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Statutory Eucalypts in the Law of Charity

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Whatever is meant by "Statutory Eucalypts in the Law of Charity"? Owen Dixon who had read the entirety of Aristotle and for whom no work was closer to his fatalistic soul than Aeschylus' *Agamemnon* would surely have known.[1] So too would Gough Whitlam and Kenneth Jacobs, both of whom were taught by the youngest ever professor of Greek at this or perhaps any other university, Enoch Powell, who lectured in the sandstone building opposite us in 1937, including to two young undergraduates both of whom left records of their impressions. Gough Whitlam called him "dry as dust",[2] which contrasts with his speeches as a firebrand member of the Westminster Parliament in the 1960s. Kenneth Jacobs thought he had far too high an impression of himself.[3] That under-appreciated Supreme Court and High Court judge interrupted his law degree in order to fight in the Second World War. He survived not only the Battle of El Alamein in 1942 and the landings at Lae and Finshhafen in Papua New Guinea in 1943,[4] but also 36 years of retirement after his untimely departure from the High Court following a medical misdiagnosis, in which time he returned to classical studies and completed a masters degree at University College London. He was of course the author of the first edition of *Jacobs' Law of Trusts in Australia*.

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1 See S Crennan and W Gummow (eds), *Jesting Pilate* (3rd ed 2019), p 45, reproducing J Merralls (2017) 160 *Vic Bar News* 58.
2 S Maloney and C Grosz, "Gough Whitlam & Enoch Powell", *The Monthly*, April 2012.
3 Oral history recorded by Peter Coleman, 10 May 1996 (transcript available in National Library of Australia).
4 See R French, "Remembering Sir Kenneth Jacobs KBE QC" [2015] (Summer) *Bar News* 61 at 62.

The term “eucalypt” comes to us from the Greek via Cook’s third voyage and the French enlightenment. The distinctive flower buds collected from Tasmania on Cook’s third voyage were named “eucalypt” in 1788 by a French botanist,[5] from the Greek ευ (the adverb seen in euphoric or euphonious or eulogy) and the participle καλυπτος (which is cognate with calyx and incorporated in the name of Calypso in the Odyssey). “Well hidden” is a good literal translation of “eucalypt”, and if everything that follows tonight is a blur, at least you have learnt some Greek! I feel sure that Sir Ken would have approved!

That is the background against which I want to explore the structure of the law of charity. It is all too easy to overlook the hidden role of statutes, and even easier to miss the quite subtle ways in which statutes can operate.

Many lawyers’ understanding of the law of charity derives from the structure given to them in undergraduate equity, with heavy emphasis upon the so-called four categories commonly attributed to Lord Macnaghten in *Pemsel’s* case, the preamble to the Statute of Elizabeth, the reasoning process illustrated by unlikely appeals concerning crematoria or law reporting, something about “spirit and intendment” which is moderately mystifying and a swather of decisions on public benefit. With luck, there will be mention of cy-près schemes, the *Charitable Trusts Act 1993* (NSW) and the *Charities Act 2013* (Cth), perhaps with an emphasis on how the former is substantive and the latter is not. That is a very rough overview of the law as it is today, which illustrates the impossibility within the time constraints of an undergraduate course of saying anything much about the deeply fascinating history of how the law reached the state it is in.

There has been a deal of tinkering around the edges of the law of charity, and some of the distinctions familiar from undergraduate cases have been overturned by the Commonwealth statute. Thus for example the *Charities Act 2013* (Cth) overturns what was held in *Gilmour v Coates*[6] as to the absence of public benefit in a gift to a cloistered religious order.[7] The same statute also provides that “it does not matter whether a

5 See Charles Louis L’Heriter de Brutelle, *Sertum Anglicum seu Plantae Rariores* (Paris, 1788) pp 68-69, which may be seen at https://gallica.bnf.fr/ark:/12148/bpt6k9818871b/f68.item and https://gallica.bnf.fr/ark:/12148/bpt6k9818871b/f69.item

6 [1945] AC 426.

7 Section 10(2). Legislation to similar effect was found in s 4 of the *Extension of Charitable Purpose Act 2004* (Cth), which was repealed by s 43 of the *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth).

purpose is directed to something in Australia or overseas", and so overturns the distinctions considered by (for example) Jacobs J holding that a gift to establish a prize for Viennese composers was not a valid charitable purpose, although a gift in the same will for a similar competition for a modern Australian orchestral work, which the testator insisted "should be modern but not extrimly modern",[8] was upheld.[9] The difficulty of trusts established by settlors and testators which are, or which become, impracticable to implement has of course been familiar for centuries. But it is important to be clear at the outset as to the effect of federal law. The Commonwealth *Charities Act* does not *directly* affect the substantive law of charitable trusts. It is directed at the way in which courts are to construe other federal statutes, such as federal taxing statutes. The result is a little peculiar: the same trust may be invalid as a charitable trust as a matter of State law,[10] but would be charitable for the purposes of federal legislation. A trust for the purpose of Carmelite nuns or some other cloistered order is within the scope of what is "charitable" for the purposes of federal legislation, but probably not within the scope of what is charitable for the purposes of validity.

A related complexity arises in Australia from divergent State legislation. For example, s 103 of the *Trusts Act 1973* (Qld) and s 4 of the *Variation of Trusts Act 1994* (Tas) partly overturn *Baddeley's* case,[11] (the famous decision which hypothesised a bridge for impecunious Methodists), doing so in different ways. Thus a trust for land to be used for recreational purposes by a particular group may be valid in Queensland but not in New South Wales.[12]

It may seem natural to think that such different outcomes at the State and Federal levels, or between different States, are a quintessentially Australian phenomenon. One purpose of this address is to illustrate that that is only because we are more ignorant than we should be of events in the United Kingdom a century or more ago. I shall do so by referring to two spirits. You heard me right, "spirits". I am still talking about the law of trusts, and the spirits are the "spirit of the trust" for the purposes of cy-près schemes, and,

8 Spelling and emphasis in the original will.
9 *Re Lowin; Perpetual Trustee Co (Ltd) v Robins* (unreported, Supreme Court of New South Wales, 16 April 1964).
10 Having regard to the relaxation of the requirement of certainty of object: see P Creighton, "Certainty of Objects of Trusts and Powers: The Impact of *McPhail v Doulton* in Australia" (2000) 22 *Sydney Law Review* 93.
11 *Inland Revenue Commissioners v Baddeley* [1955] AC 572.
12 For example, *Re Samford Hall Trust* [1995] 1 Qd R 60. See D Ong, *Trusts Law in Australia* (5th ed 2018, Federation Press), pp 421-422.

more importantly, the spirit and intendment of the Statute of Elizabeth.

One important aspect of the law of charity is altering the terms of a trust to something which is practicable, or sensible, or less absurd than the settlor's or testator's intention. One nineteenth century commentator, writing in 1846 in the Edinburgh Review, gave the example of a trust to establish a grammar school, in which ten boys were to be taught Latin, but the trustees had replaced this by a commercial school in which two hundred are taught English. In contending for a broad power to amend a trust, it was said:[13]

> in vain that neighbours protest that they want a commercial, and do not want a Latin school; that they show that teaching ten boys Latin would cost more than teaching two hundred English; that ten boys or five boys, to whom Latin would be useful, are to be found in the district, and that there are five hundred who wish to learn English. 'All this may be true', answers the Judge, 'but this court has nothing to do with it. My duty is to carry into effect the trusts of the Testator's Will'.

Property held on charitable trust was an important part of the economy, and abuses of such property warranted the attention of Parliament. The work of the Charity Commissioners established under Sir Samuel Romilly's Act permitted the author of the article in the Edinburgh Review to say that there were more than 10,000 charities actually deriving income each year, more than 50,000 trustees, and the land held on trust was 442,915 acres excluding town land, of which "a considerable part is withheld by claimants under adverse titles, or under no title at all, or by fraudulent lessees". The result was a stream of English legislation concerning the enforcement and variation of charitable trusts, especially small ones which do not warrant an application to court. I shall mention seven (there are many more):[14] the Statute of Elizabeth itself, Sir Samuel Romilly's Act of 1812, the *Charity Amendment Act 1853*, the *Charities and Mortmain Act 1888*, the *Charities Act 1960*, the *Charities Act 1993* and finally the *Charities Act 2011*.

These statutes trickle through to the current Australian law in ways which are sometimes surprising. For example, it is customary to refer to s 9(1) of the *Charitable Trusts Act 1993* (NSW),[15] because it extends the availability of the power to order a scheme. That is plain

13 "Administration of Charitable Trusts" (1846) Vol LXXXIII No CLXVIII 475 at 477-478. The same example is given in T Lewin, *The Law of Trusts* (W Maxwell, 5th ed 1867) pp 403-404.

14 One instance is 3 & 4 Vict c 77, which is linked to the example in the previous footnote, and which extended the subjects which could be taught in grammar schools.

15 The circumstances in which the original purposes of a charitable trust can be altered to allow the trust property or any part of it to be applied cy pres include circumstances in which the original purposes, wholly or in part, have

from its title ("Extension of the occasions for applying trust property cy-près"), and was confirmed not so long ago in one of the *Serbian Orthodox Church* cases,[16] but requires the Court to have regard to the "spirit of the trust". That is a most unusual *Peko-Wallsend* relevant consideration; whatever does it mean? How does one prove by admissible evidence the "spirit" of the trust, let alone have regard to it?

Like many aspects of law, the only way of explaining that provision is historical, and fortunately in this case, the history is relatively recent. The *Serbian Orthodox Church* case explains that the Nathan Committee on the Law and Practice relating to Charitable Trusts sought to relax the cy-près doctrine, and to do so by drawing upon long established Scottish law and proposed that the formulation of any cy-près scheme should have "special regard to the spirit of the intention of the founders".[17] That may have been clear to Lord Nathan, but more recently the Court of Session referred to this as an "elusive concept".[18] And last fortnight the Court of Appeal of England and Wales said it was "somewhat nebulous".[19] What is more, Scottish law is signally different from the law of England and Wales in connection with trusts: in particular, the basic rule that a trust must either be for identifiable objects or for charitable purposes does not hold in Scotland, and thus there may be purpose trusts which are not charitable.[20] The *Charities Act 1960* (UK) enacted an extension which resembles s 9(1), but then in 2006, references to the "spirit of the gift" in s 13(1)(c), (d) and (e) of the *Charities Act 1993* (UK) were replaced by the expression "appropriate considerations", shifting the "spirit" to a definition which more helpfully contrasted the spirit of the gift on one hand, and the social and economic circumstances at the time of altering the original purposes on the other hand. That provision now appears as s 62 of the *Charities Act 2011* (UK). In short, the Australian State Legislatures have enacted British legislation, which has long since been further refined in that country, but not updated here. In order to find the original context of the Australian State legislation, you need to resort to repealed English legislation, which in turn

since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust.

16 *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Bishop Irinej Dobrijevic* [2017] NSWCA 28 at [197]. Lord Nathan was later the author of *Nathan on the Charities Act 1960* (Butterworths, 1962), reviewed (1963) 26 *MLR* 459.

17 At [201].

18 *Inverclyde Council, Trustee Of The Birkmyre Trust v Dunlop* [2005] CSIH62; 2006 SCLR 463 at [22].

19 *Zedra Financial Services (UK) Ltd v HM Attorney General* [2023] EWCA Civ 1332 at [59]. See also *Varsani v Jesani* [1999] Ch 219.

20 See Wilson and Duncan, *Trusts, Trustees and Executors* (2nd ed 1995), p 14-02, and Scottish Law Commission, *Report on Trust Law* SLC 239 (2014), para 14.2.

picked up Scottish law. That example illustrates and introduces the major theme of tonight's address.

The "spirit of the trust" for the purpose of schemes is quite different from the spirit and intendment of the Statute of Elizabeth.[21] The latter is decidedly peculiar. We are generally familiar with the notion that the boundaries of charitable purposes are shaped by the matters identified in the preamble of a statute enacted in the 43rd year of the reign of Queen Elizabeth I. It is quite clear albeit for different reasons that the Statute did not apply when enacted in Scotland or New South Wales. In 1601, Scotland was a separate country, and England asserted no sovereignty over Australia.

We are generally much less familiar with the *Mortmain Act 1736*.[22] That statute declared any testamentary gift for charitable purposes void, with the property reverting to the testator's heir at law, unless there were a deed executed in the presence of two witnesses 12 months before the donor's death and enrolled in Chancery within six months after its execution. One mid-Victorian author said that the Statutes of Mortmain:[23]

> were meant and intended to meet the cunning of the ecclesiastics, whose conscience smote them sore, if may be believed, when they saw lands and goods diverted from the church into the hands of the avaricious but lawful and natural heir, to whom the chief comfort left after his spoliation, would be, that his ancestor through the good offices of the church may have been passed from purgatory earlier and more easily.

The immediate effect seems to have been to preserve the broader approach to charity. As Professor Jones put it:[24]

> This statute was inspired by a fear and hatred of the Church and ecclesiastical charities, by a contempt for the 'vainglorious' ambitions of charitably minded testators and by a desire to ensure that the heir-at-law should enjoy 'some sort of natural right to succeed after his [ancestor's] death, at least to his [ancestor's] land estate'. Yet, paradoxically, it was the existence of the Mortmain Act 1736 which preserved from serious questioning the inherited, generous conception of legal charity; for by classifying an object a charitable, the judges, who interpreted the

21 43 Eliz I c 4 (1601).

22 9 Geo II c 36 (1736).

23 P Francis, *The Law of Charities comprising The Charitable Trusts Act 1853* (John Crockford, London, 1854), p 11. See C Stebbings, "Charity Law: A Mortmain Confusion" (1991) 12 *J of Leg Hist* 7 at 10-14, including as to the misnomer of "mortmain".

24 G Jones, *History of the Law of Charity 1532-1827* (Cambridge University Press, 1969), p 107.

> statute 'to repel the mischief, and advance the remedy', ensured that the devise to charity would be avoided and the land would result to the heir-at-law or next-of-kin. Consequently, there was little concern to restrict the class of objects which the law deemed to be charitable.

Thus for example, a gift for the benefit of the British Museum was held to be charitable within the meaning of the *Mortmain Act* and therefore set aside.[25] In reaching that result, Sir John Leach VC held that "every gift for a public purpose, whether local or general, is within [the Statute of Mortmain], although not a charitable Use within the common and narrow sense of those words". The consequence was the heir received the proceeds of sale of the land, not the trustees of the British Museum.

The *Mortmain Act 1736* was familiar two centuries ago in the colony of New South Wales, but for a completely different reason: it was an outstanding example of an English statute which was *not* received into the colony. This was settled soon after the Third Charter. In 1825 in *Walker v Scott (No 1)* Mr William Charles Wentworth claimed that the Statutes of Mortmain rendered the grant of land to the Female Orphan School in Parramatta void, leaving Forbes CJ to remind him "You are aware, Mr. Wentworth, it has been decided that the Acts of Mortmain do not apply to the Colonies".[26] The reference is not stated in the report, but it is not difficult to identify Sir William Grant's decision in 1817 in *Attorney General v Stewart*,[27] which arose upon the application of the statute of Mortmain to Grenada, which was regarded as "a law of local policy adapted solely to the country in which it was made".[28] That decision was frequently invoked in that very important category of case in the Supreme Court of the Colony of New South Wales, namely, which English statutes of general application had been received into the colony.[29] (It is difficult for us today to appreciate that one of the most reported classes of decisions in the Supreme Court of the Colony of New South Wales – making up some 25% of the total – were decisions on whether English laws of general application extended to the colony.)

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25 (1826) *Trustees of British Museum v White* (1826) 2 S & S 594 at 596.

26 [1825] NSWSupC 60; [1825] NSWKR 6.

27 (1817) 2 Merivale 159; 35 ER 895.

28 "It is undoubtedly true, that all the laws of England are not, and cannot possibly be in force in that or any other colony … I conceive that the object of the statute of Mortmain is wholly political - that it grew out of local circumstances, and was meant to have merely a local operation. The thing to be prevented, was a mischief existing in England, and it was by the quality and extent of the mischief, as it there existed, that the propriety of legislative interference upon the subject was to be determined."

29 See for example *R v Maloney* (1836) 1 Legge 74 (following a trial for bigamy, whether the English Marriage Act 4 Geo IV c 76 was in force in the colony).

I need to make one further point. Unlike the Statute of Elizabeth and the Statute or Mortmain, the legislation enacted during the reign of Queen Victoria was *capable* of application to the Australian colonies, but this did not occur. Those statutes were expressly confined to England and Wales. For example, s 67 of the *Charitable Trusts Act 1853* provided "This act shall not extend to Scotland or Ireland".

To return to that undergraduate conception of the law of charity, we tend to think of two concepts: the (so-called) four categories identified in *Pemsel*: poverty, education, religion and charitable purposes which are not for the relief of poverty, education or religion, and charitable purposes within the spirit and intendment of the Statute of Elizabeth. Both aspects have interesting histories.

As to the first, Lord Macnaghten's formulation in *Pemsel's* case is regarded as the source of the fourfold classification of charitable purposes only because his Lordship failed to attribute it to Sir Samuel Romilly's argument for the next of kin in the great case of *Morice v Bishop of Durham*.[30] Ironically, you won't see this in Lord Eldon's decision either, because although the Lord Chancellor found in favour of the next of kin, he did so not by adopting Sir Samuel's classification but by having regard to the preamble to the Statute of Elizabeth. That may readily[31] be seen in volume 10 of Francis Vesey's reports where Romilly's submission is recorded:

> There are four objects, within one of which all charity, to be administered in this Court, must fall: 1st, relief of the indigent; in various ways: money: provisions: education: medical assistance; etc.: 2dly, the advancement of learning: 3dly, the advancement of religion; and, 4thly, which is the most difficult, the advancement of objects of general public utility.

Lord Eldon did not accept the submission, but instead referred to the Statute of Elizabeth. He spoke of "charity":[32]

> in the sense, which the determinations have affixed to that word in this Court: viz. either such charitable purposes as are expressed in the Statute (stat. 43 Eliz. c. 4), or to purposes having analogy to those. I believe, the expression "charitable

30 A point made by Lord Reid in *Inland Revenue Commissioners v Baddeley* [1955] AC 572 at 607-608.

31 And also in Lord Eldon's notebooks, now found in Georgetown University, which have been examined by Professor Getzler: see J Getzler, "*Morice v Bishop of Durham*" in C Mitchell and P Mitchell, *Landmark Cases in Equity* (Hart Publishing, 2012).

32 (1805) 10 Ves 522 at 540.

> purposes," as used in this Court, has been applied to many Acts described in that Statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the Statute given to all the purposes described.

Slightly more than halfway through this address, I cannot resist the following aside. Shortly after defeating the Bishop of Durham in that important litigation, Pitt the Younger died, Sir Samuel was appointed as Solicitor General in Lord Grenville's Ministry of All the Talents, and Chancellor of the Court of Chancery of the County Palatine of Durham. He loathed the latter office. His biographer quotes him as saying that "the experience of two tedious days passed at Durham would have been sufficient to cure him of all ambition, if he could have 'imagined that the duties of a Chancellor of England bore any resemblance to those of a Chancellor of Durham."[33]

Sir Samuel Romilly is better known for his reform of criminal law and his work towards the abolition of slave-trading, and his failure to denounce Lord Eldon's delays in Chancery (to do so would have destroyed his practice) is regarded as a blot on his otherwise impeccable character.[34] However, 52 Geo III c 101 is commonly known as Sir Samuel Romilly's Act, and provided an alternative to the superseded and unsatisfactory means of investigating charities which was, after all, the purpose of the Statute of Elizabeth.[35]

There is a tendency to identify *Morice* with the principle that the metes and bounds of charity were affected by the preamble to the Statute of Elizabeth. Thus Professor Gareth Jones stated that "Sir William Grant's and Lord Eldon's pronouncements gradually led to the acceptance of the view that there could be no synonym for "charitable" and no substitute for the preamble as the source of the definition of legal charity".[36] One scholar notes that "the die was cast and over time the courts settled on the position that there could be no charitable purpose that did not derive its status from the Preamble".[37]

That is not quite the whole truth, because of statutes which now 170 years later seem to

33 P Medd, Romilly: A Life of Sir Samuel Romilly, Lawyer and Reformer (London, Collins, 1968), pp 131-132. Cf Getzler, above, at p 181.
34 See Medd, above, p 265.
35 His Act was, revealingly, titled "An Act to provide a summary Remedy in Cases of Abuses of Trusts created for Charitable Purposes", and authorised two or more persons to present a petition to the Chancellor, Master of the Rolls or Exchequer (it will be recalled that the Exchequer had a flourishing equitable jurisdiction until 1841).
36 G Jones, *History of the Law of Charity 1532-1827* (Cambridge University Press, 1969), p 126.
37 J Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013), p 3.

be well-hidden. For example, the *Charitable Trusts Act 1853* (Eng)[38] - an update of Sir Samuel Romilly's Act – defines "charity" to mean "every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purview, or interpretation of the statute of 43 Eliz, c 4, or as to which, or the administration of the revenue or property whereof, the Court of Chancery has or may exercise jurisdiction."[39]

That is quite ironic, since the preamble had long since been repealed. The Statute of Elizabeth itself was repealed by the *Mortmain and Charitable Uses Act 1888* (UK), a consolidating Act, but s 13(2) preserved the role played by the preamble.[40] The same course was taken by its successor, the *Charities Act 1960*.[41] The *Charities Act 1960* was itself repealed by the *Charities Act 2006* (UK), which had a similar definition.[42]
But s 3 of the *Charities Act 2011* (UK) broke from all this and defines charitable purposes to include a wide array of things.[43] There are now new notions of the advancement of

38 16 & 17 Vict c 137.

39 Section 66.

40 "Whereas by the preamble to the [Statute of Elizabeth] it is recited as follows [the whole preamble is set out] Be it therefore enacted that references to such charities shall be construed as references to charities within the meaning, purview, and interpretation of the said preamble".

41 Section 38(4) provided that "Any reference in any enactment or document to a charity within the meaning, purview and interpretation of the Charitable Uses Act 1601, or of the preamble to it, shall be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales."

42 Meaning of "charity"
(1) For the purposes of the law of England and Wales, "charity" means an institution which—
(a) is established for charitable purposes only, and
(b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.
(2) The definition of "charity" in subsection (1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment.
(3) A reference in any enactment or document to a charity within the meaning of the Charitable Uses Act 1601 (c. 4) or the preamble to it is to be construed as a reference to a charity as defined by subsection (1).

43 (1)A purpose falls within this subsection if it falls within any of the following descriptions of purposes—
(a) the prevention or relief of poverty;
(b) the advancement of education;
(c) the advancement of religion;
(d) the advancement of health or the saving of lives;
(e) the advancement of citizenship or community development;
(f) the advancement of the arts, culture, heritage or science;
(g) the advancement of amateur sport;
(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
(I) the advancement of environmental protection or improvement;
(j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;
(k) the advancement of animal welfare;
(l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;
(m) any other purposes—
(i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,

amateur sport, the advancement of citizenship or community development, the advancement of animal welfare, and so on. There are also changes to familiar notions. Thus "religion" includes a religion which does not involve belief in a god, recreational trusts are recognised, and there is a sweeper in subsection (1)(m)(i) for purposes outside that long list but which are recognised as charitable purposes "under the old law", which is defined in subsection (4) to mean "the law relating to charities in England and Wales as in force immediately before 1 April 2008". That reference to "the old law" was a reference to the preamble to the Statute of Elizabeth which by s 1(3) of the *Charities Act 2006* continues to have some relevance, although it might be thought that it would be a highly unusual case which fell outside the vastly expanded categories in the 2011 statute but was preserved as a charitable purpose through subsection (4).

In short, in the United Kingdom, there was until 2011 a clear statutory basis for regard to be had to the preamble of the Statute of Elizabeth. That is now for practical purposes gone, and the substantive law of charity is determined by a modern statute. But in Australia, where neither the preamble of the Statute of Elizabeth nor its substance ever applied, nor did the Statute of Mortmain nor the Victorian or 20th century legislation on charities, we have somehow inherited – and tend to treat as a body of judge-made law – English decisions on statutes that never applied here and are no longer the law in England. It is a very strange position. It is also an example of the significance of characterising a body of law as judge-made law as opposed to glosses upon a statute.[44]

Aspects of this peculiarity were explored by Kirby J in *Central Bayside General Practice Association Limited v Commissioner of State Revenue*,[45] an appeal on a payroll tax exemption for "charitable bodies". There were good reasons, in Kirby J's view, to depart from the search for the "spirit and intendment" of the preamble to the Statute of Elizabeth, including:[46]

(ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or

(iii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

44 See M Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023), pp 45-48 and 113-117.

45 (2006) 228 CLR 168; [2006] HCA 43.

46 (2006) 228 CLR 168; [2006] HCA 43 at [96]-[97].

> It is unlikely that an Australian Parliament, acting without instruction and comprising ordinary citizens, would appreciate and intend that enacting a statute not specifically concerned with charitable trusts automatically imports a classification devised in England four centuries ago.
>
> Least of all could this be regarded as likely if the legislators knew that, in the United Kingdom, where the statutory formula was first adopted in 1601, the *Statute of Elizabeth* itself was repealed by the *Mortmain and Charitable Uses Act 1888* (UK), passed before the federation of the Australian colonies. Although that repeal preserved the preamble, which thereby remained in operation, the 1888 Act, including the preamble, was itself later repealed by the *Charities Act 1960* (UK). The words of Gonthier J in the Supreme Court of Canada are equally applicable in the Australian context: "no statutory authority for the preamble now exists".

There is a great deal of force in his Honour's words.

In most of the cases which matter, the question is one of statutory construction. That was the case in *Pemsel* itself. It was a great case, argued over three days on a pure question of construction. You will remember that Mrs Bates had settled lands on trust for the general purpose of maintaining, supporting and advancing the missionary establishments of the Moravian Church amongst heathen nations. The question was whether income from those lands was liable to income tax, or fell within an exemption. The terms of the exemption matter:[47]

> the rents or profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes.

Tax exemptions based on charitable status are very ancient. The very first income tax Act, Pitt's famous short-term *Duties on Income Tax Act 1799,* contained an exemption for "any Corporation, Fraternity or Society of Persons established for charitable Purposes only".[48] Ever since Pitt's Income Tax Act, the exemption seems to have been construed to extend to charitable purposes as known to the law of England – even though the Act extended to Scotland and Ireland. In 1891, it will be recalled that there was a nation called the United Kingdom of Great Britain and Ireland, made from the union in 1801 of the Kingdom of Great Britain and the Kingdom of Ireland, the Kingdom of Great Britain itself arising from the Acts of Union of 1707, which preserved the distinction still seen today between English and Scots law. Shortly before *Pemsel's* case, which was a test case, the Board of Inland

47 5 & 6 Vict c 35, No VI Sch A.
48 39 Geo III c 13, s 4.

Revenue took the view that "charitable" bore its colloquial meaning, a view which found favour with Lords Halsbury and Brampton, but was rejected by Lords Watson, Herschell, Macnaghten and Morris. The argument for the Commissioners was attractive, especially to an Australian versed in federalism. It was said that "The [Statute] of Elizabeth was enacted for England only, and has never been extended to Scotland", nor to Ireland.[49] Further, in construing a statute which applied to the whole of the United Kingdom, "legal technicalities must be disregarded and the language of the Legislature must be taken in its popular sense", for it would lead to "strange confusion if an institution were taxed in Scotland which was exempt in England".[50] Still further, the Act had a separate exemption for the British Museum, which would be unnecessary if "charitable" bore its technical meaning. And for good measure, the fact that the statute included the word "heritages" (which as a matter of Scottish law is approximately the property inherited by the heir) was a further indication telling in favour of a general rather than technical meaning.

Two somewhat subtle points emerge from *Pemsel.* One concerns a further aspect of the significance of the *Mortmain Act 1736*. Lord Macnaghten said that it made it clear – a century before judicature legislation – that the technical law of charities was the law of England, not merely the law in Chancery:[51]

> Courts of Law, of course, had nothing to do with the administration of trusts. Originally, therefore, they were not concerned with charities as all. But after the passing of the Act 9 Geo 2, commonly known as the Statute of Mortmain, which avoided in certain cases gifts to "uses called charitable uses", alienations and dispositions sometimes came under the cognizance of Courts of law, and those Courts, as they were bound to do, construed the words "charitable uses" in the sense recognised in the Court of Chancery, and in the Statute of Elizabeth, as their proper meaning. I have dwelt for a moment on this point, because it seems to me that there is a disposition to treat the technical meaning of the term "charity" rather as the idiom of a particular Court than as the language of the law of England.

Lord Macnaghten also explained that the question in the appeal turned on construction, and involved what we would now call a federal question, by reference to a letter by Lord Hardwicke to Lord Kames:[52]

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49 At 535.
50 At 535.
51 [1891] AC 531 at 581.
52 At 579-580.

> where there are two countries with different systems of jurisprudence under one legislature, the expressions in statutes applying to both are almost always taken from the language or style of one, and do not harmonize equally with the genius or terms of both systems of law. … you must take the meaning of the legal expressions from the law of the country to which they properly belong, and in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation and effect of the statute the same in both countries.

You will see that the arguments of statutory construction were quite sophisticated.[53]

The main point in the case was whether the technical or colloquial meaning was to be given to "charitable purposes", in a section which identified schools and hospitals, but required *all* activities falling within the exemption to be for charitable purposes.

Pemsel's case is, first and foremost, a case of statutory construction. So too was the *Chesterman* litigation a century ago.[54] All members of the High Court emphasised, perhaps most especially Higgins J, who commenced his reasons with "It must be clearly understood that the first question in this case stated turns on the construction of the *Estate Duty Assessment Act 1914*, and on that only". But the statute was different: it was disjunctive. The question was whether the trust established by will fell within an exemption of "for religious, scientific, charitable or public educational purposes"; this is nothing like the cumulative requirement in the exemption considered in *Pemsel*. A majority of the High Court, after four days of argument, concluded that "charitable" did not bear its technical meaning, but was confined to its popular sense of the relief of poverty. The Privy Council disagreed, in advice occupying 3½ pages of the report, and the salient reasoning a single page, which was that because not every trust for religious purposes was charitable, the use of both "religious" and "charitable" in the exemption did not displace the technical meaning, because the use of the word "charitable" added something to the other words. It was not the Judicial Committee's finest hour. It is one of those decisions which left Dixon deeply dissatisfied. But it would not recur today at the federal level, because of the *Charities Act 2013* (Cth).

53 Cf the difficulties in applying Australian or United Kingdom legislation dealing with trusts to entities created under civil law systems: see M Leeming, "Translating Overseas Trusts into the Australian Legal System" (2014) 88 *ALJ* 169.

54 *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317 reversing *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; [1923] HCA 24.

Does any of this matter today? Here are four reasons why it does. First, one problem with thinking about the law of charity as a body of judge-made law is that it tends to neglect the significance of the legislative text. For there was a long tradition of colonial taxation statutes which pre-dated *Pemsel* and used charity in a different sense. For example, consider s 163 of the *Municipalities Act 1867* (NSW), which exempted from the definition of rateable property "Hospitals Benevolent Institutions and Buildings used exclusively for public charitable purposes Churches Chapels and other building exclusively used for Public Worship all Schools subject to the provisions of the Public Schools Act of 1866 Colleges and Universities". It is awkward to contend that "public charitable purposes" picks up a legal concept reformulated decades later as opposed to the colloquial meaning of relief from poverty. The same basic structure of a series of specific exemptions, some of which fall within the *Pemsel* notion of charity, while others did not, may be seen today in the modern counterpart, s 555 of the *Local Government Act 1993* (NSW). That also resembled the structure of the *Estate Duty Assessment Act* in *Chesterman.* It does seem a little strange to construe legislation which predated the formulation in *Pemsel's* case by reference to Lord Macnaghten's structure of the law of charity.

Secondly, although the *Charities Act 2013* applies to the interpretation of statutes, most charities cases turn on statutory construction, and indeed the law of charity, at least for the last four centuries, has been deeply informed by the construction of statutes.

Thirdly, the result of *Chesterman* is, in truth, far worse than Kirby J considered. For it depends upon the preamble to an Elizabethan statute, which never applied in Australia, and which was repealed in the nineteenth century by another statute which never applied in Australia. The notion of charity in England was expanded by the *Mortmain Act 1736*, a statute which was famous for never applying in Australia. By a doubly obscure set of transitional provisions in the United Kingdom, in the *Charities Act 2006* and *2011*, there is at least express provision for picking up and preserving charitable purposes within the spirit and intendment of the Statute of Elizabeth, but law reform has very substantially swept those old rules aside. In New South Wales and Australia the position is quite different. Here, in jurisdictions where the English statutes never applied, we have somehow been left with an ongoing role for an Elizabethan preamble, subject to tinkering around the edges by State statutes, and a wholesale updating for the important question of statutory construction in the case of federal legislation.

Fourthly, this example indicates the sort of under-appreciated complexity in some notion of a "common law of Australia". One cannot ignore statute, and statutory differences at the Federal level and between the States produce bodies of decisions which are inevitably inconsistent. In order for any notion of a single "common law of Australia" to be correct, one must subtract the statutes. That is no easy thing to do.[55]

The theme underlying this address may be worth re-stating. Looking at the law of charity merely through the framework formed by an undergraduate curriculum can be deeply misleading. It is a little like walking through a Tasmanian rainforest like that explored by the 18th century botanists who travelled with Cook. There is a fascinating miscellany of flora and fauna on the ground, easily observed, and of intrinsic interest. But if one merely looks at the undergrowth, it is easy to miss one of the dominant features of the ecosystem, which are those towering eucalypts, not readily seen unless one steps back and takes an historical perspective. Only then can one see how the undergrowth – those judgments we read – has beep shaped by the statutory context.

55 See, generally, M Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023).