# Finding a place to test public benefit in charity law

**Charity Law Association of Australia and New Zealand Conference 2018**

**The Hon Dr Gary Johns**

**Commissioner Australian Charities and Not-for profits Commission**

## The objective

Object one of the ACNC Act 2013, demands that I 'maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector.'

At this stage I only regulate charities, and therefore I confine my comments to charities.

In the main, object one is interpreted as guarding against charity misdeeds.

But, it could also be about charity deeds.

Those deeds are presumed, by and large, to be for public benefit.

I believe that donors are also looking to discern public benefit in their charities.

We intend to provide a platform for donors to search our register for charities that deliver programs of interest to donors.

The idea is to give donors a better chance to find a charity program that may achieve what they wish – presumably, a public benefit.

My intention today is to invite this association to join the discussion about public benefit.

Like Speaker of the House of Representatives Joan Child who, when mention of her gender was raised in the House, replied, that she did not 'have sex in this position': I too must stay out of the fun.

Instead, my objective is to locate a discussion among a group of people who know well charity law.

My observation of charity law is that it protects the charitable trust to an extraordinary degree. It does this by speaking of charitable purpose.

What if a charitable purpose does not generate a benefit?

'Trust and confidence' cannot rely on promises alone, they require proof.

Can this be fixed at the entry point, i.e. registration of the charity?

**Swim between the flags**

'Swim between the flags' is a familiar metaphor in charity regulation.

On the one side is a flag representing a presumption of public benefit in a charitable purpose, on the other, a flag representing the disqualifying purposes (and governance standards).

The flags are set far apart for maximum safety. Safety for whom?

- Does the beneficiary receive maximum protection?
- Does the donor receive maximum protection?
- Does the taxpayer receive maximum protection?

The law defines who is in and who is out of the charity club, and to a far lesser extent what can be done in the name of charity.

Nonetheless, the law operates in a wider charity market where the wind blows in a different direction.

The law operates in a market where government contracts, won by charities, demand results.

It operates in a market where philanthropists experiment with social bonds and social enterprise that carry the promise of investing in results.

It operates in a market where charities 'problematise' issues and seek 'societal' solutions which seem a long way from charity.

Two recent examples from the mouths of philanthropists may be straws in the wind of future purposes -

'There is a flaw at the heart of economics …. Profit does not measure what we value.' Sure, but I am not sure that encouraging a revolution is a charitable purpose.

And, 'From poverty to inequality.' But 'solving' inequality is not a charitable purpose.

I am sure that these philanthropists are hoping to fund DGR status charities, but I detect considerable drift from charitable purposes.

There are many organisations champing at the bit to prove that they, deep down, have a charitable purpose.

This week, *The Australian* newspaper reported that sport is now charitable, apparently based on the recent registration of the Australian Sports Foundation Charitable Fund.

This report is wrong.

The ASF Charitable fund is confined to the development of sport for sporting facilities in remote disadvantaged communities and for the disabled.

If amateur sport is to become a charitable purpose, it would require either judicial boldness or statutory intervention.

But nothing stops people knocking on our door to get into the charity club.

For example, there is pressure from some quarters for the ACNC to register not-for-profits, or at least the largest of them.

Should that occur, large NFPs may begin to think that they too have a purpose beneficial to the public. These things have a life of their own, especially when there is an incentive to look beneficent.

**Government footprint**

I have also had several people ask about my fascination with donors when private donations are only 8 per cent of the market? Indeed, 40 per cent of charity income comes from government, and the remainder comes from charges for services, most of which are government subsidised.

Surely, such people are not suggesting that government should just take over the entire market?

We know that a charity may be 100 per cent government funded and remain a charity so long as the trust allows control of the activities of the charities purpose.

There is, I think, a credibility problem here …

This is also a long way from a charity asking directly for a donation to support a cause.

Government is not asking taxpayers permission, charities are not asking taxpayers permission There is, therefore, a great deal of expectation placed on the fulfilment of the promise of public benefit.

Is there altruism in government grants? After all, no one gives money to government.

The grant of funds to a charity is controversial it almost certainly offends some taxpayers. This is unlikely to occur with monies directly donated.

And, of course, the philanthropists view of public benefit may differ from taxpayers who subsidise the donation.

Which begs the question, should government 'confine itself to promoting only those charitable purposes that stand to produce outcomes that all reasonable people would agree are good.'[1]

[1] Matthew Harding, 2014. *Charity Law and the Liberal State*. Cambridge University Press, page 47, quoting Nick Martin.

As one commentator has written, 'The charitable sector has a remarkable willingness to believe that only good can come from being embraced by the State.'[2]

Charities sit in a comfortable legal position. And yet, David Crosbie of the Community Council of Australia, following debate around two Bills in Parliament on foreign influence and funding was suggesting he may advise charities to give up their privileges and become political parties. 'I think the "Australian Charities Party" has a certain ring to it!'[3] he wrote.

A word of advice from a former politician: charities so doing would lose their tax advantages, their status, and their donors. And they would almost certainly not win a seat in Parliament.

**Certainty is very important**

I am wholly conscious of the view that 'Charitable purposes offers certainty; determining it according to their activities does not and cannot.'[4]

To stray too far may also open a can of worms, for example to insist that a charity must prove its purpose: presumption removed can unleash old jealousies, as it did with the private schools debate in the UK.

But there is a large gap between purpose and achievement, especially when a charity may have been registered for decades …

It is no concern of the law that a charity is useless, but it is everyone else's concern.

Of course, non-legal remedies may come to the fore, i.e. the charity fails to garner support.

**Decision-makers are given a strong lead in some purposes and not others …**

In Australia, statutory reform has reinforced any presumption of benefit that applied under the old law. The Charities Act of 2013

[2] Blake Bromley, '1601 Preamble: The State's Agenda for Charity.' Charity Law in the Pacific Rim Conference Queensland University Of Technology Brisbane, Australia October 4-6, 2001, page 2.
[3] David Crosbie, 'Time to Party.' *Pro Bono* 12 April 2018.
[4] Mary Synge, 2018. *The 'New' Public Benefit Requirement*. Bloomsbury, page 246.

declares that several types of purpose are presumed to be of benefit to the public unless the contrary is proved by evidence. But not all.

Are there three classes of purpose, the originals where benefit is assumed, those listed in the Act where proof is required and those not listed but analogous where more scrutiny is required first to find whether the analogy is strong and whether the beneficial purpose exists.

The Act leaves some challenges for the charity regulator. First, how are we to interpret the invitation to discern further purposes by analogy to the other purposes listed? Should we confine our discovery of uncovered charitable purposes only to those previously allowed by the courts, or can we analogise ourselves?

Does this mean, to use Matthew Harding's terms, that the legislature exhibits 'a relatively low degree of scepticism' about some purposes and a 'relatively high degree of scepticism' about others?

'Is this combination of general acceptance of the beneficial character of certain types of purpose and scepticism about the beneficial character of specific purposes justified?'[5]

Harding reminds us that 'a purpose is regarded as charitable in law only where the consequences of carrying it out are likely to be beneficial to the public, as opposed to detrimental or neither beneficial nor detrimental.'

This general proposition underpins the 'benefit' component of the public benefit test.

The key question he poses is, 'What counts as sufficient evidence of public benefit?'[6]

He explains, elsewhere, the ways in which decision-makers working with the 'benefit' component of the public benefit test typically go about applying that component.

These ways will mean a great deal more to this audience than they do to me, but they are the tools which law uses to arrive at its conclusions.

[5] Harding 2014, page 30.
[6] Matthew Harding, 2008. 'Trusts for Religious Purposes and the Question of Public Benefit.' *The Modern Law Review* Volume 71 March No 2, page 168.

Further, Harding in his *Charity Law and the Liberal State* is at pains to create a philosophical basis, or at least test a basis in liberal philosophy for charity law.

Now, Matthew's bent towards securing the autonomy of the individual as his anchor to liberalism has too much of the whiff of cosmic justice for me, how long is a piece of string to secure autonomy? But, that is not the question.

His is an adventure in looking at the techniques used to arrive at tests of benefit in charity law.

This search is at the heart of the matter.

This is a debate well worth the effort, especially in a charity market that is unrecognisable, at least in the public mind, from its, perhaps mythical origins.

In any event, the donor wants to know what they get for their money, and the law is not much help at present. It tells us who can play and their intentions, but not a lot else.

**Conclusion**

There will be differing views on whether certain purposes are for the public benefit. Presently there are means to assess the issue.

The applicant or registrant must satisfy the regulator that the proposed purpose is for the public benefit.

If there is no presumption for that purpose, such satisfaction may require objective and perhaps expert evidence.

And the cases indicate that subjective and contested value judgments of 'benefit' and 'detriment' do not have a place in determining public benefit in the charity law context.

The matter can be tested by accessible and affordable review by tribunals and courts.

Professional advisers and academics can make these issues the subject of vigorous discussion in conferences such as this.

And, there is scope for the legislature to re-adjust the settings and provide brighter lines.

But, there is no satisfaction that a charity can achieve its purpose, or that its idealisation of the purpose is so remote as to be impractical.

Ultimately, the donor will decide what is of benefit and what is not. The greater transparency of what is going on in a charity, the better positioned the donor will be to make informed choices of what to support.

There is no coherent or single philosophy underpinning charity law, there may never be, but debate about benefit in this burgeoning sector is a good thing.

I invite this association to turn its mind to better methods to test benefit.