

# Ripples in the Boundaries: Elasticity in the Common Law Countries

## Australia

Professor Myles McGregor-Lowndes\*

### Introduction

Australian colonies received English law on settlement, including the law relating to charitable trusts and the *Statute of Charitable Uses of 1601* (Statute of Elizabeth).<sup>1</sup> As Australian states were formed, they adopted or closely followed the English definition of charity based on the Preamble to the Statute of Elizabeth. The classification of four heads of charitable purposes from *Pemsel's* case<sup>2</sup> has been the foundation upon which Australian courts and legislatures have built Australian charity jurisprudence. English case authority has been used consistently as precedent, for example, the principal taxation ruling on the meaning of 'charity' references substantially more English than Australian cases.<sup>3</sup>

Despite this apparent policy transfer *en bloc* to the Australian jurisdiction, the Commonwealth parliament, early in its life, attempted to enact a narrower definition of charity for estate duties, only to be rebuffed by the English Privy Council. Not to be thwarted, the Commonwealth devised a new legal term for a restricted purpose charity, the public benevolent institution (PBI) to achieve its purposes. This characterises the Australian legislative structure of tax deductible gifts to this day. Australian courts have also exercised a creative independence at times, enabling them to determine that a wide range of purposes are charitable, e.g. the preservation of native fauna and flora,<sup>4</sup> the

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<sup>1</sup> 43 Eliz. I, c.4.; The Statute of Charitable Uses 1601 has been repealed with reservations that it will not affect the general law of charity in: the Australian Capital Territory: Imperial Acts Application Act 1986 (ACT) s 4(5), New South Wales: Imperial Acts Application Act 1969 (NSW) s 8, and Queensland: Trusts Act 1973 s 103(1). It is not in force in Victoria, but remains in force in the other jurisdictions.

<sup>2</sup> *Income Tax Special Purposes Commissioners v Pemsel* [1891] All ER Rep 28, Lord Macnaghten. For application of *Pemsel* to: estate duty see *Chesterman v Federal Commissioner of Taxation* [1926] AC 128; to rates see *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corp* (1952) 85 CLR 159; *Ashfield Corp v Joyce* [1978] AC 122.

<sup>3</sup> Australian Taxation Office, *Income tax and fringe benefits tax: charities*, TR 2005/21 & 22, dated 21 December 2005. It cites 145 English cases and only 113 Australian, with 28 decisions from other jurisdictions.

<sup>4</sup> *Attorney General (NSW) v Satwell* [1978] 2 NSWLR 200.

elimination of war,<sup>5</sup> the Church of Scientology,<sup>6</sup> adopting electronic commerce,<sup>7</sup> and the promotion of a culture of innovation and entrepreneurship.<sup>8</sup> The courts have also adopted a wider view of the public benefit needed for charitable purposes that benefit communities abroad.<sup>9</sup>

The contribution of the judiciary is dependent on cases proceeding to court and often to the ultimate court of appeal (the High Court of Australia). The cost of litigation, strategies of regulators to settle out of court to prevent public precedents and the sensitivity of nonprofit organisations to adverse publicity have at different times combined to limit the potential of this avenue. Until recently, the last major case in the High Court had occurred 33 years ago.<sup>10</sup> Without a vibrant case flow, the common law tends to ossify, particularly if there is no quasi-judicial body in the legal environment such as a Charity Commission of England and Wales. However, since 2006, a number of High Court judgements have shown a judicial activism which has literally changed the face of Australian charity jurisprudence.<sup>11</sup>

Recent statutory reform has more than matched this judicial activism. At the state level, legislative amendments have been made to reduce the fiscal impact of judicial decisions. However, at the Commonwealth level it is a different matter. In 2013, the *Charities Act 2013* (Cth) was passed by the Commonwealth parliament to standardise the definition of charity for the purposes of Commonwealth statutes including income tax legislation. This significant legislative reform has led to expansion and clarification of the definition of charity. A year earlier the Commonwealth government had established an independent regulatory commission known as the Australian Charities and Not-for-profits Commission (ACNC) as a one-stop registration gateway for chari-

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<sup>5</sup> *Southwood v AG* [1998] 40 LS Gaz R 37.

<sup>6</sup> *The Church of the New Faith v The Commissioner of Pay-roll Tax* (Victoria) (1983) 154 CLR 120.

<sup>7</sup> *Tasmanian Electronic Commerce Centre Pty Ltd v FC of T* (2005) 142 FCR 371; 2005 ATC 4219; (2005) 59 ATR 10.

<sup>8</sup> *FC of T v The Triton Foundation* 2005 ATC 4891; (2005) 60 ATR 451.

<sup>9</sup> *Re Pieper* (deceased) [1951] VLR 42 (the relief of distress in Europe); *Estate of Schultz* [1961] SASR 377 (the advancement of education in Germany); *Re Stone* (deceased) (1970) 91 WN (NSW) 704 (settlement of healthcare in Greece).

<sup>10</sup> *Bathurst City Council v PWC Properties* (1998) 195 CLR 566 concerned a church carpark and the previous case was *Commissioner of Land Tax (NSW) v Joyce* (1974) 132 CLR 22

<sup>11</sup> *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2006] HCA 43; *Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55; *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42; *Commissioner of Taxation v Bargwana* [2012] HCA 11.

ties accessing Commonwealth entitlements including fiscal concessions. As the experience in England and Wales has shown, the expansion or contraction of the definition of charity through administrative practices can significantly alter the charity boundary.

How elastic have the Australian charity boundaries been and what are the early indications with the new statutory provisions and regulatory arrangements? This paper examines the boundaries of charity definition from the three arms of government with power to influence the scope of the definition: the judiciary, the legislature and the administration. Each is dealt with in turn to ascertain their role in marking the boundaries of charity.

### **Judicial Expansion of the Boundaries**

After a 30-year hiatus, a number of cases have come before the High Court of Australia (the High Court) in recent years. These are examined for their impact on the boundaries of charity, along with a number of other significant decisions. First, the controversial political boundary—a paradigm shift in charity law has occurred in Australia, followed quickly in New Zealand. Second, the boundary between government and charity is examined through a High Court case featuring an organisation which appeared almost to be a creature of government. Third, the boundary between business and charity comes into focus through a series of cases endeavouring to find the line between individual profit and sector advancement. Fourth, the boundary between charity and sport or recreation is addressed. Finally, a selection of cases is presented where the courts have refused charitable status as being beyond the boundaries.

#### *The Political Boundary*

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.<sup>12</sup> 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

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<sup>12</sup> *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

purposes. This was a departure from English precedents, and the case was followed shortly afterwards by a New Zealand decision involving Greenpeace.<sup>13</sup>

AID/WATCH is a nonprofit association which researches, monitors and campaigns about the delivery of overseas aid. It is an organisation concerned with promoting the effectiveness of Australian and multinational aid including investment programs, projects and policies. It does not deliver any aid directly to any person, but produces research reports about Australian aid effectiveness as well as performing publicity events (such as sending derisory 60th birthday gifts to the World Bank suggesting it was time for the bank to retire). AID/WATCH had been endorsed as a charitable institution under the *Income Tax Assessment Act 1997* (ITAA 1997), but the Commissioner revoked these endorsements because, firstly, AID/WATCH did not distribute aid itself, and thus was not charitable, and secondly, it achieved its objects through campaigning which amounted to a political purpose.

The High Court examined the history of the law on political purposes, drawing on the UK cases<sup>14</sup> and their consideration in Australia.<sup>15</sup> The Court also discussed the position in the US which it noted had taken a different path from English law, quoting from §28 of the *Restatement of the Law Third, Trusts*:

A trust may be charitable although the accomplishment of the purpose for which the trust is created involves a change in the existing law. If the purpose of the trust is to bring about a change in the law by illegal means, however, such as by revolution, bribery, or illegal lobbying, or bringing improper pressure to bear upon members of the legislature, the purpose is not charitable. ....

The mere fact, however, that the purpose of a trust is to advocate and bring about a *particular* change of law does not prevent the purpose from being charitable. This is so whether the change is pursued indirectly through the education and persuasion of the electorate, so as to bring about a public sentiment favourable to the change, or through more direct but lawful influences, such as by proper lobbying and other persuasion brought to bear upon legislators. [emphasis in original] ...

Although a trust to promote the success of a particular political party is not charitable, the development and dissemination of information advocating or seeking to improve understanding of a particular set of social, economic, or po-

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<sup>13</sup> *Re Greenpeace of New Zealand Inc* [2014] NZSC 105.

<sup>14</sup> *Bowman v Secular Society* [1917] AC 406; *McGovern v Attorney-General* [1982] Ch 321 at 340.

<sup>15</sup> *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396.

litical views is charitable, whether because it is educational ... or because it contributes to a market-place of ideas that is beneficial to the community.<sup>16</sup>

The majority of the Court (5 to 2) accepted AID/WATCH's submissions that its generation of public debate was a charitable purpose because its activities contributed to public welfare and were therefore charitable within the fourth head of *Pemsel*; and that, whatever the scope of exclusion for political purposes is in Australian law, AID/WATCH's 'purposes and activities ... do not fall within any area of disqualification for reasons of contrariety between the established system of government and the general public welfare'.<sup>17</sup> The majority of the Court stated:

By notice of contention the Commissioner submitted that the Full Court should have decided the appeal in his favour on the ground that the main or predominant or dominant objects of Aid/Watch itself were too remote from the relief of poverty or advancement of education to attract the first or second heads in *Pemsel*. It is unnecessary to rule upon these submissions by the Commissioner. This is because **the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community** within the fourth head in *Pemsel*.<sup>18</sup>

The court decided that the English case of *McGovern v Attorney-General*<sup>19</sup> does not apply in Australia and thus there is no general doctrine which excludes political objects from charitable purposes.<sup>20</sup> The majority decision did issue a note of warning that disqualification of charitable purpose may still occur where a purpose does not contribute to the public welfare, probably by reason of the particular ends and means involved. The two dissenting judgments took a more orthodox approach, finding the organisation did not fall within any of the heads of charity.

### *The Government Boundary*

A case exploring the boundary between government and charity arose when Central Bayside Division of General Practice Ltd (Central Bayside)<sup>21</sup> sought exemption from payroll tax in Victoria on the basis that the wages were paid by a charitable body. Central Bayside was a company limited by guarantee whose members were general

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<sup>16</sup> [2010] HCA 42, [38], quoting from the *Restatement of the Law Third, Trusts*, §28, 23-24

<sup>17</sup> [2010] HCA 42, [46].

<sup>18</sup> [2010] HCA 42, [47] [emphasis added].

<sup>19</sup> [1982] Ch 321.

<sup>20</sup> [2010] HCA 42, [48].

<sup>21</sup> *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2006] HCA 43.

medical practitioners. It was part of a nationwide scheme designed by the Commonwealth government to promote healthcare at a local level through the Divisions of General Practice Program, but the directors were appointed by the members without government interference or power to dismiss them. About 93% of Central Bayside's income was from government grants, with about 43% being an 'outcomes based funding' grant from the Commonwealth. The funding was contractual in nature, rather than a statutory appropriation. Central Bayside's other income was derived from advertising, sponsorship and interest. The Commissioner of State Revenue 'contended that [charitable body status] was precluded because it acted so much under the control or influence of government that it could be seen to be acting in furtherance of government objectives rather than, or as well as, in the independent performance of its own objects'.<sup>22</sup>

All five judges of the High Court arrived at the conclusion that Central Bayside's constitutional objects were charitable, falling within the head of 'purposes beneficial to the community', and it was a 'charitable body'. However, there were three separate judgments with varying reasons for the decision. Gleeson CJ, Heydon and Crennan JJ all agreed that Bayside was not under the control of the government and used the following to decide the worthiness:

1. An examination of the funding agreements found that although they were in large measure in a standard form, the central obligations depended on the 'Programs of Activity' as described in the organisation's extended Strategic Plan and approved Business Plans. As the plans were devised by each division to suit its own purposes, resources, problems and personnel, each organisation in fact proposed the items for Commonwealth funding.
2. The evidence did not reveal that there was in fact any incapacity to negotiate. There was no legal compulsion on the organisation to seek funding from the Commonwealth. That the organisation had to report or follow its strategic plan did not necessarily mean it was under the dictation of the government. The court found that it was common for the donors of funds for charitable purposes to attach conditions to the gift or to stipulate mechanisms

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<sup>22</sup> [2006] HCA 43, [23].

pursuant to which the funds are to be expended. These conditions or stipulations do not affect the charitable character of gifts.

The Court considered that Central Bayside could decide whether to accept or reject the government funding, as it had an independently formed board which made its own decisions. Just because a charity had the same goals as government did not mean, without more, that it was not independent of government. It may have been different if the Central Bayside board members were appointed, dismissed or controlled by government. In a separate judgment, Justice Callinan agreed in principle with this line of reasoning. Justice Kirby also reached the same result, after an interesting review of the place of the definition of charity in modern Australian society. He noted that, ‘For judges, no longer subject to the authority of Imperial or English courts, to maintain obedience to conceptions of “charity” and “charitable bodies”, expressed in such different times, seems, on the face of things, an irrational surrender to the pull of history over contemporary understandings of language used in a modern Australian statute’.<sup>23</sup> However, in the end Justice Kirby did not seek to overturn the current judicial definition of charity.

#### *The Business Sector Boundary*

The *Word Investments case* has been a profound watershed for Australian charity law jurisprudence, entrenching the destination of profits test into Australian taxation law.<sup>24</sup> Word Investments Ltd (Word) was established in 1975 by Wycliffe Bible Translators (Wycliffe) to provide financial and fund-raising support to Wycliffe. Wycliffe is an evangelical missionary organisation that seeks to spread the Christian religion through literacy and translation work, predominantly in the developing world. Wycliffe was an income tax exempt charity and claimed that Word Investments was exempt as a charity as well.

Word Investments initially raised funds through housing development and then passed any surplus on to Wycliffe. These activities ceased in the early 1980s, but in the late 1980s Word took over the fundraising activities then carried on by Wycliffe, activi-

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<sup>23</sup> [2006] HCA 43, [96].

<sup>24</sup> *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204.

ties which consisted of investing money borrowed at non-commercial rates from supporters. At this time, Word also offered financial planning for a fee. Word continued to pass funds to Wycliffe until, in 1996, it resolved to establish Bethel Funerals, a business that traded with the public, giving surplus funds back to Wycliffe.

The Administrative Appeals Tribunal, the Federal Court, and then the Full Court of the Federal Court found by an examination of its constitution that Word was charitable.<sup>25</sup> In the High Court, Gummow, Hayne, Heydon and Crennan JJ found that Word was entitled to be regarded as a 'charitable institution' under the ITAA 1997.<sup>26</sup> Their Honours found that Word's objects were confined to advancing religious charitable purposes and it endeavoured to make a profit only in aid of its charitable purposes. They considered that to isolate the goal of profit as the relevant purpose would be to create a false dichotomy between characterisation of an institution as commercial or charitable. In that regard, although the commercial fundraising activities of Word were not intrinsically charitable they were charitable in character because they were carried out in furtherance of a charitable purpose.

There are other recent cases in which nonprofit organisations that seek to further the conduct of commerce in a community or a specific subsector of industry and commerce have been pulling at the definition of charity in the courts in the quest for fiscal concessions. The first case sought to promote inventors and innovation, the second electronic commerce and finally a state chamber of commerce sought charity status.

The principal object of the Triton Foundations was 'the promotion of a culture of innovation and entrepreneurship in Australia, particularly among the young, by visibly assisting innovators to commercialise their ideas.'<sup>27</sup> Triton provided advice to inventors on marketing, intellectual property, business planning, etc., by telephone, facsimile, e-mail or in person with an interactive website that provides a self-assessment module to assist inventors identify gaps in their knowledge and to determine where

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<sup>25</sup> *Re VT 2003/66 v The Commissioner of Taxation* AAT, 2005 No VT 2003/66; *Commissioner of Taxation v Word Investments Ltd* [2006] FCA 1414; *Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171.

<sup>26</sup> *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204.

<sup>27</sup> *FCT v The Triton Foundation* [2005] ATC 4715.



they are placed in the pathway to a commercial product. The website was accessible by the public. However, Triton provided further services to some people through case managers who reviewed applications for assistance and provided guidance. Triton's initial services, up to the assessment by a case manager, were available to any person, but the result of the assessment could be advice to an applicant that there was no point in continuing the process. Triton was free to decline assistance to any individual and was 'more likely to concentrate its resources on ideas that [were] more likely than others to be successful'.

The Commissioner submitted that Triton's broad object of 'promoting a culture of innovation and entrepreneurship in Australia' was too vague and imprecise to fall within the spirit and intendment of the preamble to the Statute of Elizabeth. Since Triton's activities focused on assisting innovators to commercialise their ideas and it limited its services to innovators that showed commercial potential, Triton was not a charitable institution. The Commissioner contended that Triton's services were not available to all members or a relevant section of the community without discrimination. Ultimately, although the purpose of promoting innovation in commerce or industry, was capable of being a charitable purpose, Triton was not a charitable institution because of the way in which it was seeking to carry out its purpose. Alternatively, Triton was not a charitable institution, because its real purpose was to benefit individuals.

The court considered that Triton focused on inventors, especially inventors with ideas that were most likely to have commercial success, as a means to achieve its main promotional object, which was designed to benefit the community at large. The assistance given to inventors, though of direct benefit to them, was concomitant or ancillary to its principal object. This assistance, which was intended to enable Triton to 'showcase' inventors and their inventions, complemented Triton's other activities, also directed to promoting and publicising an innovative and entrepreneurial commercial approach in Australia. Triton offered its services for the benefit of the public or a sector of the public, as opposed to individual members of the community. Therefore it was a charitable purpose. A similar conclusion was reached in *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*<sup>28</sup> which involved a company formed

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<sup>28</sup> [2005] ATC 44219.

jointly by the Tasmanian government and the University of Tasmania to assist Tasmanian business and industry to adopt electronic commerce.

A case considering a similar point involved the Chamber of Commerce and Industry of Western Australia (CCI), a nonprofit association established through an amalgamation of representative industry and commerce bodies. The CCI sought exemption from the payment of state payroll tax on the basis that it came within the definition of a 'charitable body or organisation' for the purposes of the *Pay-roll Tax Assessment Act 2002 (WA)* (the Act).<sup>29</sup> The Commissioner of State Revenue (the Commissioner) rejected the application for exemption, arguing that the main (or at least equally important) purpose for which the CCI carried on its operations was to provide services to its members rather than any purpose which was directed to the benefit of the public generally.

The CCI argued that it was exempt because it was a charitable body or organisation falling under 'other purposes beneficial to the community'. It described its central and dominant purpose as being 'to make it easier to do business' through pursuing a competitive and responsible free enterprise economy. This was re-phrased in its submissions to read 'the charitable purpose of promotion of industry and commerce in Western Australia and Australia.' The Tribunal had to consider whether the promotion of commerce could be a charitable purpose.

The Commissioner acknowledged that it had been recognised that the promotion of industry or commerce in general can be a public purpose of a charitable nature, so long as it is for the benefit of the public or a considerable section of the public and not for the purpose of furthering the interests of individuals engaged in trade, industry or commerce. However, the Commissioner took the view that the CCI existed to help individual members to carry on their businesses. Its object was not to support business generally. That is, there was no true 'public benefit'.

The Tribunal considered in detail the CCI's history, constitution and current activities and concluded:

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<sup>29</sup> *Chamber of Commerce and Industry of Western Australia Inc v Commissioner of State Revenue* [2012] WASAT 146.

The critical question for present purposes is not as to the nature of the activities, but rather as to the purpose of which those activities are carried on. Are the activities of CCI directed to the purpose of promotion and industry, generally in Western Australia, as the applicant contends, or rather are the activities directed to serving the private interests of members or other businesses, as the Commissioner contends? ...

The activities ... including the numerous discussion and policy papers, the activities of various committees and the advocacy and lobbying role played by CCI, are all suggestive of an organisation being carried on for a public benefit (in the sense that promotion of industry and commerce has been recognised as being directed to public benefit). The fact that the role played by CCI may be driven from a particular political or philosophical perspective does not disqualify its purpose from being characterised as charitable ... This suggests that the principal purpose of CCI is a public purpose of a charitable nature within the fourth class of charitable purposes referred to in *Pemsel*.<sup>30</sup>

The Tribunal took the view that the CCI's **main** purpose was charitable, and that it should be exempt from payroll tax. The tenor of this view has been recently confirmed in another case<sup>31</sup> and state governments are statutorily narrowing the judicial decision as we will show in the next section.

The Victorian Women Lawyers' Association (VWL) claimed it was exempt from income tax as a charitable institution but the Australian Taxation Office (ATO) disagreed.<sup>32</sup> The Commissioner questioned whether the activities of VWL were of 'benefit' or 'service' in relation to the association's concerns with gender based discrimination and the need to take positive steps to overcome it. After examining the legislation in the various States, and International Conventions that Australia was party to, the court decided that advancement of women on an equal basis with men was of benefit and service to the community.

The Commissioner's objection to the 'law reform' objects of the VWL constitution were dismissed, as it was not a significant element of VWL's purposes. A further contention was that either the association was for the advancement of VWL's members directly, and only indirectly for women lawyers as a whole, or that it was a social or networking group. The court found that the principal purpose was to remove barriers and increase opportunities for participation by and advancement of women in the legal

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<sup>30</sup> [2012] WASAT 146, [90], [93]–[94].

<sup>31</sup> *Queensland Chamber of Commerce and Industry v Commissioner of State Revenue* [2015] QSC 77.

<sup>32</sup> *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983.

profession in Victoria and such other activities were only incidental or ancillary to its main purpose. Thus, VWL was a charitable institution for the purposes of the ITAA 1997.

### *Sporting Boundary*

The boundary between sport and recreation has shown some flexibility in recent judicial decisions. The English case of *In Re Nottage*<sup>33</sup> was approved by the High Court in *The Royal National Agricultural and Industrial Association v Chester*<sup>34</sup> and had been followed in Australia in a long line of cases to exclude sports, recreation and pastimes from being charitable. *Chester* involved a residuary bequest to a charitable body for the purpose of applying the income to improving the breeding and racing of homing pigeons. The gift was held not to be for a charitable purpose.

More recently, Bicycle Victoria<sup>35</sup> was found by the courts to be charitable. In 2009 its Statement of Purposes was amended to read: ‘The purpose of the association is to promote the health of the community through the prevention and control of disease by “More People Cycling More Often.”’ The court decided that it was a charitable organisation. 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.<sup>36</sup>

Yachting Australia Incorporated,<sup>37</sup> was also found to be charitable. It had sought exemption on the basis that it was heavily involved in educational activity, providing the only system of nationally endorsed training and certification to a common Australian standard for recreational users of both sail craft and power boats. To this end, a network of Yachting Australia Training Centres had been authorised Australia wide. Approximately 1300 instructors had met standards pre-determined by Yachting Australia. In addition, following several deaths in the 1998 Sydney to Hobart Yacht Race, Yachting Australia had played a vital role in the development of a Safety and Sea Sur-

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<sup>33</sup> [1895] 2 Ch 649.

<sup>34</sup> (1974) 48 ALJR 304, 306.

<sup>35</sup> *Bicycle Victoria v Commissioner of Taxation* [2011] AATA 444.

<sup>36</sup> *Bicycle Victoria v Commissioner of Taxation* [2011] AATA 444.

<sup>37</sup> [2005] NSWADT 208.

vival Course for the crews of racing yachts. Such activities led the New South Wales Administrative Decisions Tribunal to conclude that Yachting Australia was not merely involved in a non-charitable pursuit of sport, but clearly carried on a ‘significant’ educational activity which enhanced public welfare.<sup>38</sup>

On the other hand, Northern NSW Football Ltd (NNF)<sup>39</sup> was involved in the sport of soccer, and claimed that a portion of its payroll was exempt from payroll tax as it was a nonprofit organisation having as its sole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose. The Court held that the dominant purpose of the NNF was the promotion and management of football. Any benefit to the community (such as health etc.) from playing football was a result of the purpose, and not a purpose in itself. Therefore, the purposes of the NNF were neither charitable nor benevolent.

#### *What Is Not Charitable*

In two recent cases the courts can be seen to draw a line which they are reluctant to cross in relation to the definition of charity. In one case, the Commissioner of Taxation sought to revoke the charitable institution income tax exemption status of an organisation known as The Study and Prevention of Psychological Diseases Foundation Incorporated (SPED).<sup>40</sup> The founders of SPED had previously been engaged in group living experiments, and ‘research’ since the mid-1980s. One of its founders had published a book on the issue of ‘emotional quotient’, and another had operated multidisciplinary ‘health’ clinics. They had also developed the ‘Ideal Human Environment’ (IHE) as a means of assisting young people with social disorders. SPED claimed to be formed to engage in ‘24 x 7’ research and then to trial and test research findings through the conduct of programs designed to promote the prevention of psychological disease, and included in its objects:

- The Foundation[‘s] objects are for public benefit and charitable purposes,

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<sup>38</sup> [2005] NSWADT 208, [27].

<sup>39</sup> *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51.

<sup>40</sup> *The Study and Prevention of Psychological Diseases Foundation Incorporated and Commissioner of Taxation* [2013] AATA 919.

in seeking to promote the prevention and control of psychological diseases in human beings and therefore setting out to ultimately create the Ideal Human Environment (IHE).<sup>41</sup>

- ... primarily to operate and fund a research team that functions 7 days a week, 24 hours a day, whose purpose is to research human psychological disease by studying a cross-section of human behav[iour] in a variety of emotional, social and physical conditions, circumstances and environments.<sup>42</sup>

Any person could become a member of SPED, and the number of members was allegedly unlimited. There were two types of membership: full-time research team members (FTRs), and freelance research team members (FLRs, which included anyone who had ever attended a course run by SPED). However, only the FTRs were really regarded as members and at the date of trial, they numbered 17. All the members were bound by blood ties, marriage or friendship. SPED had never actively sought membership from the general public. It was said to undertake ‘action based qualitative research whereby research is undertaken in an interactive real time manner.’ This involved using ‘the whole number of possible hours in any one week’. All the members were described both as ‘researchers’ and ‘guinea pigs.’ However, none of them had any qualifications in psychology or any social science, although one of the founders was a chiropractor.

The range of human experiences examined was said to include dealing with poverty, opulence, crowded living, living alone, living in cities, living in remote isolated communities, living overseas, and living in Australia. In effect, however, the members were just living their normal lives, and referring to that experience as ‘research’. One of the projects undertaken was ‘Project Inebriation’ which dealt with the experience of owning and using luxury motor vehicles. The vehicles, including a Hummer (\$100,000), a Ferrari (\$300,000) and a Rolls Royce (\$695,000), were purchased by SPED. Another was ‘Project India’ which funded a member’s trip to India to attend a wedding. None of the ‘research’ conducted was ever published in any journal of medicine or social science, although there were apparently internal reports produced. Membership required payment as described by clause 9 of the Constitution:

Upon joining the SPED SRT [Social Research Team] all your assets become part of the asset base to be available for use by the SPED Foundation. This includes cash and all forms of property. These assets form part of what is termed entry princip[al] assets.

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<sup>41</sup> Clause 4 of its Constitution.

<sup>42</sup> Clause 5.1 of its Constitution.

Assets were said to be returnable ‘upon the completion of this agreement’ but no interest was payable. In addition, all the income earned by members (most of whom were employed or self-employed in regular jobs) was given to SPED. Thus, all the members paid no income tax. All the members’ expenses (including ordinary household expenses) were paid by SPED, and claimed by it as costs of research. SPED’s accounts revealed that it engaged in very substantial share trading during 2008–09. It had assets of \$10,665,655 and liabilities of \$3,151,812 as at 30 June 2009. There were very substantial expenses recorded during 2009 including ‘research expenses’, which at \$760,000, embraced ordinary household expenses, travel and ‘personal items’. Moreover, there were questionable amounts included which in evidence were identified as possible loans, but appear to have been advances to companies owned and operated by the founder members.

SPED claimed to be a charitable institution having charitable purposes within two of the classes described in *Pemsel*: the advancement of education and other purposes beneficial to the community. Taking all the evidence into account, the Tribunal did not accept that SPED’s activities were at all charitable, or in accordance with its objects:

SPED’s principal activities, as it claims, are the research its members are carrying on 24 hours per day, seven days a week. I do not accept that this is research. The members’ activities, described by SPED as research, are predomin[ant]ly the ordinary activities of life. They are carried out for the personal benefit of the members themselves. Similarly SPED claims that all of its expenditure is on research. However, overwhelmingly, its expenditure goes on its members’ living expenses, other personal expenditure, and commercial investments. Expenditure in any way beneficial to the community is insignificant compared to expenditure on private purposes...

SPED’s actual activities do not coincide with the stated objects in its Constitution. It does not fulfil the charitable purposes it asserts. It exists, and existed during the relevant years, for the benefit of its small number of members. A considerable part of that benefit is financial... SPED was not at any relevant time a charitable institution.<sup>43</sup>

In another recent case, the High Court has indicated that there is a limit to a beneficial interpretation of the taxing statutes in relation to charity.<sup>44</sup> Mr and Mrs Bargwanna, were the trustees of the Kalos Metron Charitable Trust (the Fund). The

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<sup>43</sup> [2013] AATA 919, [70]–[71], [74]–[75].

<sup>44</sup> *Commissioner of Taxation v Bargwanna* [2012] HCA 11.

objects of the Fund were accepted as charitable and for the public benefit. However, the Commissioner denied that the trust was a nonprofit entity, and that its funds were applied for the purposes for which it was established. The trust deed did not contain acceptable clauses which prevented the distribution of profits or assets for non-charitable purposes, the income of the trust had been accumulated over the period of 2002 and 2003 and had not been applied for any of its stated purposes since 1997, and there was maladministration of the Trust between 2002 and 2007. In particular, in breach of trust, moneys were mixed with moneys held by the trustees for others. Further, the trustees in their personal capacities obtained a housing loan from a bank and as partial consideration for that advance, a sum that represented almost half of the net assets of the Trust was transferred into a non-interest bearing account with the bank which was maintained by the respondents in their personal capacity. By this means the interest on the housing loan was reduced. The court found that the administration of the trust was not motivated by an intention to defraud the fisc, but it was not charitable.

## Legislative Expansion of the Boundaries

### *State Jurisdictions*

In Australia, formal division of powers between the states and the Commonwealth primarily gives power to regulate charities to the states, so that most legislation in respect of charities comes under the jurisdiction of the states and territories. Between them, the states and territories have over 150 pieces of legislation which use a definition of charity, but the two key definitional statutes are those that are used to collect taxes for stamp duty, payroll and land tax and those that modify the law of trusts. The statutory definitions borrow heavily from the common law definition of charity, with specific statutes adding other activities or confining the definition as policy dictates.

In some states, the *Statute of Charitable Uses of 1601* (Statute of Elizabeth) is still in force, since having been adopted when the states were British colonies.<sup>45</sup> Some have even imported statutory amendments. The English case of *Inland Revenue Com-*

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<sup>45</sup> 43 Eliz. I, c.4. *The Statute of Charitable Uses 1601* has been repealed, with reservations that its repeal does not affect the general law of charity in: the Australian Capital Territory: *Imperial Acts Application Act 1986* (ACT) s 4(5), New South Wales: *Imperial Acts Application Act 1969* (NSW) s 8, and Queensland: *Trusts Act 1973* (Qld) s 103(1). It is not in force in Victoria, but remains in force in the other jurisdictions.



*missioners v Baddeley* [1955] AC 572 stimulated the English Parliament to enact the *Recreational Charities Act 1958* (UK) to permit facilities for recreation and other leisure purposes to be considered as charitable, and similar provisions were enacted in Queensland, South Australia, Tasmania and Western Australia to make it charitable ‘to provide, or to assist in the provision of, facilities for recreation or other leisure-time occupation, if those facilities are provided in the interests of social welfare’.<sup>46</sup> This has had the effect of broadening the definition of charity in those jurisdictions.

The Report into the Definition of Charity gave the example of the *Charities Funds Act 1958* (Qld) which includes a long list of purposes, prefaced by the statement: ‘In this Act, charitable purpose means every purpose which in accordance with the law of England is a charitable purpose’<sup>47</sup> and then goes on to list a number of specific purposes which widen the definition:

- (a) the supply of help, aid, relief, assistance, or support howsoever to any persons in distress (including, but without limiting the generality thereof, the supply of the physical wants of any such persons);
- (b) the education or instruction (spiritual, mental, physical, technical, or social) and the reformation, employment, or care of any persons;
- (c) any public purpose (whether of any of the purposes before enumerated or not) being a purpose in which the general interest of the community or a substantial section of the community (at large or in a particular locality), as opposed to the particular interest of individuals, is directly and vitally concerned;
- (d) the construction, carrying out, maintenance, or repair of buildings, works, and places for any of the purposes aforementioned;
- (e) any benevolent or philanthropic purpose (whether of the purposes before enumerated or not);

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<sup>46</sup> *Trusts Act 1973* (Qld) s 103; *Charitable Trusts Act 1962* (WA) s 5(1); *Trustee Act 1936* (SA) s 69C; *Variation of Trusts Act 1994* (Tas) s 4(1).

<sup>47</sup> *Charities Funds Act 1958* (Qld) s 2.

(f) any analogous purpose declared either generally or in the particular case for the purposes of this Act by the Governor in Council by order in council published in the gazette to be a charitable purpose.<sup>48</sup>

This significantly broadens the definition of charity for the purposes of the Act. On the other hand many state and territory statutes narrow the definition, for example the *Taxation Administration Act 2001* (Qld) in which an organisation is exempt from payroll tax when it is ‘fulfilling a charitable object or promoting the public good’<sup>49</sup> but is excluded if it has a leisure, recreational, social or sporting object or pursuit.<sup>50</sup>

In response to recent cases that have widened the definition of charity to include chambers of commerce under the fourth head of charity, one state and one territory have introduced amendments designed to protect their taxation revenue. For example, the Western Australian parliament enacted the *Taxation Legislation Amendment Act (No 2) 2015* (WA), following the decision in *Chamber of Commerce and Industry of Western Australia Inc v Commissioner of State Revenue*<sup>51</sup> where it was decided that the principal purpose of the Chamber of Commerce was a public purpose of a charitable nature, within the fourth class of charitable purposes referred to in *Pemsel*, i.e. purposes beneficial to the community and having a public benefit. The legislative amendment reduces the scope of concessions for stamp duty, pay-roll tax and land tax for certain classes of charities by identifying them as ‘relevant bodies’. The definition of ‘relevant body’<sup>52</sup> is:

- (a) a political party;
- (b) an industrial association;
- (c) a professional association;
- (d) a body, other than a body referred to in paragraph (a), (b), (c) or (e) that promotes trade, industry or commerce, unless the main purposes of the body are charitable purposes that fall within the first 3 categories (being relief of poverty; advancement of education and advancement of religion) identified by Lord

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<sup>48</sup> *Charities Funds Act 1958* (Qld) s 2.

<sup>49</sup> *Taxation Administration Act 2001* (Qld) s 149C(3)(a).

<sup>50</sup> *Taxation Administration Act 2001* (Qld) s 149C(3)(b).

<sup>51</sup> [2012] WASAT 146.

<sup>52</sup> *Duties Act 2008* (WA) s 96A.

Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 as developed by the common law of Australia from time to time.

(e) a body that is a member of a class of bodies prescribed for the purposes of this paragraph;

(f) a body that [is a member of a pay-roll tax group, related body corporate, or that has a sole or dominant purpose of conferring a benefit on another relevant body].

It is still possible for organisations to be exempted from disqualification by the Finance Minister, with the Treasurer's concurrence.

The Western Australian amendment was followed quickly by the Northern Territory, which enacted the *Revenue and Other Legislation Amendment Act 2015* (NT) in June 2015, to restrict payroll tax concessions for charities. The new categories of 'excluded entities' are predominantly based on purposes:

- A 'trade, industry or commerce entity', which includes an entity if 'a purpose of the entity is to promote trade, industry or commerce (whether generally or in respect of any particular kind of trade, industry or commerce)', but not where the sole or predominant purpose of the entity is one or more of the first three limbs of charitable purposes.
- A 'political party', defined as 'an entity that has as one of its purposes the promotion of the election' of a candidate endorsed by it.
- An 'industrial association', which is defined by reference to the identity of the persons associating together (employers or employees) and in some instances also by reference to purpose.
- A 'professional association', defined as 'an entity that has as one of its purposes the promotion of the interests of its members in any profession'.<sup>53</sup>

In both cases, the principal reason given for the amendments was to protect the revenue, and it has been mooted that other jurisdictions are considering introducing similar limitations on the definition of charities for taxing statutes.

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<sup>53</sup> *Payroll Tax Act 2009* (NT) ss 48A and 48B.

### *Commonwealth Jurisdiction*

The Commonwealth of Australia came into existence in 1901 as a federation of states and territories. The Commonwealth (federal) government eventually came to be responsible for the bulk of taxation, in particular, income tax for the whole of Australia, including provisions relating to charities. There has been significant statutory movement in the definition of charity in the federal jurisdiction, firstly to narrow the definition in the early years of federation, and, in the last decade, to reform and widen the definition.

The *Income Tax Assessment Act 1915* (Cth) exempted ‘the income of a religious, scientific, charitable, or public educational institution’ from income tax<sup>54</sup> and allowed a deduction for ‘gifts exceeding Twenty pounds each to public charitable institutions in Australia.’<sup>55</sup> While income tax exemption was accorded to organisations with purposes regarded as charitable under the *Pemsel* formulation, the word ‘public’ was intended to narrow the class of institutions that could receive deductibility status to those whose purposes came with the popular meaning of charity. This same narrow definition used in a different federal taxing statute was challenged in 1920<sup>56</sup> and again in 1925, and while the High Court found that the deduction was limited to the narrow popular meaning of charity, an appeal to the Privy Council in England saw this decision reversed and replaced by the wider legal meaning.<sup>57</sup> The next legislative review of the taxation legislation introduced the term public benevolent institution (PBI) to revert back to the narrow popular definition.<sup>58</sup>

Following this, the parliament added specific descriptions of nonprofit activities to statutes rather than expanding the definition of charity, for example granting income tax exemption for sporting, cultural and some industry associations. It was not until 1999 that serious consideration was given to the meaning of the term ‘charity’ as used in statutes.

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<sup>54</sup> s 11(d).

<sup>55</sup> s 18(h).

<sup>56</sup> *Swinburne v Federal Commissioner of Taxation* (1920) 27 CLR 377.

<sup>57</sup> *Chesterman v Federal Commissioner of Taxation* [1925] 37 CLR 317; 26 AC 128

<sup>58</sup> *Income Tax Act 1927* (Cth) s 23.

The Charities Definition Inquiry (CDI)<sup>59</sup> had its genesis in significant tax reform at the turn of the century when Australia adopted a broad-based transaction tax (known as the Goods and Services Tax or GST) to replace a wholesale sales tax (WST) and some other state transaction taxes.<sup>60</sup> To secure the passage of the legislation, the government made various concessions, including a promise to hold an inquiry into the definition of charity that was used to exempt or preference certain nonprofit organisations. Nearly two years later an inquiry into definitional issues relating to charitable, religious and community service nonprofit organisations – the Inquiry into the Definition of Charities and Related Organisations (CDI Inquiry) – was held.<sup>61</sup> It was not a full independent Law Reform Commission brief as expected, but a relatively quick ‘committee’ inquiry headed by three prominent lawyers. The Inquiry reported on 30 June 2001 to the Federal Treasurer. It made 27 recommendations, among which was the introduction of a statutory definition of charity with an independent administrative body for federal law. It recommended specifically that:

- The principles enabling charitable purposes be set out in legislation; and
- Agreement of state and territory governments to adopt a nationally consistent definition.

In relation to widening the definition of charity it recommended that:

- Self-help groups which have open and non-discriminatory membership be regarded as meeting the public benefit test and thus charitable;
- Closed or contemplative religious orders also be regarded as meeting the public benefit test and thus charitable; and
- Care, support and protection of children be a charitable purpose

It also recommended that the following matters should not be considered charitable:

- Sport and recreation unless a charitable purpose was furthered by it;
- Bodies effectively controlled by government;

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<sup>59</sup> *Inquiry into the Definition of Charities and Related Organisations*, established 18<sup>th</sup> September 2000, <http://www.cdi.gov.au/>.

<sup>60</sup> *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

<sup>61</sup> The Hon John Howard MP, ‘Inquiry into Charitable and Related Organisations’ (Media Release, 18 September 2000), Pandora Archive, National Library of Australia <[http://pandora.nla.gov.au/pan/10052/20010821-0000/www.pm.gov.au/news/media\\_releases/2000/media\\_release456.htm](http://pandora.nla.gov.au/pan/10052/20010821-0000/www.pm.gov.au/news/media_releases/2000/media_release456.htm)>.

- Bodies that have purposes that promote a political party or a candidate for political office;
- Bodies where there is a relationship between beneficiaries and the donor such as family or employment relationship;
- Bodies that have illegal purposes or are contrary to public policy; and
- Bodies that have activities that are illegal, contrary to public policy or promote a political party or a candidate for political office.

After receiving the recommendations of the CDI Inquiry Report,<sup>62</sup> the federal government announced in 2003 that it intended to amend the definition of charity for all federal purposes including income tax exemption, and requested the Board of Taxation to prepare a report on a draft bill, which was released in May 2004.<sup>63</sup> The Board of Taxation is a body, independent of government, which reviews potential taxation legislation and advises the government on improving its design and effectiveness. The Board was to consult not about the announced policy of the Government, but about its workability as enacted in the legislation. It found a number of possible defects in the legislation and reported widespread opposition amongst charities and their professional advisors.<sup>64</sup>

The Treasurer finally brought a much shorter and revised bill before Parliament to amend the definition of charity in a very limited way, ignoring most of the CDI recommendations. The bill contained a statutory extension to the common law definition of charity to include nonprofit child care available to the public, self-help groups with open non-discriminatory membership, and closed or contemplative religious orders that offer prayerful intervention to the public. The legislation applied from 1 July 2004.<sup>65</sup> Many were disappointed with these minor amendments, and after a change of government, they attracted the attention of the new government with a reformist bent. The new Treasurer commissioned a research report from the Productivity Commission,

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<sup>62</sup> I Sheppard, R Fitzgerald and D Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001).

<sup>63</sup> Hon Peter Costello MP, Treasurer of Australia, 'Release of Charities Definition Exposure Draft' (Media Release, No 059, 22 July 2003).

<sup>64</sup> Board of Taxation, *Review of the Definition of a Charity*, <[http://www.taxboard.gov.au/content/content.aspx?doc=reviews\\_and\\_consultations/definition\\_of\\_a\\_charity/default.htm&pageid=007](http://www.taxboard.gov.au/content/content.aspx?doc=reviews_and_consultations/definition_of_a_charity/default.htm&pageid=007)>.

<sup>65</sup> *Extension of Charitable Purpose Act 2004* (Cth).

another government funded, but independent, policy research body. In 2010, the commission published a wide ranging report on the charitable sector and made recommendations about the definition of charity, which revived the CDI report recommendations. Specifically the recommendations included:

- Recommendation 7.1  
The Australian Government should adopt a statutory definition of charitable purposes in accordance with the recommendations of the 2001 Inquiry into the Definition of Charities and Related Organisations.
- Recommendation 7.2  
State and territory governments should recognise the tax concession status endorsement of not-for-profit organisations at the Commonwealth level. Given the disparities between eligibility for tax concessions across jurisdictions, state and territory governments should utilise such Commonwealth endorsements in determining eligibility for their jurisdictional concessions, and seek to harmonise tax concessional status definitions or classifications with the Commonwealth over time.<sup>66</sup>

This time the government acted upon the report and in 2012 a discussion paper on a statutory definition of charity was released by Treasury, in 2013 a draft bill was released for comment, and then a bill was introduced into parliament. The Charities Bill 2013 and the Charities (Consequential Amendments and Transitional Provisions) Bill 2013 were passed in 2013 to come into force on 1 January 2014. An independent commission known as the Australian Charities and Not-for-profits Commission (ACNC) was established by its own legislation in 2012 to act as a one-stop registration gateway for charities accessing Commonwealth entitlements including fiscal concessions. This significant legislative reform has led to expansion and clarification of the definitions of charity, but the exact boundaries will be shaped by administrative practice and eventually through judicial review.

The statutory definition set out in the Charities Act 2013 (the Act) generally preserves the common law principles by introducing a statutory framework based on those principles, but incorporating minor modifications to modernise and provide greater clarity and certainty about the meaning of charity and charitable purpose. It is expected that this will still allow further judicial development in the Commonwealth jurisdiction.

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<sup>66</sup> Productivity Commission, *Contribution of the Not-for-Profit Sector: Research Report* (2010), xlvi.

Charitable purposes under the Act are:

- advancing health;
- advancing education;
- advancing social or public welfare;
- advancing religion;
- advancing culture;
- promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- promoting or protecting human rights;
- advancing the security or safety of Australia or the Australian public;
- preventing or relieving the suffering of animals;
- advancing the natural environment;
- any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, the above purposes;
- promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, in furtherance or protection of one or more of the above purposes.<sup>67</sup>

The statutory definition moves from the four traditional *Pemsel* purposes to eleven categories of purpose. The nomenclature of education and religion remain, while relief of poverty, sickness and the needs of the aged are captured under the headings of advancing health and advancing social or public welfare. The other eight categories capture the fourth head, purposes beneficial to the community, with an encompassing provision for beneficial purposes analogous to those stated.

It is worth noting that the various purposes adopt different verbs: ‘advancing’, ‘promoting’, ‘promoting or opposing’, and ‘promoting or protecting.’ The Act defines ‘advancing’ to include protecting, maintaining, supporting, researching and improving’,<sup>68</sup> but the other terms are not defined. The dictionary and ordinary meanings of the words are very similar. As a matter of statutory interpretation, where the drafter could have used the same word but chose to use a different word, it can be inferred

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<sup>67</sup> *Charities Act 2013* (Cth) s 12.

<sup>68</sup> *Charities Act 2013* (Cth) s 3.



that the intention was to change the meaning.<sup>69</sup> If this is the case, it is unclear whether the meaning of ‘promoting’ will be wider or narrower than ‘advancing.’

### *Purposes for Public Benefit*

Certain purposes are presumed to be for the public benefit unless there is evidence to the contrary. These are: preventing and relieving sickness, disease or human suffering; advancing education; relieving the poverty, distress or disadvantage of individuals or families; caring for and supporting the aged or people with disabilities; and advancing religion.<sup>70</sup> These maintain the common law position, but the presumption is extended to the whole of the public benefit test, rather than merely a presumption that the purpose is beneficial. In line with the common law position, the presumption of public benefit is rebutted or overturned where there is evidence available to suggest that an entity does not in fact meet the public benefit test or an element of the test, so an organisation may be challenged to provide evidence demonstrating that its purpose is for a public benefit.

### *Indigenous Kinship Organisations*

Indigenous kinship organisations may fail the public benefit test under the common law because they direct benefits to persons who are related, so the Act has addressed this problem. For example, an organisation may hold, receive or manage money or non-cash benefits, including assets relating to native title or traditional indigenous rights of ownership, occupation, use or enjoyment of land. As traditional land ownership or usage involves persons who are related or otherwise connected in a way traditionally recognised by indigenous persons, the effect may be that these entities direct benefits only to such persons. Where the purpose of an organization that has land rights related assets would fail a public benefit test solely because the entity directs benefits to indigenous Australians who are related, the purpose is treated as being for the public benefit under the Act.<sup>71</sup>

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<sup>69</sup> *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 75; see DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, (Lexis Nexis Butterworths, 8<sup>th</sup> ed, 2014) 150 ff.

<sup>70</sup> *Charities Act 2013* (Cth) s 7.

<sup>71</sup> *Charities Act 2013* (Cth) s 9.

The other aspects of the public benefit test, including the nature and purposes of the entity, the beneficiary class, other relationships between the beneficiaries and the number of beneficiaries, are still relevant when determining whether the entity is charitable.

#### *Self-Help and Closed Religious Orders*

The public benefit test does not apply to open and non-discriminatory self-help groups, closed or contemplative religious orders or where the purpose is directed to one or more individuals in necessitous circumstances, as described in the ITAA 1997.<sup>72</sup> This continues the widening of the definition to these organisations under the *Extension of Charitable Purpose Act 2004*.

#### *Poor Relations and Poor Employees*

The CDI report agreed<sup>73</sup> with the UK Goodman report of 1976<sup>74</sup> that the ‘poor relations’,<sup>75</sup> ‘poor employees’<sup>76</sup> and poor ‘association members’<sup>77</sup> exemption from the normal test of public benefit should be removed as being anomalous in contemporary Australia. The Act does not accommodate these anomalies. However, organisations that have a purpose of relieving poverty and were registered with the ACNC before the commencement of the Act will continue to be treated as being for the public benefit following the commencement of the Act.<sup>78</sup>

#### *Disasters*

The common law limits charitable purpose to the relief of individual distress after a disaster.<sup>79</sup> The purpose of advancing social and community welfare includes the purpose of assisting rebuilding, repairing or securing assets after a disaster.<sup>80</sup> The effect of the provision is to extend charitable purposes to include re-establishing not for prof-

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<sup>72</sup> *Charities Act 2013* (Cth) s 10.

<sup>73</sup> CDI Report at p 129.

<sup>74</sup> National Council of Social Service, *Charity Law and Voluntary Organisations: Report of an independent committee of inquiry to examine the effect of charity law and practice on voluntary organisations*, (Bedford Square Press, 1976) (the Goodman Report).

<sup>75</sup> *Re Scarisbrick* [1951] 1 Ch 622.

<sup>76</sup> *Dingle v Turner* [1972] AC 601.

<sup>77</sup> *Armstrong v Attorney-General (NSW)* (1934) 34 SR (NSW) 54.

<sup>78</sup> Charities (Consequential Amendments and Transitional Provisions) Bill 2013, Schedule 2, item 6.

<sup>79</sup> *Re Trust Deed relating to the Darwin Cyclone Tracy Relief Trust Fund* (1979) 39 FLR 260.

<sup>80</sup> *Charities Act 2013* (Cth) s 15(4).

it community assets after a disaster, independently of the relief of individual distress. Any benefits of a commercial or private nature must be only incidental or ancillary to re-establishing the community assets and the assets must not be government assets. Rebuilding may be in a different location and to a higher standard where necessary to mitigate future risk.

*Promoting or protecting human rights*

It had not been clear in Australia that the purposes of promoting and protecting human rights were charitable, but it is now listed among the Act's charitable purposes. The purpose of promoting or protecting human rights refers to the rights and freedoms recognised or declared by the international instruments specified in the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia. The international instruments cover the elimination of racial discrimination and discrimination against women; economic, social and cultural rights; civil and political rights; conventions against torture and cruel, inhuman or degrading treatment or punishment; rights of the child; and rights of individuals with disabilities. Promoting or protecting human rights includes, without limitation:

- promoting human rights, at home or abroad;
- relieving victims of human rights abuse; and
- raising awareness of human rights issues.

*Promoting or opposing a change in the law*

The High Court ruled in 2010 that the organisation Aid/Watch was not disqualified from charitable status by virtue of its main purposes, which included generating public debate about the effectiveness of foreign aid.<sup>81</sup> The court decided that there is no general doctrine in Australia to exclude political objects from charitable purposes and that the English case of *McGovern v Attorney-General*<sup>82</sup> does not apply. The majority decision did issue a note of warning that disqualification of charitable purpose may still occur where a purpose does not contribute to the public welfare, probably by reason of the particular ends and means involved.<sup>83</sup> This was a significant

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<sup>81</sup> *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539, [48].

<sup>82</sup> [1982] Ch 321.

<sup>83</sup> *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539, [49].

expansion of the allowed charitable purposes as commonly understood in Australia, as the ATO had maintained that the McGovern case applied. Its public ruling on the definition of charity noted:

An institution or fund is not charitable if its purpose is advocating a political party or cause, attempting to change the law or government policy, or propagating or promoting a particular point of view.<sup>84</sup>

The new statutory definition of charitable purposes acknowledges this understanding with an express inclusion among charitable purposes of the ‘purpose of promoting or opposing a change to any matter established by law, policy or practice’ provided it is ‘in furtherance of’ the other charitable purposes listed.<sup>85</sup> This is arguably narrower than the High Court’s view which explained the basis of its decision:

The provisions of the Constitution mandate a system of representative and responsible government with a universal adult franchise, and s 128 establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is ‘an indispensable incident’ of that constitutional system. While personal rights of action are not by these means bestowed upon individuals in the manner of the *Bivens* action known in the United States, the Constitution informs the development of the common law. Any burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of that system of government.

The system of law which applies in Australia thus postulates for its operation the very ‘agitation’ for legislative and political changes ... it is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.<sup>86</sup>

While the new legislative provision is clearly wider than the pre-Aid/Watch position of the ATO, arguably it fails to give full expression to the High Court’s view that public debate is ‘an indispensable incident’ of the Australian Constitution, and thereby narrows the future development of Commonwealth jurisprudence of this line of reasoning in respect of charitable purposes.

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<sup>84</sup> Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Charities*, Tax Ruling TR2005/21 (2005) 27, [102].

<sup>85</sup> *Charities Act 2013* (Cth) s 12(1)(l).

<sup>86</sup> *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539, [44]–[45], references omitted.

Section 11 the Act still makes a purpose (not activity) of engaging in, or promoting, activities which are unlawful or contrary to public policy a disqualifying purpose. Public policy refers to matters such as the rule of law and system of government – it does not refer to government policies.

### *Public Benevolent Institutions*

Tax deductibility for charitable donations is restricted in Australia, unlike arrangements in the UK, USA, and Canada where gift deductibility is generally available to all charities. Only about one third of Australian charities belong to a class of entities known as Public Benevolent Institutions (PBI).<sup>87</sup> Along with other concessions, PBIs are the only charities for which donors have access to an income tax deduction for gifts. Singapore has a similar concept in their institutions of a public character (IPC).<sup>88</sup> In the UK an attempt to similarly restrict access to tax concessions to donations for relief of the poor failed to pass parliament in 1863,<sup>89</sup> but the notion was revived more recently by Professor Chesterman and HRH Prince Phillip, arguing that it provides a model for the UK in restricting charitable purposes.<sup>90</sup>

The situation in Australia was an intentional legislative response to a Privy Council decision overturning an Australian High Court decision that ‘charity’ was to be given its narrow or popular meaning rather than its wider legal meaning.<sup>91</sup> The early taxation legislation did not define a Public Benevolent Institution,<sup>92</sup> but the High Court considered a definition in the case of *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation*,<sup>93</sup> providing a binding precedent, as Australia’s highest court. The Court held that the Royal Naval House, which provided low cost accommodation and recreation for petty officers and lower ratings when ashore in Sydney, was a not PBI. The

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<sup>87</sup> Recognised as a subtype of charity in *Australian Charities and Not-for-profits Commission Act 2012*, s 25-5.

<sup>88</sup> *Charities Act (Singapore) 1995*, s. 40A.

<sup>89</sup> J Warburton, ‘Charity – One Definition for all Tax Purposes in the New Millennium?’ (2000) 3 *British Tax Review* 144.

<sup>90</sup> M Chesterman, ‘Foundations of Charity Law in the New Welfare State’ (1999) 62 *Modern Law Review* 333; HRH The Prince Phillip Duke of Edinburgh KG KT, ‘Charity or Public Benefit’, 11<sup>th</sup> Arnold Goodman Charity Lecture, Charities Aid Foundation, 1994.

<sup>91</sup> *Chesterman v Federal Commissioner of Taxation* [1925] 37CLR 317.

<sup>92</sup> *Estate Duty Assessment Act 1914*, s 8(5); *Income Tax Assessment Act 1927* (Cth).

<sup>93</sup> (1931) 45 CLR 224.

judges described the characteristics of a PBI in the following terms:

In the context in which the expression is found, and in ordinary English usage, a ‘public benevolent institution’ means, in my opinion, an institution organized for the relief of poverty, sickness, destitution, or helplessness.<sup>94</sup>

I am unable to place upon the expression ‘public benevolent institution’ in the exemption a meaning wide enough to include organizations which do not promote the relief of poverty, suffering, distress or misfortune.<sup>95</sup>

Such bodies vary greatly in scope and character. But they have one thing in common: they give relief freely to those who are in need of it and who are unable to care for themselves. Those who receive aid or comfort in this way are the poor, the sick, the aged, and the young. Their disability or distress arouses pity, and the institutions are designed to give them protection.<sup>96</sup>

The ATO had for many years adopted the following definition based on the High Court’s decision, stating that a PBI is a ‘nonprofit institution organised for the direct relief of poverty, sickness, suffering, distress, misfortune, disability or helplessness’ which it formalised in a 2003 public ruling.<sup>97</sup> The courts did not add too much to the approach of the Commissioner with Justice Tadgell in an appeal case noting that:

The judge had the task of characterizing the respondent's institutional activity on one side of the line or the other as essentially and predominantly benevolent or not. The characterization involved an assessment, partly qualitative and partly quantitative, of what the appellant stood for and what it did. A value judgment was to be made on the whole of the available evidence.<sup>98</sup>

There was a long period of judicial hiatus from 1942<sup>99</sup> during which lower courts expressed some discontent with the definition, but were bound by the High Court earlier decisions.<sup>100</sup> In the meantime two government reviews had made comments on PBIs noting that ATO’s view about ‘direct relief’ was very constraining and

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<sup>94</sup> (1931) 45 CLR 224 at 232, per Starke J.

<sup>95</sup> (1931) 45 CLR 224 at 233-234, per Dixon J.

<sup>96</sup> (1931) 45 CLR 224 at 235-236, per Evatt J.

<sup>97</sup> Australian Taxation Office, *Income tax and fringe benefits tax: public benevolent institutions*, Taxation Ruling 2003/5, at [7], [61], [62], [65].

<sup>98</sup> *Commissioner of Payroll Tax (Victoria) v Cairnmillar Institute* (1992) 92 ATC 4307, at 4312-4313.

<sup>99</sup> *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399.

<sup>100</sup> *Federal Commissioner of Taxation v Launceston Legacy* 87 ATC 4,635 in which Northrop J said at 4,646 that the authorities showed a softening of attitude to what comes within the concept of benevolent in the phrase "public benevolent institution". His Honour concluded at 4,646 - 4,647 that the concept of benevolence is no longer limited to the provision of assistance to the destitute. Need is not synonymous with financial poverty and benevolence is a much broader concept than financial assistance.

was locking out organisations that focussed on preventative action to relieve poverty.<sup>101</sup> However in 2013, the Full Federal Court reviewed the High Court’s statements on the meaning of PBI in the Hunger Project case.<sup>102</sup>

The Hunger Project Australia (HPA) is a nonprofit company limited by guarantee which is part of a global network of entities that operate under the name ‘The Hunger Project’. The principal objective of The Hunger Project is the relief of global hunger. It is currently registered by the ACNC as a charity. The activities of HPA are mainly directed at raising funds that are then disseminated to Hunger Project members in the developing world. It is those entities, not HPA itself, that directly perform charitable acts to relieve hunger. The question raised was whether HPA was a ‘public benevolent institution’ within the meaning of section 57A(1) of the Fringe Benefits Tax Assessment Act 1986 (Cth) (FBTA Act).<sup>103</sup> The Commissioner of Taxation (the Commissioner) contended that an entity that merely engaged in fundraising activities and did not materially perform charitable works **directly** for the benefit of the public was not a PBI, relying on the High Court’s ruling in the *Perpetual* case. The Federal Court of Appeal considered the Commissioner’s reliance on a 1931 understanding of the term:

There is a further difficulty with the Commissioner’s reliance on what was said in the various judgments in *Perpetual*. Even if there could be divined from the various judgments a single expression of the common understanding of public benevolent institution, the Commissioner’s approach suggests that the common understanding in 1931, when *Perpetual* was decided, must forever fix the common understanding or meaning of the expression. We doubt that is the correct approach. Whilst past judicial statements concerning the ordinary meaning of a word or expression can often assist in divining the meaning of the word or expression, the common understanding of the meaning of an expression may change over time depending on the particular expression in question. When the question is whether a particular institution is a public benevolent institution, the answer depends on the common or ordinary understanding of the expression at the relevant time. The question is not to be approached as a legal question to be dealt with by the mechanical application of past authority, irrespective of the present current understanding of the expression in the currently spoken English language... There is much to be said for the proposition that the common under-

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<sup>101</sup> Industry Commission, *Charitable Organisations in Australia*, Report No. 45, (1995), xxxii-xxxiii; I Sheppard, R Fitzgerald and D Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations*, (Productivity Commission, 2001) 255.

<sup>102</sup> *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69.

<sup>103</sup> A PBI can gain an exemption from Fringe Benefits Tax which is currently capped at \$30,000 of the grossed up taxable value of fringe benefits per employee. Further gifts of cash and property (subject to certain conditions) of a value of \$2 or more to a registered PBI which is a Deductible Gift Recipient can be claimed as a deduction by donors.

standing or usage of the expression in question here has expanded or changed since *Perpetual* was decided...It is unlikely that global aid networks comprising separate fundraising entities such as the Hunger Project were prevalent when *Perpetual* was decided. Even if it was the case that the common understanding of a public benevolent institution in 1931 involved the institution directly dispensing relief, we can see no reason why that common understanding may not have changed over time to encompass organisations that may be structured in ways that separate fund raising entities from entities that dispense relief or aid using those funds.<sup>104</sup>

Has the ordinary meaning of a PBI changed over time? The court said that it had:

In our opinion, whilst there is no single or irrefutable test or definition, the ordinary meaning or common understanding of a public benevolent institution includes... an institution which is organised, or conducted for, or promotes the relief of poverty or distress. To adapt the words of Priestley JA in *ACOSS*, such an institution conducts itself in a public way towards those in need of benevolence, however that exercise of benevolence may be manifested. The ordinary contemporary meaning or understanding of a public benevolent institution is broad enough to encompass an institution, like HPA, which raises funds for provision to associated entities for use in programs for the relief of hunger in the developing world. The fact that such an institution does not itself directly give or provide that relief, but does so via related or associated entities, is no bar to it being a public benevolent institution. Such an institution is capable of being considered to be an institution organised or conducted for the relief of poverty, sickness, destitution and helplessness.<sup>105</sup>

The ACNC now summarises its position as:

a public benevolent institution is an institution that is organised, or conducted for, promoting the relief of poverty or distress which has:

1. **concrete objects of benevolent relief** –the beneficiary group must be recognisably in need of benevolent relief. General, undirected or abstract objects like benefitting the whole community are insufficient. (In the case of a fundraising institution, there must be a recognisable group that would benefit from the charitable work being funded)
2. **clear mechanisms for delivering the benevolent relief** – the way in which the charitable work leads to benevolent relief must be clear. (In the case of a fundraising institution, there must be a clear way to deliver the benevolent relief for which the funds are raised), and
3. **a relationship of collaboration and a common public benevolent purpose** – based on the analogy of the reasoning in *Word Investments*. There are a number of ways in which an institution may be organised, or conducted for, promoting the relief of poverty or distress under a collaborative relationship or common purpose (such as through their organisational structure, shared

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<sup>104</sup> *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69, at [37]–[39].

<sup>105</sup> *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69, at [66]–[67].



planning and processes). As in *Word Investments*, the focus is on the substance of the objectives and activities, rather than the form. (In the case of fundraising, an institution that raises funds for associated entities but does not itself provide relief is no bar to it being a public benevolent institution.)<sup>106</sup>

This interpretation may allow a more flexible application of the term Public Benevolent Institution as Australian society develops new ways to address issues of poverty, sickness, suffering, distress, misfortune, disability or helplessness, but it depends on some mechanism to guide charities as to where the boundaries are situated currently. Unless there is an active stream of litigation to the superior courts, it falls to the regulator to offer clear guidance. Given the expense and natural reluctance of most charities to be distracted by litigation or exposed to adverse public comment, it is likely that it will be the regulator's role, so the ACNC is critical to maintaining a contemporary definition, fit for purpose.

#### *Health Promotion Charities*

Health Promotion Charities (HPCs), a subtype of charity, are institutions whose principal activity is to promote the prevention or control of human diseases.<sup>107</sup> The subtype was introduced by statutory amendment to overcome a situation where some of Australia's largest medical research organisations faced a loss of tax concessions. The advent of a broad-based goods and services tax for the first time necessitated a comprehensive register of Deductible Gift Recipients. This was achieved by requiring PBIs to be formally endorsed by the ATO rather than relying on their self-assessment to the status. It was realised that many may fall foul of the ATO's view of the definition of PBI requiring 'direct relief'. Medical research institutions did not relieve suffering directly, but rather were developing preventative measures or new treatment techniques, so were unable to claim PBI status. The amendment created a new subtype of charity to cure this defect,<sup>108</sup> but there might have been no need for such legislative amendment if the *Hunger Project* case line of reasoning had been adopted earlier. One case had

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<sup>106</sup> Commissioner's Interpretation Statement: *The Hunger Project* case, CIS2013/01, [http://www.acnc.gov.au/ACNC/Publications/Interp\\_HungerProject.aspx](http://www.acnc.gov.au/ACNC/Publications/Interp_HungerProject.aspx).

<sup>107</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth), s 25-5(5), item 13.

<sup>108</sup> Explanatory Memorandum, *Taxation Laws Amendment Bill (No. 2) 2001*: '[5.26] The charitable institutions to be covered by this amendment are medical or health organisations whose principal activity is preventative in nature, rather than providing direct relief of sickness or suffering. These organisations typically focus on particular types of ailments or health issues, for example, asthma, cancer, AIDS, arthritis, heart conditions, brain conditions, paraplegia and kidney conditions'.

sought to push the boundaries, but was rejected. Bicycle Victoria<sup>109</sup> was an association prompted by environmental concerns, but was ‘open to all persons who wish to support cycling’. Its earliest incorporated purpose was to ‘promote cycling’. 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.<sup>110</sup> Bicycle Victoria claimed that the health benefits of cycling and its advocacy activities, together with the public health problem of obesity, made it eligible to claim HPC status. In fact, most of its revenue was earned and spent on public riding events, while health behaviour change programs received only 8% of its annual income. Its Medical and Public Health Reference Panel, consisting mostly of academics, had never been actively consulted. The court found that Bicycle Victoria’s purpose was to promote physical fitness, and while preventing health problems was the motive behind this purpose, motive is irrelevant: it is the purpose that matters. Hence, it was not entitled to HPC status, but fell into the class of a general charity.

#### *Specific Named Organisations*

Boundary elasticity is at a premium if an organisation can persuade both houses of parliament to include them by statutory amendment into the income tax legislation, providing gift deductibility. It is the ultimate work-around, which has assisted over 130 organisations. The listing of specific organisations as having deductible gift recipient status in the legislation, is occasionally the result of overt political forces and ‘worthiness’. Two examples illustrative of the policy process are the listing of Nursing Mothers and the political think tanks of major political parties. Championed by the Australian Democrats (a then minor party of the Australian Senate), the initial attempt to amend legislation to include Nursing Mothers failed. During the debate, Senator Walsh the Minister for Finance conceded that ‘there is an element of semi or quasi-arbitrariness in the selection’ of such organisations<sup>111</sup> whilst Senator Stone, former Head of the Treasury admitted that, ‘It has been one of the most contentious, time-consuming and diffi-

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<sup>109</sup> *Bicycle Victoria v Commissioner of Taxation* [2011] AATA 444.

<sup>110</sup> *Bicycle Victoria v Commissioner of Taxation* [2011] AATA 444.

<sup>111</sup> Commonwealth, *Parliamentary Debates*, Senate Hansard, 1989, 3766 (Senator Walsh).

cult areas of tax law for many years'.<sup>112</sup> Nursing Mothers initiated a grassroots political campaign to alter the decision. After six months of association members lobbying their members of Parliament, 10,000 letters and personal representations by wives of members of Parliament who were members of the organisation, the Senate agreed to Nursing Mothers being listed. Another example is the listing of the Evatt and the Menzies Foundations that are commonly referred to as the think tanks of the major political parties. They would not qualify for donation deductibility status under any other category in the taxation legislation. On the first of April 1998, Hansard records the following in relation to a question without notice of the then Prime Minister, Mr Howard:

**Mr Howard:** ... The honourable member comes to a decision that was taken on 1 October 1996 by the government to grant \$100,000 to the Menzies Foundation and also grant \$100,000 to the Evatt Foundation.

**Mr McLachlan:** The Evatt Foundation!

**Mr Howard:** Hang on, it gets better. We also granted tax deductible status to the Menzies Research Centre. Let me say a couple of things about that and then I will come to the issue of declaration which has been asked by the Member for Hotham. The first thing I would report to you is that, on the day cabinet met, I happened to ring the Leader of the Opposition. I rang the Leader of the Opposition and I said, 'Kim, we have it in mind to give \$100,000 to the Menzies centre. In the interests of political balance, we will give \$100,000 to the Evatt Foundation and grant tax deductibility to the Menzies Research Centre because Evatt has already got it.' I might add in parenthesis that I was the Treasurer who, in 1981, granted tax deductibility to the Evatt Foundation.<sup>113</sup>

Clearly the worthiness of these specifically listed organisation depends on the robust decision making of elected representatives. A sense of unfairness is harboured by small voluntary organisations without access to political champions.

### **Administrative Boundary Widening**

There is some scope for elasticity when administrators are interpreting the boundaries of what is charitable. The exemplar of expansion was the Charity Commission of England and Wales, which expanded the definition of charity during the decade prior to statutory intervention, by virtue of its procedure and practice. When that jurisdiction's parliament enacted a legislative definition of charity, many of the provisions largely mirrored what had been the practice of the Commission. They had engaged

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<sup>112</sup> Commonwealth, *Parliamentary Debates*, Senate Hansard, 1989, 3769-70 (Senator Stone).

<sup>113</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 1998, 2118 (Hon John Howard).

with the sector about contemporary issues and reasoned by analogy from the *Pemsel* heads of charity, giving due regard to the settled principles of charity jurisprudence.<sup>114</sup>

In Australia, prior to the establishment of the ACNC, the ATO was the administrative authority with most influence over the charity definition. The ACNC is now the gateway to charity status for all Commonwealth purposes, but the ATO is still required to vet and monitor extra tax status criteria. What role have these agencies played in the charity definitional boundaries?

The ATO is generally regarded as having quite a conservative approach to the definition of charity, which is not surprising, given its fiscal imperatives. One example mentioned above is the definition of PBI being fixed to its meaning in 1931, rather than its contemporary usage. Another example relates to child care. The ATO was reluctant to recognise charity status for child care organisations because there were no Australian or English cases of any import directly addressing the issue of whether child care of the very young was education or mere child minding. In Taxation Ruling TR 96/8, the ATO states that a child care centre is considered not to be a school for the purposes of deductibility of gifts made to a school building fund, but indicates that a preschool kindergarten may qualify as a school.<sup>115</sup> It was willing to accommodate some child care organisations as exempt under the category of public educational institution where it could be shown that there were the common characteristics of a school, such as an educational program and trained professional educators. This head of exemption was outside the general charitable exemption. The ATO was not willing to use the education head nor to reason by analogy from the relief of the poverty head as there was no significant case law in Australia or England directly on point.

The Preamble's purposes such as preferment of orphans, marriage of poor maids, aid of young tradesmen, handicraftsmen and persons decayed and impotent all point to a category of vulnerable persons. In 1601 the only children perceived as in need were those which were helpless or vulnerable, usually orphans. As noted in the

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<sup>114</sup> Lindsay Driscoll, 'England and Wales: Pemsel Plus' in Myles McGregor-Lowndes and Kerrie O'Halloran (eds), *Modernising Charity Law: Recent developments and Future Directions*, Edward Elgar, 2010, 48, 52.

<sup>115</sup> Australian Taxation Office, *Income Tax, Schools and College Building Funds*, Taxation Ruling TR 96/8 (1996) [81].

CDI report which corresponded with the Charity Commission of England and Wales about the issue:

Children do not have the ability to care for themselves because of their immaturity and lack of resources, and as such they represent a vulnerable and helpless section of the community. We regard their care and protection as serving a public benefit, in the same way as the care and protection of helpless and vulnerable aged people is clearly recognised as serving a public benefit, irrespective of whether those assisted are perceived to be ‘disadvantaged’. This is consistent with the Preamble to the Statute of Elizabeth and centuries of common law interpretation that recognises the relief of ‘impotence’ as a charitable purpose.<sup>116</sup>

The CDI recommended that ‘the care, support and protection of children and young people, including the provision of child care services, be considered a charitable purpose’<sup>117</sup> but the ATO was unwilling to push the boundaries of charity in this direction without a specific amendment to the legislation. This was eventually remedied by statute through the *Extension of Charitable Purpose Act 2004*.

In its relatively short history the ACNC has issued a number of pieces of administrative guidance about its approach to ascertaining the boundaries of charity, including Health Promotion Charities, provision of housing by charities, the Hunger Project case, and Indigenous charities.<sup>118</sup> These are generally regarded by practitioners as far less constricting than ATO rulings on similar issues. Both agencies appear to agree on the basic interpretation of the statute and case law and have said so to parliamentary committees.<sup>119</sup> It is more subtle differences between these two gate keepers that is apparent to practitioners. Contributing to the perception may be the greater enthusiasm and availability of the ACNC, led by its senior staff, to engage with the sector and resolve issues of the day, with speed and transparency in its decision-making. For example, the association of charity lawyers was refused charity status by the ATO, but granted it by the ACNC once the latter came into existence. Another example which illustrates the point is in relation to housing as a charitable purpose. As a means of encouraging affordable housing, the government prior to the ACNC establishment developed a program known as the National Rental Affordability Scheme (NRAS). A condition of

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<sup>116</sup> CDI Report, 206.

<sup>117</sup> CDI Report, 207.

<sup>118</sup> ACNC, *Commissioner’s Interpretation Statements*, <<http://www.acnc.gov.au/ACNC/Pblctns/Interp/ACNC/Publications/InterpStmnt.aspx?hkey=56e40a9d-66d2-46e0-986f-a7fa62bc0f05>>.

<sup>119</sup> Murray Baird, Senate Economics Legislation Committee, *Hansard*, 5 June, 2014, 116.

participating in the scheme is that a proportion of the housing provided under the scheme must be made available to medium income tenants (who would not otherwise be eligible), usually at 80% of market rent. The scheme also encouraged charitable housing providers to build new housing by allowing them to sell a proportion of it, to fund the acquisition of other housing which would then be made available to those in need of charitable housing. The ATO's primary ruling on charities during the establishment of the NRAS only mentioned housing as a charitable purpose in passing, and gave little guidance to housing providers undertaking such activities at the urging of government social welfare departments.<sup>120</sup> At the same time, state governments were divesting themselves of social housing stock through a number of schemes, resulting in the transfer to, or management of their social housing stock by, the charitable sector. The ATO did not provide any public guidance on the issue and dealt with individual cases by private rulings which remained confidential.

Once established the ACNC identified the issue and consulted widely with the sector to publish a public ruling.<sup>121</sup> The ACNC's administrative guidance on charitable housing gives detailed guidance for housing providers, supported by judicial authorities (not mentioned in the ATO's primary public ruling).

The ACNC appears bold enough to reason by analogy from the principles of charity jurisprudence. For example the ATO's primary public ruling stated, in relation to commercial activities that cross-subsidise charitable purposes which was at the heart of the housing issues, that:

[W]e would not agree with the views expressed in the Taxation Board of Review decision in Case B122 (1952) 2 TBRD 613 in relation to paragraph 23(e) of the ITAA 1936. In that case the trustees of a public park formed a club to operate a picture show business to raise revenue to improve the park. The Board of Review found that the club – which was an entity separate from the trust – was a charitable institution and therefore its income was exempt from tax.<sup>122</sup>

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<sup>120</sup> Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Charities*, Taxation Ruling TR 2005/21 (2005) [33], [57], [197], [199].

<sup>121</sup> ACNC, Commissioner's Interpretation Statement: Provision of housing by charities, CIS 2014/02 [https://www.acnc.gov.au/ACNC/Publications/Interp\\_housing.aspx](https://www.acnc.gov.au/ACNC/Publications/Interp_housing.aspx)

<sup>122</sup> Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Charities*, Taxation Ruling TR 2005/21 (2005) [134].

By contrast, the ACNC notes about a similar issue:

An example of the commercial activities that may be undertaken are those of a charitable housing provider who participates in the National Rental Affordability Scheme (NRAS) in order to provide charitable housing to those needing relief from poverty, distress or disadvantage. The scheme, which commenced in 2008, seeks to address the shortage of affordable rental housing by offering financial incentives to entities, such as those in the business and community sectors, to build and rent dwellings to low- and moderate-income households at a rate that is at least 20 per cent below the market value rent.

It may be that certain moderate-income tenants would not otherwise be eligible for housing by a participating charity. However, if participation in NRAS is the necessary mechanism for providing the additional housing stock to enable a charity to fulfil its charitable purpose of relieving poverty, distress and disadvantage, the housing provider may retain its charitable status. It is of course a requirement that any income derived is put towards achieving the charitable purpose of providing charitable housing.<sup>123</sup>

Australia has not had a history of administrators being in any way adventurous to modify the definition of charity in the absence of substantial case authority. It is early days for the ACNC, but the initial indications are that it is more willing to address definition issues in a transparent and timely fashion within the confines of the principles of charity law.

## **Conclusion**

Australia could be characterised as having an incremental approach to altering the definition of charity. Legislators and administrators have sought the smallest possible response to reduce any perceived definitional issues to a tolerable level. The emphasis has been on short term fixes, rather than longer term policy rationalisation or facilitation of the charitable sector. In the past, it has been the threat of leakage of revenue from the fisc that has prompted the legislature into action, such as the definition of Public Benevolent Institution or exclusion of chambers of commerce from state tax concessions. It is notable that the likely increase of Commonwealth tax expenditures consequent on the Word and Hunger Projects decisions has not yet resulted in actual remedial legislation, though perhaps we are just witnessing a lag.

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<sup>123</sup> ACNC, *Commissioner's Interpretation Statement: Provision of Housing by Charities*, No. CIS 2014/02 (2014) 9-10 (references omitted).

The courts have delivered significant expansion to the definition of charity since the turn of the last century, as well as to that of PBI that was designed to be essentially restrictive. It has not been due primarily to a change of attitude by the courts, but just the opportunity of superior courts to be able to give judgments. The High Court until recently never had the opportunity to decide on political and advocacy purposes, destination of profits, or the government/charity boundary. The contemporising of the PBI definition by an appeal court took over eighty years before a suitable case presented itself. The willingness of parties to seek judicial resolution of contentious issues in recent years certainly has enlivened the charity jurisdiction. It would be tempting to conclude that this might be due to organisations overcoming the usual barriers of cost and publicity by sheer necessity to challenge the increasingly conservative administration by the ATO. However, several of the cases were test cases funded by the ATO itself. But since the establishment of the ACNC in 2012 there have been no significant cases generated from ACNC decision making, which is in stark contrast to the number of cases involving the New Zealand charity regulator shortly after its commencement.

The statutory definition of charity for Commonwealth statutes in 2013 could be characterised as a bold policy initiative which falls outside an incremental policy response. It is a significant departure from reliance on the common law, but it did not depart radically from the structure of the charity jurisprudence. The statutory definition appears to have expanded the boundary at the margins in relation to indigenous kinship associations, self-help associations, closed religious orders, child care, human rights, and disaster relief. It is narrowed for anomalous poverty and perhaps promoting or opposing a change in the law as recently understood by the High Court. These movements could be characterised as generally incremental responses to well-documented issues, going no further than necessary to satisfy the median voter. Will it remain so?

While the ACNC at present appears to have a beneficial approach to the statutory definition, the attitudes of the courts are yet to be tested. So, how elastic are the definitional boundaries of charity in Australia? Just enough to cater to contemporary issues provided that there is someone willing to pay the cost of stretching them, unless there is a threat to the fisc.



## Appendix A

### *Charities Act 2013 (Cth)*

#### 12 Definition of *charitable purpose*

(1) In any Act:

*charitable purpose* means any of the following:

- (a) the purpose of advancing health;
- (b) the purpose of advancing education;
- (c) the purpose of advancing social or public welfare;
- (d) the purpose of advancing religion;
- (e) the purpose of advancing culture;
- (f) the purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- (g) the purpose of promoting or protecting human rights;
- (h) the purpose of advancing the security or safety of Australia or the Australian public;
- (i) the purpose of preventing or relieving the suffering of animals;
- (j) the purpose of advancing the natural environment;
- (k) any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j);

Note: In the case of a purpose that was a charitable purpose before the commencement of this Act and to which the other paragraphs of this definition do not apply, see item 7 of Schedule 2 to the *Charities (Consequential Amendments and Transitional Provisions) Act 2013*.

- (l) the purpose of promoting or opposing a change to any matter established by

law, policy or practice in the Commonwealth, a State, a Territory or another country, if:

(i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or

(ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

(2) Paragraph (l) of the definition of *charitable purpose* in subsection (1) is the only paragraph of that definition that can apply to the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country.

(3) For the purposes of this section, it does not matter whether a purpose is directed to something in Australia or overseas.

## Division 2—Types of charitable purpose

### 14 *Purpose of advancing health*

Without limiting what constitutes the purpose of advancing health, the *purpose of advancing health* includes the purpose of preventing and relieving sickness, disease or human suffering.

### 15 *Purpose of advancing social or public welfare*

(1) Without limiting what constitutes the purpose of advancing social or public welfare, the *purpose of advancing social or public welfare* includes the purpose of relieving the poverty, distress or disadvantage of individuals or families.

(2) Without limiting what constitutes the purpose of advancing social or public welfare, the *purpose of advancing social or public welfare* includes the purpose of caring for and supporting:

(a) the aged; or

(b) individuals with disabilities.

(3) Without limiting what constitutes the purpose of advancing social or public welfare, the *purpose of advancing social or public welfare* includes the purpose of caring for, supporting and protecting children and young individuals (and, in particular, providing child care services).

(4) Without limiting what constitutes the purpose of advancing social or public welfare, the *purpose of advancing social or public welfare* includes the purpose of assisting the rebuilding, repairing or securing of assets after a disaster if:

(a) the disaster developed rapidly and:

(i) resulted in the death, serious injury or other physical suffering of a large number of individuals; or

(ii) caused distress to a large number of individuals and resulted in widespread damage to property or the natural environment; and

b) the rebuilding, repairing or securing is in furtherance or in aid of the purposes of one or more exempt entities (within the meaning of the *Income Tax Assessment Act 1997*); and

(c) the purpose of assisting is directed to providing benefits that are commercial or private only to an incidental and ancillary extent, if at all; and

(d) the assets are assets of entities that:

(i) are not government entities; or

(ii) would be charities were they not government entities.

#### **16 Purpose of advancing culture**

(1) Without limiting what constitutes the purpose of advancing culture, the *purpose of advancing culture* includes the purpose of promoting or fostering culture.

(2) Without limiting what constitutes the purpose of advancing culture, the *purpose of advancing culture* includes the purpose of caring for, preserving and protecting Australian heritage.

*17 Purpose of advancing the security or safety of Australia or the Australian public*

Without limiting what constitutes the purpose of advancing the security or safety of Australia or the Australian public, the *purpose of advancing the security or safety of Australia or the Australian public* includes the purpose of promoting the efficiency of the Australian Defence Force.