

CHAPTER 8: CHARITY AND RELATED TERMS IN COMMONWEALTH AND STATE ACTS

This chapter looks at some examples of how the term charity and other related terms are used in Commonwealth and State Acts. A survey of the Acts that include references to charity or related terms is in Appendix D. The terms appear in numerous Acts none of which attempts to define the terms, relying instead either on the common law or the definition of terms used by the legislature and given effect through judicial or administrative interpretation. Some Acts seek to clarify what is meant by the terms within the boundaries set by the common law. Others seek to include or exclude particular entities without reference to the common law.

Commonwealth Acts

The terms charity, religious institution and public benevolent institution and the concept of community service organisation appear in the *Income Tax Assessment Act 1997* (ITAA97) translated from the *Income Tax Assessment Act 1936* (ITAA36), and the *Fringe Benefits Tax Assessment Act 1986* (FBTAA). Charities and religious entities are also found in the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

The terms, and the concept of community service not-for-profit organisation, are not defined in these Acts and therefore take their meaning from the common law or judicial interpretation. Public rulings and publications issued by the Australian Taxation Office (ATO) or State Revenue Offices provide guidance on how the terms are interpreted by the ATO or State Revenue Offices for the purposes of administering the Acts. Often because of the absence of any judicial interpretation, they provide the only guidance except in cases where the taxpayer has received professional advice.

It is clear that the intention of the Parliament when the ITAA36 was introduced was to leave the meaning of these terms to judicial interpretation. When the *Income Tax Assessment Bill 1936* was being debated, the Postmaster-General made the following statement:

The Government has thought it unwise to include a definition of the institutions covered by the paragraph. It prefers that the Commissioner, if not satisfied that an organization is entitled to exemption, shall assess and levy tax on its income...The Commissioner of Taxation himself would

prefer to depend on the legal interpretation given to this provision than include in the clause a definition which by means of some legal subterfuge might be evaded...¹

The interpretation section of the *Foreign Acquisitions and Takeovers Regulations 1989* refers to a 'charitable institution'. The description given does not cross the boundaries of the common law meaning of charity but attempts to provide some clarification of what is included, for example:

- any charitable, religious, scientific or educational institution (including an institution providing residential accommodation wholly or principally for full-time students attending an educational institution);
- any institution being, or carrying on, a hospital; and
- any institution the sole or principal purpose of which is to assist in the saving of life, or the prevention of loss or damage to property, whether at sea or otherwise.

Section 95(A)(1)(5) of the *Political Broadcasts and Political Disclosures Act 1991*, states that 'charitable organisation' means 'a public organisation whose objects are to benefit the public through the relief of poverty, or the advancement of education, religion, public health or science'. This is much narrower than the common law definition of charity as it does not include many of the charitable purposes that fall under the head of 'other purposes beneficial to the community'.

State and Territory Acts

In State and Territory Acts the most commonly used term is 'charity' or 'charitable'. The expressions 'religious' or 'public benevolent' purposes or institution sometimes appear within the description of charitable purposes or entities, although the term 'community service' does not appear. The term 'community organisation' appears but is given a broader definition than that given to community service organisations in the Commonwealth revenue Acts.

As with Commonwealth Acts, State and Territory Acts rely heavily on the common law meaning of charity. Some Acts list those purposes that are included in charitable purposes without limiting the meaning, while others

¹ Australia, Senate 1936, *Debates*, p 1893.

seek to widen the application of the provisions beyond charity or to limit their effect more narrowly.

A number of State Acts provide guidance on what is meant by 'charity' or 'charitable institution' without overriding the common law meaning. For example, section 2 of the *Charities Funds Act 1958* (Qld) includes a long list of purposes, prefaced by the following:

In this Act, charitable purpose means every purpose which in accordance with the law of England is a charitable purpose, and, without limiting or otherwise affecting the foregoing, includes all or any of the following...

Section 10 of the *Pay-roll Tax Act 1971* (Qld) includes a Ministerial discretion to extend the status of 'exempt charitable institution' to an institution the 'principal object and pursuit of which is the fulfilling of a charitable object or an object promoting the public good (not being an object or pursuit that is a sporting, recreational, leisure or social pursuit)...'. A Revenue Ruling dealing with the Minister's discretion takes its meaning of 'charitable institution' from the common law meaning (citing the four heads of charity) and states that 'the expression "object promoting the public good"...equate(s) to the fourth category of charitable trust identified in Pemsels' case'.²

Other Acts appear, superficially, to narrow the common law definition of charity although again the common law prevails. For example, the *Financial Institutions Duty Act of Victoria 1982* describes a charitable organisation as a public benevolent institution, a religious institution, a public hospital, a non-profit hospital, a non-profit primary school and a non-profit secondary school or college. These types of entities normally fit within the first three heads of charity while the fourth head of charity is not accounted for. However, a Circular issued by the Victorian State Revenue Office notes that 'as the various Acts do not provide definitions of "charitable" or "public benevolent institution", we have provided the following definitions, based on common law principles' and goes on to define charitable as being those purposes found under the four heads of charity.³

The *Collections for Charitable Purposes Act 1939* (SA) gives a meaning to charitable purposes which is narrower than the common law meaning. In this Act, charitable purposes are:

2 Office of State Revenue Queensland 1998, Revenue Rulings General, 2.1 *Exempt Charitable Institutions*, 3.1 *Relief of Poverty*, 4.1 *Public Benevolent Institutions* and 5.1 *Minister's discretion — guidelines as to charitable object or an object promoting the public good*.

3 State Revenue Office Victoria (undated), *Charitable bodies — exemption from Victorian duties and taxes*, p 1.

- the affording of relief to diseased, disabled, sick, infirm, incurable, poor, destitute, helpless, or unemployed persons, or to the dependants of any such persons;
- the relief of distress occasioned by war, whether occasioned in South Australia or elsewhere;
- the affording of relief, assistance, or support to persons who are or have been members of the armed forces of Australia or to the dependants of any such persons; and
- the provision of welfare services for animals.

This list appears to exclude the heads of charity of 'the advancement of education' and 'the advancement of religion' as well as many of the purposes held to be charitable under the fourth head of 'other purposes beneficial to the community'.

The *Land Tax Act 1936* (SA) specifically extends its provisions beyond the common law meaning of charity. In section 4 it includes 'land that is owned by an association that is established for a charitable, educational, benevolent, religious or philanthropic purpose (whether or not the purpose is charitable within the meaning of any rule of law)'. However, the operation of the Act is then narrowed by limiting the provisions to the supply of certain services at or below cost. The Act applies to land:

...owned by an association whose objects are or include the supplying to necessitous or helpless persons of living accommodation, food, clothing, medical treatment, nursing, pre-maternity or maternity care, or other help, either without cost to such persons or in return for payments or services the amount or value of which is in the commissioner's opinion substantially less than the value of the accommodation, food, clothing, treatment, nursing, care or help supplied...

Some State Acts dealing with the administration of trusts include a statutory widening of the common law meaning of charity. Part 2, section 4 of the *Variation of Trusts Act 1994* (Tas.) deems the provision of recreational facilities to be a charitable purpose (a purpose that might not fit into the common law meaning). In Queensland, Western Australia and South Australia, legislation dealing with the administration of trusts has also widened the meaning of charitable purposes to include the provision of facilities for recreation.

However, in these States it is limited to such provision as is 'in the interests of social welfare'⁴ or 'for the public benefit'.⁵

A survey of the use of the term 'charity' in Commonwealth and State Acts confirms the reliance on the common law. However, there are instances where the legislation adds to or subtracts from the entities that would normally be caught by the common law meaning. This suggests that the common law meaning of charity does not suit all purposes of public policy. This is manifestly the case in the ITAA97 where the related term 'public benevolent institution' was included to limit tax deductibility of gifts (this is discussed in Chapter 29) and the concept of 'community service organisation' was included to make income tax exemption available to altruistic organisations outside the boundary of charities (see Chapter 31).

4 *Trusts Act 1973* (Qld).

5 *Trustee Act 1936* (SA).

