

# TRUSTS: Charitable Trusts

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- A type of purpose trust held for a charitable purpose rather than for a person
  - Beneficiary principle does not apply
    - Therefore, no certainty of objects requirement – neither list nor criterion certainty
- One key distinction is **perpetuity**
  - A private trust **must vest at some point**
  - Charitable trusts, on the other hand, **can go on indefinitely**

## Four-Stage Test for Charitable Status

1. Charitable in nature under a Pemsel head (or s 12 Charities Act)
2. Beneficial
  - Presumed for heads 1-3 (cf **Re Shaw; Re Pinion**), must be **proved** for head 4
3. Confers a **public benefit**
  - A section of the public, not numerically negligible, not defined by a personal nexus
4. Exclusively charitable
  - Non-charitable purposes may be severed – s 102 Trustees Act (WA)

## Pemsel Heads

- List of charitable purposes from *Pemsel* [1891] (Lord McNaghten)

### Head 1 – Relief of poverty, aged, impotent

- Poverty is an inability to maintain a ‘modest standard of living’ (**Ballarat Trustees**), not destitution (**Re Coulthurst’s WT**); no express reference to poverty needed (**Downing**)
- Aged refers to relief of needs arising from old age (**City of Hawthorn**)
- Impotent means disability/sickness; hospitals charitable even if they charge, provided no individual profits from surplus (**Re Resch’s WT**)

### Head 2 – Advancement of education

- A ‘balanced and systematic process of instruction, training and practice’ (**McMullen**); genuine research with public dissemination qualifies (**Re Hopkins’ WT**)
- Limit is that mere accumulation of knowledge is not education (**Re Shaw** – new alphabet for learning-impaired children); a worthless collection lacks public benefit (**Re Pinion**)

### Head 3 – Advancement of religion

- All religions unless ‘subversive of all morality’ (**Thornton**)
  - Religion is defined as the belief in a supernatural being/thing/principle with canons of conduct giving effect to it
- ‘Advancement’ requires steps to spread belief, not mere moral cultivation (**United Grand Lodge**)

## Head 4 – Other purposes beneficial to the community

- Two stages
  - Beneficial to the community (proved); and
  - Within the spirit and intendment of the Preamble to the Statute of Charitable Uses 1601, ‘indispensables of a settled community’
- Animal-protection charity is justified in human terms (promotes compassion), not for the animals (**Murdoch**); disaster relief qualifies (**NSW Rural Fire Service Brigades**)
- An entity is charitable even if it runs a business, where profits are devoted to charitable purposes
  - **Word Investments**; cf Kirby J dissent – activity must be related/ancillary/incidental

## Statutory Framework – Charities Act 2013 (Cth)

- Section 12: definition of ‘charitable purpose’
  - (a) advancing health; (b) advancing education; (c) advancing social or public welfare; (d) advancing religion; (e) advancing culture; (f) promoting reconciliation, mutual respect and tolerance between groups in Australia; (g) promoting or protecting human rights; (h) advancing the security or safety of Australia or the Australian public; (i) preventing or relieving suffering of animals; (j) advancing the natural environment; (k) any analogous purpose beneficial to the general public – **modern equivalent of Pemsel Head 4**; (l) political advocacy: promoting or opposing a change to law, policy, or practice, where the change is in furtherance (or opposition) of one of the above
- Codification of Pemsel heads
  - The first three Pemsel heads can be seen in (a) to (d)
  - The fourth (catch-all) head is teased out across (a) to (j), with (k) doing the analogous work

## Charitable Trusts Act 2022 (WA)

- Section 4 defines ‘charitable purpose’
  - a. A purpose that is charitable under the law of this State (preserves general law/**Pemsel**)
  - b. Includes any charitable purpose as defined under s 12 *Charities Act*

## Public Benefit

- For a trust to be a valid charitable trust at law it must:
  - Be for an acceptable charitable purpose (**Pemsel**)
  - Benefit the public (or at least a sufficient section of the public)
- There are certain assumptions for ‘public benefit’
  - Trust for the relief of poverty
    - **Public benefit is positively presumed**
  - Trust for the advancement of education and religion
    - **Public benefit is presumed**, but the presumption **can be rebutted by evidence**
  - Fourth head (other purposes beneficial to the community)
    - **Public benefit must be demonstrated**; it is not presumed

### • **Oppenheim v Tobacco Securities Trust Co [1951] Personal Nexus Rule**

- Education of children of employees/former employees of BAT (110,000+) – **not charitable**
  - The class was defined by **personal nexus** to the employer; nexus destroys the public element regardless of class size

### • **Dingle v Turner [1972] (HL) Poverty Exception**

- Trust for 'poor employees' of a company is **charitable** despite the personal nexus
  - **Poverty exception** to *Oppenheim* (only applies to poverty)

### • **Gilmour v Coats [1949] (HL) Closed Religious Orders**

- Gift to an enclosed contemplative order of nuns – **no public benefit**
  - No contact with the public; open orders (teaching, missions, hospitals) succeed

## Disqualifying Factors

### • **Aid/Watch Inc v Commissioner of Taxation (2010) Political Purposes (Australia)**

- Campaigned to influence government policy on foreign aid (relief of poverty)
- Held to be charitable
  - Generating lawful public debate on a matter connected to a recognised head is itself beneficial; the Constitution presupposes freedom of political communication
- **Profit distribution** to individuals defeats charity (**Re Resch's WT**)
- Trusts tied to a political party remain non-charitable

## Statutory Modification of 'Public Benefit' Rule

- Section 6 *Charities Act* captures the public benefit requirement
  - Sections 8 to 11 provide modifications and qualifications to s 6
- Section 7 *Charities Act*: Purposes presumed to be for the public benefit (in the absence of evidence to the contrary)
  - (a) preventing and relieving sickness, disease or human suffering; (b) advancing education; (c) relieving the poverty, distress or disadvantage of individuals or families; (d) caring for and supporting the aged or individuals with disabilities; (e) advancing religion
- Section 6(1) *Charitable Trusts Act (WA)* preserves the position
  - 'Nothing in this Part detracts from the principle that a purpose must be for the public benefit in order to be charitable'

## Mixed Charitable/Non-Charitable Trusts

- Historically a trust that was for both charitable and non-charitable purposes would be struck down entirely; no 'mixed' charitable trust was allowed
- **Trustees Act 1962 (WA)** s 102 has changed that position
  - Mixed-purpose trusts are no longer automatically void
  - The **charitable purposes can be severed and given effect to**

## Schemes for Charitable Trusts

- Where a charitable purpose cannot be carried out as intended, equity may apply a scheme to give effect to the settlor's charitable intention
  - Two types of schemes
    - **General administrative scheme**
    - **Cy-près scheme**
- Both are dealt with in Part 3 of the *Charitable Trusts Act 2022* (WA)
  - They have similar mechanics but are designed for different situations

### General Administrative Scheme

- For where it is clear enough what the trust was trying to achieve, but the mechanisms or mechanics have misfired or there is some other problem with them
  - Statutory pathway
    - Section 12 *Charitable Trusts Act* (WA)
    - Section 13(2)(c) *Charitable Trusts Act* (WA)

### Cy-Près Scheme

- For variation of the settlor's intended charitable purpose itself (not just the administrative mechanics)
  - Statutory pathway
  - Section 10 *Charitable Trusts Act* (WA)
  - Section 13(2)(a) *Charitable Trusts Act* (WA)
- Cy-Près triggers
  - Initial impossibility
    - Trustee not specified/refuses; the charitable object never existed or has ceased to exist; the purpose was impracticable from the outset
      - Requires a **general charitable intention**
  - Supervening impossibility
    - The purpose becomes impossible/impracticable after the trust takes effect
  - Surplus
    - The original purpose is satisfied, and trust property remains

### • **Re Simpson [1946] Administrative Scheme**

- 'Cancer research' with no machinery specified
  - Court approved an administrative scheme directing the gift to a university for cancer research, giving effect to a general charitable intention
- Cf **Taylor v PMH [2012]** (Edelman J)
  - Construe first to find what the testator must have meant; only if construction fails does a cy-près order issue

- **Taylor v PMH [2012]**

- Facts
  - Testator left money to PMH and National Diabetes Services Scheme of Australia; neither of which actually existed
  - Also left a small gift for care of his dog, Bonnie
- Issues
  - When testator-named entities do not exist, will they be construed to mean an entity which does exist?
  - If construction fails, can a cy-près order issue?
- Held (Edelman J)
  - Undertakes a process of construction to arrive at what the testator must have meant
    - *When the testator said this, in fact we can construe it that he meant that*
  - The gift for the dog's care is not contested
    - Recall the anomalous cases noted earlier under Charitable Trusts

### Current Position on Trusts Left for Pets

- The orthodox position: a trust for a pet is not enforceable as a purpose trust
- Workaround using precatory words
  - 'I leave it to X in the full hope and expectation that he or she will look after Bonnie'
  - The legatee takes absolutely; the words of 'hope and expectation' are not binding

## TRUSTS: Other Purpose Trusts

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- *Bryan* identifies three basic objections to enforcing a trust for non-charitable purposes
  - Lack of an identifiable beneficiary
  - Absence of anyone to enforce the trust
  - Possible infringement of the rule against perpetuities
- Older (primarily English) cases enforced trusts for pets, monuments, etc.
  - Now regarded as unenforceable

### Beneficiary Principle and its Exceptions

- A non-charitable trust is **valid only if it is a charitable purpose or a recognised anomalous purpose, or falls within *Re Denley*** (purpose directly/indirectly for ascertainable persons)

### Anomalous Purpose Trusts – 'Ought Not to be Extended' (*Re Endacott*)

- Care/upkeep of particular graves (*Re Hooper*); erection of a particular monument (*Mussett*)
- Maintenance of a specific named animal (*Re Dean* – ponies/hounds), **not** general animal welfare
- Fox hunting (*Re Thompson*) – likely not upheld today on public-policy/legality grounds