
The Charity Law and Practice Review

CHARITABLE AUSTRALIAN HOUSING CO-OPERATIVES

Myles McGregor-Lowndes¹

The Australian judiciary is receiving fewer opportunities to expound on the contemporary boundaries of charity. Fewer trustees are willing to negotiate the expensive and distracting path to any courts, let alone the superior courts. The potential adverse publicity consequent on such exercises and the adoption of alternative dispute resolution techniques may also be contributing factors. The lack of any Australian body such as the Charity Commission to make quasi-judicial determinations on the public record or formulate policy statements, increases the possibility of the stagnation of charity precedents.

Two recent Australian cases have dealt with the definition of charity. *Common Equity Housing Ltd v Commissioner of State Revenue (Victoria)*² and *Toomelah Co-operative Limited v Moree Plains Shire Council*,³ both involved the charitable status of housing co-operatives in the context of taxation or rating statutes. Both cases deal with issues similar to those canvassed in *Joseph Rowntree Memorial Trust Housing Association Ltd v A-G*⁴ and more recently in the Charity Commissioners' decision concerning the *Garfield Property Trust*.⁵

¹ Myles McGregor-Lowndes BA, LLB, M Admin, PhD, Co-Director Program on Nonprofit Corporations, Queensland University of Technology, GPO Box 2423, Brisbane, Queensland, Australia.
Tel: (+ 61 7) 3864 2936 Fax: (+ 61 7) 3864 1812.

² 96 ATC 4598.

³ Unreported Land and Environment Court of New South Wales, no 30080 to 30089 of 1993, judgment delivered on 4th March 1996 by Stein J.

⁴ [1983] 1 Ch 159.

⁵ Appendix A (e), Report of the Charity Commissioners for England and Wales for the year 1990, London, 1991 at p 28. See also the Decision of the Charity Commissioners in the Charitable status of Habitat for Humanity Great Britain 919950 4 Ch.Comm.Dec., pp 14-16.

Common Equity Housing Ltd v Commissioner of State Revenue (Victoria)⁶

Common Equity Housing Ltd was a company limited by guarantee with the principal object of providing finance for other associated organisations to secure residential rental accommodation for low income persons. The company was founded as the result of a government report. It was part of a scheme to encourage low income housing through co-operation between the private finance sector, the government and the tenants themselves. The company was controlled by the rental housing co-operative sector for low income earners. The company would seek funds and purchase suitable houses, then lease them to its member associations. The member associations would act as landlords to low income tenants and were usually in the legal form of a community co-operative. Common Equity Housing Limited's objects reflected these purposes with a nondistribution constraint clause prohibiting members from receiving any share of the profits and a dissolution clause which directed any surplus assets to a state government official, "The Director of Housing for the Acquisition of Public Rental Housing".

In subsequent years the company purchased about 1500 properties and leased them to 114 small member co-operatives. These co-operatives were bound to lease the properties to their members at below market rents, for a long term and government financed housing could only be let to those who met the government eligibility criteria. Although two-thirds of the finance came from the government and one-third from private lending institutions, 90% of tenants satisfied the government's eligibility test.

The company had, since its inception, been paying stamp duty on its property purchases. The company sought a declaration that it was a corporation "associated for charitable purposes" and entitled to a refund of all stamp duties paid since its incorporation.⁷ The court decided that the corporation could seek a refund, provided it was exempt from stamp duty as "a corporation associated for charitable purposes".

It was argued by the revenue authorities that the association was not for charitable purposes because:

- (a) some tenants never met the government guidelines for those eligible to receive housing assistance and this showed that the benefits were not exclusively distributed to the relief of the poor,

⁶ Supra fn 2.

⁷ Heading VI of the Third Schedule of the Stamps Act 1958 (Victoria).

- (b) tenants had scope for gain, by receiving below market rentals and private sector loan moneys at advantageous rates,
- (c) tenants received an indirect profit distribution and the association was a mutual society, and
- (d) the dissolution clause which would have surplus assets transferred to the government for the relief of consolidated revenue was not for a charitable purpose.

No Need to be Uniformly Poor

It was contended that as about 10% of tenants did not meet the government guidelines for assisted housing, the association was not exclusively for the charitable object of relief of poverty.⁸ This was rejected as the overwhelming majority of tenants were of low income by community standards and none was able to own any real property and remain a co-operative member. The English case of *Joseph Rowntree Memorial Trust Housing Association Ltd v A-G*⁹ was referred to and specifically endorsed. The judge also noted that it may be necessary for the efficient management of the member co-operatives that some tenants with special management expertise be utilised to increase the funds available for provision of extra housing. It was not fatal if some of these persons with special skills failed to qualify under the government guidelines where non-government monies were used. They were still required to qualify under the ordinary guidelines of the co-operatives.

Breach of the Nondistribution Constraint Clause

It was claimed that all the tenants received a financial gain from the below market accommodation rentals.¹⁰ It was argued that this was a breach of the nondistribution constraint and thus the organisation could not be for charitable purposes. It was held that such a gain was regarded as nothing more than the result of the organisation achieving the charitable purposes for which it was

⁸ Supra fn 2 at 4613.

⁹ Supra fn 4 at 175.

¹⁰ Supra fn 2 at 4613.

established. Again, this appears consistent with *Joseph Rowntree Memorial Trust Housing Association Ltd v A-G*.¹¹

Mutual Society

A further claim was made that the arrangement between the company and the co-operatives was that of a mutual society or a self-help trust. The company could not be charitable because it would not fulfil the requirement of public benefit.¹² This was rejected because the company was not in a mutual relationship with its members (the co-operatives). The company merely arranged to receive finances, purchase the properties and then lease them to its member co-operatives. The ultimate occupants did not have any contractual rights through the constitution of the company to the dwellings and thus fell outside the remarks of Peter Gibson J in *Rowntree* concerning co-operatives.¹³

Dissolution Clause

The company's constitution contained a provision that upon winding up, any surplus assets "shall be distributed to the Director of Housing for the Acquisition of Public Rental Housing". The Director of Housing was a state government departmental officer. An argument was made that such a clause was incompatible with the corporation being associated for charitable purposes, as the ultimate destination of the funds was not for charitable purposes. Reliance was placed on the case of *In Re Cain (deceased) The National Trustees Executors & Agency Co. of Australia Ltd v Jeffrey*¹⁴ where the validity of a charitable bequest to "the Children's Welfare Department" of the State government was considered. Justice Dean in that case noted that, if the gift was for the mere carrying on the ordinary activities of government, then the gift would not be charitable.¹⁵ However, he found that the gift was intended for activities over and above the normal governmental activities and ordered that a scheme be put in place to effect the

¹¹ Supra fn 4 at 176.

¹² Supra fn 2 at 4614.

¹³ Supra fn 4 at p 175.

¹⁴ [1950] VLR 382.

¹⁵ Ibid at 387.

charitable intention. In *Aboriginal Hostels Ltd v Darwin CC*,¹⁶ a dissolution clause gave a Minister of the Crown powers to direct the disposal of surplus assets of a company, but the court construed the power as subject to the cy-près doctrine.

The present case was distinguished from *In Re Cain* on the grounds that any surplus assets had to be used for the original purpose of the company, not relief of government expenditure. The issue of whether a gift to the government for carrying on its ordinary activities is a charitable purpose does not appear to have been squarely addressed by the English courts. The provision of public amenities such as court-houses,¹⁷ military defence,¹⁸ or reduction of the National Debt,¹⁹ on one view would all be normal activities or even exclusive activities of the state. The case of *Construction Industry Training Board v Att. Gen.*²⁰ addressed a similar issue, but from the perspective of whether the High Court had jurisdiction over a ministerially created and controlled board. It appears that the Australian courts will permit dissolution clauses which transfer property to a government officer for charitable purposes, or try to construe any unqualified transfer to such a person as being subject to the cy-près doctrine.

Other Purposes Beneficial to the Community

Finally, by way of obiter dicta, the judge concluded that the purposes of the company would also fall within the fourth purpose described in *Pemsel* as well as the relief of poverty.

*Toomelah Co-operative Limited v Moree Plains Shire Council*²¹

The Toomelah Co-operative Limited was incorporated as a community advancement society under the Co-operation Act 1923 (NSW). The primary purpose of the co-operative was "to provide and maintain buildings and land for

¹⁶ 75 FLR 197 at 208.

¹⁷ *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] Ch 73.

¹⁸ *Re Drifill* [1950] Ch 92.

¹⁹ *Re Smith* [1932] 1 Ch 153.

²⁰ [1973] Ch 173.

²¹ *Supra* fn 3.

the purpose and benefit of its members and the Aboriginal community in general". There were also incidental purposes of:

- carrying on commercial activities for the benefit of the Aboriginal community,
- training Aboriginals in various skills,
- fostering the developing of Aboriginal and Islander identity and culture, and
- promoting land rights and other legal and cultural rights of the Aboriginal community.

The Co-operative had a nondistribution constraint clause where no income or property of the society could be transferred to its members. The dissolution clause contained two directions. It directed that "any assets" were to be transferred to an organisation for the perpetual use and benefit of the Aboriginal community and further that "any surplus shall be devoted to the promotion of co-operation or to such community purpose and in such manner as a general meeting shall determine".

The Co-operative owned eleven houses in rural Australia which were leased to Aboriginal members at low rentals. The houses had no sewerage and one 3-bedroom house had between 7 and 15 occupants at times. Of the 900 aboriginals living in the area over 95% were unemployed. Only two members of the society were employed, one as a labourer and the other as an Aboriginal Liaison Officer with the Police Department. Various government authorities had been criticised in a Human Rights Commission Report for failing to provide basic services to the Toomelah Aboriginal community over many years.²²

The co-operative sought exemption from paying rates on the basis that it was "a public benevolent institution or a public charity".²³ The term "public benevolent institution" is a term used in section 78 of the Income Tax Assessment Act 1936 (Cth) to identify nonprofit organisations to which taxpayer donations are allowable tax deductions. The term is restricted to nonprofit organisations which have

²² Australia, Report on the Problems and Needs of Aboriginals on the New South Wales Queensland Border, Human Rights Commission, June 1988.

²³ S.132(1)(d) Local Government Act 1919 (NSW).

principal objects and activities for the direct "relief of poverty" which are also public institutions.²⁴

Relief of Poverty

It was found that the Aboriginal community in the area constituted a section of the public who were in need of relief from poverty. The Council argued that two of the members of the Co-operative were employed, so had no need for subsidised accommodation and thus the land was not used for charitable purposes. This was rejected as the facts showed that the members were generally impoverished. Again, this is consistent with the decision in *Rowntree*.²⁵

Strengthening and Fostering the Development of Aboriginal Identity and Culture

The inclusion of the object of "strengthening and fostering the development of Aboriginal identity and culture" was not seen as such as to disqualify the co-operative from status as a Public Benevolent Institution or a public charity. The situation was distinguished from *Williams' Trustees v Inland Revenue Commissioners*.²⁶ In that case a trust was created for the purpose of establishing a meeting place in London for the benefit of the Welsh people and the trustees provided lectures, lounge, billiard room, sports, dinners and parties; this was not a charitable purpose. In this case it was found that "the niceties of socials and whist parties are far removed from the contemporary situations and needs of Australia's indigenous population".²⁷ A similar conclusion was reached in *Nungera Co-operative Society v Maclean S C*²⁸ by construing such an object as ancillary to a principal charitable object.

²⁴ *Perpetual Trustee Co v FCT* (1931) 45 CLR 224.

²⁵ *Supra* fn 4.

²⁶ [1947] AC 447.

²⁷ *Supra* fn 3 at 16.

²⁸ (1991) LGRA 178 at 182.

Land Rights

The court also found little amiss with the promotion of land rights given the context of the Aboriginal people and the dispossession of their land by European settlers and that it was incidental to the Co-operative's overall purpose.²⁹ Such purposes, it was thought, would fall into the heads of either "relief of poverty" or "other purposes beneficial to the community". The court did not express an opinion on the dividing line between promoting land rights and political purposes, especially the alteration of policy and laws with respect to native title. It is likely that land rights which are incidental to a charitable object will be permitted, but will not in themselves be regarded as charitable because of previous authority on the matter. In *Dareton v Wentworth Council*, an Aboriginal Land Council, the primary objects of which were "to work with and encourage all Aboriginal organisations and people generally to obtain land rights for Aboriginal people" was not regarded as either charitable or benevolent.³⁰

Co-operativeness

As the co-operative had the power to "promote co-operation", which was neither charitable nor falling within the accepted activities of a public benevolent institution, it was argued that this was fatal to its claim. The provision had its origin in the Act under which the co-operative was formed which permits surpluses to be used for furthering the co-operative principles as adopted by the International Co-operative Alliance. Reliance was placed on an earlier authority³¹ which found that the words "promoting co-operation" were:

- either uncertain and would be disregarded,
- saved by a statutory provision which directs a construction of mixed valid and invalid charitable purposes be adopted which would save the charitable purposes, or
- a mere subsidiary provision when construed in the light of the whole constitution.

²⁹ *Mabo v Queensland [No.2]* (1992) 175 CLR 1.

³⁰ (1995) 89 LGERA 120 at 127.

³¹ *Maclean Shire Council v Nungeraa Co-operative Society Ltd* (1995) 86 LGERA 430 at 433.

The provisions of the dissolution clause were not commented upon in the judgment. One part of the clause has "any assets" being transferred to another Aboriginal fund or association to be held "in perpetuity for the use and benefit of the Aboriginal community in Australia". Another part of the clause states that "any surplus shall be devoted to the promotion of co-operation or to such community purpose and in such manner as a general meeting shall determine". Clearly, not all purposes which may be described as "the promotion of co-operation" or "community purposes" would be charitable. Perhaps this provision might also be construed as being subject to the more specific direction to be held for the Aboriginal community on charitable purposes.

Conclusion

Both cases provide some guidance for those wishing to create membership bodies which have charitable purposes. A number of issues such as whether indirect financial gain represents a breach of the nondistribution constraint, inclusion of charges, benefits to a minority of members who may not be desperately poor and appropriate dissolution clauses appear to follow robust English precedents. As state and federal governments in Australia prepare to hand more responsibility for the provision of public assisted housing to the private welfare sector, these decisions will assist in devising structures to take advantage of fiscal exemptions.