Lawyers, Reform and Regulation in the Australian Third Sector

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Abstract

This personal comment examines legal developments in the Australian third sector over the last fifteen years. It begins by reflecting on the significant cases that have changed the face of the charity law after decades of no significant cases. This is followed by some observations about substantial legislative reform during the period. Finally, some comments are made about the development of legal scholarship, professional services and future challenges.

Keywords

Charity; law reform; charity lawyers.

Introduction

The legal profession attracts its fair share of criticism, as well as being the butt of some very biting but insightful humour. I have found those lawyers who take an interest in the law and regulation of third sector organisations to be, as a group, a more than adequate answer to such barbs. The editors of *Third Sector Review* have asked me for my personal reflections as a lawyer and legal scholar on the development of charity law since the journal's 2002 special issue, 'Charity Law in the Pacific Rim', which I edited. As scholars usually have to bring a degree of impersonal objectivity to assuage the hypercritical blind reviewers, few such reflections appear in journals. I thank the editors of this special

issue for carrying on the adventurous nature of *Third Sector Review*, evident from its very first number.

In such a personal reflection, some declarations are necessary. I acknowledge my leaning toward the realist legal school, and an appreciation of regulation being as much about facilitation of activities as control of them. So I hold that law reform can be achieved not only by judges developing the common law through cases, and by legislators through making new laws, but also by administrators exercising (or not) their powers in shopfront practices.

In October 2001 the quadricentennial anniversary of the passing of the Statute of Elizabeth 1601, which is the basis of the common law definition of charity, was marked in Australia by a gathering of lawyers from around the world at the Queensland University of Technology. It resulted in a special issue of *Third Sector Review* that featured contributions from England, Canada, England, Ireland, Hong Kong, Australia, New Zealand and other Pacific nations. It was held only months after the attack on the World Trade Center in New York. In addition, England, Ireland, Scotland, Canada, South Africa, Australia and New Zealand were all actively examining the definition of charity in their respectively policy settings. Australia was leading the policy development, with the Charity Definition Inquiry (2001) having reported and with a draft bill under development, but was soon to fall to the back of the pack.

I begin by reflecting on the string of cases that occurred after 2002 and that changed the face of charity law, after decades of almost no cases of significance. This is followed by legislative reform that is significant and well chronicled already in the literature (Zilla 2011; Cham 2014a, 2014b; Gilchrist 2014; Martin 2014; Mullins 2014; Murray 2014a, 2014b; Nehme 2014; O'Connell et al. 2014; Saj 2014; Butcher 2015; Butcher & Gilchrist 2016). Finally, I make some observations about the development of legal scholarship, services and education.

The Development of Case Law

Case law generated by other sectors often applies to third sector organisations, and its general direction suffices its needs. However, the common law definition of charity requires a steady flow of cases or other interventions if it is to be kept relevant. There was a 33-year gap between major charity cases decided by the High Court after 1974. Without a vibrant case flow, the common law tends to ossify. In Australia there was no quasijudicial body in the legal environment, such as the Charity Commission of England and Wales, that might develop the definition of charity. The cost of litigation, regulatory strategies to settle out of court to prevent public precedents, and the sensitivity of non-profit organisations to adverse publicity have combined to limit the potential modernisation of the law through cases.

Over the last decade, a number of High Court and Appeal Court judgements have shown a judicial activism that has changed the face of Australian charity jurisprudence. It is hard to identify one single factor that precipitated such cases to proceed to judicial determination. A number have been funded by the Australian Taxation Office (ATO) as test cases, and another was underwritten by some non-profit bodies. A quality silk with a good track record appeared in a number of cases, and lawyers who were backed by their passionate clients may have all played a part, as well as chance.

In *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2006] HCA 43 (Central Bayside), the court was asked to decide whether overwhelming government funding of an organisation (nearly 93%) would put in jeopardy its charitable status. The High Court found that Central Bayside's ability to decide whether to accept or reject the government funding made all the difference. It assists in marking the boundary between state and charity in a time of rapid government outsourcing.

The Word Investments case (*Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55) was a profound watershed for Australian charity law jurisprudence, entrenching the destination of the profits test in Australian taxation

law. Word Investments provided financial support to another charity using unrelated business income generation, including enterprises such as a funeral home, financial advice and land development. Was this a charity with a supporting business or a business with some charitable objects? Was it the purpose or the activity that was important in any classification decision?

The High Court decision, as many in the profession had emphasised to revenue authorities for decades, was that it is the purpose, not the activities, that is the primary focus. It was the destination of the profits that was critical. The ability of charities to earn tax-free income is somewhat controversial in tax policy circles, but an absolute boon to charities. This was followed up by another example in which Bicycle Victoria was found by the courts to be charitable (*Bicycle Victoria v Commissioner of Taxation* [2011] AATA 444). The purpose of the association was to promote the health of the community through the prevention and control of disease by 'More People Cycling More Often'. The court decided that although a recreational or sporting purpose is not a charitable purpose, an institution that promotes an activity that is sporting or recreational in nature can still be charitable if the activity is simply a means by which a broader charitable purpose is achieved. Again, it is a matter of purpose, not merely activity.

In a similar vein, the definition of Public Benevolent Institution (PBI) has been significantly modernised by the decision in *Commissioner of Taxation v Hunger Project Australia* [2014] FACFC 69 (Hunger Project). The case found that the concept of benevolence is no longer limited to the provision of assistance to the destitute, that need is not synonymous with financial poverty, and that benevolence is a much broader concept than financial assistance. Hunger Project did not itself have to directly perform charitable acts to relieve hunger, but could do so through others.

One of the most significant cases that has helped clarify the boundaries of charity in Australia dealt with the advocacy organisation AID/WATCH. Its main purposes included generating public debate about the effectiveness of foreign aid. In *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, the High Court found, despite the views of many, in particular the revenue authorities, that there

is no general doctrine in Australia to exclude political objects from charitable purposes. This was a departure from English precedents, and was followed shortly afterwards by *Re Greenpeace of New Zealand Inc.* [2013] NZSC 12. Further, the court decided that the English case of *McGovern v Attorney-General* (1982) Ch 321 did not apply in Australia, and thus there was no general doctrine which excluded political objects from charitable purposes. Such a decision is the envy of the common law world, and it has not opened the floodgates to charities using their trustworthiness to inappropriately skew political debate.

Legislative Reforms

The charity regulation reform journey began with a report by the Industry Commission in 1995, *Charitable Organisations in Australia*, and then stalled until the Charity Definition Inquiry in 2001. That inquiry failed to make any serious reform inroads; finally, the 2010 Productivity Commission report, *Contribution of the Not-for-Profit Sector*, jump-started the journey to the creation of the Australian Charities and Not-for-profits Commission (ACNC) and the *Charities Act 2013* (Cth). As I have noted elsewhere, over 15.5 million words on nearly 50,000 pages were generated from government reports, scoping papers and submissions, taking one about three and a half months to read end to end (McGregor-Lowndes 2014). The process finally delivered a Commonwealth charity regulator and a new definition of charity for Commonwealth purposes. Many lawyers were involved in legislative reform, with Robert Fitzgerald being involved for years, and later as the inaugural chair of the ACNC Advisory Council.

The ACNC and its dedicated staff, led by Susan Pascoe, have navigated a difficult political environment with outstanding professionalism. Murray Baird, who headed a Melbourne legal firm's non-profit legal team that took the Word Investments case and became the first ACNC general counsel, continues to be a breath of fresh air in charity law development, and to achieve some outstanding administrator-led legal reforms.

For instance, first, there is the staff culture of dealing with the public, charities and their professional advisors; this was in stark contrast to

that of other regulators for its courtesy, timeliness and helpfulness. The call centre staff have been outstanding in this regard. Second, the regulator has produced a number of administrative guidance documents setting out their views on contentious matters that (compared to other regulators' past attempts) has been considered genuinely consultative, progressive and facilitative without misstating the law. Difficult calls such as the practical advice about the limits of political advocacy, keeping faith with purposes being dominant rather than activities, use of fundraising and administrative ratios, health promotion and the definition of a PBI have all been addressed in a frank and honest manner. Third, despite external interference beyond its control, the ACNC has laid the groundwork for Commonwealth and state agencies to cooperate on a range issues, such as duplicative record filing, streamlined contracting and fundraising reform. Fourth, its record of dealing with abusive charity behavior is largely hidden behind legislative secrecy provisions, but one can point to the cleaning of the ACNC registry of defunct charities and the number of public complaints against charities that have been investigated and resolved. A systematic review of the charity register is the next challenge for the regulator to face; funding this will be essential if the register's integrity is to be maintained.

The *Charities Act* has conservatively moved the definition of charity on with recognition of Indigenous issues, political advocacy and modernising charity-head descriptors. It is not quite as adventurous as other jurisdictions. Other significant legislation, such as association incorporation, that was significantly reformed in the 1980s undergoes periodic amendment, and cooperative statutes were nationally harmonised after years of consultation. Fundraising reform has been very uneven between jurisdictions and lacking any consistent basis. It awaits reform despite being used as the classic example of duplicative red tape and outdated regulation during the twenty years of reform discussions. As I write, there are some green shoots of fundraising reform revival, with Queensland and New South Wales proposing discussion papers – one that would abolish the legislation completely and rely on other statutes and agencies to deal with any mischief. If fundraising regulation is abolished in one state it may lead others to do the same. The

regulatory space would be covered by local councils taking responsibility for public nuisance mischiefs such as street collections, criminal and consumer legislation dealing with fraud and misrepresentations, the ACNC for financial transparency and governance, and a number of self-regulatory measures for marketing and consumer complaints.

Development of Legal Services and Education

There has been outstanding progress in the provision of professional legal services for non-profit organisations. The provision of legal advice generally has moved from well-meaning practitioners being cornered into providing pro bono advice to a viable sub-market that will support remunerated legal specialisation. Most significant legal firms now tout that they have the capabilities to assist non-profit organisations, and specialist firms focusing on non-profits have been established in several capital cities.

Australia has left behind the promoter tax schemes involving non-profits that have so afflicted the United States, Canada and United Kingdom and were rampant here in the 1970s. Why are we the odd jurisdiction in this respect? Perhaps, in the terms of John Braithwaite, Australia's non-profit legal profession is at present in a 'market of virtue' rather than a 'market of vice' (Braithwaite 2005). While there will always be fraud in the sector, it is to be hoped that lawyers will not aid and abet blatant tax schemes that masquerade as charity tax concessions, and that they will actively report them once they arise.

It is now becoming common for large non-profits to have internal general legal counsel, even if on a part-time basis. The Royal Commission into Institutional Responses to Child Sexual Abuse has certainly driven this trend amongst religious charities. The criticisms of the commission directed at past legal advice that failed to appreciate a client's mission and clients who meekly abdicated to hide behind the legal process stand as testament that both lawyer and client require improvement in legal capabilities. These developments were well overdue after the rapid professionalisation of the community services sector during the 1990s because of the rapid outsourcing of government services. The

introduction of a goods and services tax was the tipping point requiring non-profit organisations, and in particular charities, to enter the taxation administration system with professional advice.

The consequences of legal advice moving to a remunerated basis are taken for granted, but significant. An association of charity lawyers with an annual conference was formed, while state and national law societies creating internal non-profit law committees. They are playing an important role in specialised legal education, preparing considered submissions to regulators and various inquiries on non-profit issues and assisting other society committees with general law submissions that may incidentally touch on non-profit issues. These representations carry far greater weight with regulators and policy-makers than most individual submissions.

This does not mean the end of pro bono service to small non-profit organisations. Lawyers will continue to provide pro bono services, however it will be far more effective and coordinated. Community legal services are at the front of this coordination with the achievements of Justice Connect being an exemplar. It has established a national web portal, online education and a telephone assistance service with funding from governments and private foundations and pro bono legal advice. As a consequence of the remunerated use of lawyers, non-profits now have far more firms and practitioners to draw upon.

The ACNC has also provided, through its website, a number of well-considered legal precedents and guides. This include model constitutions for unincorporated associations, companies limited by guarantee, model charitable purposes as well as templates for common legal documents such as annual meetings, letters of appointment and common registers.

Educational opportunities for lawyers seeking to develop skills in the area of non-profit law have gradually improved since the turn of the millennium. Crowded undergraduate core legal courses will always merely touch on non-profit legal issues, with charitable trusts and gifts in equity units, incorporated associations in corporations law units, and tax concessions in tax law units. A number of university law schools and business faculties now offer undergraduate elective and postgraduate non-profit legal units as electives that are well-supported by students.

Professional education opportunities have also grown through commercial providers, law societies and other professional bodies such as the Australian Institute of Company Directors and the Governance Institute. The ACNC and the ATO also provide professional development seminars.

Legal Scholarship

Gino Dal Pont contributed to the *Third Sector Review*'s special issue in 2002 with a thoughtful piece about whether parliaments would be best to abandon the use of the word *charity* with its common law baggage, and instead precisely define the organisation or activity on which they wished to bestow concessions or impose regulation (Dal Pont 2002). His book *Law of Charity* (Dal Pont 2010) provides a first place of reference for practitioners and scholars alike, and he continues to publish substantive articles in legal journals (Dal Pont 2013, 2015). Melbourne University Law School's professors Ann O'Connell, Miranda Stewart and Matthew Harding were awarded an Australian Research Council Discovery Project grant from 2010 to 2012 to examine non-profit legal issues. The project, 'Defining, Regulating and Taxing the Not-forProfit Sector in Australia: Law and Policy for the 21st Century', with research fellow Dr Joyce Chia, was exceptionally well-timed and provided invaluable considered legal thought about the development of the legislative framework for the ACNC and the statutory definition of charity. The team worked tirelessly to produce detailed submissions to the reform process. The project spawned two books, one being a collection of papers delivered at an international conference of legal scholars about charity law (Harding et al. 2014), and another being a consideration of the dilemmas of the liberal state and charity law (Harding 2014).

The greater flow of charity cases, with many reaching the appeal courts, has also resulted in scholarly commentary on the jurisprudence and implications of such decisions. For example, the Word Investments case appeared to launch a multitude of articles on its implications and applications (Murray 2008; Gousmett 2009; Murray 2009; Richards 2009; Russell 2009; Sadiq & Richardson 2010; McGregor-Lowndes et al. 2011;

Stewart 2014; Silver et al. 2016). The pleasing feature is that much of the scholarship is finding its place in top-tier legal journals, although many may argue that while this ticks the box for university rankings, its practical impact compared to a well-argued technical submission to a parliamentary committee is minimal. Legal scholarship has also advanced in the last decade, with a group of very talented doctoral students turning in solid legal dissertations on a range of non-profit legal topics. Legal education and scholarship in the non-profit area should blossom in the future, given the talented people who are turning their minds to the challenges of a sector grappling with increasing hybridity, episodic volunteering and a changing role of government.

Conclusion

After years of the common law of charity being moribund, without any superior court decisions and disinterested legislatures, the turn of the millennium ushered in a fitful gushing of legal developments and reforms. The increasing pace of technological disruptions, governments reshaping their role, and the very nature of many social services in Australia will require equally rapid legal facilitation and regulation. Lawyers will be faced with multiple challenges: the demand for hybrid legal structures, for new financing arrangements, mergers and partnerships with other sectors, for global fundraising using the internet and social media platforms, and volunteers, stakeholders and beneficiaries wanting legal redress against non-profit organisations.

Our state and federal system of government will also be tested by these trends, as well as having the legacy issues of the constitutional division of powers and lack of taxpayers' willingness to adequately fund command-and-control regulation. My prediction is that smarter regulation through the use of self-regulation, co-option by the state of third-party regulators and innovative light-touch, high-impact regulatory tools will increasingly become the norm.

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