

Greenpeace Australia Pacific submission to the Productivity Commission Report on the Contribution of the Not for Profit Sector.

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nfp@pc.gov.au

Greenpeace welcomes the opportunity to comment on the Productivity Commission's Draft Research Report on the Contribution of the Not for Profit Sector.

While the Report is extensive and contains much that is praiseworthy and much that requires ongoing and further discussion and debate, we have restricted our comments to the issue of the definition of charitable purposes, which we find the most problematic and troubling element of the report.

The Productivity Commission recommends adopting the definition as proposed in the 2001 *Inquiry into the Definition of Charities and Related Organisations* (CDI), and endorses the findings of that inquiry in relation to its discussion of political activities.

The Productivity Commission also recommends a somewhat broader definition of charitable purposes than that currently being used by the Courts and the ATO.

The Committee recommends that a distinction be drawn between purposes that advance a political party or a candidate for political office, which will deny charitable status, and non party-political purposes, that will not affect charitable status provided they further, or are in aid of, the charity's dominant charitable purpose. (Ch 26)

The PC also recommends (Rec 17):

That charities be permitted neither to have purposes that promote a political party or a candidate for political office, nor to undertake activities that promote a political party or a candidate for political office.

Political activities

The CD Inquiry supports continued use of the common law definition of charitable activities with acknowledgement of the importance of political advocacy. Neither the CD Inquiry nor the PC report examine the underlying assumption of targeting political activity for special treatment in the definition of charitable activity. The history of the common law view of charitable purposes seems to regard political activity, by definition, as a non-charitable activity. This is not justified in the CD Inquiry, the PC report or in the ATO ruling (TR2005/21).

The problem with the proposed definition and the treatment of political activity is that it singles out a particular type of activity as requiring special treatment but does not support that position with evidence, either that there is a particular problem with current levels and types of political activities by charitable organizations or that the problems are in any way distinct from similar problems associated with charitable activities in other sectors, such as corporate work.

It is particularly concerning that direct participation in democratic processes is the most likely to be characterised under the PC recommendation as a non-charitable activity. This seems to be justified primarily on historical grounds.

The CDI suggested concerns with capture; in other words that promotion of a particular party or candidate might result in activities that are bipartisan and no longer 'charitable'. Greenpeace acknowledges the risks associated with certain types of partisan political activity in the context of charitable activities, but does not believe that either the PC or the CDI have substantiated the risk or provided any evidence that that would justify its explicit inclusion in the definition of activities that are prohibited. There are five components to this failure:

1. failure to define clearly the nature of the risk associated with political activities;
2. failure to demonstrate that the risk is high;
3. failure to demonstrate that the risk has resulted in events or outcomes that are sufficiently significant or regular in order to justify targeted regulatory treatment;
4. failure to show that the risk is higher than the risks associated with the chilling effects of the proposed regulatory definition;
5. failure to show that the risk is higher or more severe than the risks associated with not for profit activities in other sectors.

Greenpeace would argue that the greater risk in relation to charitable activities is those that are for the benefit of specific corporate interests. We would not, however, argue that in the context of charitable activities that this would need targeted regulatory approaches. It should be noted that Greenpeace does not accept corporate donations.

Interpretation of political activities

While an individual activity may not result in the loss of charitable status, it is in the sum total of activities that a determination will be made. How individual activities are interpreted will obviously be critical to any determination. The current proposed definition is far too open to abuse, ideologically based interpretations and genuine dispute over the purpose(s) of an activity.

The proposed definition may well result in stopping or chilling activities that are charitable. Following the CDI in 2001, the Howard Government introduced tax amendment legislation, which essentially sought to prevent political work of any description for those seeking to retain charitable status. The Bill was far more draconian than the recommendations of the CDI in relation to political activities. This followed large cuts in grants by the Howard Government to most environment NGOs,¹ and what many in the environment movement saw as an attempt by the Howard Government to silence criticism of his policies.

The CDI examined some of the historical approaches to charitable purposes by the courts. For example, the National Anti-Vivisection Society was held not to be charitable in part because one of the main objects of the Society was to seek to repeal the *Cruelty to Animals Act 1876* and to

¹ MacGregor-Lowndes, *Modernising Charity Law*, QUT, April 2009, pp 6-7
<https://wiki.qut.edu.au/download/attachments/89014018/M.McGregor+Modernising+Charity+Law.pdf?version=1>; see also Hamilton and Maddison, *Silencing Dissent*, selection published in the Sydney Morning Herald, Jan 2009,
https://www.tai.org.au/file.php?file=/media_releases/...pdf

institute a new law prohibiting vivisection. Attempts to sway public opinion on controversial social matters have also been held to be non-charitable by courts.²

In this context, the Howard Government's attempt to chill public debate was not an isolated event.

It is a history that does not inspire confidence in the ability of the courts or political decision-makers, who may seek to insulate themselves from criticism, to develop a definition of charitable activities and public good that is sufficiently broad to allow and indeed even encourage legitimate dissent.

As the AidWatch case makes clear, any number of political activities may threaten the charitable status of not-for-profits and may well result in non-for-profits eliminating activities that may be problematic under the current proposed definition.³

The AidWatch decision is based on a simple precept developed through the Common Law: "Political purposes are said to be inconsistent with charity in the legal sense."⁴

In the AidWatch case, the charitable purpose of the organization was recognised but it was the fact that the methods for achieving those ends were primarily political not directly addressing aid questions that justified a finding against them:

*"Having considered Aid/Watch's objects, as stated in its constitution and in the evidence accepted by the Tribunal, there can be no doubt that, ultimately, the organisation directs most, if not all, of its energies towards the relief of poverty, an ostensibly charitable goal. At one level of generality therefore, it could be said that Aid/Watch's goal is the relief of poverty. At another level, however, Aid/Watch's goal may be described as being to influence, and thereby to change, the way in which aid is delivered."*⁵

*"Aid/Watch's attempt to persuade the government (however indirectly) to its point of view necessarily involves criticism of, and an attempt to bring about change in, government activity and, in some cases, government policy. There can be little doubt that this is political activity and that behind this activity is a political purpose. Moreover the activity is Aid/Watch's main activity and the political purpose is its main purpose. Recognising Aid/Watch's ultimate concern to relieve poverty does diminish its political purpose."*⁶

It is deeply disturbing when political engagement, which is fundamentally and critically democratic, is punished as not being in the public good.

² Report of the Inquiry into the Definition of Charities and Related Organisations, June 2001, pp 115, 209, http://www.cdi.gov.au/report/pdf/Charities_final.pdf

³ Commissioner of Taxation v Aid/Watch Incorporated [2009] FCAFC 128 (23 September 2009), <http://www.austlii.edu.au/au/cases/cth/FCAFC/2009/128.html>

⁴ Commissioner of Taxation v Aid/Watch Incorporated [2009] FCAFC 128 (23 September 2009), par. 13

⁵ Commissioner of Taxation v Aid/Watch Incorporated [2009] FCAFC 128 (23 September 2009), par. 30

⁶ Commissioner of Taxation v Aid/Watch Incorporated [2009] FCAFC 128 (23 September 2009), par 37

The PC has recommended a somewhat broader view of charitable purposes than the one currently in force, but Greenpeace suggests it is not broad enough. Political activities by NFPs should be supported unless it is shown (as with any other activity) that the primary purpose of an NFP is private good, either that of the organization itself or those it is being deemed to assist. This shift in both the onus of proof and the nature of the standard would seem more likely to protect legitimate public good activities.

It is the Greenpeace view that the definition of charitable purpose must explicitly recognise political activity, engagement and advocacy as a public good. Greenpeace recommends that Government develop, in consultation with the NFP, sector guidelines for determining when the boundaries of public good advocacy are crossed, not only in political but also corporate and other sectors. These should be reviewed on a regular basis in recognition that cultural, political and social norms will alter.

Greenpeace also recommends that arbitration systems be established to resolve disputes over what constitutes public good activities rather than relying in the first instance on the courts.