

CHAPTER 2: WHAT IS A CHARITY?

A dictionary definition of charity is 'giving voluntarily to those in need; alms-giving; an institution or organisation for helping those in need; a kindness, benevolence; tolerance in judging others; love of one's fellow human beings'.¹ In more popular usage charity is sometimes thought of in more narrow terms as the relief of poverty or distress.

In Australia there is no statutory definition of charity or of the other entities² included in the terms of reference. The law dealing with charity is part of the law of trusts. A charity is essentially the instrument for carrying the purpose of a charitable trust into effect. Hammond J has commented that:

There is no intrinsic legal definition of a charity. As a matter of technique, Courts can only describe the attributes of charities. And the essential attribute required is that a charitable activity must seek the public weal; or, to put it another way, a charity is not concerned with the conferment of private advantage.³

An attempt was made in England to classify or provide guidelines for the identification of charitable purposes in the Preamble to the *Charitable Uses Act 1601*.⁴ The Act, referred to as the Statute of Elizabeth, was introduced to address abuses in charitable trusts. The Preamble set out the following charitable purposes:

The relief of the aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids, the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor

1 Moore, B (ed) 1997, *The Australian Concise Oxford Dictionary of Current English*, 3rd edition, Oxford University Press, Melbourne.

2 The term 'entity' has been used by the Inquiry to refer to all types of structures that may be adopted by charities, eg trust, incorporated body or unincorporated body. The meaning the Inquiry attaches to 'entity' is discussed in more detail in Chapter 11.

3 *D V Bryant Trust Board v Hamilton City Council* [1997] 2 NZLR 342 at 347.

4 43 Eliz I c 4.

inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.⁵

The Preamble was not, even in 1601, an exhaustive list of charitable purposes. Trusts for the advancement of religion were omitted as were some other trusts that were considered to be adequately administered and so not requiring the protection of the Act (for example, some educational institutions).⁶ Purposes much broader than relief of poverty, sickness or distress were also included in the Preamble. In the course of a discussion of the Preamble in 1971, Barwick CJ said that:

Out of certain of the instances given in the preamble to the Act of 1601 a broad concept emerges of the kind of object of public utility which will satisfy the quality of charity. Any notion that the concept is of an eleemosynary nature is seen to be untenable by some of those very instances themselves, eg the repair of bridges, havens, causeways, seabanks and highways and the setting out of soldiers. Further, these instances seem to regard the provision of some of the indispensables of a settled community as charitable.⁷

By the early 19th century, the courts had ruled that charitable purposes had to be both for the public benefit and within the spirit and intendment of the Preamble to the Statute of Elizabeth.⁸ The *Charitable Uses Act 1601* was repealed in England by the *Mortmain and Charitable Uses Act 1888* but it provided that references to charities 'should be construed as references to charities within the meaning, purview, and interpretation of the preamble to the statute'.⁹ Thus, notwithstanding its repeal long ago, it continues to have effect in the UK. The position is similar in Australia. For example, the *Imperial Acts Application Act 1969* (NSW) repealed the Statute so far as it affected New South Wales but provided that the repeal was not to affect the established rules of law relating to charity.¹⁰

The place of the Preamble to the Statute of Elizabeth for the law in Australia was confirmed by the High Court in its most recent consideration of charitable purposes in 1974.¹¹ It concluded that the existence of the two elements of being

5 Picarda, H 1999, *The Law and Practice Relating to Charities*, 3rd edition, Butterworths, London, p 9.

6 Picarda, p 72 and Bradshaw, FM 1983, *The Law of Charitable Trusts in Australia*, Butterworths, Sydney, p 2.

7 *Incorporated Council of Law Reporting (Queensland) v Federal Commissioner of Taxation* (1971) 125 CLR 659.

8 *Morice v Bishop of Durham* (1805) 10 Ves 522; 32 ER 947.

9 Picarda, p 10.

10 s9(2)(a).

11 *Royal National Agricultural and Industrial Association v Chester* [1974] 48 ALJR 304.

for the public benefit and being within the spirit and intendment of the Preamble to the Statute of Elizabeth 'is both necessary and sufficient to warrant the conclusion that a particular purpose is charitable in law'.¹² Whether the requirement that charitable purposes be within the spirit and intendment of the Statute of Elizabeth should remain is discussed in Chapter 14.

Through the process of judicial pronouncements on purposes being within the spirit and intendment of the Preamble, or by analogy with the purposes listed in the Preamble or with purposes that have previously been determined to be charitable, a wide legal meaning of charitable purposes has developed.

In *Pemsel's* case in 1891, Lord Macnaghten classified the categories of charitable purposes under four heads:

Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads.¹³

This judgement of Lord Macnaghten was a milestone. It stipulated a modern (at that time) classification of charities. However, the four heads of charity are a classification of charity, not a definition.

The common law meaning of charity is given to the term 'charity' in numerous Commonwealth and State laws dealing with trusts, fundraising, methods of incorporation and taxation. (Chapter 8 surveys the use of the term 'charity' in Commonwealth and State Acts.) Only one common law country, Barbados, has legislated for a definition of charity. (A discussion of approaches to charity in other countries can be found in Chapter 9.)

12 [1974] ALJR 304 at 305.

13 *Income Tax Special Purposes Commissioners v Pemsel* [1891] All ER Rep 28 at 55; [1891] AC 531.

