

# Not-for-Profit Law

Theoretical and Comparative Perspectives

EDITED BY

Matthew Harding, Ann O'Connell  
and Miranda Stewart



CAMBRIDGE

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## NOT-FOR-PROFIT LAW

The law and policy applicable to the not-for-profit sector is of growing importance around the world. In this book, legal experts address fundamental questions about not-for-profit law from a range of theoretical and comparative perspectives. The chapters provide scholarly analysis of not-for-profit law organised around four themes: (1) politics, in the broader sense of living as a community, and the narrower sense of political power; (2) charity, how it is defined and changes in its meaning over time; (3) taxation, including the rationale for government support of the sector through the tax system; (4) regulation, which is of increasing significance as governments establish increasingly complex forms of regulation of not-for-profit activity. The fundamental aim of the book is to deepen our understanding of not-for-profit law and of the rationales and modes of government support for the not-for-profit sector.

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## FOREWORD

Much regulatory and revenue law is directed to trade and commerce – to the integrity and competitiveness of markets, to the protection of consumers and to the definition and enforcement of quality and safety standards applicable to goods and services. The definition and collection of taxes imposed upon commercial entities and/or in relation to their activities occupy a major proportion of revenue law. Regulation and taxation affecting trade and commerce involve public and private interests in tension. That tension reflects the varying perspectives of business and consumers and the public interest as perceived by politicians and economists and others.

The intensity of debate about regulation and taxation in the not-for-profit sector might be thought not to be as great simply because the economic stakes are not as high. However, as the joint editors point out in their introduction, the law relating to the not-for-profit sector is on the political and legal agendas in the English-speaking world, with particular topics being the subject of sharp contention. The not-for-profit sector cannot be defined narrowly by reference to entities which collect money and do good works with it. The work of charities and other not-for-profit organisations increasingly intersects with fields of public policy. That intersection may lead to controversy about the boundaries of community benefit derived from the not-for-profit sector and the status and character of organisations which engage in advocacy on matters of public policy. The controversy is not new. It may be traced back to ‘The Statute of Elizabeth’ – the Statute of Charitable Uses Act 1601 (UK). The breadth of Lord Macnaghten’s well-known definition of ‘charity’ in *Commissioners for Special Purposes of Income Tax v. Pemsel*<sup>1</sup> set the scene for later developments, including, as it did, ‘other purposes beneficial to the community’. The notion that such other purposes did not include

<sup>1</sup> [1891] AC 531, 583.



political objects emanated largely from the dictum of Lord Parker in *Bowman v. Secular Society Ltd*,<sup>2</sup> who observed:

A trust for the attainment of political objects has always been held invalid... because the Court has no means of judging whether or not a proposed change in the law will or will not be for the public benefit.

However, in its decision in *Aid/Watch Inc. v. Federal Commissioner of Taxation*,<sup>3</sup> the High Court referred to the system of representative and responsible government mandated by the Australian Constitution and the implied freedom of political communication affecting burdens which the common law might place upon communication respecting matters of government and politics. So the plurality held that the operation of the constitutional processes comprising agitation for legislative and political changes contribute to the public welfare. Courts administering charitable trusts for that purpose are not called upon to adjudicate the merits of the debate.

The political objects and electoral speech questions which have recently engaged Australian courts represent just one dimension of a multidimensional topic. Many other aspects are covered in this interesting book. It considers social and economic phenomena, including globalisation and commercialisation, which are likely to affect the future development of charities law. They contextualise debates about the appropriate approach to tax policy in relation to the sector that is considered. Law reform initiatives relating to charities in Australia and in other jurisdictions are the subject of comparative consideration, although at the time of publication the future of recent changes to charities regulation in Australia seems somewhat uncertain.

As the joint editors observe in their introduction, a sound grasp of the fundamental questions attending not-for-profit policy and law is necessary in order to evaluate reforms that have been proposed in different jurisdictions. In the development of policy and the development of the law, be it statutory or judge-made, much assistance and a necessary largeness of vision are to be derived from theoretical and comparative perspectives of the kind that are offered in this book. I commend the book to its readers.

*The Hon. Robert French AC  
Chief Justice of the High Court of Australia*

<sup>2</sup> [1917] AC 406, 442.    <sup>3</sup> (2010) 241 CLR 539.

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## ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACNC	Australian Charities and Not-for-Profits Commission
ACPNS	Australian Centre for Philanthropy and Nonprofit Studies
AEC	Australian Electoral Commission
AFS	annual financial statement
AIS	annual information statement
ALRA	Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
ANU	Australian National University
ARC	Australian Research Council
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BCRA	Bipartisan Campaign Reform Act of 2002
BSA	Broadcasting Services Act 1992 (Cth)
CAANZ	Consumer Affairs Australia New Zealand
CAF	Charities Aid Foundation
CJEU	Court of Justice of the European Union
COAG	Council of Australian Governments
CPRN	Canadian Policy Research Networks
DGR	deductible gift recipient
DSC	Directory of Social Change
EEA	European Economic Area
FBT	fringe benefits tax
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971
GAAR	general anti-abuse rule
GST	goods and services tax
HMRC	Her Majesty's Revenue and Customs
IOF	Institute of Fundraising
IRC	Internal Revenue Code
IRD	Inland Revenue Department
IRS	Internal Revenue Service

ISC	Independent Schools Council
ITA	Income Tax Act (Canada)
ITAA 1997	Income Tax Assessment Act 1997
ITANZ	Income Tax Act 2007 (NZ)
MCFL	Massachusetts Citizens for Life
MLA	Maori Land Act 1993 (NZ)
MTBA	Maori Trusts Boards Act 1955 (NZ)
NCVO	National Council for Voluntary Organisations
NFP	not-for-profit
NFPs	not-for-profit organisations
NSCOA	national standard chart of accounts
NTA	Native Title Act 1993 (Cth)
OECD	Organisation for Economic Co-operation and Development
OLRC	Ontario Law Reform Commission
PAC	political action committee
PASC	Public Administration Select Committee
PBI	public benevolent institution
RIA	regulatory impact assessment
SBR	standard business reporting
SCOA	standard chart of accounts
TCEA	Tribunals Courts and Enforcement Act 2007 (UK)
UBI	unrelated business income
UBIT	unrelated business income tax
UDHR	Universal Declaration of Human Rights

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