

<b>1.</b>	<b>INTRODUCTION AND SCOPE</b>	<b>3</b>
A.	WHAT ARE NOT FOR PROFITS?	3
(I)	<i>How does the Law treat NFPs?</i>	3
B.	PHILANTHROPY'S FUNCTION – ATKINSON	4
C.	TRUSTEES OF A CHARITABLE TRUST – CAREY	5
D.	<i>ELLIS V PELL [2006] NSWSC</i>	5
<b>2.</b>	<b>DEFINITIONAL ISSUES</b>	<b>5</b>
A.	BACKGROUND TO THE DEFINITION OF NFP/CHARITY	5
B.	WHAT IS A CHARITY?	6
(I)	<i>Definition at Common Law</i>	6
	<i>CIT v Pemsel (1891) AC</i>	6
	<i>Chesterman v FCT (1923) HCA 24</i>	6
	<i>Chesterman v FCT (1926) AC 128 [privy council]</i>	7
(II)	<i>Statutory Definition</i>	7
C.	CONCEPTUALISING "CHARITY" IN STATE TAXATION –DAL PONT	8
D.	FISCAL CONSIDERATIONS IN THE JUDICIAL INTERPRETATION OF CHARITY – PARACHIN	9
E.	THE PUBLIC BENEFIT TEST AND CHARITIES FOR INDIGENOUS PEOPLES - MARTIN	11
<b>4.</b>	<b>DEFINITIONAL ISSUES – CONTINUED</b>	<b>12</b>
A.	DRILLING DOWN ON PEMSEL HEADS	12
(I)	<i>"Other Purposes Beneficial to the Community"</i>	12
(II)	<i>"Advancement of Education"</i>	12
(III)	<i>"Advancement of Religion"</i>	13
B.	OTHER REQUIREMENTS FOR CHARITIES UNDER THE CHARITIES ACT	13
(I)	<i>No Disqualifying Purpose</i>	13
	<i>Aid/Watch Inc. v Commissioner for Taxation [2010] HCA</i>	13
	<i>Tax Ruling TR 2011/4</i>	14
(II)	<i>Not an Individual, Political Party or part of Government</i>	14
(III)	<i>Must benefit the Public (s. 6)</i>	15
(A)	Public	15
(B)	Benefit [s. 6(2)]	15
C.	OTHER TYPES OF NFP ENTITIES	15
<b>4.</b>	<b>THE ECONOMIC CONTRIBUTIONS OF THE NFP SECTOR</b>	<b>16</b>
A.	SOURCES OF DATA	16
B.	SIZE, LOCATION, PURPOSES	16
C.	ECONOMIC CONTRIBUTION	17
D.	SOURCES OF FUNDING	17
<b>5.</b>	<b>FEDERAL TAX CONCESSIONS FOR NFPs</b>	<b>18</b>
A.	THEORETICAL JUSTIFICATIONS FOR PROVIDING TAX CONCESSIONS TO NFPs	19
B.	THE HISTORICAL DEVELOPMENT OF TAX CONCESSIONS IN AUSTRALIA	19
C.	FEDERAL TAX CONCESSIONS FOR NFP ENTITIES	20
(I)	<i>Income Tax Exemption: Div 50, ITAA 1997</i>	20
(II)	<i>Franking Credit Refunds</i>	22
(III)	<i>Capital Gains Tax (CGT) Provisions</i>	23
(IV)	<i>Deductible Gift Recipients (DGRs) Div 30, ITAA 1997</i>	23
(V)	<i>Fringe Benefits Tax (FBT) Concessions</i>	26
(VI)	<i>Goods and Services Tax (GST) Concessions</i>	27
(VII)	<i>The Principle of Mutuality</i>	27

D.	ABUSE OF TAX CONCESSIONS.....	27
<b>6.</b>	<b>REGULATION OF NFPS .....</b>	<b>29</b>
A.	INTRODUCTION.....	29
B.	MODELS OF REGULATION.....	30
C.	CHOICE OF REGULATOR.....	30
D.	DEVELOPMENT OF THE ACNC.....	31
E.	REGULATORY APPROACH OF THE ACNC .....	31
(I)	<i>Objectives of the ACNC</i> .....	31
(II)	<i>Regulatory Principles</i> .....	31
(III)	<i>Regulatory Approach: Support and Compliance</i> .....	32
F.	SCOPE OF REGULATION .....	32
(I)	<i>Registration</i> .....	32
(II)	<i>Governance</i> .....	33
(III)	<i>Reporting</i> .....	33
(IV)	<i>Oversight</i> .....	33
(V)	<i>Education</i> .....	33
(VI)	<i>Funding</i> .....	34
G.	OBLIGATIONS OF REGISTERED CHARITIES .....	34
H.	5-YEAR REVIEW OF THE ACNC .....	34
<b>7.</b>	<b>CHRISTIAN [GUEST SPEAKER FROM PHILANTHROPY AUSTRALIA] .....</b>	<b>34</b>
<b>8.</b>	<b>PROBLEM AREAS.....</b>	<b>35</b>
A.	NFPS AND POLITICS .....	35
	<i>Aid/Watch Incorporated v Commissioner of Taxation [2010] HCA 42</i> .....	36
	<i>“Navigating the Politics of Charity” – Chia et al.</i> .....	37
	<i>“Charities, Elections, and Advocacy” – AcNC Advice Document</i> .....	38
	<i>Charities Act 2013 (Cth)</i> .....	39
	<i>Case Study 1</i> .....	39
B.	JURISDICTIONAL ISSUES.....	40
(I)	<i>The ‘in Australia’ Conditions: What are they and when do they apply?</i> .....	40
	<i>FCT v Word Investments Ltd. [2008] HCA 55</i> .....	41
(II)	<i>Implications for Cross-Border Philanthropy</i> .....	42
	<i>“Should Tax Incentives Stop at Australia’s Borders?” – Stevens et al.</i> .....	42
(III)	<i>Proposals to Reform the ‘in Australia’ Requirements</i> .....	44
	<i>Case Study 2</i> .....	45
<b>C.</b>	<b>THE BOUNDARY BETWEEN CHARITY AND GOVERNMENT .....</b>	<b>45</b>
(I)	WHY DRAW THE DISTINCTION? .....	45
(II)	WHY IS IT DIFFICULT TO DRAW THE DISTINCTION? .....	45
(III)	HOW DO WE DISTINGUISH?.....	45
	<i>Central Bayside General Practice v Commissioner of State Revenue [2006] HCA</i> .....	45
	<i>Charities Act 2013 (Cth) ss. 4, 5(d), 13, 15</i> .....	47
	CASE STUDY 3 .....	48
<b>D.</b>	<b>EMPLOYMENT ISSUES .....</b>	<b>48</b>
(I)	WHAT IS THE DIFFERENCE BETWEEN AN EMPLOYEE/CONTRACTOR/VOLUNTEER? .....	48
(II)	WHY DOES THE DISTINCTION MATTER?.....	48
	<i>Unpaid Work – Fair Work Fact Sheet</i> .....	48
	CASE STUDY 4 .....	49

# 1. INTRODUCTION AND SCOPE

## A. WHAT ARE NOT FOR PROFITS?

### BASIC CRITERIA:

- Non-gov'tal (private)
- Not part of the for-profit (market) sector [doesn't have the purpose of making a profit]
- Must not make a distribution (either while in existence or upon winding up) to any of its members
  - NB: this is the key difference between a social enterprise (a for-profit co. w/ some social benefit) and NFP
- May provide benefits to members (e.g., *Victorian Women Lawyers*)
- May pay employees remuneration for services rendered
- Aimed at some beneficial societal goal

### Can be any type of entity:

- Company limited by guarantee (CLG) → formed under *Corporations Act 2001 (Cth)*
  - Advantage vs. inc. assoc? → allows for operation in multiple states/nation-wide
- Incorporated association (e.g., via *Associations Incorporation Reform Act 2012 (Vic)*) → simpler than CLG
- Charitable trust
- Unincorporated association → just a group of individual persons w/ no separate legal status
  - NB: under *Income Tax Assessment Act* it would be taxed like a company unless it got an exemption
- Other (e.g., incorporation by statute (Indigenous Organization; University); est'd by royal charter)

### Non-profit purpose requirement:

- **Tax Ruling 11**, at 35: "SOLE purpose must be charitable" but at para 5, the case defines 'sole purpose' as 'main/predominant purpose'
  - i.e., the main purpose(s) must be charitable and any ancillary purpose(s) can be non-charitable, as long as they support the charitable purpose
- Distinction between purposes and activities → activities can be non-charitable as long as they support the charitable purpose
  - However, note that analysis of an org's activities will be part of whether it is deemed to be a charity
- How is charitable purpose determined?
  - **Tax Ruling 11**: (1) constituent documents of the organisation; (2) activities; (3) how the organisation is governed; (4) any legislation applicable to the org; (5) historical mgmt. or treatment of the org
- ASIC has suggested particular wording for organisations to use in order to be recognised as charitable:

#### Suggested not-for-profit clause:

The assets and income of the organisation shall be applied solely to further its objects and no portion shall be distributed directly or indirectly to the members of the organisation except as genuine compensation for services rendered or expenses incurred on behalf of the organisation.

#### Suggested dissolution clause:

In the event of the organisation being dissolved, all assets that remain after such dissolution and the satisfaction of all debts and liabilities shall be transferred to another organisation with similar purposes, which is charitable at law and which has rules prohibiting the distribution of its assets and income to its members.

### Diversity w/in the Sector

- Can be directed towards a number of different purposes
- Vary in size, legal form, membership, use of employees and/or volunteer

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## (I) HOW DOES THE LAW TREAT NFPS?

**BENEFITS:**

- Fiscal advantages
- Priority in contracting w/ gov't to provide services
- Reputational benefits
- Relief from certain restrictions on establishment and interpretation of trusts

**LAW-MAKING ABOUT NFPs:**

**FED:** no express cth power to regulate charities ∴ must rely on other heads of power:

- **ACNC Act 2013:** Cth relied on taxation, communications, territories, and external affairs power
- **Charities Act 2013:** defines 'charity' for purposes of any cth leg'n (i.e., tax) but does not apply to state leg'n

**STATE:** regulation of incorporated associations; regulation of trusts (e.g., *Trustee Act, Charitable Trusts Act (Vic)*)

**B. PHILANTHROPY'S FUNCTION – ATKINSON**

- We should move from defining why philanthropy is good to measuring goodness and analysing it comparatively
- Component organisations of NFP sector are no coherently moving towards one vision of the social and individual good – there are many visions which compete w/ one another ∴ need to be able to measure performance

**Two basic perspectives from which to assess performance:**

- (1) **From above:** determining the proper role of philanthropy in society; what do charities do uniquely well and what do other sectors do better than phil?
- (2) **From within:** analysing our own proper practice of philanthropy as individuals in society

**Standard Model of Philanthropy:** Analyses all organisations w/in society along 2 axes: economic and political:

ECONOMIC	For-profit (some set of individual constituents entitled to its net assets)	Not for profit	
	Household	Gov'tal	Non-Voluntary (Compulsory membership)
	Market	Philanthropic	Voluntary (Members can choose whether to join)
			POLITICAL

- Limitations of standard model:
  - Atkinson argues that this model analyses and assesses NFP as an adjunct to other sectors (Market + State) → subordinates it
    - Market is #1 → gov't fills gaps in market → NFP fills gaps in whatever is left
  - Ambiguous position of household: what is it? What's its role?
  - Implicit assumption of functionalism (i.e., that every sector will be assigned the role(s) it performs best and the assessment of each will be according to its assigned position) – in turn, this implies two things
    - Giving people what they want is society's goal
    - Capitalist market and liberal democracy – operating optimally – are the best way to reach this goal
      - What's missing? No explicit statement or explanation of why this is/should be the goal; merely assuming that the patterns extant in society are the ones to be followed

**Neoclassical philanthropy:** sees the goal of society as a whole, and of philanthropy in particular, as being to give people the opportunity to attain the “highest forms of human excellence.”

### C. TRUSTEES OF A CHARITABLE TRUST – CAREY

#### What is a charitable trust?

- A legal vehicle which allows the transfer of gifts from an individual, family, or corporation to a charity
- Created when an initial sum of money is settled on the trust by someone → in so doing, they relinquish all rights to the funds
- Trust is intended to continue indefinitely
- Has no named beneficiaries ∴ although recipients of the charity’s eventual work/donation will gain benefits, these recipients cannot challenge the trust or seek to o/w enforce its terms
- Corpus (settled funds) are usually invested by a trustee and the income is then distributed to charitable orgs for the advancement of the charitable purposes specified in the trust instrument
  - Purpose of the trust and the trustee’s duties should be made explicit

#### Powers, rights, and duties of trustees:

- Can’t be given totally unfettered discretion w/r/t administration of the trust
- Powers may be given by trust instrument, statute, and the ct
- Trustee’s obligations are fiduciary in nature
- Basic duties: adhere and carry out trust terms; properly invest funds; keep proper accounts; keep trust funds separate from any other trusts or any personal funds; exercise reasonable care in the mgmt. of the trust
- Must act in accordance w/ the charitable intent of the trust
- Must carry out the terms of the trust deed

### D. ELLIS V PELL [2006] NSWSC

<b>F</b>	<ul style="list-style-type: none"> <li>• Π: Ellis; victim of childhood SA by Father Duggan (now deceased) in Catholic Archdiocese of Sydney</li> <li>• Δ: Trustees incorporated under the Roman Catholic Church Trust Property Act 1936;</li> <li>• for each RCC diocese in NSW, a corporate body was established; the statute vested all church property w/in the diocese in the respective body corporate.</li> </ul>
<b>I</b>	Whether the action could proceed against the Δ: trustees of the Roman Catholic Church for the Archdiocese of Sydney; the question is whether the body corporate was simply created in order to manage property of the church or whether it was something more.
<b>D</b>	Yes, the case could proceed. NB: this did not decide whether Δ was negligent, etc. it was just about whether they were a proper Δ.
<b>RA</b>	There is an arguable case that the trustees, at all relevant times, constituted an entity which the Roman Catholic Church adopted and put forward a the permanent corporate entity or interface between the spiritual and temporal sides of the Church, legally responsible for the acts and omissions of the Archbishop and his subordinates in the performance of his role.

## 2. DEFINITIONAL ISSUES

### A. BACKGROUND TO THE DEFINITION OF NFP/CHARITY

- Hx provision of benefits to entities not formed for profit and non-gov’tal (i.e., early taxation statutes)

- Sector developed in response to the benefits being provided
  - 1915 Federal income tax statutes gave exemptions to some entities that did not fit within the meaning of ‘charity’ but were NTL seen to deserve some special benefits
  - Exemptions being for charitable, religious, public education, and other community benefits which led to cases that debated the meaning of ‘charitable’
    - Some notion of ‘doing good’ and being ‘worthy’
- In the past 20ish years, there were a number of reports regarding the confusion and complexity of NFP sector and its regulatory situation
  - E.g., Charity Definition Inquiry (CDI): led to the statutory definition of charity being introduced
    - Importance? Clarification, public education/awareness

## B. WHAT IS A CHARITY?

### (I) DEFINITION AT COMMON LAW

#### *CIT V PEMSEL (1891) AC*

<b>F</b>	Will included a gift for “advancing missionary establishments among heathen nations.”
<b>I</b>	Was the trust charitable?
<b>D</b>	3:2 split: Halsbury & Bramwell: Missionary purposes ≠ charitable under its ordinary meaning // McNaghten, Morris, and Watson: fits w/in meaning of charity
<b>RA</b>	Charity, in its legal sense, comprises four principal divisions: <ol style="list-style-type: none"> <li>1. Relief of poverty</li> <li>2. Advancement of religion</li> <li>3. Advancement of Education</li> <li>4. Other purposes beneficial to the community</li> </ol>

#### *CHESTERMAN V FCT (1923) HCA 24*

<b>F</b>	Trust in a will made to provide prizes for competition in physical, mental, or moral excellence
<b>L</b>	<i>Estate Duty Assessment Act, s. 8(5)</i> : Duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed...for religious, scientific, charitable, or public educational purposes.
<b>I</b>	Whether the purposes of the trust were charitable under s. 8(5)
<b>D</b>	“Charity” in s. 8(5) has its ordinary meaning (i.e., it means the relief of poverty)
<b>RA</b>	Charity, in this context, means relief of any form of necessity, destitution, or helplessness, including spiritual destitution or need which excites the compassion or sympathy of men and appeals to their benevolence for relief...a gift of a fund to provide prizes for competitions, without regard to the pecuniary means of the competitors does not fall w/in this meaning.