FOREWORD

Maitland rightly considered the trust to be the most innovative contribution of English jurisprudence to world jurisprudence. So much so that civil law jurisdictions have felt obliged to try and replicate it, at least to some extent, such as in the relatively recent French la fiducie.

Within the general concept of a lawful trust sits an important institution of the charitable trust. An institution is a way of doing things. The idea behind a charitable trust is that of an entity devoted to the public weal rather than private ends. This has been one of the most beneficent contributions of English chancery jurisprudence, both in law, and in its effects in the society it serves.

Trusts of this character immediately face difficult demarcation issues. Given their public benefit element they are allowed significant concessions in law. For example, a charitable trust is non-taxable. This is because what it provides is seen to be in relief of, or at least in furtherance of, important public ends.

But how is the law to draw the necessary lines between what can be classified as a charitable trust, and what is not? The traditional classification - followed in most jurisdictions in the western world - is the determination of the categories for charitable trusts enunciated in the always elegant prose of Baron Macnaughton in Pemsel.

The common law, or judge made law, contains a few “great cases”. Baron Macnaughton produced several of them, including Pemsel. Judgments of this kind challenge what Lord Tennyson pilloried as “the lawless science of our law – That codeless myriad of precedent, That wilderness of single instances.” Any credible version of judge made law has to be informed and organised around these deeply principled great cases. They also represent the down to earth and pragmatic strength of judge made law in being able to adapt to fresh challenges and new conditions.

Ultimately such models fall to the sword of time - life wins and the law has necessarily to adjust, or go around new dimensions, in one way or another. Often it does so with “tweaks” and modifications. Why and how these adjustments are made are the source of much juristic and academic contention. This creates difficulties for the Bar and the judiciary alike. It is the very stuff of common law disputation.
Juliet Chevalier-Watts has essayed a very difficult challenge in an area which has engaged the very best of chancery jurists: essentially, where does our model of Pemsel derived jurisprudence stand today?

The Pemsel framework still stands - probably only legislation can displace it now. But time and life have posed challenges for it, as with any construction of that kind. And those challenges matter greatly under the harsh spotlight of professional life. Precisely when something can be said to be “charitable” in law is the prior, and most fundamental question of all in this area of trusts law.

There has been much writing of a “functional” character as how to set up, run, and take advantage of a charitable trust. For her part, the author has taken up the very hard work of endeavouring to nail down the fundamentals. In so doing she has (happily) utilised leading authorities from around the Commonwealth and the United States where they contribute to the fundamental principles and points at issue.

This is “lawyer’s law”. But it matters greatly. Alongside the hard law, there emerges points of real difficulty for social policy. The common law is never purely barren law. When correctly understood it is also a real repository of societal dilemmas. The author does not shrink from identifying these and remarking upon them.

This work will thus be of real benefit to lawyers and jurists and also those with an interest in the wider implications of charities law.

Hon Sir Grant Hammond KNZM LLD
Law Commission
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Sample
2.1 The Nature of Charitable Trusts

As mentioned in Chapter 1, the word “charity” can mean many things to many people, although the legal definition is more complex than a layperson’s general interpretation of charity being associated with benevolence and philanthropy. “Charity” may be construed as a word of “precise and technical meaning” and “[f]rom very early times the decision was the function of the Court”.¹

Whilst an organisation may state through its constitution that its objects are indeed charitable, this in itself is not evidence enough to establish that the body is charitable. However, such a declaration may be useful in assessing whether or not the body does meet the tests of charity at law.² In addition, “the mere fact

¹ National Anti-Vivisection Society v Inland Revenue Commissioners [1948] AC 31 (HL) at 41 per Lord Wright.
that an organisation may have philanthropic purposes of excellent character does not by itself entitle it to acceptance as a charity in law”. There are some general rules that organisations must meet in order to obtain charitable status regardless of the philanthropic nature of the body. These are set out in McGovern v Attorney-General as follows:

“i) It must be of a charitable nature, within the spirit and intendment of the preamble to the Charitable Uses Act 1601 …;

“ii) It must promote a public benefit of a nature recognised by the courts and statutes; and

“iii) The purposes of the trust must be wholly and exclusively charitable.”

The essence of these requirements can also be found in the slightly reformulated model set out in Re Grand Lodge of Antient Free and Accepted Masons in New Zealand, thus in order to exist as a charity at law an entity must:

“i) exist for charitable purposes;

“ii) those charitable purposes must be its only purposes; and

“iii) carrying out of those exclusively charitable purposes must confer a public benefit.”

Whilst a trust may be established for “good compassionate causes”, this does not mean that it will automatically qualify as a charity. An entity must meet all the requirements of being charitable at law before it can be classified as legally charitable.

2.1.01 Distinguishing Charitable Trusts from Private Trusts

A charitable trust is a type of trust, but it differs in a number of ways from other species of trusts. One basic point of distinction lies in the private/public division. With the exception of charitable trusts, all other types of trusts are private in nature, in other words, they are established for the benefit of individuals or defined classes of individuals. Charitable trusts, by their very nature, are established for purposes other than benefitting individuals, and so it is their purposes for which they are established. The differentiation can be expressed as:

3 McGovern v Attorney-General [1982] 1 Ch 321 (Ch) at 329.
4 <McGovern v Attorney-General [1982] 1 Ch 321 (Ch) at 331.
5 Re Grand Lodge of Antient Free and Accepted Masons in New Zealand [2011] 1 NZLR 277 (HC) at [9]; see also Re Draco Foundation (NZ) Charitable Trust (2011) 25 NZTC 20-032 (HC) at [12].
6 McGovern v Attorney-General [1982] 1 Ch 321 (Ch) at 333.
“trusts for purposes rather than for human beings are rarely valid. They are regarded as difficult, perhaps impossible, to enforce, uncertain in their ambit and generally beyond the capacity of the court to control. In addition, they will very often contravene legal rules against creating perpetuities and inalienability ... To this general doctrine the great exception is charitable trusts ... the distinctive feature of the charitable trust is that it is for the public benefit.”

Charitable trusts are also enforceable by the Crown, as eloquently expressed by Lord Macnaghten in Wallis v Solicitor-General for New Zealand:

“It is the province of the Crown as parens patriae to enforce the execution of charitable trusts, and it has always been recognised as the duty of the law officers of the Crown to intervene for the purpose of protecting charities and affording advice and assistance to the court in the administration of charitable trusts.”

### 2.1.02 Privileges and Benefits of Being Charitable

Charitable trusts have, over the centuries, enjoyed favourable treatment under trust law and are wholly or partly exempt from the operation of a number of rules of trust law, including the rule against perpetuities and the requirement of certainty of objects. In addition, charities also enjoy fiscal and social privileges, including tax concessions and increased public confidence in the sector. In those circumstances it is therefore unsurprising that “the law requires a number of conditions to be fulfilled before trusts can be accepted as being charitable.”

This chapter will now consider those benefits.

### 2.1.03 The Rule Against Perpetuities

The rule against perpetuities, which is also known as the “rule against remoteness of vesting”, “invalidates any future interest under a trust that is not bound to vest, if at all, within a prescribed period of time (the perpetuity period)”.

This rule expresses the historical tension that has lain between landowners who wish to ensure that their estates are preserved within their family for generations and the courts trying to constrain the practice of some settlors who seek to tie up their estates indefinitely by “providing for gifts of property to vest at some distant time in the future”.

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10 McGovern v Attorney-General (1982) 1 Ch 321 (Ch) at 331.

11 Gino Dal Pont Charity Law in Australia and New Zealand (Oxford University Press, Melbourne, 2000) at 84.
that the perpetuity period extends to the lifetime of the specified person alive at
the creation of the trust, and extends 21 years from the date of the death of the
last survivor of that person.\textsuperscript{13}

Charitable trusts, however, “are in most respects exempt from the rule against
perpetuities”.\textsuperscript{14} This means that a charitable trust, unlike other species of trusts,
can last perpetually on the proviso that it vests within the period. In other words,
“the rule of perpetuities applies to the commencement of a charitable trust, just
as to that of a private trust, but not to its continuance”.\textsuperscript{15} Therefore, the purposes
of a charitable trust may also last forever, although it should vest within that
period; “so for instance accumulating income indefinitely is likely to be rendered
void because it cannot be used by the charity”,\textsuperscript{16} so in other words “charitable
trusts can express to last indefinitely”.\textsuperscript{17} The reason for this exception to the
rule against perpetuities is as follows:\textsuperscript{18}

“It is the public interest in encouraging the endowment of charity, which
by definition is beneficial to the public, and in securing a donor’s bounty to
those who were intended to benefit in the future, that can be said to justify
this favourable treatment.”

If income is accumulated during the period of the trust and is likely to render a
charitable trust void, a court may be able to apply this income via the doctrine of
cy-près, provided there can be found a general charitable intention, which will be
discussed in Chapter 8.\textsuperscript{19}

Private trusts are also subject to another rule against perpetuity, that of the rule
against inalienability, where if there is a possibility that capital will be tied up for
longer than the perpetuity period then the disposition will be void for perpetual
trusts. Therefore, a non-charitable private trust must spend its capital
immediately, or at least within the perpetuity period, if it is not to offend this

\textsuperscript{12}Kerry O’Halloran, Myles McGregor-Lowndes and Karla W Simon (eds) Charity Law and
\textsuperscript{13}Gino Dal Pont, Charity Law in Australia and New Zealand (Oxford University Press,
Melbourne, 2000) at 84.
\textsuperscript{14}McGovern v Attorney General [1982] 1 Ch 321 (Ch) at 331.
\textsuperscript{15}Nicky Richardson, Neville’s Law of Trusts, Wills and Administration (10th ed, LexisNexis,
Wellington, 2013) at 135.
\textsuperscript{16}Gino Dal Pont Charity Law in Australia and New Zealand (Oxford University Press,
Melbourne, 2000) at 86.
\textsuperscript{17}Juliet Chevalier-Watts and Sue Tappenden Equity and Trusts and Succession (Thomson
Reuters, Wellington, 2014) at 215; Andrew Butler “Charitable Trusts” in Andrew Butler and Tim
Clarke (eds) Equity and Trusts in New Zealand (2nd ed, ThomsonReuters, Wellington, 2009) at
272.
\textsuperscript{18}Gino Dal Pont Charity Law in Australia and New Zealand (Oxford University Press,
Melbourne, 2000) at 86.
\textsuperscript{19}Peter Luxton The Law of Charities (Oxford University Press, Oxford, 2001) at 68; Martin v
Maughan (1844) 14 Sim 230 (Ch); Re Bradwell Will Trusts [1952] Ch 575.
2.1 The Nature of Charitable Trusts

rule. In contrast, charitable trusts are exempt from this requirement, which means that capital can be tied up indefinitely.\(^{20}\)

2.1.04 Certainty of Object

For an express private trust to exist, three elements, known as the “three certainties”, must be identifiable:\(^{21}\)

- certainty of intention, normally expressed in writing, verbally or in actions;
- certainty of subject matter, the trust fund itself; and
- certainty of objects, the beneficiaries.

An express private trust must fulfil these requirements if it is to be a valid trust.

Whilst charitable trusts are subject to the first two certainties, certainty of intention and certainty of subject matter, a charitable trust differs from other trusts when it comes to the third certainty: certainty of object. If it is not possible to ascertain an object in a non-charitable trust, then that trust will be void for lack of any individual beneficiary who is capable of enforcing the trust.\(^{22}\)

However, a charitable trust will not fall foul of this requirement if there is no certainty of objects because there is an assumption that the purpose of an object is charitable. Thus “the requirement of certainty of purpose is satisfied if the purpose is charitable”.\(^{23}\) In addition, a lack of beneficiary to enforce a charitable trust is not disastrous because, for reasons of public policy, the Attorney-General enforces charitable trusts.\(^{24}\)

The law of charity however does require that purposes of the trust are wholly and exclusively charitable, and if there is vagueness or uncertainty in that matter then a charity may be rendered void\(^{25}\) unless it can be remedied by a scheme under s 32 of the Charitable Trusts Act 1957, which will be addressed later in Chapter 8.

2.1.05 Fiscal Benefits of Being Charitable

The history of exemption from income tax is rooted in ancient history and examples of such exemptions can be found in the 11th century at the time of the Crusades.\(^{26}\) However, in modern times, many of the special rules pertaining to

\(^{22}\) Morice v Bishop of Durham (1805) 10 Ves Jr 522, 32 E R 947 (Ch); Brown v Yeall 7 Ves 50.
\(^{23}\) Gino Dal Pont Charity Law in Australia and New Zealand (Oxford University Press, Melbourne, 2000) at 84.
\(^{24}\) Gino Dal Pont Charity Law in Australia and New Zealand (Oxford University Press, Melbourne, 2000) at 84.
\(^{26}\) Susan Barker, Michael Gousmett and Ken Lord The Law and Practice of Charities in New Zealand (LexisNexis NZ, Wellington, 2013) at 7.
fiscal exemptions for registered charities reside in the Income Tax Act 2007, including income tax status, donee status and fringe benefit tax (FBT).  

In New Zealand, there are numerous fiscal privileges for registered charities. Whilst it is not the purpose of this chapter to provide an explicit explanation of the tax system of New Zealand pertaining to charitable entities, here are just some examples of those privileges:  

1) Exemption from income tax;  
2) Eligibility to apply for resident withholding tax;  
3) Donations to entities that have IRD-approved donee status may claim tax credits in the case of individuals or deductions in the case of companies and Maori Authorities to the extent of their taxable income in all cases;  
4) Donee organisations may be eligible to receive donations through payroll giving;  
5) Eligibility to be exempt from fringe benefit tax (FBT);  
6) Eligibility to grant concessions to their volunteers working overseas, for instance student loans and KiwiSaver tax credit purposes;  
7) Eligibility for exemption for some concessions concerning GST payments;  
8) Eligibility for exemption to pay rates on land owned by the charitable entity.

2.1.06 Non-Fiscal Benefits of Being Charitable

Obtaining registered charitable status also offers benefits and privileges in addition to fiscal benefits. These benefits are felt by the charities themselves, the public and the funders.

Chapter 5

ADVANCEMENT OF RELIGION

5.1 Introduction

5.1.01 Introduction of religion is one of the charitable purposes expressly cited in the Charities Act 2005, although to determine the actual meaning of “advancement of religion” one must look to case law for further elaboration. As to why advancement of religion is one of the four Pemsel heads, Mallon J, in Liberty Trust v Charities Commission, explains that, in reference to the Australian case of Roman Catholic Archbishop of Melbourne v Lawlor, it was because “the law has found a public benefit in the promotion of religion as an influence upon human conduct”.

Whilst the advancement of religion is evidently one of the four heads of charity, what perhaps may be surprising is that the preamble to the Statute of Elizabeth:

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1 Charities Act 2005, s 5(1).
2 Liberty Trust v Charities Commission [2011] 3 NZLR 68 (HC) at [51]-[52].
3 Liberty Trust v Charities Commission [2011] 3 NZLR 68 (HC) at [53], citing Roman Catholic Archbishop of Melbourne v Lawlor (1934) 51 CLR 1 at 33.
4 Statute of Elizabeth 1601 (UK) 43 Eliz 1 c 4.
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ADVANCEMENT OF RELIGION

(see earlier chapters for outline of the preamble) makes no reference to the advancement of religion specifically. The closest the preamble comes to such a purpose is the repair of churches. Such an exemption can perhaps be explained by understanding the secular position of Elizabeth I “and the desire of the Puritans to have a religion free of state interference”. Although religion and charity have for centuries been closely associated, that relationship has not been without its issues, and history reflects the oftentimes difficult and shifting relationship between state and religion.

It is worthwhile therefore taking a few moments to consider the historical background to the exemption of religion from tax and to contextualise the position of religion within charity law.

In the traditional Judaeo-Christian manner of religion, charity was an essential element that had its basis in three fundamental principles:

i) The first commandment, to love thy God, which required self sacrificing devotion;

ii) The second commandment, to love thy neighbour, which obliged persons to provide mutual assistance; and

iii) That evil lay at the heart of retaining material goods and wealth.

As Christianity grew in popularity, philanthropic forms of charity were promoted along with the Church’s promises of eternal salvation for those generous in their charitable gifts and eternal punishment for those who did not support such philanthropic endeavours. The Church became key, providing support to the needy, and “all charitable property was necessarily in the hands of the church”. Indeed, the notion of poverty in the Middle Ages was that of idealisation.

5 Gino Dal Pont Charity Law in Australia and New Zealand (Oxford University Press, Melbourne, 2000) at 147.


7 See also Chapter 1 for a general overview.


“possibly because its amelioration lay wholly beyond the resources of the society, and the obligation of alms was taught as an intrinsic and significant part of the Christian social duty.”

Thus most of the charitable giving was under the umbrella of alms for the poor or for the Church itself.

However, the power of the Church was subject to many challenges from the State and Monarchs. In the 11th century, William the Conqueror (William I) subjected a number of religious institutions to the burden of military tenure and his son, William II (William Rufus), ransacked and seized church property and church lands. Taxes were imposed on religious bodies throughout the 11th and 12th centuries, although they were not necessarily willingly paid. Perhaps the most profound change of relationship between State and Church came in the 16th century with the Reformation and the destruction of the wealth of churches through Henry VIII’s confiscations and persecutions between 1536 and 1541. The Reformation was central in developing charity law and the advancement of religion.\(^\text{11}\)

The privileges bestowed upon charity law were first developed in ecclesiastical courts and “ecclesiastical law developed particular doctrines in favour of donations to ‘pious causes’”.\(^\text{12}\) Such causes honoured God and the Church and also included the saying of masses, the repair of churches, and gifts to relieve suffering and assist the needy. The definition of pious causes was therefore closely associated with religion and one could say that literally “the legal definition of charity is rooted in religion”.\(^\text{13}\)

However, the Reformation reversed that and severed the link between charity and religion. Evidence of this comes from prohibiting the saying of masses, prohibiting trusts for churches and chapels and enforcing conformity with the Church of England. With the loss of religious support for the poor and the needy, the Tudor period saw the enactment of a public system of poor relief with the Poor Law 1601. This was the beginning of social services delivery.


The enactment then of the Statute of Elizabeth in 1601 reflected the “seismic shift in the relationship between church and state”. Its rationale can be explained as follows:

“Elizabeth I recognized the need to attract religious money for secular purposes. In a society which did not offer fiscal and tax benefits to donors, religion was an important factor motivating charitable gifts. The citizens with new wealth spurned her state church. Understanding the attitude of the rich Puritan merchants to both the established church and the Crown’s history of appropriating religious endowments, Elizabeth I enacted the Statute.”

Thus the preamble to the Statute set out a list of purposes that the State felt were of benefit to society and in turn wished to be supported by private contributions. The lack of explicit religious mention in the preamble was merely “a powerful expression of the increasing secularisation of charity”.

Nonetheless, the contribution to society, the building of societal infrastructures, and the underpinning of civilised values cannot perhaps be underestimated. For instance, Ireland, Australia, New Zealand and Canada “are indebted to the religious organizations that laid much of the foundations for their present health and education systems, and that often provided the staff and resources for their functioning and maintenance”.

However, echoes of the historical tensions between charity and state can still be heard in contemporary times and charitable status for trusts that advance religion are not without their critics. The role of religion and charity in a modern society are not necessarily seen as beneficial: “[o]ften this is centered on their capacity – separately or jointly – to promote equity, equality and pluralism”.

Contemporary cases also make reference to the tensions between charity and state. In the New Zealand case of Hester v Commissioner of Inland Revenue, Hammond J acknowledged that the preamble to the Statute of Elizabeth may...

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18 Kerry O’Halloran “Charity and Religion: International charity law reform outcomes and the choices for Australia” (2011) 17(2) Third Sector Review 29 at 32.
only have made reference to the repair of churches as its only nod towards religion, but that did not necessarily prevent the development of the advancement of religion:19

“From that point, Courts worked ‘outwards’ by accepting that such things as the provision of church furnishings and vestments, the maintenance of churchyards, and like matters, were charitable. And, it did not take all that long for it to be accepted that it was not only gifts for the established church which were valid. Certainly by the 19th century, the cases were clear that religious toleration required that all religions were to be treated impartially.”

Whilst it was very clear that religion was still a fundamental part of society:20

“[i]n that very appropriate recognition however lay the seeds of a contemporary dilemma: given the very considerable concessions made to charities, and given much contemporary agnosticism and even seeming indifference in many quarters to religion, what is it that today supports the concession in favour of religious charities, and more particularly, where are the edges of this head of charity to be drawn?”

Hammond J recognised that there was no easy answer to this question and noted that the answer “presently turns on an element of faith of its own kind. As an English Judge put it, ‘As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none’”.21 His Honour did not make these points to add to the controversy that surrounds trusts that advance religion; he merely made these points to “indicate that any endeavour to distinctly extend the bounds of the concessions afforded by the law to ‘religious’ charitable trusts today raises very real issues both of doctrine, and public policy”.22

Mallon J in the Liberty Trust case echoes Hammond J’s concerns23 and also notes that the point has been made that “whether there is social utility in the advancement of religion is ‘a very much more doubtful proposition’” because the “effect of religion is difficult to define and measure and any effect is ‘usually of a very personal nature’”.24 The question then becomes “why should members of

19 Hester v Commissioner of Inland Revenue [2005] 2 NZLR 172 (CA) at [5].
20 Hester v Commissioner of Inland Revenue [2005] 2 NZLR 172 (CA) at [6].
21 Hester v Commissioner of Inland Revenue [2005] 2 NZLR 172 (CA) at [7], citing Neville Estates Ltd v Madden [1962] 1 Ch 832 (Ch) at 853.
22 Hester v Commissioner of Inland Revenue [2005] 2 NZLR 172 (CA) at [8].
23 Liberty Trust v Charities Commission [2011] 3 NZLR 68 (HC) at [54].
the community bear a heavier burden of taxation merely because the beliefs of others entitle their organisations to exemption from taxation?”.

Regardless however of such criticisms, charity law has always accepted the advancement of religion as charitable at law. There are obviously some limits as to how far this head of charity will extend and, in assessing these principles and limits, this chapter will assess the meaning of religion, and the advancement of religion, in its many variations, as well as the requirement of public benefit in relation to charity law.

We turn first of all therefore to the meaning of religion in charity law.

5.2 The Meaning of Religion

Whilst it is undoubtedly correct that Western civilisation has had at its core the notion of the worship of a single God, specifically Christianity, for centuries, more recent times have seen the absorption of numerous other faiths, including Islam, Hinduism, Judaism and Buddhism, and the question has arisen, inevitably, “what is it that makes religion charitable?” One answer is as follows:

“Beyond faith, it has taught us to respect human life; it has taught us to respect property; it has taught us to respect God’s creation; it has taught us to abhor violence; it has taught us to help one another; it has taught us honesty. In essence what makes religion ‘good’ from a societal point of view is that it makes us want to become better – it makes people become better members of society.”

Whilst this may be correct, there are inevitably criticisms of such a view, as briefly stated earlier, but it is not the purpose of this book to assess the validity of such assertions or criticisms. Nonetheless, the courts have, from time to time, had to consider whether religions other than Christianity can be charitable and, in addition, determine whether or not philosophical beliefs may fall under the rubric of “religion” for charitable purposes.

This has not necessarily been an easy matter for the courts because there is no legal definition of “religion” for charitable purposes. This was highlighted by Tompkins J in Centrepoint Community Growth Trust v Commissioner of Inland Revenue, where his Honour was not aware of any definitions of religion in New Zealand. Indeed, an “endeavour to define religion for legal purposes gives rise to peculiar

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26 Juliet Chevalier-Watts and Sue Tappenden Equity, Trusts and Succession (Thomson Reuters, Wellington, 2013) at 215.
POLITICAL PURPOSES

1) Trusts that further the interests of a political party;
2) Trusts to procure changes in the laws of England and Wales;
3) Trusts to procure changes in the laws of foreign countries;
4) Trusts to procure a reversal of government policy or of particular decisions of government authorities in England and Wales; and
5) Trusts to procure a reversal of government policy or of a particular decision of government authorities in foreign countries.

It is acknowledged that this is a very wide categorisation, however Slade J noted that this was not an exhaustive list, “although he did emphasise that this categorisation should only apply to those trusts whose purposes are political and it should not apply to trusts that employ political means to further the objects of their trust.”

7.3.03 Hanchett-Stamford v Attorney-General

The more recent English case of Hanchett-Stamford v Attorney-General affirmed the view that “whatever the rationale, there is no doubt that the principle remains that a trust, one of whose purposes is to change the law, cannot be charitable”. The Court had to determine whether or not The Performing and Captive Animals Defence League was charitable. One of its significant purposes was to ban performing animals in its entirety. In Lewison J’s view, this amounted to a change in the law as much as banning fox hunting or the farming of mink. His Honour made reference to Lord Parker’s dictum in Bowman, which he thought to be rather a too dogmatic view.

He also made reference to the case of National Anti-Vivisection Society, where he acknowledged their Lordship’s views that the public benefit in permitting vivisection outweighed the inevitable suffering caused to animals as a result of vivisection, and also that the law cannot stultify itself by holding that law changes are in the public benefit.

However, his Honour preferred the view put forward by Slade J in McGovern, and also by Chadwick LJ in Southwood v Attorney-General, that trusts with the purpose of changing the law “would be trespassing on the role of legislature, whose constitutional responsibility is to evaluate the need for such changes”. In Lewison J’s view, this reason was more persuasive than the others propounded in Bowman and National Anti-Vivisection as to why trusts that seek to change the

law are not charitable. As a result therefore, inter alia, the organisation was not charitable.

However, his Honour drew an important distinction when he stated:

“That is not to say that it is unlawful for a charity to promote or oppose changes in the law, provided that its purposes are exclusively charitable. There is a distinction between the purposes or objects of a charity and the means by which it promotes those purposes or objects. Thus the Charity Commission is able to issue guidance to charities and charity trustees about the extent to which they can engage in campaigning, including campaigns to change the law.”

Therefore, the general principle is that “an organisation set up for the purpose of changing the law cannot be a charity”.

The chapter now turns to the jurisprudence of Australia, where recent significant changes to the political purpose doctrine have occurred in the High Court case of Aid/Watch Incorporated v Commissioner of Taxation, so this section of the chapter considers the judicial journey from early Australian authorities to the Aid/Watch case.

7.4 Australian Jurisprudence

The relatively recent Australian case of Victorian Women Lawyers’ Association v Commissioner of Taxation provides an initial insight into the judicial views of the political purpose doctrine where French J observed that:

“political purpose limitation is not well defined and is more difficult of application today having regard to the change in social conditions since 1917 and the involvement of legislatures in areas unthought of at that time.”

Australian case law reflects judicial uncertainty and even explicit criticism of this doctrine, even from early times. We start first by considering the very early case of Royal North Shore Hospital of Sydney v Attorney-General for New South Wales, where judicial concern for this doctrine is expressed.


88 Royal North Shore Hospital of Sydney v Attorney-General for New South Wales (1938) 60 CLR 396; see also Juliet Chevalier-Watts and Sue Tappenden Equity, Trusts and Succession (Thomson Reuters, Wellington, 2013) at 284.
7.4.01 Royal North Shore Hospital of Sydney v Attorney-General for New South Wales

In this case, one of the issues for the Court was whether a trust to provide a prize for the best essay that promoted the extension of technical education in state schools was charitable or not. Latham CJ noted that a trust for the purpose of political agitation would not be charitable and it would not be difficult to cite reasons of public policy that would “prevent recognition ... of a trust for the promotion of a particular political object ... or for the maintenance and advocacy during the indefinite future of the principles of a particular political party”.[90] Such trusts might even “become a public danger.”[91] However, his Honour was also of the view that actually the four heads of charity are all implicitly associated with political activity. For instance:[92]

“The relief of poverty is one of the commonest subjects with respect to which political activity is exercised. So also is education, and it needs but little acquaintance with history to be convinced that what has been regarded from time to time as the advancement of religion is a subject with regard to which acute and active political propaganda may take place.”

Nonetheless, such views have not prevented such trusts from falling within one of those heads of charity. Thus in his Honour’s view, the trust in question fell within the rubric of the advancement of education, and not a trust to promote a particular object by political propaganda.[93]

So Latham CJ was cautionary about the influence of Bowman and stated that it should not “be regarded as making it impossible to establish a trust as a charitable trust merely because the subject matter of the trust might be associated with political activity”.[94] “This is because legislation is a moveable feast and it is nigh on impossible to predict if a subject”[95] “might not at one time or another become the subject of political propaganda.”

89 Royal North Shore Hospital of Sydney v Attorney-General for New South Wales (1938) 60 CLR 396 at 413.
90 Royal North Shore Hospital of Sydney v Attorney-General for New South Wales (1938) 60 CLR 396 at 413.
91 Royal North Shore Hospital of Sydney v Attorney-General for New South Wales (1938) 60 CLR 396 at 413.
92 Royal North Shore Hospital of Sydney v Attorney-General for New South Wales (1938) 60 CLR 396 at 413.
93 Royal North Shore Hospital of Sydney v Attorney-General for New South Wales (1938) 60 CLR 396 at 412.
95 Royal North Shore Hospital of Sydney v Attorney-General for New South Wales (1938) 60 CLR 396 at 413.
Dixon J observed that the “case law dealing with the distinction between charitable purposes and political objects is in an unsatisfactory condition” but his Honour did affirm that “when a main purpose of a trust is to agitate for legislative or political change, then the Court will necessarily find it difficult to assess public welfare, even if the subject of change may be one of the three heads of charity” because it would be difficult to find the necessary public benefit. If the purpose falls under the fourth class, “that of undefined purposes for the public good, the difficulty becomes even greater”.

Whilst Dixon J was critical of the scope of the political doctrine, he did set out a “relatively broad interpretation of the doctrine, which perhaps foreshadow[ed] the later views of Slade J in McGowan”. Thus he referred to the following trusts that would not be charitable because they have political objects: trusts that fund a political party, or have the purpose of “influencing or taking part in the government of the country”, or that seek to “establish a means of affecting or interfering with the government administration”.

So trusts that merely “mould opinion or spread doctrine on the subject of technical education” could not be “regarded as coming within the objection that it is political in character”. Whilst Dixon J did acknowledge the authority of Bowman, his Honour endeavoured to constrain the meaning of political purpose suggesting therefore an early limiting of the application of the doctrine in Australia.

Rich J was more critical of the political doctrine than his colleagues, stating that to find that the trust in question not charitable would be driving “to an absurd...
conclusion” based on a doctrine that was already “vague and indefinite”. His Honour thought that a trust for political purposes could not include “every public object even if religious, eleemosynary or educational ceases to be charitable if the State is concerned in or affected by the trust”. It is evident therefore that whilst the Judges in Royal North Shore did acknowledge the authority of Bowman, the consensus was that if the doctrine were applied to the set of particular facts this “would be stretching the doctrine too far and indeed, such an application may lead to political purpose extending to anything that may be associated with political activity”. This case therefore represents “an early fraying around the edges of the apron strings tying Australian jurisprudence to English jurisprudence on the political purpose doctrine”. The later Australian case of Public Trustee v Attorney-General of New South Wales did little to diminish this jurisprudential approach.

7.4.02 Public Trustee v Attorney-General of New South Wales

Indeed, in this later case, Santow J “lent his voice to the rising tide of criticism being levelled at the doctrine”.

His Honour confirmed that “a trust to support a particular political party or its doctrines is clearly not charitable” and any purpose contrary to the established policy of the law also cannot be thought of as charitable. However, his Honour did acknowledge that this is still not a clear cut classification because it does not make a “distinction between supplementing the law when it may already be moving in a particular direction, and directly opposing its well established policy”.

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106 Royal North Shore Hospital of Sydney v Attorney-General for New South Wales (1938) 60 CLR 396 at 420.


