

25

Recent Reforms to Australian Charity Law

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I. Introduction

In Australia, until recently, the definition of charity for all legal purposes was drawn almost exclusively from judge-made law.² Thus, whether the setting was an inquiry into the validity of a purpose trust or eligibility for a Commonwealth, state or territory tax concession available to charities, judge-made law typically supplied a complete answer to the definitional question. As a result of recent legislative reforms, this is no longer the case. The legal landscape in Australia is now one in which judge-made law supplies the definition of charity for some legal purposes, Commonwealth statutory law supplies it for others, and state and territory legislation supplies it for others still. The current picture is thus one of definitional proliferation.

1 Melbourne Law School. My thanks to Ian Murray for characteristically perceptive comments on a draft.

2 There were, however, exceptions: see, for example, *Extension of Charitable Purposes Act 2004* (Cth).

II. Commonwealth Reforms

At the Commonwealth level, the key reform is the *Charities Act 2013*. This Act defines charity for the purposes of Commonwealth law including, crucially, the purposes of Div 50 of the *Income Tax Assessment Act 1997* (which makes provision for income tax exemptions for charities). The *Charities Act 2013* is not designed to operate as a code, departing radically from the judge-made law that preceded it; rather, the preamble to the Act states that it will ‘ensur[e] continuity by utilising familiar concepts from the common law’. However, many of the concepts in the Act, and much of the language in which the statutory text is expressed, are in fact foreign to judge-made charity law. Thus, for example, s 12 identifies as charitable ‘the purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia’ and ‘the purpose of promoting or protecting human rights’; one struggles to find statements in judge-made charity law to the effect that either type of purpose is charitable.³ And s 7 seems not only to reflect the judicial strategy of presuming the benefit of certain types of purpose; it seems also to presume that those types of purpose are public in character, a strategy that has never been deployed in judge-made charity law.⁴ The precise relation of the *Charities Act 2013*, and the judge-made charity law onto which it has been overlain, is thus unclear.

To what extent should decision-makers interpret the *Charities Act 2013* by drawing on antecedent judge-made law, and to what extent should they apply principles of statutory interpretation that demand departure from that judge-made law? This sort of question is not new in the history of charity law. It has arisen in cases where judges have been asked to interpret the term ‘charity’ (or one of its cognates) in the context of a tax statute. In *Commissioners for Special Purposes of Income Tax v Pemsel* itself, the House of Lords had to determine whether references to ‘charitable’ purposes in the *Income Tax Act 1842* were to be given the ‘technical legal’ meaning developed over centuries by judges in equity or some other meaning more in accord with contemporary understandings.⁵ And the High Court of Australia was asked, in *Chesterman v Federal Commissioner of Taxation*,

3 Indeed, the judge-made law points the other way: *McGovern v Attorney-General* [1982] 1 Ch 321 (Slade J).

4 For further analysis of the approach in judge-made law, see Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014) 25–29.

5 See [1891] AC 531 at 534–39 for a summary of counsel’s arguments.

to rule on the question whether the word ‘charitable’ in the *Estate Duty Assessment Act 1914–1916* (Cth) was to be given a meaning drawn from judge-made law, or whether principles of statutory interpretation demanded that some different meaning be recognised.⁶

In both *Pemsel* and *Chesterman*, courts ultimately preferred interpretations that drew on antecedent judge-made law. But in neither case was this preference uncontested.⁷ And the basis for the preference, at least as expressed in *Pemsel* and *Chesterman*, is open to question in light of contemporary understandings of statutory interpretation. In *Pemsel*, Lord Macnaghten stated that ‘[i]n construing Acts of Parliament, it is a general rule ... that words must be taken in their legal sense unless a contrary intention appears’.⁸ This principle has been endorsed by Australian cases of the highest authority.⁹ However, it seems, at least to some degree, at odds with other principles of statutory interpretation that have also been approved by the High Court of Australia, according to which interpreters must look to the ordinary meaning of the statutory text in context, and to relevant legislative purposes.¹⁰ This tension in the law of statutory interpretation, as it applies to the legal definition of charity, will not be manifested in a post-*Charities Act 2013* world in quite the same way as it was in cases like *Pemsel* and *Chesterman*. Decision-makers called on to interpret references to ‘charity’ in Commonwealth tax statutes must now look to the *Charities Act 2013* for guidance and to that extent need not make interpretive decisions. But in ascertaining the meaning of the *Charities Act 2013* itself, so as to apply the definition of charity that the Act sets out, decision-makers may find that they are confronted with interpretive challenges of the type experienced in *Pemsel* and *Chesterman*, challenges that surround the interpretation of statutory terms with judge-made histories. In the *Charities Act 2013*, these include key terms like ‘advancing education’, ‘advancing religion’ and ‘public benefit’.¹¹

6 (1923) 32 CLR 362.

7 *Pemsel* was a 3:2 decision. And in *Chesterman*, a majority of the High Court of Australia actually rejected an interpretation drawing on antecedent judge-made law; the case was subsequently appealed to the Privy Council, which overturned the decision of the High Court. I discuss the two cases in detail in Matthew Harding, ‘Equity and Statute in Charity Law’ (2015) 9 *Journal of Equity* 167, 173–75.

8 [1891] AC 534 at 580.

9 See the authorities discussed in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th edn, 2014) [4.13].

10 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Lacey v Attorney-General (QLD)* (2011) 242 CLR 573. And note the judgment of Kirby J in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 [91]–[119].

11 *Charities Act 2013* (Cth) ss 12(1)(b), 12(1)(d) and 6.

Further interpretive challenges arise in relation to the numerous terms in the *Charities Act 2013* that do not originate in judge-made law. For example, s 12(1)(c) of the Act refers to ‘the purpose of advancing social or public welfare’, a phrase that is not known to judge-made charity law. And s 12(1)(h) refers to ‘the purpose of advancing the security and safety of Australia or the Australian public’; the closest that judge-made law comes to this phrase is ‘the promotion of public defence and security’.¹² When it comes to provisions like these, the principle that words ‘must be taken in their legal sense unless a contrary intention appears’ cannot be applied because there is no legal sense in which to take them. Without that principle to guide them, decision-makers are likely to fall back on other principles of statutory interpretation, such that the definition of charity under the *Charities Act 2013* may, over time, come to diverge in substantial ways from the definition of charity in antecedent judge-made law. This is hardly surprising; it seems a natural consequence of enacting a statute that is to a non-trivial degree couched in terms unknown to the judge-made charity law that preceded it. But it may nonetheless be a matter for concern, at least while the extent to which it is desirable for the *Charities Act 2013* to innovate in relation to the definition of charity in Commonwealth law remains unclear.

III. State and Territory Reforms

Reforms in state and territory law have taken a different path. In 2012, the Western Australian State Administrative Tribunal determined that the Chamber of Commerce and Industry of Western Australia was a charitable organisation for the purposes of that state’s *Pay-Roll Tax Assessment Act 2002*, notwithstanding that it was, to some degree, an organisation committed to serving members.¹³ Where judges have found that an organisation’s dominant purpose is to benefit members, they have refused to extend charity status to that organisation;¹⁴ in contrast, judges have recognised as charities organisations with a purpose of serving members, so long as their

12 *Downing v Federal Commissioner of Taxation* (1971) 125 CLR 185 at 198 (Walsh J).

13 *Chamber of Commerce and Industry of Western Australia Inc v Commissioner of State Revenue* [2012] WASAT 146 (Justice J A Cheney).

14 See, for example, *Inland Revenue Commissioners v City of Glasgow Police Athletics Association* [1953] AC 380 (HL); and, perhaps more controversially, *Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC 604 (Digby J).

dominant purpose is to generate public benefit.¹⁵ The Western Australian Tribunal decision, when read in that light, is unremarkable. That is not, however, how it was read by the Western Australian legislature. In 2015, by the *Taxation Legislation Amendment Act (No 2)*, that legislature sought to narrow the definition of charity for certain purposes of Western Australian law.

According to the Western Australian reforms, a range of member-serving organisations cannot be charities for the purposes of Western Australian tax law. And, crucially, the Western Australian reforms exclude from the definition of charity, for the purposes of Western Australian tax law, a ‘professional association’. ‘Professional association’ is, in turn, defined to mean an organisation ‘having *as one of its objects or activities* the promotion of the interests of its members in any profession’.¹⁶ That definition encompasses organisations with a dominant purpose of generating public benefit, and a subsidiary purpose or even a practice of benefiting a membership drawn from a particular profession. And the Western Australian reforms tighten the definition of charity for the purposes of Western Australian tax law in another way as well, by excluding from tax concessions an organisation that ‘promotes trade, industry or commerce’.¹⁷ The promotion of trade, industry or commerce has long been recognised as a type of charitable purpose in judge-made law,¹⁸ and to the extent that the Western Australian reforms mean that for the purposes of Western Australian tax law this recognition has been withdrawn, the Western Australian reforms represent a significant departure from antecedent law.

The Western Australian reforms make provision for a professional member-serving or commerce-promoting organisation to apply to the Minister for Finance for a determination that the organisation is not in fact excluded from tax concessions despite the other provisions that the Western Australian reforms have brought into effect. The minister is empowered under the Western Australian reforms to make such a determination, with the concurrence of the state treasurer, and also to

15 See, for example, *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 681 (HL).

16 *Duties Act 2008* (WA) ss 3, 95, 96A; *Land Tax Assessment Act 2002* (WA) ss 37, 38AA, Sch 1, Glossary; *Pay-Roll Tax Assessment Act 2002* (WA) ss 41, 42A, Sch 1, Glossary. Emphasis added.

17 *Ibid.*

18 See *Crystal Palace Trustees v Minister of Town and Country Planning* [1950] 2 Ch 857 (Danckwerts J); *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 371 (Heerey J).

revoke or amend the determination, again with the concurrence of the treasurer. The minister may make, revoke or amend a determination ‘only if the Minister is of the opinion that it is in the public interest to do so and after considering any information that the Minister considers relevant’.¹⁹ No action may be brought in a court to compel the minister to make a determination, and the minister’s determination may not be reviewed or appealed in any way.²⁰

The Western Australian reforms have been taken up elsewhere. In the Australian Capital Territory, by the *Revenue (Charitable Organisations) Legislation Amendment Act 2015*, the legislature has withdrawn charity status, for the purposes of tax law, from professional member-serving and commerce-promoting organisations.²¹ Like the Western Australian reforms, the ACT reforms enable excluded organisations to apply for a determination that they ought not to be excluded; but unlike the Western Australian reforms, the ACT reforms empower the Commissioner for ACT Revenue, rather than the relevant government minister, to make such a determination, and they spell out more clearly than the Western Australian reforms the grounds on which the determination may be made.²² Moreover, the ACT reforms provide that the Commissioner’s determinations and revocations of determinations are reviewable.²³

In the Northern Territory, the *Revenue and Other Legislation Amendment Act 2015* effects changes to that territory’s *Payroll Tax Act* similar to the Western Australian and ACT reforms. The Northern Territory reforms withdraw payroll tax exemptions from professional member-serving and commerce-promoting organisations;²⁴ at the same time the Northern Territory reforms empower the Commissioner of Territory Revenue, presumably following an application in the ordinary case, to make a determination that a member-serving or commerce-promoting organisation ought not to be excluded. The Northern Territory reforms make reference to considerations to which the Commissioner ‘may’ have regard when deciding whether to make such a determination, and

19 *Duties Act 2008* (WA) ss 95, 96B, 96C; *Land Tax Assessment Act 2002* (WA) ss 37, 38AB, 38AC; *Pay-Roll Tax Assessment Act 2002* (WA) ss 41, 42B, 42C, Sch 1.

20 *Taxation Administration Act 2003* (WA) s 34A.

21 *Taxation Administration Act 1999* (ACT) ss 18B and 18C.

22 *Ibid.* ss 18E, 18F and 18G.

23 *Ibid.* Sch 1, ss 1.2(b) and (c).

24 *Payroll Tax Act* (NT) ss 48, 48A and 48B.

these considerations are similar to those set out in the ACT reforms.²⁵ Determinations of the Commissioner are reviewable under the *Taxation Administration Act*.²⁶

These state and territory law reforms bring with them at least two challenges. The first challenge is in identifying a sound basis for excluding from the definition of charity, for certain purposes of state or territory law, organisations whose dominant purpose is to generate public benefit. One legacy of the great case of *Morice v Bishop of Durham* is that not all public benefit purposes are recognised in law as charitable;²⁷ thus, a state or territory legislature that withdraws charitable status from organisations with certain public benefit purposes is not, to that extent, engaging in heterodoxy. Moreover, recent state and territory reforms to the legal definition of charity have been enacted in order to preserve government revenues against perceived threats. This is an entirely appropriate policy objective for the legislatures in those jurisdictions to form and pursue.²⁸ Perhaps more difficult to defend is the legislative choice to seek to preserve government revenues by modifying the legal definition of charity when different conceptual architecture could have been used. Recent state and territory reforms have created legislation that relies largely on traditional charity law criteria – the *Pemsel* taxonomy and a public benefit test – but at the same time denies charity status to certain purposes that meet those criteria, on the basis of considerations external to charity law as it has developed over the centuries. Should the legal definition of charity be affected by such external considerations, or are those considerations best reflected in legal rules that do not bear on the definition of charity but nonetheless affect the operation of charities?²⁹ This is a large and fundamental question which requires careful consideration in light of the state and territory reforms of recent years.

A second challenge generated by state and territory law reforms is in keeping the operation of Australian charity law consistent with rule of law ideals. In each of the three reforming jurisdictions, charity status has been

25 Ibid. s 48E.

26 *Taxation Administration Act* (NT) ss 107–15.

27 (1804) 9 Ves Jun 399 at 405 (Sir William Grant MR); (1805) 10 Ves Jun 522 at 541 (Lord Eldon). See also Joshua Getzler, '*Morice v Bishop of Durham* (1805)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart, 2012) 157 at 196–97.

28 Whether or not it is a sound objective for courts to pursue is another matter: see generally *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217.

29 For one view on this question, see Adam Parachin, 'Legal Privilege as a Defining Characteristic of Charity' (2009) 48 *Canadian Business Law Journal* 36.

withdrawn from professional member-serving and commerce-promoting organisations, and such organisations have been enabled to apply to an officer of the executive branch of government for a determination that they ought not to be excluded. In antecedent law, a professional member-serving or commerce-promoting organisation could rely on a tax official applying rules and principles of law in determining whether or not it was a charity; moreover, such an organisation could seek review of the tax official's decision in a tribunal or court. Following the reforms, organisations must rely to a much greater extent on relatively unfettered executive discretion. This is clearest in the case of the Western Australian reforms, where determinations are to be made by the Minister of Finance taking into account vague criteria of 'public interest' and relevance, and where there is no right of review. But executive discretion is also pronounced in the ACT and Northern Territory reforms, notwithstanding that legislation in those jurisdictions articulates criteria that may be taken into account in the exercise of executive discretion and notwithstanding that determinations may be reviewed. If Australian charity law is to live up to rule of law ideals, this reliance on executive discretion as a means to determining charity status should be extended no further than is currently the case, and indeed should be abandoned in the jurisdictions in which it is now embedded.

IV. Conclusion

The reforms to Australian charity law that have been effected recently are of interest insofar as they alter a legal landscape formed and reformed over hundreds of years. However, they represent just the beginning of an even more interesting journey, as judges and other decision-makers work with the statute law that has brought about the reforms in question, interpreting that statute law and fashioning it with an eye to social, political and economic circumstances. In this regard, notwithstanding recent reforms, the future of Australian charity law may be viewed as the continuation of a tradition that began with early interpretations of the preamble to the Statute of Elizabeth.

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