or not \$1 billion in public funds is spent building social capital in Australian communities or funding sometimes nefarious activities of questionable merit.

For the Tax Commissioner, 'charity' has its origins in the rarefied air of early seventeenth-century England,

where we find reference to the spirit and intendment of what is now known as the Statute of Elizabeth. It was in the introduction to the Statute of Elizabeth that the English Government of the day took a shot at a list of purposes intended to be sufficient to be deemed charitable and hence the organization pursuing such a purpose to be eligible for the conferment of 'charitable status'. According to the Australian Taxation Office, charity begins in seventeenth century England.

Upon a close examination of the Statute of Elizabeth, charities or 'charitable trusts', were accorded special legal status largely by virtue of their diminution of legitimate citizen demands upon the crown. Under the Statute of Elizabeth, the repair of ports, roads and bridges were all accorded charitable status in seventeenth-century England. Hence, on a faithful interpretation, the Statute of Elizabeth could make the likes of Patrick Corporation's Chris Corrigan the head of Australia's largest listed charity.

Australia has been a pioneer in the adoption and formation of democratic institutions that are the foundation of a strong and vibrant civil society, founded on liberal democratic principles. The Australian (or secret) ballot, the enfranchisement of all men and women are just two examples of the democratic institutions upon which Australia's civil society has been founded. Republican sentiments aside, it is highly anachronistic that contemporary Australian definitions of 'charity' are dependent on a list drawn up at the beginning of the seventeenth century to suit very different times, very different needs and very different policy objectives.

While TR 2005/21 goes on to include references to definitions of 'charity' within Australian law, such as the provision of child care services on a non-profit basis, it does so in a rather disparate way. Its purpose may be well-intentioned, but TR 2005/21 builds on legal and legislative precedents that are centuries old and outdated for modern Australian society. As an approach to defining 'charity' in Australia today, TR 2005/21 fails to provide the clarity that could unleash the Australian charitable and community sector from a cumbersome and murky legal regime.

The 2001 Charity Definition Inquiry (CDI) chaired by former Federal Court Judge the Hon. Ian Sheppard recommended that 'charity' should begin at home, or rather, in the formal 'home' of Australia's democracy, by means of a Charity Act in the Australian parliament. A Charity Act, appropriately designed, could eliminate a number of troubling issues in Australian charity law. The Act should define a charitable purpose with greater clarity in a context more suited to modern charitable activities than that derived from the Statute of Elizabeth enacted in 1601, Lord Macnaghten's four heads of charity as conceived in 1891 or accumulated case law from the common law. All of these are the substantial reference points for the definition of 'charity' in the Tax Office's tax ruling.

The gestation of a new charity could be best described as 'troubled'. It faces uncertainty and trepidation while Tax Office officials evaluate its stated purposes to classify it within the context of TR 2005/21. It then awaits the coveted discretionary ministerial tick-off that confers Deductible Gift

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Recipient (DGR) status for more than 20,000 organizations.

A Charity Act should eliminate the uncertainty and ambiguity surrounding charitable status by establishing a clear and transparent process by which organizations obtain charitable or other similar status and hence gain access to direct and indirect financial benefits. Currently, various governments, both State and Federal, bestow financial benefits through tax systems to organizations according to *ad hoc* regulatory arrangements. For example, an environmental group whose purpose and activities are identical to other groups who have DGR status must still be added to a list for this purpose at the discretion of the Environment Minister.

The substantial public resources expended by charities and non-profit organisations suggest that a Charity Act is required to balance the competing interests in the civil society sector. Accountability and transparency that ensures the continued trust and faith of the community must be balanced with the desire to promote and support civil society organizations and charities by freeing them from unnecessary or over-zealous regulation.

An effective Charity Act should stipulate a framework in which charities and other organizations of civil society who benefit from community and government support are accountable. The Act should also consider, as has recently been recommended by the law reform commission in Ireland, the establishment of a new legal entity similar to a corporation but tailored in reporting requirements and subject to regulation more appropriate to the purposes and activities of charities and non-profits. Such an initiative might introduce special exemptions from certain regulations to allow genuine community activities—whether it be the CWA holding cake stalls, the scouts running lamington drives or individuals helping out at homeless shelters. Such activities should be free from regulation that stipulates kitchen hygiene and bureaucratic clearances for simple,

straightforward and otherwise everyday activities.

The guiding purpose of a Charity Act should be to promote and support civil society organizations and charities. These organizations have an important role in promoting the free expression of individuals in modern society. The definition of charity provided by the Charity Act should be the result of widespread community debate that arrives at a political consensus. The CDI recommendations would be the logical starting point for this endeavour.

A Charity Act will also need to be clear on what activities and purposes do *not* qualify as charitable, how this will be determined and under what circumstances charitable or other related status might be revoked. TR 2005/21 fails to address this issue adequately. Greenpeace's repeated illegal activities in pursuit of its purpose are just one example of an organization where a regulator needs to ensure that public resources are not diverted to fund activities which go beyond being merely dissident in nature to downright illegal.

Where organizations such as Greenpeace intentionally break the law in pursuit of their purpose, an activity test should be enforced by an entity nominated by a Charity Act. Political campaigning activity, activities contrary to public policy and activities for private benefit should be similarly declared incompatible with charitable purposes.

Civil society organizations and charities in particular have a significant role in Australian society. An estimated 700,000 predominantly small organizations with a combined revenue in 1999–2000 of \$33.5 billion make up the non-profit sector in Australia. Approximately 35,000 of these organizations employ staff, with the largest 30,000 representing 8 per cent of Australia's workforce.

A recent study commissioned by the Prime Minister's Community Business Partnership estimates the total value of giving to nonprofits in 2004

at \$8.9 billion, which represents a 58 per cent real increase since 1997. Along with financial resources, individuals are volunteering more than 800 million hours of their time.

Australia's future society will be strengthened by the extent to which civil society organizations and charities are permitted to flourish. Civil society organizations (and specifically charities) offer the potential to enhance expression of individual freedom unfettered by the regulatory constraints and monolithic bureaucracy too often imposed by modern governments.

Liberal conservatives seek freedom for the individual, evidence for change and incremental initiatives that add to existing institutional virtues rather than raze them to the ground. Civil society organizations—to the extent that they embody the free expression of individuals—offer the opportunity to realize liberal conservative aspirations.

Serious policy efforts, beginning with a Charity Act that brings the regulation of charities and civil society organizations into the twenty-first century must be made to advance individual freedom and empower communities within our existing democratic institutions.

When it comes to charities, liberal conservatives may not wish to let 'a thousand flowers bloom', but we shouldn't cringe from empowering individuals and communities within civil society to seed and nurture a few native blooms. Australian civil society has overseen the germination of powerful and effective democratic institutions in the past. When it comes to providing an environment in which individuals are free to express themselves through charities, volunteering and community participation, it might soon be true to say that a renewed concept of charity and civil society began in early twenty-first-century Australia.