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IS IT REALLY A CHARITY? MEMBERSHIP-BASED ENTITIES AS CHARITIES

The Australian experience

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The application of the word 'charity' in this connection is not confined to the objects that come within the quaint catalogue of the Statute of Elizabeth, but applies also to cases analogous, and what seems to be more alarming, to cases analogous to cases which have been adjudged to be analogous, thereby making the development of the law perpetual . . . the pursuit of these analogies obviously requires caution and circumspection.

(Commissioners of Inland Revenue v Yorkshire
Agricultural Society (1927) 13 TC 58: 65 per Rowlatt J)

1 Introduction

The not-for-profit (NFP) sector in Australia, as elsewhere, is incredibly diverse. In addition to diversity related to purpose, there are significant differences related to size, legal form, reliance on volunteers and/or employees and geographic coverage. Those differences are also reflected in charities, an important subgroup of NFPs. Another possible difference relates to whether the entity has members. Some NFPs have 'members' and some do not. Indeed, some NFPs are deliberately established and operated for the benefit of members, for example, social clubs and societies, and might appropriately be referred to as 'member benefit organisations'. Some charities also have members, but a distinguishing feature of charity is that the charity must provide 'public benefit'. If there are any benefits to members of the charity, they must be incidental to the public benefit. This means that although having members does not preclude the entity from being a charity, it does raise the question about whether those members are receiving benefits and, if so, whether those benefits are incidental.

The federal taxing statute, the Income Tax Assessment Act 1997 (ITAA 1997), provides a number of tax concessions to charities, but it also provides concessions to many NFPs that are not charities (non-charitable NFPs). Given that legislative scheme, it is interesting to consider why entities that appear to be primarily for the benefit of members, and perhaps eligible for income tax exemption, would seek to be classified as charities and why courts or regulators would extend charitable status to entities that appear to be covered by specific legislative provisions. This chapter considers some different types of membership-based NFPs and asks whether

they are appropriately 'charities' for federal, and perhaps state and territory, tax purposes. The Australian experience demonstrates that having information about tax-preferred entities, as now occurs as a result of a searchable register, allows questions to be raised about eligibility and, indeed, suitability for those concessions.

This chapter will proceed as follows: Section 2 will consider the different types of NFP membership-based entities. Section 3 will consider the legislative context for the granting of tax concessions to charities and to non-charitable NFPs. Section 4 will consider what is required to be a charity under the Charities Act 2013 (Cth) (Charities Act). Section 5 will consider three case studies of membership-based entities that have sought relief as charities – agricultural associations, business associations and professional associations. Section 6 will draw some conclusions and offer some suggestions for reform going forward.

2 Different types of membership-based entities

One of the problems of examining membership-based entities that receive tax concessions is that there is little data collected on this characteristic, and, indeed, little has been written about the significance of a NFP entity having members. Neither the Australian charities regulator, the Australian Charities and Not-for-profits Commission (ACNC), or the Australian Taxation Office (ATO) collect data on how many entities have members. Analysis from the United States suggests that approximately 33% of all NFPs have members and that this increases to 60% if religious congregations are included (Tschirhart 2006). A report of the Charity Commission for England and Wales in 2004, based on a survey of registered charities, found that 44% of charities surveyed had members (Charity Commission for England and Wales, 2004, p. 44). The report also noted that 80% of charities surveyed had voting members (*ibid*: 5), meaning that the membership had some say in the governance of the charity.¹ The charities that had both voting and non-voting members used a variety of terms to refer to non-voting members, such as 'sponsors', 'friends' and 'associate members' (*ibid*: 44). There are currently approximately 140,000 non-charitable NFPs in Australia in receipt of some tax concessions² and 58,800 charities,³ but it is not possible to say what percentage of those entities are membership-based.⁴ It is however clear that some entities, in receipt of tax concessions will be membership based. Indeed, this is contemplated by the governance standards set out in the Australian Charities and Not-for-profits Regulations 2013, which mandate disclosure by the entity to members.⁵

A NFP entity may have members or may be formed without members. It seems likely, however, that the majority of non-charitable NFPs will have members, such as sporting clubs and community service organisations. On the other hand, it seems likely that many registered charities will not have members, such as hospitals and educational institutions. Although there is no data available on either non-charitable or charitable NFP membership, two factors may give an indication, that is, the type of charity and the legal form of the entity. According to the latest Australian Charities and Not-for-Profits Commission Charities Report (2018), the most significant types (or sub-types) of charities are religious entities, educational entities and welfare and public benevolent institutions (PBIs). While many religious entities will have congregations, educational entities and welfare entities are unlikely to. On the other hand, other types of entities such as cultural, environmental, human rights, animal protection and reconciliation-focused entities are more likely to have members. In relation to legal form, unincorporated associations⁶ are likely to have members; incorporated entities (either companies limited by guarantee or incorporated associations) may generally choose whether to have members beyond some statutory minimums, and trusts will not have members.

Membership structures do ensure some accountability of the entity and its officers. This can be an issue for NFP entities where the membership does not have the same sort of interest as shareholders in a company and may not, therefore, provide the same level of accountability. Where charities have a choice about ownership structure, it may be that adopting a closely held membership structure will avoid the need to comply with ACNC Governance Standard 2 relating to accountability to members. This suggests that there are tensions between accountability and the additional costs that this imposes.

Of more significance is whether the membership confers benefits on members, with or without also conferring governance authority. It is possible to identify at least three scenarios: where membership does not confer any benefits (e.g., where the member is effectively a donor or supporter of the entity), where membership confers minor benefits (e.g., access to a newsletter or reduced entry to events) and where membership confers significant benefits (e.g., a social club where members receive reduced prices on goods and services).

Some common types of NFP membership-based entities include the following:

- Community service organisations (CSOs),
- Professional and business associations,
- Non-distributing co-operatives,
- Self-help groups and
- Sporting and recreational clubs.

It is useful to consider how these different types of entities might be taxed, either as charities or as non-charitable entities.

Community service organisations

A CSO is the term used to describe an organisation that is income tax exempt under s 50–10 of the ITAA (1997). The exemption applies to a ‘society, association or club established for community service purposes (except political or lobbying purposes)’. The exemption was included in the legislation in 1990, with the Explanatory Memorandum noting that ‘many entities are not charitable, and so such bodies as the traditional community service clubs – Apex, Rotary, Lions, Zonta, Quota and the like have not qualified for exemption’ (Explanatory Memorandum, Taxation Laws Amendment Bill (No 2) 1990 (Cth): 20). The Explanatory Memorandum addressed what was intended to be covered by the exemption:

The words ‘for community service purposes’ are not defined but are to be given a wide interpretation. The words are not limited to those purposes beneficial to the community which are also charitable. They extend to a range of altruistic purposes. The words would extend to promoting, providing or carrying out activities, facilities or projects for the benefit or welfare of the community, or of any members of the community who have particular need of those activities, facilities or projects by reason of their youth, age, infirmity or disablement, poverty or social or economic circumstances.

(ibid: 21)

The Explanatory Memorandum also noted that organisations such as the Country Women’s Association of Australia and its constituent Associations would be exempt under the provision. It might be thought that the reason these types of entities would not be charities is because

they also provide benefits to their members. Despite that – and based on the examples in the Explanatory Memorandum – the government wanted to extend tax exemption to them but did not deem them charities.

Professional and business associations

An association, whether incorporated or unincorporated, will be a company for tax purposes (ITAA 1997: s. 995–1)⁷ and, in the absence of an exemption, will generally be liable to pay tax on taxable income even though it is NFP. There is no specific exemption from income tax for professional associations, although employer and employee associations are exempt (ibid: s. 50–15) (the exemption also covers trade unions). These types of entities may be able to rely on the principle of mutuality to exclude payments received from members from taxable income.⁸ Some professional associations have been able to become registered charities (for example, the Law Institute of Victoria is an ACNC-registered charity), but the state and territory tax concessions have generally not been extended (see business association cases subsequently, Section 5).

Non-distributing co-operatives

Co-operatives are companies for tax purposes (ibid: s. 995–1). Distributing co-operatives can either pay members franked dividends or claim a deduction for payments to members (Income Tax Assessment Act 1936 (Cth) (ITAA 1936): ss. 117–120). A non-distributing co-operative (e.g., a child care co-operative) may be a charity if it meets the definition in the Charities Act (2013, see Section 4). The case of Co-operative Bulk Handling Limited (CBH), discussed in the following, considers the notion of a non-distributing co-operative.

Self-help groups

Self-help groups are likely to be unincorporated associations formed primarily for the benefit of members. Whatever the legal form, such an entity will be a company for tax purposes (ITAA 1997: s. 995–1). Self-help groups were described in the *Report of the Inquiry into the Definition of Charities and Related Organisations (Charities Definition Inquiry Report)* as:

[M]ade up of and controlled by people who are directly affected by the particular disadvantage, discrimination or unmet need that draws the members together.

(*Sheppard, Fitzgerald and Gonski 2001: 126*)

Examples given were groups formed by people directly or indirectly affected by a disease or disability but could also include a community centre or neighbourhood house which through mutual support assists people seeking to overcome some form of economic or social disadvantage (ibid). The Charities Definition Inquiry Report recognised that many such groups would have difficulty meeting the ‘public benefit’ requirement of being a charity and recommended that if certain conditions were met, such entities should be regarded as having met the public benefit test (ibid: 127). This recommendation finds form in the Charities Act s 10, which provides that if the entity has an open and non-discriminatory membership and the entity is made up of, and controlled by, individuals who are affected by the disadvantage, discrimination or need, the requirement in s 5 that a purpose of an entity be for the public benefit can be disregarded.

A self-help group will therefore need to be NFP and demonstrate a charitable purpose but will not be required to demonstrate that there is public benefit. Other self-help groups, for example, a public speaking club that seeks to help to improve the self-esteem of members, will not qualify, as it will not be able to demonstrate the requisite charitable purpose (*ibid*: 126).

Sporting and recreational clubs

Sporting and recreational clubs, societies or associations will, regardless of legal form, be companies for tax purposes (ITAA 1997: s. 995-1). Some clubs may be income tax exempt under s 50-45 of the ITAA 1997, that is, a society, association or club established for the encouragement of animal racing, art, a game or sport or literature or for musical purposes. Such clubs are unlikely to be charities, as their purposes are not recognised as charitable. It has been argued that amateur sport should be recognised as charitable in line with the position in England, Wales and Scotland (Batrouney and Lee 2018: 41-44). Many clubs that do not come within s 50-45, for example, social clubs, will be able to rely on the principle of mutuality⁹ to exclude payments from members in their taxable income.

3 Tax treatment of charities and non-charitable NFPs

The notion of what constitutes a charity will be considered in more detail in Section 4. This part considers the tax concessions that are available to charities and to NFPs that are not charities.

Charities

A registered charity, that is, a charity as defined in Charities Act s 5, that is registered under the Australian Charities and Not-for-Profits Commission Act 2012 (Cth) s 25-5 (ACNC Act), will be entitled to a range of Commonwealth tax concessions. The most significant, for the purposes of membership entities,¹⁰ are:

- income tax exemption,
- refunds of franking credits, and
- fringe benefits tax (FBT) concessions.

Income tax exemption arises under s 50-5 of the ITAA 1997. A registered charity will be exempt from income tax on all income – ordinary income and statutory income (ITAA 1997: s. 50-51). Ordinary income includes income from business and investment income, for example, interest, rent and royalties.¹¹ Statutory income includes amounts that are income under a statutory provision (*ibid*: s. 6-10), for example, capital gains (*ibid*: pts. 3-1 and 3-3) and dividends (ITAA 1936 (Cth): s. 44). Unlike many other countries, trading or business income is also exempt. There are a number of conditions that must be satisfied: for example, the ‘in Australia’ condition (ITAA 1997: s. 50-50(1)(a)).

A registered charity may also be entitled to refunds of franking credits (*ibid*: divs. 67, 207), where the entity receives dividends from a corporation that has paid sufficient tax to enable a shareholder to claim a credit for the tax paid. The receipt of a franked distribution¹² by a tax-paying shareholder would allow the franking credit to be offset against any tax liability (*ibid*: s. 207-220). In the case of tax-exempt entities that have no liability to pay tax, the franking credits could potentially be wasted. However, ‘charities’, but not other NFPs unless they are deductible gift recipients under div 30 of the ITAA 1997 (*ibid*: ss. 67-25, 207-115),

are entitled to claim a refund of the amount of tax paid by the distributing company. Many philanthropic trusts that invest corpus to produce a return in order to make grants rely on the refunds of franking credits as a major source of revenue, but other, probably larger, charities also derive significant benefit from this concession. The ability of charities to claim these refunds is likely a major reason a NFP entity might seek to become a charity.

A further concession available to income tax-exempt entities that have employees arises under the Fringe Benefits Tax Assessment Act 1986 (Cth) (FBTAA). A subgroup of entities are entitled to an exemption from FBT: PBIs, health promotion charities, public and NFP hospitals and public ambulance services are exempt from the tax, subject to caps (FBTAA: ss. 5E, 57A). There are also a number of concessions for religious practitioners and religious entities (ibid: s. 57). Most registered charities that do not come within the exemption are, however, entitled to a rebate of 47% of the FBT otherwise payable, subject to caps (ibid: s. 65J). Some charities are excluded from the exemption and the rebate, including charities that are considered government-controlled entities, such as universities (ibid: s. 65J(1)).

A charity, as that term applies at common law (see Part 3), may also be entitled to tax concessions at the state and territory level. Perhaps the most significant of the concessions is the exemption from payroll tax – a tax imposed on the employer's total payroll.¹³ Some charities, notably universities, are generally excluded from the exemption (perhaps reflecting the fact the federal government rather than state government, has fiscal responsibility for universities), and there are also requirements relating to the nature of the work being performed.¹⁴ There are also other state and territory tax concessions for charities (subject to some exceptions) such as from land tax,¹⁵ municipal rates,¹⁶ and stamp duties.¹⁷

The legislative scheme in Australia since the first income tax legislation has been to have a list of eligible types of entities that are income tax exempt, including but not limited to charities.¹⁸ It has been suggested that this may have been because the drafters assumed that charity would have its ordinary meaning (*Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362). That approach was disabused by the Privy Council in 1925 (*Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317), but the legislature continued to spell out the types of entities that were eligible, including some types that would clearly come within the technical meaning of charity – such as religious entities and public educational institutions.

Non-charitable NFPs

As noted previously, a range of other types of NFP entities that would generally not qualify as charities are also entitled to exemption from income tax, including:

- CSOs (ITAA 1997: s. 50-10);
- employer and employee associations (ibid: s. 50-15);
- associations for the promotion of primary and secondary resources and tourism (ibid: s. 50-40); and
- sporting, cultural and recreational associations (ibid: s. 50-45).

According to the ATO, there are approximately 200,000 NFPs that are eligible for income tax exemption under div 50 (ATO-supplied data – see n 2).

Non-charitable NFPs that are not income tax exempt under div 50 of the ITAA 1997 may be able to rely on the common law principle of mutuality. For example, a social club that receives monies from members either as membership dues, or for goods and services, will not

be required to include those receipts as assessable income. A non-profit company that earns less than \$A417 will not pay tax (Income Tax Rates Act 1986 (Cth): s. 23(6)). There may also be a specialist regime available, for example, for co-operatives (ITAA 1936: ss. 117–120) or small credit unions (ibid: s. 23G). Being income tax exempt also allows an entity to access FBT concessions, notably the FBT rebate of 47% of FBT payable (FBTAA: s. 65J).

However, the other concession available to charities, refunds of franking credits (ITAA 1997: divs. 67, 207), is not available to most non-charitable NFPs. As noted previously, this may provide an incentive to seek charitable status.

Some state and territory concessions, such as the payroll tax exemption, are only available to charities. This may be another reason a NFP entity could wish to be treated as a charity. For example, in Victoria, the payroll tax exemption is available to ‘a religious institution; a public benevolent institution or a non-profit organisation having as its whole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose (but not including a school or an educational institution’ (Payroll Tax Act 2007 (Vic): s. 48(1)). Interestingly, some states and territories have responded to the expansion of fourth-head charities by restricting the concessions. This is discussed further in the following.

4 Meaning of charity for federal tax purposes

The meaning of the term ‘charity’ differs for federal tax purposes and for state and territory tax purposes. This is because in 2013, the federal government enacted a statutory definition in the Charities Act. The states and territories still rely on the common law meaning of the term. Despite this, there is a fair amount of commonality, since the aim of the Charities Act was said to be to restate the common law,¹⁹ but the legislature also took the opportunity to ‘modernise’ the definition (Explanatory Memorandum, Charities Bill 2013 (Cth) 2013: 3). To be a charity either under the statute or at common law, the entity must:

- be not for profit,
- have a charitable purpose and
- be for the public benefit.

i Not-for-profit requirement

This requirement is common to the Charities Act and the common law. The requirement is also common to non-charitable and charitable entities. The term ‘NFP’ is not defined, although in 2012, there was a proposal to include a definition in the tax legislation (Tax Laws Amendment (Special Conditions for Not-for-Profit Concessions) Bill 2012 (Cth)). A decision not to proceed was made following a change of government (Sinodinos 2013). In any event, the NFP requirement is fairly easily satisfied. The entity simply needs to demonstrate that it does not distribute any profit or surplus to persons or entities associated with the entity. It is usual to include standard non-distribution clauses in the governing documents (Commissioner of Taxation 1997).

Although charities and non-charitable NFPs are required to have non-distribution requirements, as Dal Pont notes, distributions of profits may occur other than as a result of a formal distribution of profit, for example, as payments to management or staff or to suppliers or associates (2017). This is significant where an entity has members, as it is necessary to consider whether there are informal distributions to those members.

ii Charitable purpose

Charities at common law, and under the Charities Act, must have a charitable purpose. In both cases, the purpose or purposes must be exclusively charitable. At common law, this is said to require the charitable purpose be the *sole* purpose. This means that if the entity has another purpose which is not charitable, it will not be a charity. This apparently strict requirement has been ameliorated to some extent by an acceptance that the entity may have purposes that are merely incidental or ancillary to its main charitable purpose. Where a charity has more than one purpose, it is therefore necessary to consider whether any of its purposes are non-charitable and, if so, whether any non-charitable purpose can appropriately be described as 'incidental or ancillary'.

The recognised categories of purpose at common law are: relief of poverty, advancement of education, advancement of religion and other purpose beneficial to the community that are 'within the spirit and intendment of the Preamble to the Statute of Elizabeth 1601' (*Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531) (*Pemsel*). The latter category, sometimes referred to as the 'fourth head of charity' (*Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539: 556–557, para. 46), is the one most often relied on by membership entities seeking to establish charitable status.

The Charities Act expanded the categories of 'charitable purposes' beyond health, education, welfare and religion to include culture, reconciliation, human rights, security and safety, animal welfare and the environment. It also includes:

(k) any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the [stated] purposes.

(*Charities Act: s. 12(1)*)

The list of charitable purposes in the Charities Act was compiled over a considerable period of time, starting with the *Charities Definition Inquiry Report* in 2001 (Sheppard, Fitzgerald and Gonski 2001). Interestingly, although the Inquiry considered one option of including a purpose of 'the promotion of community development to enhance social and economic participation', there was no express reference to promotion of agricultural, business or professional associations. Paragraph (k) serves the same purpose as the fourth head at common law and allows courts, and presumably the regulator, to determine that even though a purpose is not expressly referred to, it may be charitable, if it is reasonably analogous to the listed purposes. The 'fourth head' has been relied on in a number of cases involving membership-based NFP entities that do not fall within the recognised categories.

iii Public benefit

The third requirement for an entity to be a charity is that it needs to satisfy the requirement of public benefit. This requires identification of benefit or benefits and consideration of whether the benefits satisfy the public element. Where the relevant charitable purpose is para. (k), there seems to be some overlap between the requirements. Dal Pont's view is that the extent to which the phrase 'beneficial to the community' can be equated with the phrase 'public benefit' is unclear (2017: para. 11.4). What is clear is that under both phrases, there must be 'benefit', and the benefit must be available to the 'public'.

Certain purposes are presumed to be for the public benefit. This is stated in s 10 of the Charities Act and appears to go further than the common law presumption that applied to

the ‘public’ element rather than the ‘benefit’ element. Where the public benefit cannot be presumed, it must be demonstrated. In *Grain Growers Ltd v Chief Commissioner of State Revenue* [2015] NSWSC 925, Black J did not believe it was necessary to require proof of benefit despite counsel for the Commissioner for State Revenue arguing that it was required. Black J concluded that:

I can, without specific proof, infer that agricultural activity benefits society generally, and Australian agricultural activity benefits Australian society generally, and no evidence was led to suggest that the benefit that has previously existed in such activity has ceased to exist.

(ibid: para. 27)

Black J did, however, refer to evidence of the value of the grain industry to the Australian economy, including that the Australian grain industry contributes approximately \$15 billion to Australia’s exports and approximately \$26 billion to Australia’s gross domestic product, presumably on an annual basis (*ibid*).

The benefit element

According to s 10 of the Charities Act, the ‘benefit’ can be tangible or intangible but must be identifiable and must take into account any possible detriment. One commentator, Professor Rossman, has considered the benefit of a type of entity in the United States called a ‘regional economic development organisation’, which he describes as ‘running venture capital funds, recruiting companies to major metropolitan areas, providing technical assistance to business owners, and in a multitude of other ways facilitating targeted economic growth in urban, suburban, and rural areas throughout the country’ (2014: 1457). Although Rossman accepts that these entities might have social value, he is critical of the acceptance of indirect or remote benefits, which he describes as ‘trickle down’ benefits, as such entities are recognised as charities even though they are providing direct assistance to for-profit businesses (*ibid*: 1459). A number of recent cases appear to adopt this ‘trickle down’ notion of benefit.

The public element: public or a section of the public

At common law, the public element has been interpreted to include ‘a sufficient section of the community to amount to the public’ (*Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645: 662, 667, 670). Under the Charities Act, the benefit must be available to the public or a section of the public (Charities Act: s. 6). The sub-heading in s 6 refers to the benefit being ‘widely available’. The reference to a section of the public means that it is necessary to identify whether a group of individuals constitutes a section of the public or whether they are a group of private individuals. This has been said to require that the section of the public must be sufficiently defined and identifiable by some quality of a public nature. In any event, the cases in the next part do not rely on the membership constituting a section of the public but rather argue that the benefit that arises from the promotion of agriculture, or from a business or professional association, is available to the whole community – a version of the trickle-down argument noted previously.

Any private benefit must be incidental

The public benefit requirement for charity is sometimes expressed as prohibiting private profit or private benefit. This will exclude entities that may be formed for otherwise charitable purposes where the profits accrue to private individuals, for example, for-profit schools or for-profit hospitals. It will also exclude clubs or societies where the benefit is only available to the members, for example, a social club. In this way, the requirement of public benefit is linked to the notion that private profit or gain is inconsistent with the notion of charity.

In Taxation Ruling 2011/4 (2011: para. 258), the Commissioner notes that:

Private benefits that are no more than incidental or ancillary to a purpose of benefiting the community do not detract from the charitable status of an institution. *Benefits are incidental if they are a minor by-product of activities undertaken to carry out the institution's purpose. They are ancillary if they are conferred only as a means of achieving an institution's charitable purpose.* The greater the scope to provide private benefits, the greater the concern that the purpose is not to benefit the public, but to provide those private benefits.

(emphasis added)

In this regard, it is important to emphasise that the test is not whether the private benefits are minor in nature but whether they are *incidental* to achieving the main (charitable) purpose. However, the size of the benefits may indicate something about the purpose of the entity.

5 Stretching the concept of charity – case studies

There have been a number of cases recently dealing with whether different types of membership-based entities are charities in Australia. These cases relate to: agricultural associations, business associations and professional associations.

a Agricultural associations

The importance of agriculture in Australia is of long standing.²⁰ Tax relief for agricultural associations in Australia can be traced to a specific exemption being included in the Income Tax Assessment Act 1922 (Cth) (ITAA 1922). It provided an exemption for:

[A]ny society or association not carried on for the purposes of profit or gain to the individual members thereof, established for the purpose of promoting the development of the agricultural, pastoral, horticultural, viticultural, stock-raising, manufacturing or industrial resources of Australia.

(ITAA 1922: s. 14(1)(j))

This was in addition to the existing exemption for the income of a religious, scientific, charitable or public educational institution (ibid: s. 14(1)(d)), which suggests that the legislature did not believe that agricultural associations would be charities. The income tax exemption for agricultural and similar associations is now in s 50–40, item 8.2 of the ITAA 1997, which provides an exemption for:

a society or association established for the purpose of promoting the development of any of the following Australian resources:

- (a) agricultural resources;
- (b) horticultural resources;

- (c) industrial resources;
- (d) manufacturing resources;
- (e) pastoral resources;
- (f) viticultural resources;
- (g) aquacultural resources;
- (h) fishing resources.

The exemption is subject to a ‘special condition’ that the society or association be ‘not carried on for the profit or gain of its individual members’ (ITAA 1997: s. 50-40(1) item 8.2). The fact that this is now a condition rather than the initial requirement may dilute its significance.

It is not clear when agricultural associations started to be recognised as *charities* in Australia. Until 2000, entities self-assessed their entitlement to income tax exemption and, generally, it would not have made much difference whether the entity was a charity or exempt under the specific exemption. In 2012, the ACNC grandfathered all of the charities that had been endorsed by the ATO. The ACNC Register lists a number of entities that have the stated purpose of ‘promoting the development of agricultural resources’. For example, there are more than 140 entities with the words ‘agriculture’ or ‘agricultural’ in their name, many of which run annual shows. But there are also entities that provide significant benefits to their members and are nevertheless recognised as charities. It is interesting to consider how this has come about.

The main case that has been relied on for recognising societies and associations for the promotion of agriculture in Australia as charities is the United Kingdom Court of Appeal case of *Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611. The case involved a society formed in 1837 to hold an annual show for the exhibition of farming stock, implements and so on and for ‘the general promotion of agriculture’. The Society sought an exemption from income tax with respect to income from its investments – this was because the exemption in the United Kingdom does not apply to trading or business income. At the first instance, Rowlatt J decided against the Society, essentially on the basis that the society was formed for the private enjoyment of the founders and members rather than for charitable purposes (*Commissioners of Inland Revenue v Yorkshire Agricultural Society* (1927) 13 TC 58)). In reaching his conclusion, his Honour accepted that agriculture was of ‘great importance’ and ‘should be promoted’, but he cautioned that to be a charity, there must be ‘a real public charitable object’ (ibid: 67). The Court of Appeal took a different view and concluded that the ‘right interpretation to be given to this society is that it has been formed for improvement of agriculture as a whole’ (*Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611, 612).

Several comments can be made about this case. First, it should be noted that the cases relied on by the Court of Appeal were wills and trust cases, not taxation cases. It should also be noted that the cost to revenue in the United Kingdom of granting the exemption is much less, as it only applies to investment income and trading income of charities is subject to tax. Finally, it can be noted that the same facts are capable of quite different interpretation. Rowlatt J, contrary to the view of the Court of Appeal, decided that the members of the society were promoting their own businesses ((1927) 13 TC 58, 68)).

There are few Australian cases dealing with these types of entities under the income tax legislation, possibly because of the specific exemption in the income tax legislation since 1922 for societies and associations engaged in ‘promotion of agriculture’. There was an obiter reference to the promotion of agriculture in the case of (*Incorporated Council of Law Reporting (Qld) v Federal*

Commissioner of Taxation (1971) 125 CLR 659, a case concerned with whether the production of law reports came within the fourth head of charity under the *Pemsel* case. Barwick CJ noted:

Agriculture partakes of that fundamental social quality which can give a charitable nature to a trust or purpose relating thereto which is beneficial to the community.
(1971) 125 CLR 659: 669)

The High Court also referred to this purpose in a case dealing with a bequest in *Royal National Agricultural and Industrial Association v Chester* (1974) 3 ALR 486). The bequest was to establish an event for pigeon racing. The High Court acknowledged that the society was itself charitable ((1974) 3 ALR 486: 487). But the Court concluded that:

[T]he breeding of pigeons for racing cannot, either by analogy or by reason of the character of the activity itself, be said to be of benefit to the community in a sense within the preamble.

(*ibid*: 489)

The Federal Court returned to the issue of agricultural associations in *Federal Commissioner of Taxation v Co-operative Bulk Handling Ltd* (2010) 189 FCR 322 (*FCT v CBH*). The issue in this case was not whether CBH was a charity but whether it was entitled to income tax exemption under ITAA 1997 s 50-40, item 8-2, that is, whether it was 'a society or association established for the purpose of promoting the development of Australian agricultural resources; and not carried on for the profit or gain of its individual members'. This is significant because it means that there were only two matters being considered: whether CBH had the purpose of 'promoting the development of Australian agricultural resources' and whether CBH was established 'for the profit or gain of its individual members' (*FCT v CBH*: 335, para. 59). It did not need to consider whether 'the promotion of the development of agricultural resources' was a charitable purpose, that is, whether it was 'beneficial to the community' or for the 'public benefit'. The Commissioner had previously issued private rulings in 1971 (and 1996) that accepted that clauses in CBH's constituent documents preventing distributions to members, including on winding up, meant that CBH was entitled to the exemption under s 50-40 (*ibid*: 330-331, paras. 41-43). In 2008, the Commissioner reviewed the entitlement of CBH to the exemption, arguing that much had changed since 1971 and that the size and scope of the activities of CBH now meant, *inter alia*, that CBH was not 'established for the purpose of promoting the development of Australian agricultural resources' and that CBH did not satisfy the requirement that it was 'not carried on for the profit or gain of its individual members' in their capacity as members (*ibid*: 328-329, para. 34).

In relation to the first issue, the majority, Mansfield and McKerracher JJ, noted that CBH had significant revenue and a number of commercial subsidiaries (*ibid*: 332, para. 48) but concluded that the primary objective of CBH was promoting the development of the Western Australian grain industry, thereby advancing Australia's competitiveness in grain export markets (*ibid*: 340, para. 76). In relation to the second issue, the majority noted that members would 'gain' from the activities of CBH but said that this was also the case for non-member growers (*ibid*: 344, para. 95). Further, they noted that where an entity satisfied the first limb (the 'broader community objective'), the fact that there were 'incidental gains or benefits' to members did not disentitle the entity to the exemption (*ibid*: 343-343, para. 94).

Siopis J dissented (*ibid*: 350-355, paras. 117-153). He noted that the purpose of promoting agriculture was not included in the objects listed in the constituent documents of

CBH (although it is now: Co-operative Bulk Handling Ltd Rules 2021: cl. 3.2(a)) and that the emphasis in the documents (and in operations) was on conducting the business of bulk handling as its core activity (*FCT v CBH*: 350, para. 123). Further, he noted that CBH is the parent company of a sophisticated international conglomerate which, through subsidiaries, holds investments in flour milling operations in South East Asia as well as shipping and container transportation (ibid: 351, para. 130). That is, CBH is concerned with conducting a business rather than having a broader purpose of promoting Australian agriculture (ibid: 352, para. 132). In his view, the business was carried on for the financial gain of its members despite the fact that some non-members also used the services (ibid: 355, para. 152). Siopis J noted that 90% of customers were members and accounted for 95% of business (ibid: 355, para. 151).

Perhaps what is most surprising about the majority judgment is the conclusion that any benefits to members were ‘incidental’. It seems that the fact that there were some non-members that used the services, as well as members, was important in this regard (ibid: 349, para. 112), but, as Siopis J said, the vast majority of business was conducted with and for members. In any event, CBH was retrospectively endorsed by the ATO in 2014 as a *charitable institution*, with effect from 1 July 2000 (CBH 2019: 71).

The recognition of CBH as a charity, now a charity registered by the ACNC, seems to stretch the notion of charity in a number of ways. First, CBH runs a business that is an end in itself. The size of the business is remarkable – in 2019, CBH had gross revenue of \$748 million and a ‘surplus’ of \$101 million (CBH 2020). This puts it in the very highest category of registered charities by size – ‘extra-large’ – with only 0.4% of charities having revenue in excess of \$100 million (ACNC 2018: 4). CBH also has assets of \$1.9 billion (CBH 2020). It has 15 wholly owned subsidiaries and 2 associated companies (ibid). Of course, many charities run businesses and then apply the profits or surplus towards charitable objects; for example, Word Investments Ltd applied the profits to advance a religious purpose (*Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204), and universities apply their profits to advance education, but CBH does not apply its revenue for a charitable purpose. Second, the labelling of this significant business enterprise as a charity blurs the lines between the charitable and the for-profit sector. The ATO has released data about the non-payment of tax of many of Australia’s largest companies, and in 2013–14, CBH was the second largest company to pay no tax (Janda and Anderson 2016).²¹ Third, CBH wholly owns a large number of commercial subsidiaries that do pay tax (CBH 2019: 79). However, when they distribute those taxed profits as franked dividends to CBH, CBH is entitled to claim refunds of franking credits as a charity (ITAA 1997: divs. 67, 207), meaning that the profits of the commercial subsidiaries may be effectively tax free. Fourth, CBH has contemplated changing its structure and potentially becoming a listed company. In 2016, a company offered to acquire the interests of members of CBH for \$1 billion in cash and scrip (Shepherd 2016). The fact that such a bid was entertained by the board suggests that it is clearly looking at ways to maximise the value of the company rather than to promote agriculture. Fifth, although, as a company limited by guarantee, CBH does not pay dividends, it has operated a program, now called the Grower Patronage Rebate Program, since June 2013 (and a variation on this program in the 2009–2011 income years) where amounts are distributed to growers (including the small percentage of non-member growers) to effectively reduce the amount they pay for the service CBH provides (Grain Central 2019). Although this would not be unusual in a distributing co-operative, it seems anomalous that these distributions would not indicate that there is a gain or benefit to members that is more than incidental.

In 2017, the Productivity Commission was critical of the granting of charitable tax concessions to agricultural trading companies. The Productivity Commission recommended that:

The Australian Government should legislate to exclude agricultural commodity trading companies from being granted charity status and receiving the associated tax concessions.

(Productivity Commission 2016: 44)

b Business association cases

Starting in 2012, there were a number of cases involving state-based Chambers of Commerce claiming eligibility for various state tax concessions. In *Chamber of Commerce and Industry Inc (WA) v Commissioner of State Revenue* (2012) 82 SR (WA) 204 (*CCI v CSR*), the Administrative Tribunal of Western Australia was asked to consider whether the Chamber of Commerce and Industry was a 'charitable body or organisation' for the purposes of the exemption from payroll tax.²² The legislation defined a charitable body or organisation as one that was 'established or carried on for charitable purposes' (Pay-Roll Tax Assessment Act 2002 (WA): glossary). The Chamber argued that its activities were carried on mainly for the promotion of trade and commerce in Western Australia – a purpose that it argued was beneficial to the wider community, not simply its members.

The Tribunal considered cases such as (*Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611) as well as more recent cases, such as *FCT v CBH* (which, as noted, was not a case about charity). Chaney J accepted that the Chamber devoted extensive resources to the provision of services to its members and to business generally (*CCI v CSR*: 229, para. 90). However, his Honour concluded that the Chamber's main purpose was the promotion of trade and commerce in Western Australia, not serving the private interests of its members (*ibid*: 229–31, paras. 90–99). The decision in *CCI v CSR* is a first instance decision and therefore not binding on courts in other jurisdictions, although such decisions may be persuasive.²³

The decision in *CCI v CSR* encouraged similar organisations in other jurisdictions to claim exemptions with mixed results. In (*Queensland Chamber of Commerce and Industry Ltd v Commissioner of State Revenue* (2015) 108 ACSR 334), the issue was whether the Queensland Chamber of Commerce and Industry (QCCI) was entitled to an exemption from payroll tax. The case did not consider whether QCCI was a charitable institution; rather, it appears to have been accepted that QCCI was a charitable institution (*ibid*: 340, para. 18).²⁴ The case was concerned with whether 'under its constitution . . . no amount [was] to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members' (Taxation Administration Act 2001 (Qld): s. 149C(5)). The Commissioner argued that these requirements were not satisfied because there were no express provisions in QCCI's constitution to that effect ((2015) 108 ACSR 334: 340, para. 21). Despite that, Jackson J held that QCCI was entitled to registration as a charitable institution (*ibid*: 351, para. 94).

In (*South Australian Employers' Chamber of Commerce & Industry Inc v Commissioner of State Taxation* [2017] SASC 127), the Chamber was claiming an exemption from payroll tax as a charitable entity. Blue J concluded that it was not a charity. He accepted that advancement of trade or commerce (or agriculture) can be a charitable purpose, referring to *Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611 ([2017] SASC 127: 37–38, paras. 123–124). He also noted that an entity would not be disqualified if it provided incidental benefits to its members (*ibid*: 49, para. 163). However, if its main purpose was to

benefit members, the entity would not be charitable (ibid). After reviewing the constitution of the Chamber [which he noted was amended in 2012 ‘to enhance the prospects of the Chamber obtaining tax advantages’ (ibid: 7, para. 32)] and its activities, he concluded that the dominant purpose was to advance the interests of its members – South Australian business entities (ibid: 61, para. 217). Blue J recognised that this result was at odds with *CCI v CSR* but distinguished that case on the facts, noting that the South Australian Chambers’ policy advocacy activities were of less significance than its counterpart in Western Australia and that the member services provided by the South Australia Chamber were too substantial to be considered ancillary to any charitable purpose of the Chamber (ibid: 64, paras. 231–233, 78, para. 298). The Full Court of the Supreme Court of South Australia affirmed the decision (*South Australian Employers’ Chamber of Commerce and Industry Inc v Commissioner of State Taxation* [2019] SASCFC 125). It should be noted that following these decisions, several jurisdictions amended their legislation to exclude ‘trade, industry or commerce’ bodies (as well as some other types of entities) from the charitable tax concessions. These changes are discussed in Section 6.

c Professional associations

A professional association is a body of persons engaged in the same profession that is formed to promote the interests of its members in the profession. Professional associations often act as a peak body for professionals working in the same or similar fields, representing the interests of members to government and the community. These associations may control the ability to act in a profession to members who have satisfied certain requirements. They will typically assist members through ongoing professional development and seek to maintain standards within a profession, exercising quality control and carrying out research. Although the nature of the entity and the activities it engages in will vary, a professional association, invariably, has as one of its purposes the promotion of the interests of its members.

The case that is often referred to as authority for income tax exemption for professional associations is a United Kingdom decision, (*Commissioners of Inland Revenue v Forrest* (1890) 15 App Cas 334), concerning a civil engineers association. The case was concerned with an exemption from tax which applied to ‘property which, or the profits or income whereof’ that were ‘applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts’ ((1890) 15 App Cas 334: 337). The Institution of Civil Engineers (ICE) was incorporated by Royal Charter in June 1828, and its ‘objects’ were stated to be ‘for the general advancement of mechanical science, and more particularly, for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer’ (ibid: 345). The issue was whether the Institution was established for the promotion of science. There was no discussion about whether the Institution might also be charitable. A majority in the House of Lords concluded that the entity was a scientific institution. In 1931, the status of ICE was again considered, this time under the Income Tax Act 1918 (UK) which provided an exemption to an entity that was formed ‘for charitable purposes only’ in ([1932] 1 KB 149). Although there was not much discussion of the term ‘charitable’, it was noted that the fact ‘that the promotion of science is a charitable object is not disputed’ ([1932] 1 KB 149: 177).

In 1952, the House of Lords considered whether a professional medical association was a charity in (*Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631);

however, this was not a tax case but a case concerned with whether a bequest was charitable and therefore valid. The House of Lords held that:

All indications point to the object of the College being the advancement of knowledge and skill necessary for surgery and not the advancement of the professional position of its individual members.

([1952] AC 631: 661)

In 1943, the Australian High Court considered whether the Royal Australasian College of Surgeons was entitled to income tax exemption not as a charity but as a scientific institution under ITAA 1936 s 23(e) (now s 50-5 item 1.3 of the *ITAA 1997*) (*Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436). The High Court unanimously decided that the College was a scientific institution and did not need to consider whether it was a charity. The Royal Australasian College of Surgeons is now a registered charity.

In 2008, in (*Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318), the Federal Court was asked to consider whether the Victorian Women Lawyers' Association Inc (VWL) was entitled to income tax exemption either as a charity or as a community services organisation. The case was heard by French J just prior to taking up his appointment as Chief Justice of the High Court. French J noted that under the fourth head, he was required to find a purpose that was beneficial to the public and analogous to the spirit and intendment of the Preamble, noting that this required some direct and general benefit to the community. He also noted the need to find a public benefit and not just the creation of private benefits. After considering the constituent documents of the association and its activities, he found them to be charitable, commenting that VWL:

[W]as established to overcome a well-known social deficit, namely the substantial under-representation of women in the legal profession, in its upper reaches and in the judiciary.

(*ibid*: 352, para. 148)

He noted the activities of the Association, including the social and networking functions – which would normally mark an association as being for the benefit of members, but said that ‘they were . . . directed to the larger object and in many cases to a larger audience, the legal profession in Victoria’ (*ibid*: 352, para. 149). One reading of the case is that French J was so impressed by the ‘worthy’ purpose that he was prepared to overlook the fact that the members did receive benefits in the form of career advancement. VWL is now a federally registered charity.

Finally, in 2015, in (*Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC 604), a professional association representing the state’s lawyers, which at the time of the case had 18,120 members and more than 100 staff, argued that it was entitled to an exemption from payroll tax as a NFP entity with a sole or dominant charitable purpose. Digby J concluded that the nature of the regulatory and membership activities meant that the Law Institute of Victoria (LIV) could not be charitable. He also noted that the considerable amounts of money generated by the regulatory and membership activities suggested they could not be ‘minor, ancillary, incidental, supplemental or subsidiary’ to charitable objects. It is of interest to note that LIV was

and is a registered charity for federal tax purposes. Digby J noted this but said it provided ‘no assistance’ because:

[T]hat recognition and registration was achieved pursuant to a separate and distinct framework and criteria.

([2015] VSC 604: 40, para. 130)

6 Conclusions and possible solutions

Consideration of these three case studies raises a number of issues. First, they demonstrate that membership-based entities have at least the possibility of ‘private’ benefits. This is not necessarily true in all cases – members may receive no benefit and may perform important oversight functions in relation to the entity and its officers. But membership should at least raise a red flag that should be investigated to see if there is private benefit. A second issue concerns the judicial function and perhaps the role of a regulator tasked with determining whether the entity is a charity or is otherwise eligible for tax relief. There are really two sub-issues here: first, although the requirements for eligibility are clear, there is a level of discretion for the decision-maker as to whether those requirements are met. This is particularly the case with the fourth head of charity, where the test of ‘beneficial to the community’ is so broad that almost any worthwhile purpose could fall within it. A second sub-issue in relation to determining eligibility is that the use of wills cases to determine eligibility for tax relief results in an expansion of the categories of charity, even though the relevant policy considerations are quite different. A third issue is that the doctrine of precedent, and what might be described as ‘creeping assumptions’, has blurred the lines between for-profit and NFP entities. The initial case discussed, involving the Yorkshire Agricultural Society (*Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611), involved a small society in the United Kingdom holding agricultural shows, with very little taxable income, performing what might be viewed as educational activities, but has led to a very large and profitable entity, CBH, being found eligible for tax relief as a non-charitable entity (*Federal Commissioner of Taxation v Co-operative Bulk Handling Ltd* (2010) 189 FCR 322) that then somehow became a registered charity eligible for additional tax relief. That case also demonstrated how difficult it is to remove a tax concession once it has been granted. A fourth issue relates to the absence of tax policy analysis in relation to the concessions. Tax concessions are equivalent to a government spending program, and it is legitimate to have regard to the ‘cost’ of those concessions. For example, the significant revenue of CBH (and its subsidiaries) should be a matter of legitimate concern to decision-makers in determining whether such an entity is providing public benefits that would justify those concessions. Similarly, when LIV applied for an exemption from Victorian payroll tax (*Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC 604), it should have been a legitimate concern that LIV had more than 100 employees and that the cost of exempting such an entity was relatively high. By contrast, the amount of revenue forgone in the Yorkshire Agricultural Society case (*Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611) and in the VWL case (*Victorian Women Lawyers’ Association Inc v Commissioner of Taxation* (2008) 170 FCR 318) was relatively small. In none of these cases was there any consideration of the underlying tax policy issue. Finally, the cases demonstrate a growing disparity concerning the federal government and the states and territories on the meaning of charity. This is likely to result in uncertainty and potentially increased compliance costs for entities that operate across jurisdictions.

These three case studies demonstrate that although the requirements for charity can be clearly enunciated, the application of the tests by judges and regulators is subjective and that if the decision-maker accepts that the purpose is 'worthy' or even worthwhile, they may overlook the possibility of private benefits arising to members. This may require the tests for charity to be made more rigorous. Three possible ways of seeking to ensure that charities do not provide benefits to their members could be:

- i Changing the definition of charity for tax purposes to include benevolence or altruism,
- ii Requiring membership-based entities to demonstrate altruism/public benefit, or
- iii Excluding certain membership-based entities from concessions (as has occurred in some states and territories).

i Benevolent or altruistic charity

The idea of restricting the notion of charity to those entities that are directed at helping others is not new. It is likely what the legislatures had in mind in colonial times and early in the Federation, when the concessions were granted to 'public benevolent institutions' and 'public charities' as well as religious and public educational institutions. The current position is that PBIs receive some tax concessions that are not available to other charities, that is, deductible gift recipient status and the FBT exemption.

A similar sentiment was expressed by the *Charities Definition Inquiry Report*. The Report recommended that the public benefit test be strengthened by requiring that the dominant purpose of a charitable entity must be altruistic (Sheppard, Fitzgerald and Gonski 2001: rec. 7). The Report noted that the dictionary meaning of that term is 'unselfish concern for the welfare of others' or 'regard for others as a principle for action'. By including altruism or benevolence in the definition of charity, many of the entities that are in reality member serving would be removed from the notion of charity. Of course, this would not preclude the grant of tax exemption if a case could be made.

ii A requirement to demonstrate public benefit

A precedent for requiring certain entities to demonstrate public benefit can be found in the United States. The Internal Revenue Service (IRS) imposes a requirement on 'charitable hospitals' that, to qualify as income tax exempt, a hospital must:

- demonstrate that it provides benefits to a class of persons that is broad enough to benefit the community, and
- operate to serve a public rather than a private interest (IRS 2020).

The inclusion of this requirement (termed the 'Community Benefit' requirement) did not stem from concern about membership interests but rather because of concern that doctors might establish hospitals that treated only their own patients.²⁵ IRS Revenue Ruling 69-545 (1969) provides the following factors that demonstrate community benefit, including:

- operating an emergency room open to all, regardless of ability to pay;
- providing hospital care for all patients able to pay, including those who pay their bills through public programs such as Medicaid and Medicare;
- using surplus funds to improve facilities, equipment and patient care; and
- using surplus funds to advance medical training, education and research.

The interesting feature of such a test is not so much what is required but that the hospital (or other charity) has the onus of establishing that it meets the public benefit requirement.

iii Excluding some membership-based entities from concessions

Following the decision in 2012 granting charitable status to the Chamber of Commerce and Industry in Western Australia (*CCI v CSR*, 2012), several jurisdictions enacted legislation excluding certain entities from state and territory tax concessions. For example, in Western Australia, the definition of ‘charity’ excludes a ‘relevant body’ which is defined as:

- an industrial association;
- a professional association; or
- a body that promotes trade, industry or commerce (Pay-Roll Tax Assessment Act 2002 (WA): s. 42A).

The term ‘promotes trade, industry or commerce’ is defined to include ‘carrying out an undertaking a purpose of which includes the promotion of, or the advocacy for, trade, industry or commerce, whether generally or with respect to any particular kind of trade, industry or commerce’ (ibid: glossary).

Similar provisions have been enacted in the Australian Capital Territory (Taxation Administration Act 1999 (ACT): s. 18B) and in the Northern Territory (Revenue and Other Legislation Amendment Act 2015 (NT): s. 48B). In each of these jurisdictions, it is possible to apply to the commissioner for a determination that the organisation is a charity ‘within the first three heads’ set out in the *Pemsel* case. This effectively requires the entity to demonstrate that it provides public benefits.

It is of course open to any jurisdiction to grant tax concessions to such entities in the same way that the federal tax acts provide concessions to non-charitable NFPs. But by imposing some limits on fourth-head charities, we may avoid the ever-growing number of entities that are regarded as ‘charities’ and in that way restore integrity to the term.

Notes

- 1 In a recent case in the United Kingdom, *Children’s Investment Fund Foundation (UK) v Attorney-General* [2020] UKSC 33, the Supreme Court held that in some circumstances, members of charities may owe fiduciary duties to act in the best interests of the charitable company. The case was concerned with highly unusual circumstances involving the Children’s Investment Fund Foundation and the breakdown of the marriage of the two trustees/directors. A resolution approving a grant to a new charity to be controlled by one spouse needed statutory approval by the members. The one independent member was ultimately held to owe a fiduciary duty (and was required to vote on the resolution in accordance with a direction by the lower court).
- 2 Data provided by the Australian Taxation Office (ATO) as at April 2020. The figure refers to entities that have an active Australian Business Number registration that self-assess as income tax exempt. The ATO also states that there are an additional 56,000 registered charities and approximately 8,000 NFP entities that are taxable, making a total of approximately 205,000 NFP entities that interact with the federal tax system.
- 3 Data provided by the ATO as at April 2020. The Australian Charities and Not-for-Profits Commission (ACNC) website states that as at January 2021, there are 58,783 registered charities (ACNC 2021).
- 4 One category of charities, those that are on the Register of Environmental Organisations, must have at least 50 individual members (ITAA 1997: s. 30–275(1)(b)).

- 5 Australian Charities and Not-for-profits Regulations 2013, reg 45.10 Accountability to Members.
- 6 An unincorporated association is an informal group of individuals. An unincorporated association may be a charity (Australian Charities and Not-for-Profits Commission Act 2012 (Cth): s. 205.5) and in the absence of an exemption will be taxable as a company (ITAA 1997 (Cth): s. 995-1).
- 7 'Company' means a body corporate or any other unincorporated association or body of persons but does not include a partnership.
- 8 The common law principle of mutuality provides that where a number of persons contribute to a common fund created and controlled by them for a common purpose, such as a social club, any surplus arising from the use of that fund for the common purpose is not income. The principle does not extend to include income that is derived from sources outside that group, so that receipts from non-members will be taxed as income.
- 9 The mutuality principle has the effect that amounts paid by members of a club or association to the club or association are not income of the entity. Amounts received from non-members will, however, be assessable as income. It has been accepted that the principle applies in Australia (*The Social Credit Savings and Loans Society Ltd v Federal Commissioner of Taxation* (1971) 125 CLR 560 per Gibbs J, referring to *The New York Life Insurance Co v Styles (Surveyor of Taxes)* (1889) 14 App Cas 381 and *The Bohemians Club v Acting Federal Commissioner of Taxation* (1918) 24 CLR 334).
- 10 A further concession for some charities is the ability to receive gifts that are deductible under div 30 of the ITAA 1997. This is unlikely to be available to NFP entities that provide benefits to members.
- 11 Ibid s. 6–5 describes ordinary income as income according to ordinary concepts.
- 12 Ibid s. 995-1 defines a franked distribution as a distribution franked in accordance with s. 202-205.
- 13 Payroll Tax Act 2011 (ACT); Payroll Tax Act 2007 (NSW); Payroll Tax Act 2009 (NT); Payroll Tax Act 1971 (Qld); Payroll Tax Act 2009 (SA); Payroll Tax Act 2008 (Tas); Payroll Tax Act 2007 (Vic); Pay-Roll Tax Assessment Act 2002 (WA).
- 14 For example, in Victoria, the wages must be paid or payable to a person engaged exclusively in work of a religious, charitable, benevolent, philanthropic or patriotic nature for the institution or non-profit organisation (Payroll Tax Act 2007 (Vic): s. 48(1)(b)).
- 15 Land Tax Act 2004 (ACT); Land Tax Management Act 1956 (NSW); Land Tax Act 2010 (Qld); Land Tax Act 1936 (SA); Land Tax Rating Act 2000 (Tas); Land Tax Act 2005 (Vic); Land Tax Act 2002 (WA) (the Northern Territory does not have a land tax).
- 16 Rates Act 2004 (ACT); Local Government Act 1993 (NSW); Rates Act 1971 (NT); Local Government Act 2009 (Qld); Local Government Act 1999 (SA); Local Government Act 1993 (Tas); Local Government Act 1989 (Vic); Local Government Act 1995 (WA).
- 17 Duties Act 1999 (ACT); Duties Act 1997 No 123 (NSW); Stamp Duty Act 1978 (NT); Duties Act 2001 (Qld); Stamp Duties Act 1923 (SA); Duties Act 2001 (Tas); Duties Act 2000 (Vic); Duties Act 2008 (WA).
- 18 The Income Tax Assessment Act 1915 (Cth) s. 11(1)(d) provided an exemption for the income of a religious, scientific, charitable or public educational institution.
- 19 The Explanatory Memorandum to the Charities Bill 2013 (Cth) noted that 'the statutory definition generally preserves the common law principles by introducing a statutory framework based on those principles but incorporating minor modifications to modernise and provide greater clarity and certainty about the meaning of charity and charitable purpose' (2013: 3).
- 20 Historian F. K. Crowley in 1973 noted that 'Australian farmers and their spokesman have always considered that life on the land is inherently more virtuous, more healthy, more important and more productive, than living in the towns and cities' (Crowley 1973: 77–78).
- 21 In 2017–18, 710 companies did not pay any tax, including CBH (Khadem 2020).
- 22 The Tribunal was also asked to consider whether, if an exemption applied, this would apply to all of the wages paid by the Chamber of Commerce and Industry. This issue is discussed in the following.
- 23 Although the position may be otherwise with respect to courts of appeal *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.
- 24 There was no discussion about why it was common ground that QCCI fell within s 149C(3); however, it is assumed that this was due to the Administrative Tribunal of Western Australia decision in *CCI v CSR* discussed previously.
- 25 The IRS (2020) notes that 'a hospital that restricts its medical staff privileges to a limited group of physicians is likely to be operating for the private benefit of the staff physicians rather than for the public interest'.

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