LAW OF CHARITY

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Law of Charity

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With two chapters on the History of Charity Law by

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Preface

A century ago a Massachusetts court remarked that charity is 'not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man'.[1] If correct, this highlights the importance of charity, broadly defined, to society, and with this the need for the law to encourage and develop, while at the same time regulate, the doing of charity.

Generally speaking, though, courts in common law countries have struggled to break free from the 1601 statutory historical genesis of charity law — the Elizabethan Statute of Charitable Uses. Legislatures have variously escaped the historical shackles, although until the most recent of times these escapes have been partial at best. The pressure for change is intensifying. Prompted by multiple government-commissioned and other reports, the last five years has witnessed new charity legislation in England, Scotland, Ireland and New Zealand. Though not revolutionary, these statutory initiatives mark some of the most substantial changes in the history of charity law in those countries. And these have been accompanied by various revenue-related changes over the years in jurisdictions including the United States, Canada and South Africa.

Each of these changes and statutory initiatives are mentioned in this book, especially in the chapters dealing with the reform of charity law (namely Chapters 19–21). The book cannot avoid an international flavour, albeit with the focus on Australian law, in view of an eminent commentator's description of the legal concept of charity across jurisdictions as a *'lingua franca'*.[2] Yet in Australia, even in the face of report after report containing remarkably aligned recommendations relating to the definition and regulation of charity, relatively little has translated by way of statutory reform. This stalemate is unlikely to remain, though challenges will.

Accepting the admonition that 'it is more important to create a law that reflects the sector rather than to attempt to create the sector through drafting a law',[3] the very diversity of the charity (and broader non-profit) sector highlights one of the chief hurdles that must be overcome in any regulatory endeavour. But the observation of an Australian inquiry that '[i]t is unlikely that anyone other than a lawyer, whether practitioner or judge, steeped in the intricacies of charity law, could confidently express a view about whether or not in a borderline case, a purpose was charitable'[4] emphasises the need for reform. At the same time, in charity law as in other areas of practice, heed must be paid to the words of Oliver Wendell Holmes that '[m]ost distinctions ... are [ones of degree], and are none the worse for it'.[5]

1. *Little v Newburyport* (1912) 210 Mass 414 at 417.
2. H Picarda, 'The Preamble to the Statute of Charitable Uses in 1601: Peter Pan or Alice in Wonderland?' (2002) 8 *Third Sector Review* 229 at 256.
3. E B Bromley, 'Exporting Civil Society: Confessions of a "Foreign Legal Expert"', Paper presented at the NCVO International Charity Law Conference, London, 16–17 September 1994, p 14.
4. I Sheppard, R Fitzgerald and D Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations*, Commonwealth of Australia, 2001, p 151.
5. *Haddock v Haddock* (1906) 201 US 562 at 631.

While purporting to present a comprehensive treatment of charity law from an Australian perspective, the book necessarily has limits. It does not go beyond the legal treatment of charity in common law countries; civil law and Islamic law concepts of charity fall outside its scope. Others have engaged in comparative charity law research from civil and Islamic perspectives,[6] which provide springboards for further investigation. The book, moreover, is not intended as a 'how to' manual to establish or manage charities.

As with any monograph, a temporal line must drawn, which here is 31 January 2010. As a result, mention is made of the Productivity Commission report issued in January 2010,[7] although in less detail than it would otherwise have merited, as the manuscript was completed before its release. Some useful cases were decided early in 2010, too late to influence the text, including *Joyce Henderson Trustee (Inc) v Attorney-General*[8] and *Tantau v MacFarlane*.[9] Also, the High Court's grant of leave to appeal the decision of the Full Federal Court in *Federal Commissioner of Taxation v Aid/Watch Incorporated*[10] augurs well for the first modern High Court pronouncement on the intersection between politics and charity. And on 25 February 2010 the Senate passed the Tax Laws Amendment (Political Contributions and Gifts) Bill 2008 (Cth), heralding the implementation of the promised removal of tax deductibility for political donations by businesses.[11] The forthcoming release of the Henry Review of Taxation will presumably be a catalyst for more substantial revenue-related changes impacting on the charity sector.

I am indebted in writing this work to Associate Professor Stefan Petrow,[12] who authored the chapters dealing with the history of charity law (Chapters 4 and 5, which form Part II of the book). Thanks are also due to Noelene Lowes for her excellent proofreading and editing, and to Joanne Beckett of LexisNexis for managing the project.

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Hobart
15 April 2010

6. See, for example, P C Hemphill, 'The Civil-law Foundation as a Model for the Reform of Charitable Trusts Law' (1990) 64 *ALJ* 404; J A Schoenblum, 'The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust' (1999) 32 *Vand J Transnat'l L* 1191.
7. Productivity Commission, *Contribution of the Not-For-Profit Sector*, Research Report, January 2010 (available at <www.pc.gov.au>).
8. [2010] WASC 60 (17 March 2010), which supports the proposition found at [16.8].
9. [2010] NSWSC 224 (25 March 2010), dealing with, inter alia, the concept of impossibility (arising out of a disclaimer) in a cy-près application: see [15.20], [15.21].
10. [2009] FCAFC 128; (2009) 178 FCR 423, mentioned at [12.35].
11. Hence the statement made at [12.17] must be read subject to this.
12. School of History and Classics, University of Tasmania.

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