FAITH HOPE AND CHARITY: THE RESILIENCE OF THE CHARITABLE TRUST FROM THE MIDDLE AGES TO THE 21ST CENTURY[▽]

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I INTRODUCTION

This paper takes its title from the King James Bible's poetic translation of a beautiful passage from Paul's first letter to the Corinthians which concludes:

> And now abideth faith, hope, charity, these three; but the greatest of these *is* charity.[1]

Over the years, "charity" gained something of a bad name, epitomised by the similie "as cold as charity". Perhaps that is why more recent translations of Paul's

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[1] The complete passage is contained in Ch 13 v 1-13:

> Though I speak with the tongues of men and of angels, and have not charity, I am become *as* sounding brass, or a tinkling cymbal.
> And though I have *the gift of* prophecy, and understand all mysteries, and all knowledge; and though I have all faith, so that I could remove mountains, and have not charity, I am nothing.
> And though I bestow all my goods to feed *the poor*, and though I give my body to be burned, and have not charity, it profiteth me nothing.
> Charity suffereth long, *and* is kind; charity envieth not; charity vaunteth not itself, is not puffed up,
> Doth not behave itself unseemly, seeketh not her own, is not easily provoked, thinketh no evil;
> Rejoiceth not in iniquity, but rejoiceth in the truth;
> Beareth all things, believeth all things, hopeth with all things, endureth all things.
> Charity never faileth: but whether *there be* prophecies, they shall fail; whether *there be* tongues, they shall cease; whether *there be* knowledge, it shall vanish away.
> For we know in part, and we prophesy in part.
> But when that which is perfect is come, then that which is in part shall be done away.
> When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things.
> For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.
> And now abideth faith, hope, charity, these three; but the greatest of these *is* charity.

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letter have replaced "charity" with "love" so that it is much quoted in Christian wedding ceremonies, including mine. But the term "love" in this context is not romantic love but love in the sense of benevolence, philanthropy, compassion for those less fortunate, (and a new word I learned in my research) eleemosynary,[2] that is, *charity*. Our increasingly crowded and diverse world needs all the charitable love it can find.

Many learned tomes have been written on trusts and equity with discrete chapters on charitable trusts. This paper can give but a brief overview of that law.

I hope in this paper to demonstrate both the adaptability of the legal concept of charity to changing knowledge and social needs, and the resilience of charitable trusts as an effective institution for delivering philanthropy. I exhort you to have faith that I can! The paper is in four parts. The first traces the origins and history of the trust with an emphasis on the charitable trust. The second is an analysis of the changing legal notion of charity since the seminal preamble to the *Statute of Elizabeth*,[3] concluding with the High Court's 2010 pronouncement on the topic in *Aid/Watch*.[4] The third is a discussion of the present law applicable in Queensland to charitable trusts. Finally, I will discuss aspects of likely imminent reform of this area of the law in Australia.

II A BRIEF HISTORY OF THE TRUST

The origins of the trust remain shrouded in mystery and speculation. The theory that trusts arose in Roman law is no longer popular.[5] The prevalent academic view is that an early form of the trust developed in England during the Middle Ages. One topical theory is that English Crusaders brought back from Jerusalem the Islamic concept of "waqf", a form of continuous charity bringing rewards after the death of the giver of the *waqf* for as long as people continue to benefit from it. The concept of *waqf* is certainly comparable to the common law world's charitable trusts.[6]

What is certain is that during the Middle Ages in England, landowners developed the "use", a direct precursor to the trust. Under the use, the landowners or the feoffor (comparable to the settlor in the modern trust) would convey or enfeoff legal title to their land to one or more trusted friends called feoffees (comparable to modern trustees). This was on the basis that the feoffees would only exercise their legal right and title to the land for the benefit or to the use of a specified person or persons known as the *cestui que* use (comparable to the beneficiary under a trust).

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2 "the relief of individual distress whether due to poverty, age, sickness or other similar individual afflictions": Harold Arthur John Ford and William Anthony Lee, *Principles of the Law of Trusts*, (Thomson Law Book Co), [19.10.10].

3 *Charitable Uses Act* 1601 (43 Eliz I, c 4).

4 Aid/Watch Inc v Commissioner of Taxation (2010) 241 CLR 539; [2010] HCA 42.

5 Peter Young, Clyde Croft and Megan Louise Smith, *On Equity*, (Law Book Co, 2009), 381, [6.20]; Holmes OW, "Early English Equity" (1885) 1 *Law Quarterly Review* 162.

6 Islamic Relief Australia, "Waqf", 21 April 2011 available at: www.islamic-relief.com.au.

The use gave landowners of the Middle Ages advantages relating to power, money, love and lust, matters equally as important in the Middle Ages as now. The use allowed landowners to provide for a mistress or illegitimate children; to avoid freehold land passing on the death of the landowner to a despised heir at law or the next tenant in tail; and, in times long before any married women's property acts, to make a marriage settlement for the benefit of a daughter without passing property to the husband. Until 1391, a use could allow religious houses to enjoy the benefit of land ownership without the otherwise required Royal licence. The use also assisted landowners to evade creditors' claims and feudal forms of taxation, as well as to preserve property for the landowner's family when the landowner backed the wrong political side or was convicted of serious criminal offences.

Generally speaking, the common law did not recognise interests created under a use, leaving their enforcement to equity in the Chancellor's courts. Until about 1469, equity considered the use a purely personal obligation of the feoffee (cf trustee) to the *cestui que* use (cf beneficiary). Equity only gave relief against the feoffees personally and not their heirs and successors. But by 1482 equity would sometimes enforce a use against heirs to the feoffees.[7]

Over the following decades, uses were so successful in evading feudal taxes that Henry VIII became worried about lost revenue. His reign was a time of great change. He seized control of the Church of England from the Pope and authorised the Great Bible, the first English translation to be read aloud in Church of England services. In 1535, he exercised his considerable diplomatic and political skills to ensure the enactment of the *Statute of Uses* by unwilling parliamentarians, mostly landowners benefiting from uses. Its effect was to execute uses so that the cestui que use (cf beneficiary) became the legal owner of the land. This meant that as land owner the cestui que use had to pay tax on the land to the Crown. The *Statute of Uses* was controversial. It led to the Pilgrimage of Grace where "pilgrims" demanded an end to Henry's radical religious changes and the abandonment of the *Statute of Uses*. They were unsuccessful on both counts.

Sixteenth century lawyers and landowners were not so different from nowadays. They developed a new concept to attempt to avoid the execution of uses and the necessity to pay land tax, a "use upon a use". In 1557 the common law courts held that the *Statute of Uses* had no effect on and did not execute the use upon a use, as the second use was inconsistent with the first and therefore void.[8] The Chancellor generally took the same approach in equity but from as early as 1560 began to give relief in special cases to those seeking to take the benefit of a use upon a use.[9]

A major event in terms of this paper occurred at the beginning of the 17th century with the *Statute of Elizabeth*, but more of that later. A second was the publication in English of the King James edition of the Bible in response to perceived problems with earlier translations. This year marks the 400th anniversary of that

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7 Young, Croft and Smith, above n 5, 383, [6.30].

8 (1557) *Dyer* 155a; 73 ER 336.

9 *Countess of Suffolk v Herenden* (1560): report appended to Barker JH, Note (1977) 93 *Law Review Quarterly* 36.

publication which inspired the title of this paper. A third came in 1660 when Charles II abolished feudal tenure and instead, in contrast with his description the "Merrie Monarch", placed a tax on beer. This meant that neither the use nor the use upon a use imposed any threat to the revenue. As a result, the Chancellor reversed equity's general policy of not recognising the use upon a use.

The term "trust" was first coined to refer to this second unexecuted use, the use upon a use, as the interest of the *cestui que* use (cf beneficiary) was held to be enforceable, not just against the feoffees (cf trustees) personally, but as an enforceable proprietary right.[10] At least by 1671, the Chancery courts developed the practice of enforcing the use upon a use, now called a trust, in the same way as it had enforced the use prior to Henry's *Statute of Uses*. A body of case law surrounding trusts began to develop, much of which remains relevant today.[11]

The law of trusts continued to evolve throughout the 18th century as its transformation from a personal to a proprietary right became established.[12]

The 19th century saw its further refinement as case law gradually separated trust law from the law relating to fiduciary relationships.[13]

During the 20th century, a trust came to be commonly considered as an equitable obligation binding a person (the trustee) to deal with trust property separately and distinctly from the trustee's private property, either for the benefit of a person or persons (the beneficiaries) in a private trust, or in a public trust for a charitable purpose.[14] Trusts can take many forms. They primarily include express trusts,

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[10] Young, Croft and Smith, above n 5, 385, [6.50].

[11] For example, Lord Nottingham's observations in *Cook v Fountain* (1672) 3 Swans 585, 591-592; 36 ER 984, 987:

> All trusts are either, first express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law; again express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is when the Court, upon all the circumstances presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant … There is one good, general and infallible rule that goes to both of these kinds of trusts; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; the law never implied, the Court never presumes a trust, but in case of absolute necessity. The reason for this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust, unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate; and so at last every case in court will become casus pro amico.;

Young, Croft and Smith, above n 5, 385-386, [6.60].

[12] See Lord Mansfield's observation in *Burgess v Wheate* (1759) 1W Bl 123, 162; 96 ER 67, 84:

> An use or trust heretofore was (while it was an use) understood to be merely as an agreement, by which the trustee and all claiming under him in privity were personally liable to the cestuy que trust, and all claiming under him in like privity. Nobody in the post was entitled under, or bound by the agreement. But now the trust in this Court is the same as the land, and the trustee is considered merely as an instrument of conveyance ... As the trust is the land in this Court, so the declaration of trust is the disposition of the land.

[13] Young, Croft and Smith, above n 5, 386, [6.70].

[14] *Muschinski v Dodds* (1985) 160 CLR 583, 613–614; [1985] HCA 78; Young, Croft and Smith, above n 5, [6.90]; G E Dal Pont, *Law of Charity*, (LexisNexis Butterworths, 2010), 446, [17.3].

constructive trusts and resulting trusts. It is the charitable trust, a form of express trust, with which this lecture is primarily concerned. Unlike private trusts which benefit a person or persons, charitable trusts are public trusts which must have a charitable purpose.[15]

Today, trusts are an integral part of commerce and are used in superannuation funds; managed investment schemes; debenture holdings;[16] syndicated loan schemes; to administer sinking or retention funds; to facilitate pledges or bills of lading; and by solicitors, real estate and other commercial agents holding clients' monies in designated accounts. They are also commonly used for charitable purposes.

In this brief overview, I have explained something of the history of the English trust. But there are broadly comparable entities in European law. For example, in Germanic countries the Church treated funds it held for philanthropic purposes, "shiftung", (broadly translated as "foundation") as if the "shiftung" were entities with independent corporate personalities. "Shiftung" were set up by "founders" to do good works for others for the benefit of the founders' souls, not unlike the Islamic concept of *waqf*. The term "foundation" is often used by charitable trusts in common law countries.

III THE CHANGING NATURE OF THE LEGAL CONCEPT OF CHARITY

Citizens in the Middle Ages commonly willed a significant part of their personal or real property to charity, believing this would help save their souls. The ecclesiastical courts originally administered these estates but over time Chancery courts took over this role.[17]

By 1600, poverty was a major social problem following Henry VIII's dissolution of the monasteries.[18] The *Statute of Elizabeth* attempted to improve the ability of charitable trusts to provide relief to the poor. Its seminal preamble continues to set parameters for the meaning of charity:

> Whereas Lands, Tenements, Rents, Annuities, Profits, Hereditaments, Goods, Chattels, Money and Stocks of Money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty, and her most noble Progenitors, as by sundry other well disposed Persons: some for Relief of aged, impotent and poor People, some for Maintenance of sick and maimed Soldiers and Mariners, Schools of Learning, Free Schools, and Scholars in Universities, some for repair of Bridges, Ports, Havens, Causeways, Churches, Sea-Banks and Highways, some for Education and Preferment of Orphans, some for or towards Relief, Stock or Maintenance for Houses of Correction, some for marriages of Poor Maids, some for Supportation, Aid and Help of young Tradesmen, Handicraftsmen and Persons decayed, and others for any poor Inhabitants concerning payments of Fifteens, setting out of Soldiers and other Taxes; which lands Tenements, Rents, Annuities, Profits, Hereditaments, Goods,

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15 *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209, Dixon and Evatt JJ, 222; [1940] HCA 12.
16 See *Corporations Act* 2001 (Cth), Ch 2L.
17 Young, Croft and Smith, above n 5, 412, [6.360].
18 Ford and Lee, above n 2, [19.230].

> Chattels, Money and Stocks of Money, nevertheless have not been employed according to the charitable intent of the givers and Founders thereof, by reason of Frauds, Breaches of Trust, and Negligence in those that should pay, deliver and employ the same.

This preamble was never intended to be an exhaustive list of charitable purposes and courts have always avoided providing any limiting definition of "charitable purpose".[19]

In 1736, the *Mortmain Act* invalidated devises of real property to charity so as to ensure its availability to commerce during the Industrial Revolution. Judges gave full effect to the Act and the definition of charity broadened further.[20]

By the early 19th century, courts had made clear that a charitable purpose must be both for the public benefit and within the spirit and intendment of the preamble to the *Statute of Elizabeth*.[21] That Statute and the *Mortmain Act* were repealed in England in 1888,[22] but the preamble remained in operation there until 1960.[23] The preamble continues to have influence in Queensland and throughout Australia.[24] It remains a useful starting point in determining whether a trust is for a charitable purpose.[25] Lord Macnaughten in 1891 refined the concept of charity in his milestone speech in *Pemsel's* Case:

> '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.[26]

A body of case law has developed in an attempt to clarify what is a charitable purpose in borderline cases. If the word "charity" or its derivative is used in setting out the purpose, courts will generally construe the purpose to be charitable, absent a clear or necessary contrary implication.[27]

As charitable trusts are public trusts, normally enforced by a public officer, the Attorney-General,[28] the first requirement is that they must be for the benefit of the public. In cases where public benefit is not self-evident, it must be established.[29]

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19 *Re Foveaux* [1895] 2 Ch 501, Chitty J, 504.

20 Ford and Lee, above n 2, [19.250].

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

22 Mortmain and Charitable Uses Act 1888 (UK).

23 Charities Act 1960 (UK) repealed the preamble; see also Central Bayside General Practice Association Ltd v Commissioner of State Revenue for the State of Victoria (2006) 228 CLR 168, Kirby J, 201, [95]; [2006] HCA 43.

24 See *Trusts Act* 1973 (Qld), s 103(1); *Imperial Acts Application Act* 1969 (NSW), s 9(2)(a).

25 Central Bayside General Practice Association Ltd v Commissioner of State Revenue (2006) 228 CLR 168, Kirby J, 205, [109].

26 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 583; approved by the High Court as recently as in *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, 546, [18], [47], [69].

27 *Taylor v Taylor* (1910) 10 CLR 218, Griffiths CJ at 225; [1910] HCA 4; Ford and Lee, above n 2, [19.470].

28 Ford and Lee, above n 2, [19.080].

29 National Anti-Vivisection Society v Inland Revenue Commissioners [1948] AC 31, 42.

The public in this sense means the general community or a sufficiently wide section of it.[30] By way of analogy, the Queensland Court of Appeal in *Jensen & Ors v Brisbane City Council*[31] held that a religious fellowship known as the Brethren was not exempt from paying Council rates for land on which their meeting room was built. The question was whether the building was used entirely for public worship. The notion of "public" required the worship to be in a place open to all properly disposed persons who wish to be present, without being vetted by a gate keeper.[32] The exclusivity of the Brethren as to those who could attend the meeting room meant that it was not a place of public meetings and therefore not a building used entirely for public worship. The land was not therefore exempt from Council rates.

In the mid-20th century, the House of Lords held in the much-debated but now well-entrenched *Oppenheim case*[33] that a trust for the benefit of the children of a large group of employees was not a charitable purpose as the group to be benefited depended on the personal relationship tie to a particular individual; the children were neither the community nor a section of it for charitable purposes. For similar reasons, a trust for the descendants of Presbyterian migrants to Australia from Northern Ireland was held not to be a charitable trust.[34] And similarly in the 21st century, a trust for members of a show jumping club was found not to be for a public purpose and therefore not a charitable trust.[35] By contrast, a trust for the benefit of the inhabitants of a particular location, or any particular class of those inhabitants, no matter how small the location, is sufficiently for the benefit of the public to be charitable.[36]

As well as being for the benefit of the public, charitable trusts must ordinarily come within one of Lord Macnaughten's four categories of charity in *Pemsel*. In *Williams' Trustees v Inland Revenue Commissioners*[37] the House of Lords in 1947 found that a trust for maintaining a London institute for the benefit of Welsh people, was for the public benefit but was not for a charitable purpose and therefore not a charitable trust. I do not know what Professor Lee thought of that! But this century, an English court construed a gift for a particular class of inhabitants within a locality as implicitly for charitable purposes unless there was something specific in the gift to exclude it.[38]

The first of the *Pemsel* categories of charity is the relief of poverty. This provides an exception to the general rule that a trust to benefit individuals ascertained by

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30 *Verge v Somerville* [1924] AC 496, 499; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645, 662; [1955] HCA 71.

31 [2006] 2 Qd R 20; [2005] QCA 469, McMurdo P, Keane JA, Mackenzie J.

32 *Jensen & Ors v Brisbane City Council* [2006] 2 Qd R 20; [2005] QCA 469, [43], [44] and [49]. Special leave was refused in *Jensen & Ors v Brisbane City Council* (B4/2006) on 21-22 June 2006.

33 [1951] AC 297; see the discussion in Gino Evan Dal Pont, *Law of Charity*, (LexisNexis Butterworths, 2010), 4-55, [3.11]- [3.12] and in Ford and Lee, above n 2, [19.650].

34 Davies v Perpetual Trustee Co [1959] AC 439.

35 Strathalbyn Show Jumping Club Inc v Mayes (2001) 79 SASR 54; [2001] SASC 73.

36 *Goodman v Sultash Corporation* (1882) 7 App Cas 633, Lord Selborne, 642.

37 [1947] AC 447.

38 *Re Harding* (2007) 1 All ER 747, Lewison J, 751, [16].

reference to a person or tie is not charitable where the tie is either one of blood (the "poor relation" cases); or through contract; or amongst employees of a particular company and their dependants.[39]

The second category is the advancement of education; uncontroversially, a charitable purpose. Courts take a wide view of the meaning of education. In 1952, education was held to include the teaching of the arts of personal contact and social intercourse.[40] Trusts to benefit fee paying schools,[41] universities, and to promote training for the law have also been held to be charitable.[42] Gifts to school teachers are generally not considered charitable. But gifts to the home of rest for lady teachers[43] and a trust for sick or overworked young governesses[44] were held to be charitable; not under the *Pemsel* category of education, but under the category for the relief of poverty. Trusts for sport within educational establishments are valid charitable trusts for educational purposes.[45]

Ordinarily, gifts for the advancement of religion, the third category in *Pemsel*, are charitable, regardless of the religious opinions advanced,[46] providing they meet the public benefit requirement. For obvious reasons, gifts for religious purposes will only be charitable if they are to benefit the public and not merely the members of a religious group. In 1959, in *Leahy's* case both the High Court and the Privy Council found a gift for a contemplative order of nuns did not meet the necessary elements of public benefit.[47] I wonder if the same decision would be reached today in light of new age as well as traditional religious beliefs as to the collective beneficial power of prayer, meditation and positive thought.[48]

The fourth category of charity in *Pemsel* is community benefit. This is a broad concept to be determined in an ever changing social context[49] and explains the longevity of the *Pemsel* definition. Readers of this paper may be pleased that the High Court in 1971 determined that the Queensland Incorporated Council of Law Reporting's role was charitable under this category, exempting it from tax.[50]

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39 *Issac v Defriez* (1754) Amb 595; 27 ER 387; *Re Scarisbrick* [1951] Ch 622 Jenkins LJ, 649 but cf *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

40 *Re Shaw's Will Trusts* [1952] Ch 163, Vaisey J, 172.

41 Campbell College Belfast v Commissioner of Valuation for Northern Ireland [1964] 1 WLR 912 (HL).

42 Smith v Kerr [1902] 1 Ch 774; Incorporated Council of Law Reporting for England and Wales for the Attorney-General [1972] Ch 73; College of Law (Properties) Pty Ltd v Willoughby Municipal Council (1978) 38 LGRA 81.

43 *Re Eastlin* (1903) 72 LJ Ch 687.

44 *Re Pearse* [1955] 1 DLR 801.

45 *Kearins v Kearins* (1956) 57 SR (NSW) 286.

46 *Thorton v Howe* (1862) 31 Beav 14; 54 ER 1042.

47 *Leahy v Attorney-General (NSW)* (1959) 101 CLR 611; [1959] AC 457.

48 The *Extension of Charitable Purpose Act* 2004 (Cth), s 5, extends the definition of "charity" for the purposes of all Commonwealth legislation to "closed or contemplative religious orders offering prayerful intervention".

49 *Attorney-General (NSW)v Sawtell* [1978] 2 NSWLR 200, Holland J, 205.

50 *Incorporated Council of Law Reporting (Queensland) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667; [1971] HCA 44. See the discussion of this and related cases in Ford and Lee, above n 2, [19.6010].

Trusts for the protection of wild animals were not considered charitable in 1929[51] but a changing, greener social view meant that by 1951 a trust to preserve mammals and birds indigenous to Australia was held to be charitable.[52] A trust for the beautification of an area will generally be considered charitable under this category.[53] Trusts for mere sport;[54] trusts for political purposes,[55] and trusts for illegal purposes[56] have been held not to be charitable. But this is all fluid in a rapidly changing and increasingly knowledgeable society.

In *Central Bayside General Practice Association Ltd v Commissioner of State Revenue for the State of Victoria*,[57] the appellant was a non-profit company whose officers were medical practitioners funded largely by the Commonwealth. The company's object was to improve patient care and health, chiefly in the locale in which it operated. The issue was whether it should be exempt from payroll tax as it paid wages to people "engaged exclusively in work of … a charitable nature."[58] The respondent argued that the appellant's relationship with the Commonwealth government precluded its charitable status. The Victorian Civil and Administrative Tribunal, the Supreme Court[59] and the majority in the Court of Appeal agreed.[60] The High Court unanimously rejected that view, determining that the fact the appellant and the government both had the purpose of improving patient care and health did not stop the appellant's purpose from being charitable. Nor did the fact that the government sourced the funds the appellant used to carry out that purpose.[61] Nevertheless, an organisation delivering funds or services for the benefit of the community may cease to be charitable where it delivers a purely governmental function and where the government effectively controls the organisation's management and funding.[62]

The recent and highly relevant case of *Aid/Watch*[63] widens the concept of charity to advocacy groups with a political (but not party political) purpose. *Aid/Watch* sought to promote the most advantageous delivery of Australian and multi-national foreign aid for the relief of poverty. It claimed to be a charitable

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51 *Re Grove-Grady* [1929] 1 Ch 557.
52 *Re Ingham* [1951] VLR 424.
53 *Re Spehr* [1965] VR 770 but cf *Garden Clubs of Australia Inc v Eyres* [2002] NSWSC 801, [34].
54 Re Nottage [1895] 2 Ch 649; Royal National Agricultural and Industrial Association v Chester (1974) 48 ALJR 304; Strathalbyn Show Jumping Club Inc v Mayes (2001) 79 SASR 54.
55 Royal Northshore Hospital (Sydney) v Attorney-General (NSW) (1938) 60 CLR 396; National Anti-Vivisection Society v Inland Revenue Commissioner [1948] AC 31; Re Collier (deceased) [1998] 1 NZLR 81; Southwood v Attorney-General (2000) 159 NLJ Rep 1017; and Re Van Campen-Beekman [2007] NSWSC 916.
56 *Re Collier* (deceased) [1998] 1 NZLR 81.
57 (2006) 228 CLR 168.
58 *Payroll Tax Act* 1971 (Vic), s 10(1)(bb) (repealed).
59 Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic) (2003) 53 ATR 473; [2003] VSC 285.
60 Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic) (2005) 60 ATR 151; [2005] VSCA 168.
61 (2006) 228 CLR 168, Gleeson CJ, Heydon and Crennan JJ, [40]; Kirby J [144], Callinan J [185].
62 G E Dal Pont, *Law of Charity*, (LexisNexis Butterworths, 2010), 30-31, [2.22].
63 (2010) 241 CLR 539.

institution for the purposes of various Commonwealth taxation statutes[64] and thus exempt from liability under those Acts. It argued that it was within the first, second and fourth categories in *Pemsel* (the relief of poverty; the advancement of education; and for other purposes beneficial to the community). The Commissioner of Taxation found that it was not a "charitable institution" under those Acts. The Administrative Appeals Tribunal took the contrary view.[65]

The Full Federal Court[66] affirmed the Commissioner's approach, holding that *Aid/Watch*'s principal purpose was political; it was to influence government so as to bring about change in government activity and policy and this invalidated its claim to charitable status.

In the High Court, the plurality, French CJ, Gummow, Hayne and Bell JJ, referred to the 1917 case of *Bowman v Secular Society Ltd*[67] where Lord Parker of Waddington said:

> a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.[68]

Their Honours noted that from those remarks, a body of case law developed to the effect that a trust with a principal purpose to procure a reversal of government policy is a trust for political purposes and can never be charitable.[69] This English political object doctrine was a late development with shallow roots in earlier precedent. The United States had taken a different path, treating law reform and public participation in the legislative and government process as themselves for the public benefit.[70] This was subject only to the requirement that the purpose of the trust was to bring about lawful change, not by revolution, bribery, illegal lobbying or improper pressure.[71] Their Honours rejected Dixon J's notion in *Royal North Shore Hospital of Sydney v Attorney-General (NSW)*[72] that a trust for a political purpose contrary to the established policy of the law could not be for a charitable purpose as it could not be for the public welfare to advocate for political change in a coherent system of law.[73]

The plurality reasoned that our Constitution mandates a system of representative and responsible government with universal adult franchise and establishes a

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64 *Income Tax Assessment Act* 1997, s 50-5; *Fringe Benefits Tax Assessment Act* 1986 (Cth), s 65J(1)(baa) and s 123E; and A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 176-1.

65 Re *Aid/Watch* Incorporated and Commissioner of Taxation [2008] AATA 652, Downes J.

66 *Commissioner of Taxation v Aid/Watch Inc* (2009) 266 ALR 526; [2009] FCAFC 128, Kenny, Stone and Perram JJ.

67 [1917] AC 406, 442.

68 (2010) 241 CLR 539, 550, [27].

69 *Bowman v Secular Society Ltd*, (2010) 241 CLR 539, 550-551, [27]-[28].

70 *Bowman v Secular Society Ltd*, (2010) 241 CLR 539, 553, [36]-[37].

71 *Bowman v Secular Society Ltd*, (2010) 241 CLR 539, 553-554, [38].

72 (1938) 60 CLR 396, 426; [1938] HCA 39.

73 (2010) 241 CLR 539, 555, [42].

system for amendment of the Constitution by submitting the proposed law to effect the amendment to the electors. Communication between electors, legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident" of that Constitutional system. The Constitution informs the development of the common law. Any burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of that system of government. The system of law operating in Australia includes agitation for legislative and political change. A court administering a charitable trust for the purpose of political change would not be called upon to adjudicate the merits of the matters agitated or the purpose of that charitable trust.[74] *Aid/Watch*'s activities were apt to contribute to the public welfare as a purpose beneficial to the community under the fourth category of *Pemsel*. Its purposes and activities were not such as to disqualify it as contrary to the established system of government and the general public welfare.[75] For these reasons, *Aid/Watch* was a charitable institution for the purposes of the taxing statutes.

Heydon and Kiefel JJ gave separate and interesting dissenting judgments, each finding that on their view of the facts, *Aid/Watch* did not have a charitable purpose because of the way it conducted its activities.[76]

IV ASPECTS OF THE PRESENT LAW RELATING TO CHARITABLE TRUSTS IN QUEENSLAND

In Queensland, charitable trusts, like other trusts, are subject to the *Trusts Act* 1973 (Qld), Part 8 of which deals specifically with charitable trusts, although the Act also has general application.[77] The *Trusts Act* preserves the common law as to charities[78] but then varies it in specified ways. It clarifies that facilities for recreation or other leisure time occupations provided in the interests of social welfare are charitable.[79] But that is provisional on the trust having the object of improving the conditions of life for the primarily intended beneficiaries.[80] It is also provisional on either the beneficiaries needing the facilities because of their youth, age, infirmity or disablement, poverty or social and economic circumstances,[81] or the facilities being available to the male members or female members of the public at large.[82] It confirms that to be charitable, a gift, trust or

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74 Royal North Shore Hospital of Sydney v Attorney-General (NSW) (2010) 241 CLR 539, 555-557, [44], [45], [47].
75 Royal North Shore Hospital of Sydney v Attorney-General (NSW) (2010) 241 CLR 539, 556-557, [46]-[47].
76 Heydon J at [58] and Kiefel J at [68]-[69] and [89]. See also the discussion of this case in Ford and Lee, above n 2, [19.8180].
77 Dal Pont, above n 33, 458, [17.24].
78 *Trusts Act* 1973 (Qld), s 103(1).
79 *Trusts Act* 1973 (Qld), s 103(2).
80 *Trusts Act* 1973 (Qld), s 103(3)(a).
81 *Trusts Act* 1973 (Qld), s 103(3)(b)(i).
82 *Trusts Act* 1973 (Qld), s 103(3)(b)(ii).

institution must be for the public benefit.[83] Unlike at common law, trusts with mixed charitable and non-charitable purposes will not be held invalid.[84]

Trustees of private trusts owe a duty directly to individual beneficiaries but trustees of charitable trusts owe a duty to the promotion of the charitable object of the trust.[85] The law expects the same standard of care of charity trustees as of other trustees, namely, that of the ordinary prudent business person, or in the case of professional trustees, that of the ordinary professional trustee. This includes the basic fiduciary duties to avoid either a conflict of interest and duty; or obtaining an unauthorised profit; or a conflict of the duties as trustee with any other duty.[86] Trustees of a charitable trust must be guided in decision-making by the goal of promoting the lasting interests of the trust's charitable object. Excessive remuneration of charity trustees and others may amount to a distribution of private profit inconsistent with charitable status.[87]

Charity trustees must acquaint themselves with the terms of the trust document; execute the trust according to those terms and the general law for the benefit of the community; protect and preserve the trust property; and exercise any discretionary power in good faith upon a real and genuine consideration of and according to the purpose for which that power was conferred. They must not delegate their powers or discretions except in accordance with the trust document or legislation.[88] If trustees exercise their discretionary powers in good faith, responsibly and reasonably, having informed themselves of relevant matters, the court will not interfere with the exercise of that discretion. The onus of establishing that a trustee has exercised power illegitimately lies on the person seeking the court's intervention.[89] Charity trustees are personally responsible for expenses and liabilities incurred in the conduct of the trust but are entitled to an indemnity from trust funds for properly incurred expenses or liabilities.[90] They are liable for torts and breaches of statutory duty committed in administering the trust. There is no concept in Australia of general charitable immunity for torts although there may be a right to indemnity from the trust, providing the tort or breach does not amount to a breach of trust.[91] They are personally liable for any loss caused by breach of trust and any gain derived from it.

Concerns about the administration of a charitable trust may be addressed by way of an application to the Supreme Court of Queensland under the *Trusts Act*.[92] The applicant will ordinarily be the Attorney-General representing the Crown as *parens patriae* (parent of his country).[93] The charity, or any trustee of the trust, or any person interested in the due administration of the trust may make an

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83 *Trusts Act* 1973 (Qld), s 103(4).
84 *Trusts Act* 1973 (Qld), s 104.
85 Dal Pont, above n 33, 459, [17.25].
86 Ford and Lee, above n 2, [20.090].
87 Dal Pont, above n 33, 459, [17.25].
88 Ibid, 459-460, [17.26].
89 Ibid, 461-462, [17.31].
90 Ibid, 463, [17.34].
91 Ibid, 463, [17.35].
92 *Trusts Act*, s 106.
93 Dal Pont, above n 33, 360, [14.23], 463-464, [17.36]; Ford and Lee, above n 2, [20.170].

application.[94] Notice of the application must be given to the Attorney-General, to the trustee of the trust and to others as the court directs.[95] Such an application could result in an order for compensation or an order for an account of profits.[96] It seems unlikely that the equitable defence of *laches* is available to charity trustees and the *Limitations of Actions Act* 1974 (Qld) affords no defence.[97]

Unlike private trusts subject to the rule against remoteness of vesting, charitable trusts have the advantage of longevity and may continue indefinitely.[98] Variations in social conditions, knowledge or legislation may mean the purpose of a charitable trust becomes impossible, impractical or illegal, or the charitable purpose is no longer beneficial to the community. It is then the trustee's duty to apply to the court to alter the trust to allow the trust property to be applied *cy près* (as nearly as possible) to meet the donor's original intention[99] by disposing of the fund or appropriating it to another charitable purpose. These provisions operate symbiotically with those of the *Charitable Funds Act* 1958 (Qld)[100] where "charitable purpose" is widely and inclusively defined.[101] It extends the meaning to "any benevolent or philanthropic purpose"[102] and to any analogous purpose declared by the Governor-in-Council to be charitable.[103]

Charitable trusts are now but one vehicle for giving effect to charitable purposes. Charities may take the form of unincorporated associations or, more commonly, charitable companies, often limited by guarantee. In 2001, the Australian government announced a new entity akin to a charitable trust, the prescribed private fund (PPF), which it fêted as an innovative vehicle to be embraced by the

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94 *Trusts Act*, s 106(2).
95 *Trusts Act*, s 106(3).
96 Dal Pont, above n 33, 464-465, [17.37].
97 Ibid, 465, [17.38]; *Limitation of Actions Act* 1974 (Qld), s 27.
98 Ford and Lee, above n 2, [20.050].
99 *Trusts Act*, s 105(4); see also Ford and Lee, above n 2, [20.5050].
100 *Trusts Act*, s 105(5).
101 *Charitable Funds Act* 1958 (Qld), s 2,

> **charitable purpose** means 'every purpose which in accordance with the law of England is a charitable purpose, and, without limiting or otherwise affecting the aforegoing, includes all or any of the following-
> (a) the supply of help, aid, relief, assistance, or support howsoever to any persons in distress (including, but without limiting the generality thereof, the supply of the physical wants of any such persons);
> (b) the education or instruction (spiritual, mental, physical, technical, or social) and the reformation, employment, or care of any persons;
> (c) any public purpose (whether or any of the purposes before enumerated or not) being a purpose in which the general of the community or a substantial section of the community (at large or in a particular locality), as opposed to the particular interest of individuals, is directly and vitally concerned;
> (d) the construction, carrying out, maintenance or repair of buildings, works, and places for any of the purposes aforementioned;
> (e) any benevolent or philanthropic purpose (whether of the purposes before enumerated or not);
> (f) any analogous purpose declared either generally or in a particular case for the purposes of this Act by the Governor in Council by Order in Council published in the Gazette to be a charitable purpose.'

102 *Charitable Funds Act* 1958 (Qld), s 2, (e).
103 *Charitable Funds Act* 1958 (Qld), s 2, (f).

Australian public so that private philanthropy here would be as popular as in the United States. The government sought to encourage families and individuals to secure tax deductibility for donations to their own trust, allowing them to disperse donations from that trust to a range of other tax deductible gift recipients. This meant it was no longer necessary to make the original gift to a public fund for it to be tax deductible. In 2009, these PPFs were renamed private ancillary funds (PAFs).[104] Each PAF trustee must be a company and must comply strictly with Australian Taxation Office (ATO) guidelines. Accordingly, the *Trusts Act* was amended in 2009 to provide for PAFs in its Part 9.[105] Corporate trustees of charitable trusts are also subject to regulation under the *Corporations Act* 2001 (Cth).

That all important decision, whether a trust is charitable and so exempt from taxation and rates and able to receive donations which are tax deductible for the donors, is governed by many and varied, predominantly Commonwealth, taxing statutes.[106] Charitable status also has other benefits such as exemption from anti-discrimination legislation[107] and receipt of imputation credits on dividends from company shares.[108]

In *Bargwanna (Trustee) v Commissioner of Taxation*,[109] the Bargwannas were trustees of, and Mrs Bargwanna settlor of, a trust which they claimed to be an exempt entity for the purposes of the *Income Tax Assessment Act* 1997 (Cth). Under s 50-60, trust funds established in Australia for public charitable purposes are exempt from tax only where "the fund is applied for the purposes for which it was established". The Commissioner revoked the trust's tax exempt status ultimately because of irregularities in its administration which the Commissioner claimed meant that trust funds were not being applied exclusively for charitable purposes. The Administrative Appeals Tribunal set aside the Commissioner's decision and held the fund to be exempt.[110]

The Federal Court took the view that strict compliance was required because of the fund's privileged status of exemption from income tax[111] and upheld the Commissioner's view. The Full Court of the Federal Court took a gentler approach, stating:

> The relevant question seems to be whether, having regard to the whole administration of the relevant fund, it is to be concluded that it 'is applied' to the relevant charitable purpose. The question is not limited by concepts of substantiality. Nor does it address individual misapplications of parts of the fund.
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> …

[104] Tax Law Amendment (2009 Measures No 4) Act 2009 (Cth).
[105] Criminal Proceeds Confiscation and Other Acts Amendment Act 2009 (Qld), Pt 5, ss 80-84.
[106] These are set out in Ford and Lee, above n 2, [20.8010]-[20.10150].
[107] Racial Discrimination Act 1975 (Cth), s 8(2) and s 8(3); Sex Discrimination Act 1984 (Cth) s 36(1); Disability Discrimination Act 1992 (Cth) s 49(1); Anti-Discrimination Act 1991 (Qld) s 110.
[108] Ford and Lee, above n 2, [19.690].
[109] (2010) 191 FCR 184; [2010] FCAFC 126.
[110] TACT and Commissioner of Taxation [2008] AATA 275, P W Taylor SC.
[111] Commissioner of Taxation v Bargwanna [2009] FCA 620, Edmonds J, [28].

> It seems unlikely that the purpose of s 50-60 is to deny a fund its exempt status merely because a trustee is inept or makes a mistake. Of course, a deliberate misapplication may justify adverse inferences as to the transaction in question and other transactions. In this context, though, 'deliberate' means 'intending to breach the trust'. A discrete breach may, alone, be sufficient to justify an inference as to intention. Similarly, disposition of a substantial part of the Funds' assets for an unauthorized purpose might also, by itself, justify an adverse inference. As we understand it, his Honour found non-compliance with s 50-60 upon the basis of the interest set-off question and the trust account question, treating the Trustees' explanations as being irrelevant, and without regard to the administration of the Fund as a whole. That approach was erroneous. Those transactions had to be assessed in the light of the wider conduct of the fund, including the subjective evidence from those who acted in its administration."[112]

The Commissioner was granted special leave to appeal on 12 August.[113] The High Court appeal is listed for hearing in the first week of sittings in 2012.

Trusts created under Australian law sometimes have assets and operations in other countries. The *Trusts* (*Hague Convention) Act* 1991 (Cth) adopts the UN Hague Trusts Convention and allows courts outside Australia to determine disputes concerning such a trust even though the concept of trusts may be foreign to that legal system.[114]

V LIKELY REFORMS TO THE LAW CONCERNING CHARITIES IN AUSTRALIA

As in England in the times of Henry VIII and Elizabeth I, in 21st century Australia (where, as we were reminded by her recent visit, Elizabeth II is Head of State) there remains disquiet about the definition of charity and the use of charitable trusts to evade taxes.

As I have explained, primary responsibility for their regulation rests with States and Territories under legislation such as the *Trusts Act* and under the common law relating to equity and trusts. In recent years, the Commonwealth has increasingly emphasised that State and Territory Attorneys-General have limited supervisory and investigatory powers over charitable trusts. It has argued that States and Territories are therefore limited in ensuring their proper administration and application of funds.[115]

In 2001, a Commonwealth report[116] proposed a refined and comprehensive definition of "charitable purposes" aimed at embracing, clarifying and extending the traditional legal concept of charity.[117] The report led to the *Charities Bill*

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[112] *Bargwanna (Trustee) v Commissioner of Taxation* [2010] FCAFC 126, Dowsett, Kenny and Middleton JJ, [69]-[72].

[113] Conditional that he pay the Bargwannas' costs of the High Court appeal in any event and that there be no change to the Full Court of the Federal Court's costs orders in their favour: [2011] HCA Trans 211.

[114] Young, Croft and Smith, above n 5, 397-398, [6.240].

[115] See Commonwealth of Australia, Federal Treasury, Consultation Paper, *Scoping Study for a National Not-for-profit Regulator* (January 2011), 9-10, [51]-[58].

[116] Commonwealth of Australia, Charities Definition Inquiry, *Definition of Charities and Related Organisations* (June 2001).

[117] Ibid, Recommendation 13.

2003 (Cth) which was to have come into effect on 1 July 2004. It did not become law, largely because of the charity sector's adverse reaction.[118] But the *Extension of Charitable Purpose Act* 2004 (Cth), consistent with the *Charities Bill* 2003, extended the definition of charity under Commonwealth legislation to include non-profit public child care; self-help bodies with open and non-discriminatory membership; and closed or contemplative religious orders offering prayerful public intervention (vale *Leahy's case*[119]).

The Federal government remained concerned about the definition of charity and the governance of charitable trusts and related institutions. It briefed the Productivity Commission to assess the community contribution of the non-for-profit sector and to review impediments to its development. The Commission noted in its resulting 2010 report[120] that there are about 600,000 not-for-profit organisations (NFPs) in Australia of which 58,779 are economically significant, employing 889,900 staff (around 8 per cent of the paid workforce) and contributing almost $43 billion to Australia's GDP in 2006-2007. This contribution has increased at 7.7 per cent per year since 1999. Over 4.6 million Australians volunteered with NFPs in 2006-2007 for a wage equivalent value of $14.6 billion.[121] The report proposed amendments to the law concerning the NFP sector, including the development of a national Registrar for Community and Charitable Purposes Organisations[122] and a statutory definition of charity in the terms proposed by the 2001 report.[123]

The Productivity Commission report was followed in January 2011 by the *Scoping Study for a National Not-for-profit Regulator* Consultation Paper. The paper noted that other Western democracies have a national not-for-profit regulator. Canada has a Charities Directorate, a structurally separate area of the Canada Revenue Agency. The United States' Internal Review Service is responsible for the registration of all tax exempt organisations in that country. The independent regulator of charities in England and Wales is the Charity Commission. New Zealand, too, has a Charities Commission to register charities, provide education as to good governance, collect annual returns, maintain a public register, and enquire into misconduct. As to charitable trusts, the paper noted that there is a risk that they are under-regulated and thus should be brought under the purview of a national regulator.[124]

In April 2011, the final report of the *Scoping Study* was published.[125] It noted that charitable trusts play an important role in the NFP sector. The Trustee Corporations Association of Australia (TCA) comprises eight private trustee

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[118] Dal Pont, above n 33, 536, [19.10]; Ford and Lee, above n 2, [19.410].
[119] *Leahy v Attorney-General (NSW)* (1959) 101 CLR 611; [1959] AC 457.
[120] Commonwealth of Australia, Productivity Commission, Research Report, *Contribution of the Not-for-profit Sector* (January 2010).
[121] Ibid, Overview, XXVI.
[122] Ibid, Recommendation 6.5; Recommendations XLIII.
[123] Ibid, Recommendation 7.1; Recommendations XLV.
[124] Commonwealth of Australia, Federal Treasury, Consultation Paper, *Scoping Study for a National Not-for-profit Regulator* (January 2011), [55].
[125] Commonwealth of Australia, Federal Treasury, Final Report, *Scoping Study for a National Not-for-profit Regulator* (April 2011).

corporations and the State and Territory Public Trustees, and manages 2,000 charitable trusts and foundations with assets of $3.9 billion, which in 2008-2009 distributed $180 million. There may be many more charitable trusts that are not administered by TCA members.[126] The report noted the size of the NFP sector and its support from government and the community. It recommended that a single NFP regulator should be established for governance, accountability and transparency purposes and that a cooperative approach to reform, including of charitable trusts, should be progressed through the Council of Australian Governments (COAG) agenda.[127]

The report further recommended that a definition of charity, harmonised across Australian jurisdictions, should be based on that in the 2003 Bill, but with further public consultation and taking into account the recommendations of the 2010 Senate Inquiry[128] and recent judicial decisions, including *Aid/Watch*.[129]

In the Federal Budget, the government announced it would provide $53.6 million over four years to establish a "one stop shop" for the support and regulation of the NFP sector,[130] the Australian Charities and Not-for-profit Commission (ACNC), to commence in 1 July 2012. ACNC will initially be responsible for determining the legal status of groups seeking charitable and other NFP benefits on behalf of all Commonwealth agencies. By 1 July 2013, the ACNC will implement a reporting framework for charities, provide education and support on technical matters, and establish a public information portal. The government will also introduce a statutory definition of "charity" applicable across all Commonwealth agencies. It will begin negotiations through COAG on national regulation of and a national regulator for the sector. The ACNC Commissioner will report directly to parliament through the Assistant Treasurer. The ACNC will receive corporate support from the ATO and take over the ATO's role in determining charitable purposes. It will be assisted by an advisory board headed by the Productivity Commissioner, Mr Robert Fitzgerald AM. The ACNC implementation task force headed by interim commissioner Susan Pascoe AM began its role on 1 July 2011.

It therefore seems likely that Federal, State and Territory governments will soon consider whether the supervision and regulation of charitable trusts should be moved from the control of their Attorneys-General to the ACNC, and whether they will adopt a uniform national definition of charity. We are asked to have faith in our legislators and to hope they have the good sense to ensure that any statutory definition retains the flexibility long provided by *Pemsel* to deal with the changing knowledge and needs of an increasingly diverse and complex Australian society.

VI CONCLUSION

[126] Ibid, Ch 3, p 21.
[127] Ibid, Ch 3, p 26.
[128] Commonwealth of Australia, Senate Economic Legislation Committee, *Tax Laws Amendment (Public Benefit Test) Bill 2010* (September 2011).
[129] Commonwealth of Australia, Federal Treasury, Final Report, *Scoping Study for a National Not-for-profit Regulator* (April 2011), Summary of Recommendations, 4, [12]-14].
[130] Hon Bill Shorten MP and Hon Tanya Pilbersek MP, "Federal Budget 2011-2012: Making it easier for charities to help those who need it", (Press Release and Joint Media Release, 5 May 2011).

The second decade of the 21st century in Australia will bring further changes to the legal meaning of charity and to the regulation of charitable trusts for the public benefit. It also seems that dispensing charity need no longer exclude having fun. The reference in the preamble of the *Statute of Elizabeth* to the "impotent" does not have its contemporary meaning. It means the physically weak, disabled and helpless.[131] Even so, the High Court's approach in *Central Bayside General Practice Association* suggests that an NFP dispensing Viagra to the general public who need it would likely be a charity. And as our affluent society becomes increasingly susceptible to sedentary-related illnesses like obesity, diabetes II, cardio vascular problems and depression, NFPs delivering sport and recreational activities aimed at an active, healthy lifestyle are likely to be considered charities. Moreover, we now know that doing good things for others releases endorphins, the happiness hormone. Donating money, goods and service to those in need and doing voluntary work in the NFP sector might benefit the public and the government, but it is also fun for those donating.

As the social divide continues to expand in Australia with the rich becoming richer and the poor poorer, I apprehend, as does the Federal Treasury, that the NFP charity sector will also continue to expand and to be increasingly relied upon by government and the public for the delivery of beneficial community services. Despite the likely changes to the definition of charity and the regulation of charitable institutions, charitable trusts will continue to play their part in this.

Looking ahead to the 22nd century, I predict legislators, lawyers and the public will still be debating the changing notion of charity and the role of charitable trusts and like institutions. They will still be discussing ways for the State to encourage kind-hearted people to donate money, goods and services to charities. They will still be concerned to ensure charitable institutions, including charitable trusts, are not used for tax evasion and are properly administered to maximise the delivery of funds, goods and services to charities.

I hope your faith in me at the commencement of this paper has been vindicated. I hope I have demonstrated both the adaptability of the definition of charity to expanding knowledge and changing social needs and the resilience of charitable trusts over centuries as an effective institution for delivering philanthropy.

Paul's words to the Corinthians, poetically translated 400 years ago, are as apposite in the 21st century as they were then and will be in the next century:

> And now abideth faith, hope, charity these three, but the greatest of these is charity.

[131] As to the meaning of "the impotent" under the *Statute of Elizabeth*, see Dal Pont, above n 33, 182-185, [8.33] and [8.34]; Ford and Lee, above n 2, [19.1050].