

## MODERNISING CHARITY LAW

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### Background

In 2001, the Centre of Philanthropy and Nonprofit Studies<sup>2</sup> at Queensland University of Technology held a small conference of charity law academics, regulators and practitioners from the Pacific Rim to discuss charity law reform options. A collection of the papers was published in a special issue of *Third Sector Review*.<sup>3</sup> The Charity Definition Inquiry was in progress at the time.<sup>4</sup> That Inquiry made 27 recommendations, among which was the introduction of a statutory definition of 'charity'. Some of the recommendations were similar to proposals adopted subsequently in the United Kingdom. On 22 July 2003, after considering the Inquiry report, the federal Treasurer released a draft Bill which took the traditional four heads of charity and divided them into seven heads, following the spirit of the Inquiry's recommendations. This reform raised only minor public comment. Other provisions in the draft Bill did, however, cause significant public discussion, and a number of submissions argued that the draft Bill was an attack on charities' ability to advocate or campaign and to generate income through unrelated business ventures.<sup>5</sup> The result was the enactment of a very short Act, applying only to the federal jurisdiction and addressing just three minor issues concerning recognition of child care, closed religious orders and self help groups as charitable.<sup>6</sup>

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<sup>2</sup> Now called The Australian Centre for Philanthropy and Nonprofit Studies.

<sup>3</sup> Published as: *Third Sector Review: Charity Law in the Pacific Rim* (2002), vol. 8(1).

<sup>4</sup> Committee of Inquiry into the Definition of Charities and Related Organisations (2001), *Report of the Inquiry into the Definition of Charities and Related Organisations*, Canberra: Australian Treasury. The Report is available at <http://www.cdi.gov.au>.

<sup>5</sup> Board of Taxation (2003), *Consultation on the Definition of a Charity: A Report to the Treasurer*, Canberra: Board of Taxation; available at: <http://www.taxboard.gov.au/content/charities.asp>.

<sup>6</sup> *Extension of Charitable Purpose Act 2004* (Cth).

With a change of federal government in 2007 there appeared to be a renewed appetite not just for charity law reform but for regulatory reform of the entire third sector. A number of overlapping inquiries touching upon charity law reform had been proceeding or were begun.<sup>7</sup> Many hoped the government would eventually lay down a blueprint for charity law reform in Australia and perhaps even reform laws governing the whole third sector, only hints of which had been seen under the previous decade of conservative administration. The Centre decided that another conference, drawing together regulators, academics and practitioners with those who would be tasked with the law reform process, would be beneficial. The Modernising Charity Law Conference was held in April 2009.

As well as international guests, the conference included Australian politicians, their advisors, research staff involved in the various inquiries touching on charity law issues, the leaders of nonprofit sector bodies and legal practitioners. The first two days of the conference focused on the charity law reform process that had developed in various jurisdictions since 2001, and an assessment of how those reforms were now faring. The third day was given over to examining the strategies to increase philanthropic behaviour by reviewing recent initiatives of a number of jurisdictions.

### **The reforms to date**

The conference began with a number of papers from an international panel giving a broad overview of the legislative and judicial activity in relation to charities since 2001 in the UK, Canada, New Zealand, Singapore and Australia.<sup>8</sup> As Kerry O'Halloran identified the UK jurisdictions have led the way with a series of reforms which, on any measure, are significant and bold. While there are differences of detail in the various UK jurisdictions, there is enough commonality to discern broad areas of agreement, for example, additional heads of charitable purpose; review of the public benefit test; greater disclosure; new hybrid legal structures; and a streamlined regulatory framework with an independent regulator at its centre.

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<sup>7</sup> Australian Treasury, *Review of Financial Reporting by Unlisted Public Companies*, begun in early 2007: see discussion paper at: [http://www.treasury.gov.au/documents/1269/PDF/Discussion\\_paper\\_Financial\\_Reporting\\_by\\_Unlisted\\_Public\\_Companies.pdf](http://www.treasury.gov.au/documents/1269/PDF/Discussion_paper_Financial_Reporting_by_Unlisted_Public_Companies.pdf); Productivity Commission, *Commissioned Study on the Contribution of the Not for Profit Sector*, begun in December 2007: see <http://www.pc.gov.au/projects/study/not-for-profit>; *The Australia's Future Tax System Review*, (the 'Henry Review') begun in May 2008: see [http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/the\\_review.htm](http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/the_review.htm); Senate Economics Committee, *Inquiry into the Disclosure Regimes for Charities and Not-For-Profit Organisations*, begun in June 2008: see [http://www.aph.gov.au/senate/committee/economics\\_ctte/charities\\_08/](http://www.aph.gov.au/senate/committee/economics_ctte/charities_08/).

<sup>8</sup> Kerry O'Halloran, Myles McGregor-Lowndes, Dennis Young, Bob Wyatt, Harvey Dale, Helmut Anheier and Sue Woodward were all contributors to the panel discussions.

Singapore is a fascinating example of a small nation with big economic ambitions and the political will to encourage charity to play a more active, but state focussed role in their developing civil society, and significant reforms have taken place there, with a Commissioner for Charities charged with protecting charities and the public interest. New Zealand has had less ambitious vision, but still made some significant progress to reforming the regulatory framework for charities, with the establishment of a commission and register. At the other end of the scale are Canada and Australia.

Canada's Voluntary Sector Initiative delivered a report in 2003 with 75 recommendations, 69 of which were adopted. Most of these reforms do not go anywhere near the UK's more adventurous policy agenda. A federal constitutional structure and a change in federal government have dulled Canada's appetite for further legal reform, with the exception of calls for changes to assist social enterprise activities.

Australia, another federation, has moved little since 2001, with only the minor reforms under the *Extension of Charitable Purpose Act 2004*; the introduction of a new form of tax effective private foundation; and other minor tax incentives. The major driver has been activism by the taxation regulator with an ongoing review of the register of charities and tax deductible entities; publication of formal rulings on a range of charity taxation issues, including the definition of charity; and, after a drought of over three decades, several High Court decisions arising from charity taxation disputes.

A further session was given over to a more forensic examination of what have been the regulatory framework initiatives that are bearing results and whether these could be transplanted to other jurisdictions. Can federations, such as Australia and Canada overcome their inherent structural impediments to provide effective and efficient regulation and facilitation of charitable endeavours? A panel consisting of Kerry O'Halloran (NI), Laird Hunter (Canada), Trevor Garrett (NZ Charity Commissioner), John Emerson (Australia) and Low Puk Yeong (Singapore) led some frank and robust discussions about regulators, their roles, achievements and failures.

## Into the Reform Details

Lindsay Driscoll<sup>9</sup> and Oonagh Breen<sup>10</sup> examined in detail the modernising reforms in England and Ireland respectively, prompting considerable discussion about lessons Australia should take from the UK's law reforms and their implementation. While

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enacting a statutory definition and new heads of charity might appear radical to an outsider, the argument put forward was that the Charity Commission's guidance in recent years had paved the way for such formal recognition of the new heads of charity. However, the new charity law tribunal and courts are yet to demonstrate whether this formalisation of incremental policy development in statute might allow some adventurous judicial decision making. Anne Robinson examined the progress or lack thereof in Australia.

## Public benefit

Debra Morris<sup>11</sup> delivered a paper on the issue of public benefit as treated in the UK, while Karla Simon<sup>12</sup> provided a public benefit update on the progress in two significant Asian jurisdictions, Japan and China. Terry de March<sup>13</sup> spoke about how charity regulators were dealing with the definition of religion in Canada. An international panel responded with a series of provocative comments about the vexed issue, particularly in relation to public benefit.<sup>14</sup>

Delegates were made aware of the practical difficulties in charting a course for legal reform through obstacles on all sides, from public prejudice, the popular press and inevitable political compromises. The 'public benefit and schools' debate would no doubt produce similar robust debate in Australia, as would the issue of public benefit in the advancement of religion.

## Unrelated business income

Oonagh Breen addressed the issue of charities earning unrelated business income, including discussion of the Australian High Court decision in the *Word Investments case*,<sup>15</sup> which entrenched the 'destination of income' test into charity tax law (much to the revenue authority's dismay). This test means that once it is shown that earned income is for charitable purposes, the manner in which the income is raised does not detract from the otherwise charitable objects. This goes against the trend of other comparable jurisdictions. The traditional issues of separation of business and charity,

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13 Former Director General, Charities Directorate, Canada Revenue Agency.

14 Fr Brian Lucas, Terrance Carter and Kerry O'Halloran formed a vibrant and challenging panel to comment on this session.

15 *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204.

alleged unfair competition and the emergence of hybrid forms between market, state and nonprofit sector were discussed.

## **Future legal and policy directions**

Two lawyers from opposite sides of the globe – Jonathan Garton<sup>16</sup> of the UK and Matthew Turnour<sup>17</sup> of Australia – but with similar concerns about the future shape of the law and regulation of charities, challenged the incremental model of charity law reform. Both have recently completed doctoral theses proposing radical reform agendas involving not just charities, but all civil society organisations.

## **Philanthropy**

The final day of the conference was given over to exploring the policy and strategies used to encourage philanthropic endeavours. Professor Harvey Dale<sup>18</sup> spoke on American charitable remainder trusts; Myles McGregor-Lowndes on the possible introduction of such vehicles into Australia; Terry Carter<sup>19</sup> on tax credits and capital gains tax incentives; Daniel McDiarmid<sup>20</sup> and Wendy Scaife<sup>21</sup> on matching strategies; Michael Gousmett<sup>22</sup> on New Zealand tax incentives; and Lindsay Driscoll on UK incentives.

## **Proceedings**

Although the conference presentations are available as streamed video from the

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Centre's web site,<sup>23</sup> a selection of revised papers will be published by Edward Elgar<sup>24</sup> in September 2010 under the title *Modernising Charity Law – Recent Developments and Future Directions*.

## Conclusion

The conference was a valuable forum for those involved at all levels of the policy process to reflect on the reform choices made in a range of jurisdictions.

The subsequent publication of two key reports<sup>25</sup> commissioned by the Australian government provides an indication of the direction that the government may choose to follow. Both the Productivity Commission and the Henry Review recommended the creation of a national body to regulate charities and the introduction of a modernised statutory definition of charitable purposes. The initial government response<sup>26</sup> to the Henry Review report focused on reducing the tax burden on business, boosting national savings and changing the way natural resources are taxed. The Treasurer in his press release accompanying the report appeared to put on hold any charity tax reform for the moment stating that:

“In the interests of business and community certainty, the Government advises that it will not implement the following policies at any stage. Some of these are recommendations of the Australia's Future Tax System review, some are potential mis-interpretations of the recommendations...

Do any changes to the tax system that harm the not-for-profit sector, including removing the benefit of tax concessions, raising the gift deductibility threshold or changing income tax arrangements for clubs.”<sup>27</sup>

Australia now awaits the government's policy view on the recommendations for the not-for-profit sector.

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<sup>23</sup> Available at:  
<http://www.bus.qut.edu.au/research/cpns/seminarevent/ModernisingCharityLawConference.jsp>.

<sup>24</sup> See [www.e-elgar.co.uk](http://www.e-elgar.co.uk)

<sup>25</sup> *Contribution of the Not for Profit Sector*, Report of the Productivity Commission, 11 February 2010: see <http://www.pc.gov.au/projects/study/not-for-profit/report>; *Australia's Future Tax System*, Final report of the 'Henry' Review, 2 May 2010: see [http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs\\_reports.htm](http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm).

<sup>26</sup> *Stronger, fairer, simpler: A tax plan for our future*, Joint Media Release by the Prime Minister and the Treasurer, 2 May 2010. See [www.futuretax.gov.au/pages/default.aspx](http://www.futuretax.gov.au/pages/default.aspx).

<sup>27</sup> Treasurer, Press Release by Treasurer no. 28 - 28 2/5/10  
<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/028.htm&pageID=003&min=wms&Year=&DocType=>