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Australia Crawls Closer to Reform of the Definition of Charity

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The Australian state and federal jurisdictions have adopted and closely followed the English definition of charity, based on the Elizabethan 1601 Preamble. English case authority is consistently used as the basis for Australian law in both federal and state courts. Australian courts and regulators rely on the classification of charitable purposes by Lord Macnaghten in *Income Tax Special Purposes Commissioners v Pemsel [1891] All ER Rep 28* (Pemsel's case) into four heads: the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community.

State courts refer to the definition of charity in context of the supervision of charity trusts, dispositions in wills, and fundraising regulation, as well as in connection with various statutes governing local tax exemptions. The Federal courts have been dominated by cases stemming from the federal income tax legislation's exemption of "charitable institutions." The state and federal jurisdictions have remained almost identical in their interpretation of the definition of charity.

However, as the cost of litigation and the sensitivity of nonprofit organizations to adverse publicity have grown, few cases have been pursued to the superior courts over the last 25 years. In fact, the last major case in the ultimate court of appeal (High Court of Australia) occurred 30 years ago. The common law without a vibrant flow of cases tends to ossify, particularly if there is no quasi-judicial body in the legal environment such as the Charity Commission (England and Wales).

On 18 September 2000, the Prime Minister announced the establishment of an independent inquiry into definitional issues relating to charitable, religious, and community service not-for-profit organizations. He said:

> We need to ensure that the legislative and administrative framework in which they operate is appropriate to the modern social and economic environment. Yet the common law definition of a charity, which is based on a legal concept dating back to 1601, has resulted in a number of legal definitions and often gives rise to legal disputes. The Inquiry will provide the government with options for enhancing the clarity and consistency of the existing definitions with respect to Commonwealth law and administrative practice. These should lead to legislative and administrative frameworks appropriate for Australia's social and economic environment in the 21st Century.

(http://www.pm.gov.au/news/media_releases/2000/media_release456.htm) It is widely believed that part of the impetus for the inquiry resulted from the difficulties in using the "charity" definition in the proposed federal Goods and Services Tax and from some draft rulings by the Australian Taxation Office on the definition.

Three lawyers were chosen to head the inquiry. The Chairman of the Inquiry was the Hon I F Sheppard AO QC, former Judge, Supreme Court of NSW and Federal Court of Australia. The other members of the Inquiry Committee were Mr Robert

Fitzgerald, Commissioner of Community Services NSW and former President of the Australian Council of Social Service, and Mr David Gonski, Principal of a merchant bank and member of the Prime Minister's Community-Business Partnership. The Inquiry reported on 30 June 2001 to the Federal Treasurer (report available at http://www.cdi.gov.au).

The report made some 27 recommendations among which was the introduction of a statutory definition of "charity" with an independent administrative body for federal law. The suggested definition was as follows:

Charitable purposes shall be:

- the advancement* of health, which without limitation includes:

  - the prevention and relief of sickness, disease or of human suffering;

- the advancement* of education;

- the advancement* of social and community welfare, which without limitation includes:

  - the prevention and relief of poverty, distress or disadvantage of individuals or families;

  - the care, support and protection of the aged and people with a disability;

  - the care, support and protection of children and young people;

  - the promotion of community development to enhance social and economic participation; and

  - the care and support of members or former members of the armed forces and the civil defence forces and their families;

- the advancement* of religion;

- the advancement* of culture, which without limitation includes:

  - the promotion and fostering of culture; and

  - the care, preservation and protection of the Australian heritage;

- the advancement* of the natural environment; and

- other purposes beneficial to the community, which without limitation include:

  - the promotion and protection of civil and human rights; and

  - the prevention and relief of suffering of animals.

*(*Advancement is taken to include protection, maintenance, support, research, improvement or enhancement.)*

The Inquiry made a number of other recommendations, such as:

- that the common law exemption from the public benefit test in the case of "poor relations" and "poor employees" charities was considered anomalous and that such purposes should no longer be regarded as charitable;

- that the public benefit test be strengthened by requiring the dominant purpose of a charitable entity to be altruistic;

- that self-help groups which have open and non-discriminatory membership be regarded as having met the public benefit test;

- that care support and protection of children and young people be recognized as a charitable purpose;

- that closed or contemplative religious orders regularly undertaking prayerful intervention at the request of the public be held to satisfy the public benefit test; and

- that the federal government seek the agreement of all state and territory governments to the adoption of new definition, so the definition would remain similar across all Australian jurisdictions.

On 22 July 2003, after considering the Inquiry report, the Federal Treasurer released a draft bill and directed the Board of Taxation to consult on the workability of the definition of charity proposed (http://www.taxboard.gov.au). The Board was to consult not about the announced policy of the Government, but about its workability. The Tax Board is a body independent of government that reviews potential taxation legislation and advises the government on improving the design and effectiveness of the taxation system.

The Treasurer announced that:

The legislative definition of a charity closely follows the definition that has been determined by over four centuries of common law, but will provide

greater clarity and transparency for charities. It explicitly allows not-for-profit child care available to the public, self-help bodies that have open and non-discriminatory membership and closed or contemplative religious orders that offer prayerful intervention for the public, to be charities. The legislation is expected to begin on 1 July 2004.

(http://treasurer.gov.au/tsr/content/pressreleases/2003/059.asp)

The strategy of the Draft Bill is to codify the existing common law of charity and to expand it in certain respects. A more conservative drafting approach would be to simply add the new purposes and delete undesired purposes, leaving the common law to stand. This is the approach taken in both England and Australia in the amendment of the definition of charity to include recreational facilities and has been quite successful in its implementation. As a code, the Draft Bill has to deal with some difficult areas that are unclear in the common law. To make matters even more confusing, while using the term "code" in the official explanatory memorandum to the Draft Bill, it will not be a pure code, and recourse seems possible to the common law. It is a real possibility that the Draft Bill, if enacted, will require judicial clarification--which is where the whole issue of reform began.

The Draft Bill applies only to the Federal jurisdiction, and the other jurisdictions have not to date shown any enthusiasm to adopt the proposals. This may lead to the situation where the old common law applies to issues reserved under the constitution to states and territories and the new definition just to federal matters, the main being income tax.

The Draft Bill takes the traditional four heads of charity and divides them into seven heads, following the spirit of the Inquiry's recommendations. The proposed sections, which have raised only minor public comment, are:

10 References to charitable purpose

(1) A reference in any Act to a charitable purpose is a reference to any of the following purposes:

(a) the advancement of health;

(b) the advancement of education;

(c) the advancement of social or community welfare;

(d) the advancement of religion;

(e) the advancement of culture;

(f) the advancement of the natural environment;

(g) any other purpose that is beneficial to the community.

(2) ***Advancement*** *includes protection, maintenance, support, research and improvement.*

11 Advancement of social or community welfare

Without limiting what constitutes the advancement of social or community welfare, ***advancement of social or community welfare*** *includes:*

(a) the care of, and the support and protection of, children and young people; and

(b) in particular, the provision of child care services.

12 Religion

(1) In determining, for the purposes of paragraph ^10(1)(d), whether particular ideas, practices and observances constitute a religion, regard is to be had to:

(a) whether the ideas and practices involve belief in the supernatural; and

(b) whether the ideas relate to people's nature and place in the universe and their relation to things supernatural; and

(c) whether the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance; and

(d) whether, however loosely knit and varying in beliefs and practices adherents may be, they constitute one or more identifiable groups; and

(e) whether adherents see the collection of ideas and/or practices as constituting a religion.

(2) This section does not limit the matters to which regard may be had in determining whether particular ideas, practices and observances constitute a religion.

Other provisions in the Draft Bill have caused significant public discussion. In a move that proved controversial, the Bill made the following purposes disqualifying:

- illegal activities;
- advocating a political party or cause;
- supporting a candidate for political office; and
- attempting to change the law or government policy.

With the exception of illegal activities, the purpose will be a disqualifying purpose if it, either by itself or when taken together with one or both of the other of these purposes, is more than ancillary or incidental to the other purposes of the entity.

While few argued that charities should be involved in illegal activities, advocate for a political party, or support a candidate for political office, many believed that the Draft Bill was an attack on their ability to advocate for a political cause or attempt to change the law or government policy. When this is combined with uncertainty about how government regulators would actually decide whether a disqualifying purpose “is more than ancillary or incidental to the other purposes of the entity concerned,” it creates a deep sense of foreboding in the nonprofit sector. The Treasurer is adamant that there will be no change to the common law by the new provision. Such organizations will still be able to advocate, but not be able to be classed as charities for federal law.

The Draft Bill also seeks to bar any organization that has engaged in a serious criminal offense (no conviction required) from charitable status with no means of rehabilitation. Many organizations are nervous about such a provision given the increasing move to strict-liability offenses for the actions of their employees and volunteers.

Government bodies are traditionally excluded from charitable status, but with the blurring of sectors and functions, the principles of the common law are becoming increasingly difficult to administer. The Draft Bill defines "government body" as including a body controlled by the Commonwealth, a State, or a Territory, as well as a body controlled by the government of a foreign country. The Draft Bill is silent on whether a local government-controlled body or a body controlled by a body controlled by a government is included. The Bill also does not clarify what constitutes control.

The Draft Bill also seeks to alter the public benefit element of the common law definition. Under the first three heads of charity in the common law is a general presumption that, prima facie, the element of public benefit is satisfied. Under the draft bill, this will no longer be the case and all organizations will be required to satisfy the test of having a purpose for the public benefit that:

- is aimed at achieving a universal or common good;
- has practical utility; and
- is directed to the benefit of the general community or to a sufficient section of the general community.

The Tax Board handed its report to the Treasurer in late December, but it has not been released at the time of writing. The legislation is expected to begin on 1 July 2004.

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