

Promoting Freedom and Community

Civil Society Organisations in Australia

Ross Fox



Principles guiding this submission

1. Australian society is best served by a strong, diverse and vibrant civil society. Civil society organisations, including charities, constitute a vital part of Australia's civil society.
2. A vibrant civil society assists in building social capital which is important for the prosperity of Australian communities.
3. Individual voluntary participation in civil society organisations, whether through giving or volunteering, increases individual and collective freedom.
4. Civil society organisations that receive benefits from governments accrue obligations.
5. Civil society organisations and charities should be subject to regulations and restrictions that achieve a reasonable balance between strengthening civil society and ensuring that they are accountable for public resources.

Abbreviations

ATO:	Australian Taxation Office
CDI:	Report of the Inquiry into the Definition of Charities and Related Organisations, 2001
CSO:	Civil society organisation
DGR:	Deductible Gift Recipient

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Disclosure statement

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Recommendations

In response to the issues faced by civil society organisations and charities in Australia, this paper recommends that:

1. A new definition of charitable purposes be enshrined in a Charity Act. The new definition should be based on broad categories within which purposes can be further specified, similar to the recommendation of the Charity Definition Inquiry.
2. The existing classification of non-profit organisations be replaced by a classification framework for all civil society organisations to include: benevolent charities; charities, altruistic community organisations and civil society organisations. A hierarchy of benefits should match the CSO classification framework, with the available benefits reflecting the extent of the public benefit derived from each organisation's status.
3. The following purposes be specified as *not* constituting charitable purposes and that approved charities should be prohibited from undertaking such activities where they are anything more than merely incidental to a charity's purpose:
 - The commission or facilitation of illegal acts;
 - Involvement in party political campaign activity;
 - Operation of purely commercial enterprises;
 - Governmental functions;
 - Conferment of private benefit.
4. CSOs be exempt from regulation that significantly hinders their community activities and instead allow individuals to choose how best to bear risks. Possible exemptions may include food labelling laws, public liability, certain occupational health and safety regulations and other regulations that do not provide significant benefit in return for their financial and social costs.
5. The ATO assume responsibility for granting charity and other status through which CSOs are able to obtain tax exemptions and concessions according to a transparent, objective and impartial process designed for application and acceptance across all Australian jurisdictions.
6. The ATO be empowered to review the activities of CSOs against legislative requirements when there is evidence of breaches of the regulations governing charities and, where necessary, revoke the relevant status.
7. CSOs in receipt of financial benefits be subject to accountability requirements which minimise any administrative burden but allow individuals to understand how public support is expended. This should include a public register of involvement with government as proposed in *The Protocol: Managing Relations with NGOs*.¹
8. Other initiatives be examined to encourage involvement in CSOs through volunteering and giving, such as a register of CSOs, their activities and contact details, to make it easier for individuals to give and volunteer.

1 Introduction

Civil society organisations (CSOs), which include charities, not-for-profit and non-government organisations, are significant in Australian society in both financial and participatory terms. The voluntary participation of Australians in CSOs—whether through financial support, volunteering or other avenues—allows individuals and communities freely to pursue the values they hold dear. CSOs therefore represent a tremendous opportunity for the fulfilment of the individual and collective aspirations of Australians. CSOs and participation therein strengthens Australia’s civil society.

CSOs are also a significant part of the Australian economy. Estimates of the contribution of not-for-profits to the Australian economy range from around 3 to 10 per cent of GDP and are even higher if their non-financial activities and services are included. In 2004 alone, Australians volunteered more than 836 million hours of their time working with and in CSOs.

Despite the prominent role that CSOs have in Australian society, CSOs are not well supported by government regulation. The benefits available to CSOs, particularly from Deductible Gift Recipient (DGR) status, lack transparency and are the subject of political manipulation rather than objective tests of charitable and public benefit. CSOs also face an increasing regulatory and compliance burden from which only marginal public benefit is derived. Public liability and insurance requirements provide the most obvious recent example of the enormous harm that has been done to CSOs by the absence of a coherent, nationally consistent legislative framework which supports the activities of genuine CSOs.

The large direct and indirect resources provided by government through a combination of grants, tax concessions and exemptions to the sector require accountability commensurate with the disbursement of government and public resources. There are a number of examples where some organisations (albeit a minority of CSOs) that receive direct or indirect support from government have undertaken activities which are either clearly not charitable in nature, not appropriate for an organisation of their status or directly break laws. Without discouraging individual participation in civil society, organisations that behave in such inappropriate ways must be held accountable for their actions. Government support should be confined to purposes and activities which meet charitable and public benefit tests.

In this report, ‘civil society’ is understood as the voluntary association of individuals and existing societal institutions through which society, its aspirations and values are expressed. CSOs and institutions maintain and further the interests of individuals, family, friendship and community

groups, and society in totality. This report examines the regulatory issues surrounding CSOs, particularly charities and related entities.

Over at least the last two decades, a large and growing literature has developed to explore the importance that ‘social capital’ has for human interactions and individual and societal well-being. This literature has attempted to understand the importance, benefits and virtues of mostly intangible elements intrinsic to human relations and interaction, such as trust, norms of reciprocity, levels of social interaction, political engagement and community participation. Empirical observations suggest that communities and societies with high levels of ‘social capital’ (broadly defined) are more likely to exhibit desirable outcomes on measures such as health and economic attainment.

In its 2003 research paper on *Social Capital*, the Productivity Commission noted that the ‘presence of significant social capital may broaden the range of policy options open to the government. It may be more effective to enhance and harness social capital in some cases than to rely on government-funded social services’.² It further noted that the presence of social capital may protect disadvantaged communities from more severe social problems and that its promotion might therefore overcome the need for more drastic interventions.³ CSOs in the form of charities and other community-based groups are a potential seed from which social capital can grow in communities around Australia.

This report begins with a brief overview of the charitable sector in Australia and an evaluation of the existing regulatory regime governing charities. The report then considers the need for a Charity Act, the definition of ‘charity’ and the availability of benefits for charities. The report continues with an examination of the activities that a charity should not be permitted to undertake, the need for an activity test to be part of any regulatory regime and identifies the ATO as a potentially suitable regulator for the sector.

This report explores the importance of civil society organisations in Australian society and makes a number of recommendations ultimately aimed at providing a clear and transparent framework within which CSOs can grow and prosper while being accountable for their actions.

In discussing ‘charities’ the report refers generally to organisations whose purpose conforms with those permitted under the definition of a charity—that is, that they pursue a charitable purpose and seek to bestow public benefit. This discussion in no way precludes, either theoretically or practically, enterprises which operate in accordance with commercial disciplines for charitable purposes.

2 Civil society organisations in Australia

Civil society organisations play an important role in modern Australian society. The most recent figures available estimate that the non-profit sector in Australia includes approximately 700,000 organisations which are predominantly small and wholly dependent on the voluntary support of members,⁴ with the largest 30,000 employing approximately 8 per cent of Australia's workforce⁵ and approximately 20,000 having DGR status.⁶

Giving Australia: Research on Philanthropy in Australia, a study commissioned by the Prime Minister's Community Business Partnership, estimates the value of total giving to non-profits in 2004 at \$8.9 billion, comprised of \$5.7 billion given by individuals and \$3.2 billion from business. Individual financial giving is complemented by individuals volunteering 836 million hours of their time. Table 1 shows the distribution of giving and volunteering in 2004 across non-profit sectors.

Giving Australia found evidence of substantial real increases in the proportion of the population giving and the average value given. Between 1997 and 2005, the real increase in the value of giving was approximately 58 per cent.⁷ Australians now give around 0.68 per cent of GDP, which compares favourably with 0.46 per cent in Canada but is less than half the 1.6 per cent observed in the USA.⁸ It would appear on

this measure that Australians are becoming more, not less, engaged in civil society.

The Tax Expenditures Statement 2005 estimates that the value of tax deductions claimed for donations to entities with DGR status was \$630 million in 2004–05 (including donations with an associated minor benefit).⁹ Even adjusting for the portion of donations which are not tax expenditures, the large discrepancy between the \$8.9 billion total given and the \$630 million of DGR tax expenditures demonstrates that most individual giving is not undertaken in order to claim tax deductions.

Public benevolent institutions received fringe benefit tax exemptions estimated at \$240 million in 2004–05, which they use to increase the after-tax value of staff remuneration packages.¹⁰ Certain non-profit societies, promotion and development non-profit societies and non-profit, non-government bodies receive a combination of income tax exemptions and fringe benefit tax rebates estimated to be worth \$70 million in 2004–05.¹¹ These figures do not include the exemptions and concessions available to CSOs from State governments.

The Tax Expenditures Statement 2005 suggests that more than \$1.1 billion in benefits were provided to CSOs through the federal tax system in 2004–05. The total value of benefits for the non-profit sector is likely to be much higher, as

Table 1: Giving and volunteering in 2004 by recipient sector

	Individual donations (% total value)	Individual volunteering (% total hours)	Business giving (% total value)
Arts or cultural associations	2.3	3.4	9.3
Community or welfare services	12.8	28.2	30.5
Education	6.6	12.2	5.0
Environmental or animal welfare groups	4.8	2.6	0.9
Health (including medical research)	14.2	10.3	18.5
Sporting and recreational groups	3.7	19.7	17.7
Religious institutions	36.1	15.0	n/a
International aid	13.3	1.4	n/a
Other non-profit sectors	6.2	7.2	18.1
Total	100	100	100
Total value	\$5.7 billion	836 million hours	\$3.2 billion

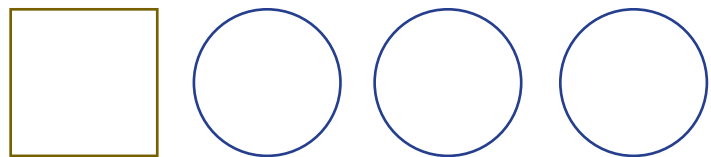
Source: *Giving Australia*, October 2005, page 22.

there are substantial CSO groups that receive tax benefits for which no estimate is provided. This is particularly true for tax exemptions provided for religious, scientific, charitable or public educational institutions where amounts are classified as unquantifiable. For such a large and important sector in the economy and Australian society, this is a glaring inadequacy in the management and support of the sector.

When asked their concerns about giving to the non-profit sector, respondents expressed concern about duplication, wastage and excessive salaries and benefits in the sector.¹² A 1997 study by ASSIRT found that 69 per cent of donors would give more if there was more information on charity efficiency, while 79 per cent of donors would give more if there was assurance that the money was going to the cause.¹³

In contrast to the expectations and concerns of givers, Givewell has found that the number of charities that separately disclose their fundraising costs has continued to decline: from 59 per cent in 2001 to 40 per cent in 2004.¹⁴ Givewell further commented that despite increased media focus on the need for accountability and transparency in charity fundraising and expenditure, many charities do not publicly release their annual reports and financial statements.

This evidence endorses the important place of CSOs in Australian society. It also emphasises, however, that CSOs need to give serious consideration to the level of transparency and accountability in their activities and the influence that this has on the trust and confidence of givers.



3 The need for regulatory reform

This section deals with the regulatory and policy issues which affect CSOs. Specific consideration is given to the need for a Charity Act governing charities and related organisations.

3.1 Need for a Charity Act

The most recent attempt to define ‘charity’ for practical application in the context of modern Australian society occurred in taxation ruling TR 2005/21, issued by the Australian Taxation Office (ATO) in December 2005. The ATO’s ruling defines ‘charity’ by reference to a disparate combination of legislation, tax rulings, common-law precedent and legal concepts. These referents include the *Statute of Elizabeth* and the *four heads of charity*. In referencing the Statute of Elizabeth, the ATO fails to venture beyond a definition of charity codified in 1601, while Lord Macnaghten’s *four heads of charity* are more than 110 years old, having been handed down in a court judgment in 1891.¹⁵

Although the *Statute of Elizabeth* might once have been a pithy and cogent description of admirable purposes, it is undoubtedly outdated. The statute’s failure to account for the changing nature of relations between, and the aspirations of, members of a free democratic society, be they governments or individuals, makes it an inappropriate and inadequate construct by which to define a charitable purpose in modern Australian society.

TR 2005/21 fails to provide CSOs that wish to obtain certainty and clarity about their legal status when undertaking community-focused activities that may be charitable in nature. This lack of clarity has the potential to discourage CSOs from seeking endorsement as charitable entities. In the absence of such endorsement, many charitable activities in the community may simply not occur.

Although efforts could be made to adapt the contents of TR 2005/21 to suit modern circumstances, the nature of the document makes it unlikely to yield a result which effectively reflects the needs of the community. Put simply, a taxation ruling is not the appropriate place to define charitable purposes.

As recommended by the Charities Definition Inquiry (CDI) in 2001, the definition of a charitable purpose and hence a charity should be enshrined in a Charity Act. The CDI noted that, under the current arrangements, extensions to the definition of charitable purposes are not pursued because of the cost involved in taking such cases to court.¹⁶

Enshrining the definition of a charity within a Charity Act would deliver greater transparency to CSOs and greater accountability for the government. A Charity Act would give responsibility for the definition of a charity to the government and parliament in preference to legal precedents. This responsibility could deliver clarity and certainty to CSOs while permitting the definition of a charity to be regularly updated as the needs of the community and the charitable sector change.

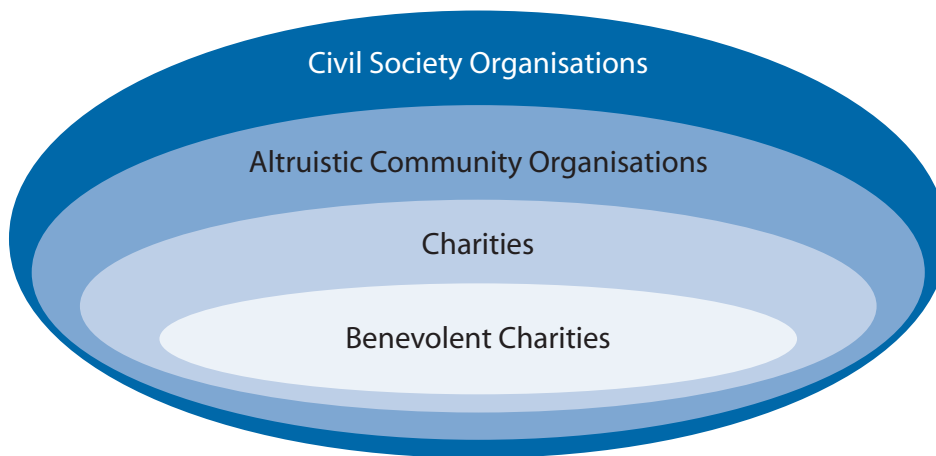
Defining ‘charity’ within a Charity Act could also mitigate the legal costs associated with testing the current definition of charitable purpose in the courts.

3.2 Classification of charitable organisations

Current regulatory arrangements for CSOs are disparate and, due to a lack of transparency and a reliance on Ministerial discretion, are subject to political manipulation. Under current arrangements, a number of complex legal and regulatory regimes determine the legal status of a CSO and hence the benefits to which a CSO is entitled. Current legislation and regulation in the State and Federal jurisdictions allow for a variety of different tax exemptions and concessions for the non-profit sector and donors to non-profit entities. These are determined with reference to the purpose and activities of an entity.

In the Federal jurisdiction, a form of hierarchy already exists whereby a particular status begets corresponding benefits. As demonstrated by the CDI, however, the current classification system is complex and poorly understood.¹⁷ The existing classifications of CSOs within the non-profit sector are community service, charity, religion and public benevolent institution (PBI).

Diagram 1: Proposed classification of CSOs¹⁸



The CDI proposed a new framework for the classification of CSOs under which only three classifications would be applied. The CDI's proposed classification system improves on the current arrangements as both a theoretical and practical system of classification. In contrast to current classifications which overlap and intersect obliquely, the CDI's classifications have concentric domains. A proposed classification system based on that recommended by the CDI is shown in Diagram 1.

3.3 Legal and tax treatment

The regime of tax benefits for CSOs, including charities, should be reformed to reflect changes to the definitional framework. Reform should seek to continue to support CSOs through tax concessions, exemptions and DGR status. Reform should also seek to further strengthen the sector by removing inefficiencies and providing positive incentives which encourage the pursuit of charitable and altruistic purposes for both individuals and organisations.

Subject to administrative processes and feasibility, altruistic community organisations might receive access to exemptions for income tax and other state-based taxes, with charities and benevolent charities both receiving access to DGR status and capped fringe-benefits tax exemptions in addition to income and State-based tax exemptions.

If a transparent process were to be adopted for the independent evaluation of all charities, it is not clear, except for the potential revenue implications, why all charities (so assessed) should not have access to DGR status.

4 Specific reform proposals for charities and related organisations

The following issues are specifically raised in the taxation ruling issued by the ATO and should form the core of a Charity Act.¹⁹

4.1 Defining a charity

Defining ‘charity’ adequately and comprehensively is the issue around which the greatest controversy exists. The CDI recommended that a charity be defined with reference to a broad group of categories within which further specification of both purposes and dominant activities could occur. As outlined above, the CDI recommended the creation of the classifications of benevolent charity and charity, both of which were to be defined in accordance with the following statement:

... a charitable entity must be not-for-profit.²⁰ Its essential or dominant purpose or purposes must be altruistic and for the public benefit, that is, they must be aimed at achieving a universal or common good, they must have practical utility and they must be for the benefit of the general community or a sufficient section of it. An entity’s activities must support its dominant purpose or purposes, and the purposes and the activities of an entity must not be unlawful or contrary to public policy, nor promote a political party or a candidate for political office.²¹

In addition to fulfilling these criteria, a benevolent charity (designed to replace the notion of ‘public benevolent institutions’) would have as its dominant purpose ‘to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs’.²²

If society’s aspiration is, as far as is practicable, to strive for the political equality of all citizens, this commends benevolent charities ahead of others by virtue of their purpose, which is to provide benefit to those whose disadvantage prevents them from meeting their own needs. Benevolent charities, by definition, have a purpose that seeks to overcome sources of disadvantage which prevent the full political participation of individuals in the Australian community. Hence, of all the CSOs, benevolent charities are the most deserving of direct and indirect support from the public and government.

Charities deserve both public and government support by virtue of their purpose being charitable and altruistic. According to the CDI’s classification, charities are distinct from other altruistic organisations of civil society because of the charitable purposes they pursue for public benefit. Those who receive public benefits must do so by being part of a group which has sufficiently open and non-discriminatory criteria for membership that it can legitimately be classified as public.

4.2 Charitable purposes

As stated above, the question of what should be included within the definition of a charitable purpose has not advanced markedly since 1601 and the Statute of Elizabeth. Rather than referencing common-law precedents developed over many years, this report supports a legislated definition of charitable purposes based on broad categories within which charitable purposes can be further defined. This approach follows that proposed by the CDI, however the final definition should ultimately be determined by the parliament in a Charity Act. A suitable definition of charitable purpose for use in legislation would be (similar to that proposed by the CDI):

Charitable purposes shall be:

- the advancement* of health, which without limitation includes:
 - the prevention and relief of sickness, disease or of human suffering;
- the advancement* of education;
- the advancement* of social and community welfare, which without limitation includes:
 - the prevention and relief of poverty, distress or disadvantage of individuals or families;
 - the care, support and protection of the aged and people with a disability;
 - the care, support and protection of children and young people;
 - the promotion of community development to enhance social and economic participation; and
 - the care and support of members or former members of the armed forces and the civil defence forces and their families;
- the advancement* of religion;
- the advancement* of culture, which without limitation includes:
 - the promotion and fostering of culture; and
 - the care, preservation and protection of the Australian heritage;
- the advancement* of the natural environment; and
- other purposes beneficial to the community, which without limitation include:
 - the prevention and relief of suffering of animals.

* Advancement is taken to include protection, maintenance, support, research, improvement or enhancement.

These categories would not, in themselves, define or bestow charitable status. Charitable status would only be conferred when an entity conformed to the other necessary conditions: pursuing public benefit, being not-for-profit and having an altruistic purpose. These issues will be explored below.

The categories and specific purposes proposed by the CDI are a good starting point for a definition of a charity within a Charity Act rather than within regulation, ministerial decree or tax ruling. Reference to civil and human rights has been excluded from the foregoing list because they refer to purposes which are contested in the political sphere and may not constitute rights. The advancement of rights about which there is significant argument regarding their existence should not constitute charitable purposes because they are, by their nature, essentially political rather than charitable purposes.

Some of the purposes listed above should also be subjected to further debate as to whether they are genuinely charitable in the sense of bestowing public benefit. For example, where things are preserved or protected merely for their own protection, rather than for any discernible benefit to society, there should be discussion over the extent to which these purposes are altruistic or bestow public benefit. This will be particularly relevant where preservation and protection of the environment and heritage is concerned. These debates should properly be held both in and outside the parliament as part of the legislative drafting process.

The extent to which charities can pursue purposes or undertake activities that are not exclusively charitable must also be specified. The ATO's stipulation that an entity is charitable only if its 'sole purpose is charitable'²³ is reasonable given that the activities of charities are not subject to the same test.

The benefits accruing to charitable status are not intended to support either non-charitable purposes or non-charitable activities. Hence, it is appropriate that charities have purposes that are exclusively charitable and undertake activities which predominantly serve that purpose. Activities of a charity which do not directly address a charitable purpose should be no more than incidental to doing so. This presumes that the scope of possible charitable purposes, as defined by legislation, is sufficiently broad so as not to constitute an unwieldy restriction on charitable purposes and the activities a charity undertakes to achieve its purposes.

4.3 Granting of charitable status

When the definition of 'charity' has been determined, a process must be defined to endorse entities that claim to have charitable purposes and conduct activities which serve these purposes.

The current process for granting charitable and DGR status is disparate and too often subject to political considerations in preference to objective assessments. This process should be significantly reformed. The process should be entirely transparent and objective for all applicants, regardless of their purposes and activities. This applies, in particular, to organisational classifications which are currently subject to ministerial discretion—for example, for groups with environmental purposes.

The charity sector and by implication civil society in Australia could derive benefit from greater certainty about the criteria upon which DGR and charitable status are granted.

Ministerial discretion should be limited to instances such as disaster appeals which are designed to have a finite life. Otherwise, Ministerial discretion should be entirely eliminated for organisations whose purpose clearly falls within or outside the provisions of a Charity Act which defines a charity.

In order to make the process of assessment of charitable status independent and transparent, it should be undertaken by an independent, a-political body. The ATO is well placed to administer this function.

The ATO's stated objective is to ensure that Australia's revenue system remains sustainable.²⁴ Despite the possibility that support for charities through the tax system could conflict with this objective, the ATO is well placed to engage in the approval, monitoring and potential investigatory functions required to manage the financial entitlements of the charitable and related sector. Directed by legislated definitions of CSO status, the ATO could efficiently and effectively balance the interests of Australian taxpayers with those of Australia's civil society. This responsibility would complement the existing organisation of the tax office which includes an organisational focus on non-profit and government organisations as a segment of taxpayers.

The CDI recommended that a Charity Commission be established to administer the regulatory regime governing the charitable sector. While there may be merit to this approach, it seems unnecessary to create an additional body when all the required functions might satisfactorily be managed within an existing institution, namely the ATO.

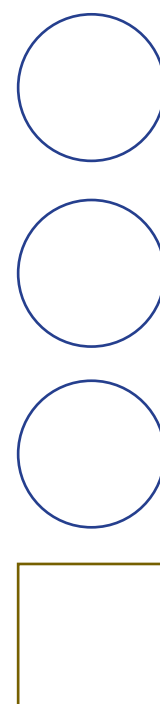
Where practicable, in order to minimise the resources consumed in compliance, consistent with current practice, the ATO should seek to create thresholds that ensure accountability for altruistic or charitable entities commensurate with the value of the benefits received.

4.4 Relationships between charities and non-charitable entities

Civil society is best furthered by organisations which are able to respond to the dynamic requirements of society and the individuals within it. Legislation and regulation which prohibits or privileges particular organisational arrangements above others is potentially counter-productive to the achievement of a stronger and more vibrant civil society.

Any regulatory regime should not impose structural inefficiencies on CSOs. Charities and CSOs should be free to structure their activities in the way which they determine best serves their purposes. This may mean that they adopt structures analogous to the corporate sector. Assuming that appropriate levels of accountability and transparency are maintained, structural and administrative arrangements should not jeopardise the benefits available to charitable entities.

Where activities are merely incidental to a charity's purposes, regardless of the structure adopted to undertake them, the tax concessions, exemptions and other benefits available to them should be unaffected.



5 Transparency and accountability

5.1 Reporting requirements

CSOs that receive public benefits from the government, citizens and taxpayers have an obligation to report on how such resources are expended on the public's behalf. Irrespective of whether benefits are obtained directly through grants or indirectly through tax exemptions or concessions, CSOs should be accountable for the value of support they receive.

Analysis by Givewell suggests that donors are more willing to give to charities that maintain higher levels of transparency and accountability. Therefore, charities that adopt greater transparency should receive greater public support than charities that are less transparent in the conduct of their activities. The prospect of increasing support from donors should provide a sufficient incentive for charities to maintain high levels of transparency.

Subject to requirements concerning the expenditure of public resources, individual CSOs should be free to decide the effective and appropriate amount of information to make available to donors and volunteers. Any reporting requirements additional to these should only be required via regulation where it will result in clear and substantial benefits for CSOs, governments and the Australian community. Such additional requirements should give specific consideration to the further provision of positive rather than punitive incentives that increase the public's confidence and trust in CSOs and charities. Adopting this approach will ensure that CSOs devote their resources to activities which most effectively achieve their stated purpose and therefore yield the greatest benefit for the public.

CSOs should also be subject to transparency in their dealings with government. Consistent with previous recommendations by the IPA in its work on an NGO Protocol²⁵ governing the transparency of relations between government and NGOs, the public should be able to ascertain easily the extent and nature of institutional relationships between CSOs and government bodies. This would ensure greater transparency and accountability for both government and CSOs.

5.2 Restrictions on charitable entities

In defining what constitutes a charitable purpose or activity, certain purposes and activities need to be specifically excluded as incompatible with the concept of 'charity'. TR 2005/21 specifically defines the purposes listed below as not charitable. According to the ATO, charities should not be permitted to have purposes or undertake activities relating to these categories:

- Purpose to confer private benefits to individuals other than as members of the public;
- Purpose is sporting, recreational or social which is more than merely incidental to a charitable purpose;
- Purpose is political or lobbying;
- Purpose is illegal or against public policy;
- Purpose is commercial in the sense of carrying on a business or commercial enterprise;
- Purposes of government in carrying out its functions;
- Purpose is vague or has insufficient value for the community.

Charitable status confers benefits on charities provided by the community. When charities receive these benefits they accrue certain obligations to the community. Such obligations include being prohibited from pursuing certain purposes and undertaking certain activities. The purposes and activities of charities should be beyond reproach and subject to a broad political consensus because of their privileged status with respect to the available benefits.

The ATO's list constitutes an entirely appropriate and reasonable restriction on charitable entities—with two clarifications. No restrictions should limit the free speech of individuals, whether the content of such speech is political or otherwise. Further, no restrictions should diminish the important role of CSOs, particularly charitable entities, from contributing through established mechanisms and avenues to policy and legislative processes.

CSOs have the potential to offer independent and informed representation in their areas of operation, drawing on their knowledge of the purpose(s) they pursue. The purposes excluded from being charitable purposes above do not diminish the contribution that charities can make in these areas. The restrictions on charitable purposes and activities listed above are therefore reasonable.

The most contentious of these prohibitions are briefly examined individually below—specifically, the prohibition on purposes which are illegal or against public policy and purposes which are political or lobbying.

5.2.1 Purposes which are illegal

The submission of the National Roundtable of Nonprofit Organizations in response to the ATO's draft taxation ruling proposed to amend the ruling to permit charities to engage in 'non-serious breaches of laws'²⁶ without any consequence for their charitable status. This report accepts that individuals should decide their own actions with respect to the law, provided that they are willing to accept the consequences of their actions. However, from this belief it does not follow that entities who receive support from governments and the community are legitimately entitled to break the law, whether the breach is serious or not.

Illegal acts that are intentionally committed by CSOs and charities in the pursuit of their purpose, even so-called 'non-serious' illegal acts, are intrinsically incompatible with charitable purposes. This restriction does not prevent individuals from engaging in whatever action they feel justified in undertaking and facing the consequences of any such actions before the law. The capacity of individuals to exercise free choice in such matters has no bearing on the desirability of governments and the community to support such action through the financial resources available to charities and CSOs. Hence this stipulation does not constitute a restriction on free speech.

The available evidence demonstrates that a few organisations with privileged legal status are misappropriating this support for illegal activities which they conduct in the pursuit of their purposes. For example, on a number of occasions, Greenpeace Australia-Pacific has engaged in illegal protests. These protests have included illegally impeding Australian Navy ships and breaking into the nuclear reactor site at Lucas Heights in NSW.²⁷

Governments and taxpayers should not endorse illegal acts in any way. These are matters more appropriately left to the realm of personal, political and legal contestation and should not be classified as charitable activities.

5.2.2 Party political campaigning and activity

There are important distinctions between the purposes and activities of political parties and those of charities which commend the maintenance of substantially different regulatory regimes to govern the conduct of each. If charities are permitted to conduct political activities without limitation, the potential for a significant inconsistency will arise. The involvement of charities in politics beyond what is merely incidental to their charitable purpose would be incompatible with the principles which currently distinguish charitable from political purposes.

Registered political parties in Australia do not currently receive charitable status. In many instances the regulatory regime governing political parties demands greater accountability than that covering the conduct of charities. Political comment, advertising and literature published by political parties must carry an authorisation and disclosure of those involved. Political parties that are registered federally are currently required to disclose the origin of donations valued at \$1,000 and above and meet minimum membership requirements.²⁸ The value of any single donation to a political party in terms of tax deductibility is also capped.

Political conduct is an activity central to democratic participation and therefore deserves special consideration as to the circumstances governing what is known about participants and the circumstances under which they participate. The purpose of political parties' existence is to participate in the political contestation of ideas, policies, elected positions and ultimately government. The importance of the transparent and accountable conduct of public debate is vital to the community's confidence and trust in the effective functioning of the processes and institutions of democracy.

In contrast to democratic political purposes which entail conflicting ideas and policies, charitable purposes should reflect a community consensus and hence should not be political. Charities should therefore be prohibited from undertaking political activity such as political campaigning that is more than merely incidental to their charitable purpose.

The effect of restricting the participation of charities in political campaigning should not prevent charities from expressing views and continuing to contribute to the normal mechanisms and channels for public debate. This measure will



merely continue the important and long-standing distinction between charitable and political activities. This distinction has an important role in ensuring the effective functioning of Australia's democracy.

Despite opposing the imposition of a political activity test for charities, the former head of ACOSS and a member of the CDI, Robert Fitzgerald, has publicly stated that 'It's absolutely appropriate that organisations that promote political parties or candidates or act in their legal way should not be charities.'²⁹

Evidence suggests that, too often, organisations which are otherwise considered charitable are explicitly aligned with political parties and actively support them through advertising and political and election campaigning. The Wilderness Society provides perhaps the most blatant and public example of an organisation with privileged legal status engaging in explicitly political activity.

According to its Website, the Wilderness Society has played an extensive role in many of the State election campaigns which have occurred in the last five years, particularly focusing on marginal seats and targeting voters who they can turn towards its favoured party. The Wilderness Society's own Website states that 'The Wilderness Society's election campaigns have determined the outcome of marginal seats at both state and federal elections.'³⁰ Such blatant political campaign activity cannot be justified as merely incidental to the Wilderness Society's purpose and is not charitable in nature.

Charities should be prohibited from providing funding or resources to political parties, and from arguing for or against political parties and their candidates. This would not prohibit charities from publicly advocating, or lobbying for, particular policies in a way that is informative on the substance of a policy area, rather than explicitly endorsing one political party over another.

Any political activities in which charities engage should be merely incidental to a charity's purpose. Activities such as the distribution of literature only to marginal seats in an election period or the provision of paid staff to political campaigns should prompt more detailed consideration of the extent to which a charity's purposes and activities are charitable rather than political. In these cases, it would seem reasonable to

classify the purposes pursued as political rather than charitable. Such instances should prompt a revocation of charitable status. Under such circumstances, charities and other CSOs receiving public benefits would be encouraged to conduct themselves with care.

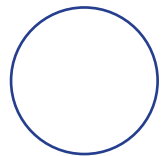
Political activity undertaken by charities should be subject to an activity test like any other activity when evidence is produced that raises doubt about purposes or activities being strictly charitable. Political activity undertaken by a charity, like any other activity that is not directly charitable, should merely be incidental to a charity's purpose. Where a charity has particular experience, knowledge and expertise, political advocacy and the provision of information to the public is legitimately incidental to its charitable purpose. Extensive involvement with political campaigns or candidates falls outside the realms of mere advocacy and constitutes political campaigning. If charities wish to receive the financial benefits associated with charitable status, they must decide whether they wish to pursue charitable purposes or political purposes. Where they choose the latter, they should be subject to the same regulatory conditions as those governing political activities.

UK charities have been prohibited from directly assisting political parties or candidates and from advocating specific party or candidate policies. Charities are, however, entitled to advocate and evaluate policy initiatives based on their purposes, but they must not seek to compare their own views with those of candidates or parties.³¹

Charities should seek to serve charitable purposes for the public benefit rather than involve themselves in politics where contest, rather than explicit pursuit of public benefit, is the central goal. By virtue of their preferred tax status, charities should be restricted in their political activities but this should in no way prevent them from serving their stated charitable purposes.

5.2.3 Purposes against public policy

TR 2005/21 is ambiguous with respect to the meaning of 'purposes against public policy'. If this specification entails that charities are prohibited from expressing a view to government (or even to their supporters) regarding government and public policy and its merits based on their experience and activities, then this is question-



able and needs further clarification before it can be accepted.

If ‘against public policy’ denotes that it is inappropriate for charitable purposes to be aimed exclusively at political or policy contestation, then it might constitute a reasonable restriction. The appropriate realm for public policy contestation is with political parties or non-charitable organisations. It is therefore reasonable to restrict charitable purposes in this way.

5.3 Activity tests for charities

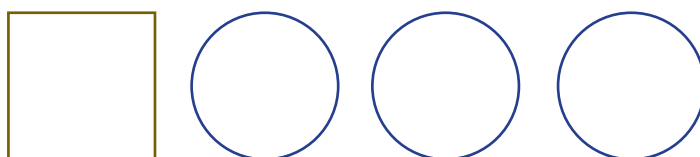
Charities, by virtue of their status as charities, receive direct and indirect support from the government. It is therefore appropriate that they be held accountable for the expenditure of community resources in conducting their activities. Any activity undertaken by a charity should either directly serve its charitable purpose or be incidental to its charitable purpose.³² If an activity is more than incidental to a charitable purpose, then it is more appropriately undertaken by an entity which is not a charity.

In order to be deemed a charity, an entity must have a purpose which is exclusively charitable. In order to maintain a clear delineation between charities and other organisations, activities undertaken by a charity should exclusively serve a charitable purpose or be incidental to it. When any doubt exists as to whether or not a charity’s activities genuinely conform to its charitable purpose, a charity should be subject to an activity test. An activity test should be instigated to protect the reputation of all organisations with charitable status.

The possibility of an activity test need constitute nothing more than a reasonable expectation that, when scrutinised, a charity’s activities will in fact serve or be incidental to their charitable purpose. That is, an activity test would merely seek to confirm that a charity’s activities do in fact happen as a consequence of its stated charitable purpose.

An activity test need not entail an additional administrative or reporting burden on charities. An activity test need only operate by exception. If evidence arises that an activity appears to be more than incidental to a charity’s purpose, this evidence should constitute grounds for a review of a charity’s status. If, upon a reasonable investigation, such evidence is confirmed to contravene the requirements of charitable activities, it should initiate the revocation of charitable status and its associated benefits.

Consideration should also be given to punitive measures for charities which abuse their status. Such measures should be in proportion to the value of charitable benefits that have been wrongly appropriated. Overall, the cost of administration by the appropriate oversight body and the cost of compliance by charities should be balanced against the adverse consequences for the entire charity sector if an organisation abuses its status.



6 Promoting and strengthening civil society organisations

6.1 Policy initiatives to strengthen the charitable sector

Recent policy initiatives, such as the instigation of workplace giving through regular payroll deductions, are continuing to create opportunities for individuals to give easily to charities in a planned way. Such initiatives create greater potential for the efficient and effective pursuit of charitable purposes. The potential result of the increased certainty and possibly greater magnitude of giving is likely to be a stronger and more vibrant charity sector.

Where possible, further efforts should be made to make individuals aware of the benefits available from planned giving and make it easier for individuals both to gather information about charities they may wish to support and to make regular and planned contributions. The availability of personal management tools approximating those now available for the management of personal financial investment portfolios may facilitate greater giving and volunteering.

A culture of voluntary civic involvement and giving throughout Australian society, regardless of geographic or demographic identity, should continue to be nurtured. Just as the purposes and activities of CSOs reflect a large diversity of interests, so the possible policy options considered should be equally diverse.

6.2 Regulatory exemptions for CSOs

In a research paper investigating social capital in Australia, the Productivity Commission noted that public liability laws have had deleterious effects on social capital and by implication on CSOs. While such laws intend to provide incentives for businesses to operate safely and compensate people who are injured, they have affected 'the viability of community events and organisations and, thus, the opportunities to enhance local social capital. Many regulations and paperwork compliance burdens may have similar unintended adverse impacts on social capital'.³³

CSOs which pursue altruistic purposes and advance the freedom of individuals should be exempt from laws and regulation which substantially hinder their operations without yielding any significant benefit to individuals, the community or CSOs.

Using the simple example of a cake stall organised to raise money for a small CSO, it is evident that the regulations 'protecting' those involved quickly become so onerous as to discourage such activities from taking place at all.

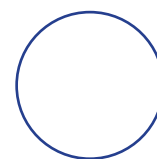
A cake stall may be required by food labelling legislation to state all the ingredients used in every item for sale to very precise specifications. Health regulations may also stipulate that any food which is sold is prepared in an environment which meets stringent hygiene requirements which most household kitchens will find difficult to satisfy. Any staff working to prepare food for the stall may also be subject to occupational health and safety legislation which dictates that training occurs and that the chef's own kitchen be inspected for risk. Any one of these regulations could make the compliance cost for a CSO prohibitive and prevent the establishment of a simple cake stall.

Viscusi and Gayer (2002) have systematically examined the justification for many regulations and found them wanting.³⁴ While there is little or no quantitative data examining the effects that such regulation has on CSOs in Australia, the anecdotal evidence suggests that it is significant.

Where possible, governments should exempt CSOs from complying with burdensome regulation and instead allow individuals to determine how best to manage their risk. Individuals may choose to purchase insurance, take precautions they judge to be reasonable or even bear the risk themselves.

Regulatory exemptions should be particularly focused on assisting those CSOs which receive little financial support as a result of their non-profit status. These regulatory exemptions might be tied to the creation of a new legal entity tailored for the needs of CSOs.

The Irish Law Reform Commission has recently recommended that a new legal structure, specifically designed for use by CSOs, be created.³⁵ The structure, to be known as a Charitable Incorporated Organisation (CIO), will provide protection for directors and managers of CSOs analogous to those available to corporate entities, but with lowered reporting requirements. In Australia, such reporting requirements could be designed to provide for a reasonable balance between the need for accountability and the desire to encourage CSO activity. The relevance and usefulness of such a CIO legal structure should be evaluated in the Australian context as part of a legislated definition of charities and CSOs and a new CSO classification framework.



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