

CHAPTER 5: THE COMMITTEE'S APPROACH

At the outset it is necessary to emphasise one general matter. This is a Commonwealth Inquiry. Its direct concern is with Commonwealth law. The principal concern the Commonwealth has relates to the terms used in its legislation. That is made clear by our terms of reference.

As is well known, the legislative power of the Commonwealth Parliament is limited to specific heads of power, for the most part to be found in the various paragraphs of s 51 of the Constitution. It seems to us that the Commonwealth Parliament has no power to enact laws with respect to charitable entities that will apply generally throughout Australia. What the Parliament can do is to make laws relating to charities for the purpose of identifying them for the purpose of Commonwealth law. For these purposes it may define them. But it may not define them so as to affect, or purport to affect, the laws of the States whether those laws be enacted by statute or derive from the common law. The Territories are in a different position because of the express power to legislate for them in s 122 of the Constitution, although, because they have self-government, the Commonwealth may be reluctant to use the powers which it has.

The division of Commonwealth and State legislative power needs to be kept in mind when the various chapters of this Report are being considered. We shall not always mention it although we shall do so on occasions when the division of legislative power appears to have a special significance.

Nevertheless, it is difficult to deal with a common law concept such as charity without dealing with it generally. In a sense our treatment of the various subject matters discussed in the Report tends to transcend Commonwealth and State legislative boundaries. That is the only way we can deal in a positive way with the matters raised.

Paragraph 4 of the Inquiry's terms of reference does not require options for a definition, but options for enhancing the clarity and consistency of existing definitions. In seeking to provide clearer and more consistent principles it is important not to leave behind the experience of the last 400 years. Even a cursory analysis of the law relating to charities demonstrates the significant role that pragmatism has played in its development. In formulating our recommendations we have endeavoured not to lose the benefit which that has brought with it.

The Committee has addressed the problems identified with the current approach to determining the status of charities and related organisations by

establishing a set of principles that could be applied to a variety of entities and a variety of situations to ensure consistent outcomes. The principles have been driven by the need to address three key imperatives. They are:

- the need for clearer and more consistent guidance to the charitable and related sector and the wider community;
- the need for a framework that can be used as a basis for government decision making about the level of support provided to charities and related organisations; and
- the need to reflect the social and economic environment of charities and related organisations and to be able to respond to changes in that environment.

The principles

The Committee's approach has been to review each of the principles established by the common law. Many of those principles were found to be of continuing relevance and so it is recommended that they be retained. However, the principles were also found wanting in some respects and a number of the recommendations seek to address these deficiencies. Some of the changes recommended by the Committee attempt to restate the principles more clearly. Other recommendations seek to make the concept of charity clearer through amending or adding to the principles. The Committee then applied the enhanced principles to issues that came before it, such as the treatment of political or commercial purposes, or how to treat self-help groups. By doing so, the Committee considers that its recommendations are consistent.

The clarity and consistency of the definitions

Improving the clarity of the definitions has been the background to all the Committee's deliberations. To be of any use, the definitions have to be unambiguous and capable of being understood by all who need to apply them. But achieving clarity can clash with achieving flexibility. For example, a set of principles able to define very varied entities may not fully encapsulate the characteristics of all entities and so leave some unsure of where they stand. Principles that are flexible require case-by-case interpretation on the basis of the facts and so the outcome of an application for charitable status cannot always be known with certainty.

Some of the recommendations in this report are the result of a trade-off between clarity and flexibility. This is unavoidable. However, the Committee

considers that its recommended approach will provide better guidance about what is a charity than is presently available to the sector and the wider community.

A framework for the definitions

The various types of entities mentioned in the Inquiry's terms of reference — charities, religious institutions, not-for-profit community service organisations and public benevolent institutions — have come into existence in an uncoordinated way. This has resulted in a set of definitions that overlap in some places and provide cracks to fall through in other places.

The Committee is recommending a framework that maintains charities at its core and eliminates gaps and overlaps. The framework provides governments with a mechanism for distinguishing between various charitable and related entities. The framework recommended by the Committee is not intended and should not be construed as a recommendation on the level of support for the sector or how that support should be distributed among the different parts of the sector. The framework is intended to be a tool to assist governments to make such decisions.

A number of submissions to the Inquiry questioned how the Committee could consider the definitions without also considering how such definitions were to be applied, particularly in terms of the fiscal implications of those definitions for charities and related entities. The Committee's response to these concerns is that it has developed a set of principles that can be used to distinguish charities and other altruistic entities from other participants in the economy and society. The level of fiscal support that such entities receive is a matter for governments to determine.

Definitions that respond to the social and economic environment

The Committee is conscious that any definitions devised specifically for today's social and economic environment run the risk of being inappropriate for tomorrow's environment. The principles that the Committee recommends as the basis of the definitions have not been developed specifically for today. Instead, the Committee has endeavoured to develop flexible principles that are capable of being applied to changing situations. But regardless of the degree of flexibility allowed for in the application of the principles, there will always be some need to re-evaluate them. For example, the language that the Committee has used has often been chosen so that it can be interpreted in its popular or

dictionary sense. However, the popular interpretation of some of that language will inevitably change over time. The Committee is therefore recommending regular reviews of the principles.