

# Regulation of the Not-for-profit Sector

## NFP's UWA Research Group

### Regulation and the Contemporary Not-for-profit: A summit

The Hon Robert French AC

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#### Introduction

No part of the law is an island entire unto itself. That is as true of the law relating to charities and not-for-profit organisations as it is of any other area of the law. Charities law embodies a good deal of legal history including that emerging from the list of charitable purposes in the Preamble to the *Statutes of Charitable Uses Act 1601* (UK),<sup>1</sup> the Statute of Elizabeth, and distilled into the categories formulated by Lord Macnaghten in *Inland Revenue Commissioner v Pemsel* in 1891.<sup>2</sup> Today, the law of charities and the much larger class of not-for-profit organisations covers many areas, including corporations, associations, trusts, wills and taxation. It includes more than one regulatory regime under Commonwealth, State and Territory laws. It intersects with public law relating to the powers and functions of regulators and their legal accountability. Like all areas of the law it rests upon constitutional foundations which are essential supports for the rule of law.<sup>3</sup>

In Australia, the rule of law is part of societal infrastructure. It creates and maintains the space within which people can enjoy their freedoms, exercise their rights, develop their capacities, take up their opportunities and discharge their responsibilities. It supports general norms of behaviour applicable to all and specific norms applicable to particular classes of activity. For example, the law prohibits conduct in trade or commerce which is misleading or deceptive or likely to mislead or deceive. That very general standard, which does not depend upon fraud or negligence, entered the statute books in 1974.<sup>4</sup> It has become a central element protective of consumers, but beyond consumers to all who have dealings with others in trade

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<sup>1</sup> 43 Eliz 1c4 .

<sup>2</sup> [1891] AC 531.

<sup>3</sup> The *Australian Charities and Not-for-profit Commission Act 2012* (Cth) is said to rest upon the taxation, communications, corporations, territories and external affairs powers.

<sup>4</sup> *Trade Practices Act 1976* (Cth) s 52 now *Australian Consumer Law* s 18.

or commerce. There are many specific behavioural norms expressed in the law in different ways. They may be set out in statutes or in regulations, rules or other instruments and in industry codes given legal force.

The governance standards applicable to charities registered under the *Australian Charities and Not-for-profit Commission Act 2012* (Cth) (ACNC Act) are an example of such norms. There are five of them. They require charities to be not-for-profit and work towards their charitable purposes, to be accountable to their members, to avoid the commission of criminal offences and to take reasonable steps to be satisfied that those who govern them as responsible persons are not disqualified from being a responsible person of a registered charity or managing a corporation. The fifth standard sets out the duties of 'responsible persons' in charities which are:

- reasonable care and diligence;
- to act honestly and in the best interests of the charity and for its purposes;
- not to misuse the position of a responsible person;
- not to misuse information obtained in performing the duties of a responsible person;
- to disclose any actual or perceived conflict of interest;
- to ensure that the charity's financial affairs are managed responsibly;
- not to allow a charity to operate while insolvent.

There is a pleasing symmetry in the fact that the general law requires much the same of public officials and authorities. Our system of administrative law in Australia includes specific propositions about the exercise of official power which are central to the rule of law:

- All official power derives from rules of law found in the Commonwealth and State Constitutions or laws made under them.
- There is no such thing as unlimited official power.
- The powers conferred by law must be exercised lawfully, rationally, fairly and in good faith and for the purposes for which those powers were granted.

- The courts had the ultimate responsibility of resolving disputes about whether the limits of official power have been exceeded.

The theme of this lecture is regulation generally and the regulation of charities and the not-for-profit sector specifically. It focusses on the purposes of regulation, the scope and limits of regulatory powers and the public ethical framework which they support. The legitimate purposes of regulated charities and the legitimate purposes of the regulator are related topics which also provide a focus for this address. A particular issue is the proper scope of public advocacy by charities and not-for-profit organisations particularly where they seek changes to the law. On the other side of that coin is the issue of the legitimate extent of advocacy by regulators in relation to their role and in seeking changes to the law or public policy affecting their purposes, powers and functions.

It is useful to turn first to a consideration of regulation generally and its purposes and its proper application as an aspect of the rule of law.

### **Regulation – the importance of clear purpose.**

Regulation is in the news. The effectiveness of regulation of the financial services industry has been considered by the Financial Services Royal Commission. In his Interim Report the Commissioner directed attention to the importance of what he described as the simple ideas underlying the regulatory regime governing the financial services industry. Those ideas were:

- Obey the law.
- Do not mislead or deceive.
- Be fair.
- Provide services that are fit for purpose.
- Deliver services with reasonable care and skill.
- When acting for another, act in the best interests of that other.<sup>5</sup>

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<sup>5</sup> Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (2018) vol 1, 290.

His observation points up the proposition that simplicity of underlying norms is important to the law, whether it be regulatory or substantive. Simplicity serves clarity of purpose. A law whose purposes are plain and accord with widely accepted community values, is likely to:

- have democratic legitimacy;
- engender public confidence;
- be complied with;
- be applied reasonably, predictably and consistently;
- not incur undue transaction costs in its interpretation, application and enforcement.

Underlying simplicity of purpose can be obscured by complexity in the framing of the law. In setting out the six simple ideas informing the regulation of financial services entities, the Commissioner said:

Their simplicity points firmly towards a need to simplify the existing law rather than add some new layer of regulation. But the more complicated the law, the easier it is to lose sight of them. The more complicated the law, the easier it is for compliance to be seen as asking ‘Can I do this?’ and answering that question by ticking boxes instead of asking ‘Should I do this? What is the *right* thing to do?’.<sup>6</sup>

The existing regulatory regime in relation to financial services was described by the Commissioner as, at least in some respects, labyrinthine and overly detailed. He said ‘[i]n the blizzard of provisions, it is too easy to lose sight of those simple ideas that must inform the conduct of financial services entities.’<sup>7</sup>

Concerns about volume and complexity are well-founded. There are innumerable statutes, regulations, by-laws, rules, standards and statutory instruments made by Ministers and public authorities throughout Australia, including those provided by hundreds of local governments. Taking the Commonwealth alone, the total number of pages of legislation passed in the first decade of Federation was 1,072. In the first six years of this century, there

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<sup>6</sup> Ibid (emphasis in original).

<sup>7</sup> Ibid.

were 40,266 pages of statute law enacted.<sup>8</sup> When large numbers of alpha-numerically identified provisions begin to be inserted into a statute through successive amendments there is a problem. Another contributor to complexity is overlap and duplication between Commonwealth and State legislation which may serve somewhat different supervisory or regulatory purposes.

Regulatory legislation generally operates upon entities engaging in a particular activity or range of activities. There are two classes of purposes relevant to such regulation:

- the legitimate purposes of the regulated entities or activities;
- the purposes of the regulatory scheme — which may be expressly stated in the legislation as in the ACNC Act or which may be implied.

In the case of the financial services industry, the six simple ideas enunciated by the Commissioner may be viewed as behavioural standards which it is the purpose of the relevant regulators to secure and enforce. They are ethical standards which any service provider should adopt as part of its internal culture. Nevertheless, they can be distinguished in a formal sense from the principal legitimate objective of financial service providers which, broadly speaking, is the provision of financial services for profit.

When it comes to the regulation of charities and not-for-profit organisations generally, there are two relevant questions:

1. What are the purposes of the bodies? That question is more important in a sense than the nature of their activities. Charities have long been characterised by reference to their purposes.
2. What are the purposes of the regulator authorised by the statute?

The purposes which define the regulated entities are relevant to the regulator's field of action. The more diverse those entities, the more challenging the regulator's task may be. That is particularly so if that task requires examination of a range of different kinds of activities from some general evaluative perspective.

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<sup>8</sup> Chris Berg, 'Policy Without Parliament: The Growth of Regulation in Australia', *Institute of Public Affairs IPA 1973* (November 2007) 2.

## Diversity and purpose in the charities sector

The diversity of the regulated population is a challenge for any regulatory scheme in relation to charities. There is a great deal of legal history embedded in ‘charity’ — a concept which encompasses a multitude of virtues, people and organisations. The term ‘charitable institution’ which until recently was used in the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936) and the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) and other taxing statutes had an established, technical, legal sense derived from the Preamble to the *Statute of Charitable Uses Act 1601* (UK). The Preamble set out a diverse list of uses deemed to be charitable. They ranged from relief of the aged and the poor to the maintenance of schools of learning, free scholarships in universities, the repair of various kinds of infrastructure, the education and preferment of orphans and the redemption of prisoners or captives. Those uses and others in the list and analogous uses which fell ‘within the spirit and intendment’ of the statute were treated as ‘charitable’. Their characterisation depended upon purpose.

Lord Macnaghten in 1891 distilled out of the statute and the case law four well-known classes of charitable trust purposes:

- the relief of poverty;
- the advancement of education;
- the advancement of religion;
- other purposes beneficial to the community.

That distillation acquired almost statutory status. It informed construction of the term ‘charitable’ in taxation and trust law long after 1891. As Gleeson CJ, Heydon and Crennan JJ said in 2006 in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*:

The word is commonly used in statutes. It is reasonable to assume that parliamentary counsel, taxpayers, revenue authorities, settlors, testators and others have acted on the faith of an understanding that the general rule applies.<sup>9</sup>

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<sup>9</sup> *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 178 [18] fn 28.

The reference to ‘charitable institutions’ in the ITAA 1997 and cognate legislation has been replaced by ‘registered entities’ under the ACNC Act. Section 25.5 of the ACNC Act provides in sub-s (1) that an entity is entitled to registration if it meets conditions in s 25.5(3) and falls within the description of one of the types of entity set out in a table in s 25.5(5).

The conditions imposed by s 25.5(3) are that:

- (a) the entity is a not-for-profit entity;
- (b) the entity is in compliance with the governance standards and external conduct standards [which are set out in the *Australian Charities and Not-for-profit Regulations 2013*].

There is no definition of the term ‘not-for-profit entity’ in the Act. It is notoriously difficult to confine that class. The term ‘entities’ is defined in s 205.5:

- (1) **Entity** means any of the following:
  - (a) an individual;
  - (b) a body corporate;
  - (c) a body politic;
  - (d) any other unincorporated association or body of persons;
  - (e) a trust.

The definition betrays conceptual confusion with its inclusion of the term ‘trust’. A ‘trust’ is not an entity it is a relationship involving entities namely, settlor, trustee and beneficiaries. That said the diversity of the range of things encompassed by the term ‘entity’ is apparent upon inspection of the definition.

To be entitled to registration under s 25.5 an entity must be a charity. The word ‘charity’ is defined for all Commonwealth statutes in the *Charities Act 2013* (Cth) as an entity:

- (a) that is a not-for-profit entity; and
- (b) all of the purposes of which are:
  - (i) charitable purposes ... that are for the public benefit ...; or
  - (ii) purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i).<sup>10</sup>

The ‘charitable purposes’ are listed in s 12 of the Act. They comprise purposes, set out in paras (a) to (e), of advancing health, education, social or public welfare, religion and culture. They extend, in para (f) to the promotion of reconciliation, mutual respect and tolerance between groups of individuals that are in Australia, in para (g) to the protection of human rights, in para (h) to advancing the security or safety of Australia or the Australian public, in para (i) preventing or relieving the suffering of animals, and in para (j) to advancing the natural environment. There is a catch-all provision in para (k) of the list of ‘charitable purposes’ which covers:

any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j).

The defined purposes are elaborated in subsequent provisions.

Paragraph (l) in the list of ‘charitable purposes’ covers the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory, or another country. The promotion of a change must be in furtherance of or in aid of any one or more of the purposes in the preceding paras (a) to (k).<sup>11</sup> In the case of opposing a change the change must be in opposition to or in hindrance of one of the purposes in paras (a) to (k). A disqualifying purpose, set out in s 11(1) is promoting or opposing a political party or a candidate for political office.

For an entity to be a charity, its charitable purposes must be for the public benefit. Purposes for the ‘public benefit’ are defined by reference to the undefined term ‘benefit’ in s 6. That term poses a challenge to the regulator. However, the Charities Regulator, the

<sup>10</sup> *Charities Act 2013* (Cth) s 5.

<sup>11</sup> *Ibid* s 12(l)(i) and (ii).



Australian Charities Not-for-profit Commission (ACNC), is no orphan in this respect. The Australian Competition and Consumer Commission (ACCC) frequently has to apply a widely-framed ‘public benefit test’ in deciding whether or not to authorise conduct which may be anti-competitive on the basis that its anti-competitive effect is likely to be outweighed by its public benefit.<sup>12</sup>

The use of the term ‘public benefit’ has a long history in the law. In 19<sup>th</sup> century England a riparian landowner could be sued for nuisance if he partly obstructed a publicly navigable river by erecting mooring posts or jetties on the riverbed. It was a defence to show that the conduct generated a public benefit. There was, not surprisingly, debate in the courts about the scope of that concept.<sup>13</sup> An analogous concept appeared in the common law doctrine relating to covenants in restraint of trade which are prima facie unenforceable at common law unless they are reasonable with respect to the interests of the parties concerned and of the public.<sup>14</sup>

As a general proposition, the range of charitable purposes contemplated by the *Charities Act* is wider than the Pemsel Four. The ACNC Act, however, brings us back to that quartet in s 25.5. Section 25.5(5) sets out the sub-class of entities within the class of ‘charity’ which are entitled to registration. They are defined by four purposes, namely:

- the relief of poverty, sickness or the needs of the aged;
- the advancement of education;
- the advancement of religion;
- another purpose that is beneficial to the community.

In addition, the term ‘charity’ covers an institution whose principal activity is to promote the prevention or control of diseases in human beings, a public benevolent institution and an entity with a charitable purpose described in s 4 of the *Extension of Charitable Purpose Act*

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<sup>12</sup> See the discussion in the decision of the Australian Competition Tribunal in *Application by Medicines Australia Inc* [2007] ACompT 4, [107] and following.

<sup>13</sup> *R v Russell* (1827) 6 B & C 566 which held that a public benefit was shown if goods could be brought to market in better condition and at smaller expense by reason of the obstruction; *Attorney-General v Terry* (1874) LR Ch App 423, 427 which applied a narrower test that the benefit must be a direct benefit to the same public who use the river.

<sup>14</sup> *Nordenfelt v The Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535, 565 (Lord Macnaghten). See also the *Restrictive Trade Practices Act 1976* (UK) which applied a public benefit test to restrictive agreements.

2004 (Cth), which relates to the provision of child care services. Section 25.5(6) declares that:

The object of column 2 of items 1, 2, 3 and 4 of the table in subsection (5) is to describe entities that are covered by the 4 heads of charity traditionally recognised by the courts.

So through that statutory thicket the reader is taken back close to square one, subject to a public benefit overlay which, in relation to the four listed categories, would seem almost redundant.

The Report<sup>15</sup> in August 2018 of the ACNC Review Panel, established by the Assistant Minister to the Treasurer in December 2017, noted that there are about 600,000 not-for-profit organisations in Australia. Approximately 246,000 of them are endorsed by the Australian Taxation Office (ATO) for tax concessions. Approximately 56,000 are registered under the ACNC Act.<sup>16</sup>

The Panel observed that the entitlement to registration under the ACNC Act is presently limited to charities falling within the definition provided in the Act. Thus, while the ACNC name reflects the potential scope of its regulatory framework it does not reflect its current actual scope. A question for the Panel was whether the regulatory framework should be extended to not-for-profits based on taxation status, legal structure, or annual revenue. The ACNC Advisory Board submitted to the Panel that the Act's full potential is yet to be utilised, particularly in relation to the regulation of further not-for-profit entities other than charities.<sup>17</sup> The Panel took the view that revenue size should be a basis upon which not-for-profits should be migrated to the ACNC. Within the parameters it established were entities with revenue of \$5 million or more per annum, of which there are approximately 580, which should not create an unreasonable burden on the ACNC.<sup>18</sup>

In this context an important issue considered by the Panel was the definition of the term 'not-for-profit'. This is an area of difficulty. The ATO treats an entity as not-for-profit

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<sup>15</sup> Commonwealth, Strengthening for Purpose: Australian Charities and Not-for-profits Commission, Legislative Review 2018, Report and Recommendations, 22 August 2018. Ibid 89.

<sup>16</sup>

<sup>17</sup> Ibid 90.

<sup>18</sup> Ibid 91.

if it cannot distribute its profits or assets among its members. If consumers take membership in tax exempt not-for-profits their income tax exempt status could be put at risk. In the case of charities, member benefit was avoided by focussing on purpose. The Panel recommended that a statutory definition of ‘not-for-profits’ not be undertaken at this time and that there is a benefit in allowing charity law to develop on a case-by-case basis.<sup>19</sup>

The point relevant for present purposes is that the introduction of more not-for-profit entities to the regulatory scheme is likely to increase significantly the diversity of organisations and activities subject to regulation by the ACNC. As that diversity increases it will militate against regulation which intrudes into the effectiveness or efficiency of such entities. It also has the potential to lead to an increase in the size of resourcing of the ACNC and additional expertise to deal with that diversity.

### **Charitable purposes and public advocacy**

Returning to the theme of ‘purpose’ an area of contention relating to qualifying purposes and perhaps also to considerations of public benefit, is that of public advocacy by regulated charities. Decisions on the law derived from the Statute of Elizabeth and its statutory embodiments prior to the *Charities Act* did not put charities at risk of their status because they engaged in public advocacy incidental to their charitable purposes. In 2005, Justice Susan Kenny of the Federal Court reviewed the authorities relating to charitable institutions in *Federal Commissioner of Taxation v Triton Foundation* and concluded:

It is ... settled law that whether a particular corporate body is a charitable institution depends on the central or essential object of the institution as determined by reference to its constitution and activities ... If the main purpose of such a body is charitable, it does not lose its charitable character simply because some of its incidental or concomitant and ancillary objects are non-charitable.<sup>20</sup>

That approach is consistent with the definition of ‘charitable purposes’ in the *Charities Act* so far as it relates to advocacy for change in law or public policy.

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<sup>19</sup> Ibid 91–92.

<sup>20</sup> (2005) 147 FCR 362, 370 [20] (citations omitted).

In 2007, a case came before the Federal Court<sup>21</sup> in which the Commissioner contended that the Victorian Women Lawyers' Association established to promote and advance the position of women in the legal profession in Victoria, was not an exempt 'charitable institution' within the meaning of s 50-1 of the ITAA 1997. The Commissioner argued, among other things, that a purpose of the Victorian Women Lawyers was to work towards reform of the law and that on that basis the Association was not charitable. He contended that the law reform object was not incidental to other purposes, but a separate object of substance in its own right.

The Association submitted that to the extent to which any of its purposes could be regarded as political they were incidental to its principal objects. Santow J, of the Supreme Court of New South Wales, who had written on the topic in the *Australian Bar Review*<sup>22</sup> said in a judgment in which the question rose in 1997:

There is a range of activity from direct lobbying of the government, to education of the public on particular issues, in the interests of a climate inductive to political change. The line between an object directed at legitimate educative activity compared to illegitimate political agitation is a blurred one, involving at the margin matters of tone and style.<sup>23</sup>

A category of exemption wider than 'charitable institutions' had been inserted into the ITAA 1936 in 1990 with the enactment of s 23(g)(v) which covered an association that '[i]s established for community service purposes (not being political purposes or lobbying purposes.'<sup>24</sup> In the Explanatory Memorandum which accompanied the Bill introducing the new provision it was stated that 'an exclusion from the exemption will apply to bodies established for political or lobbying purposes.' That supported a construction of the exemption that permitted political or lobbying activities incidental to community service purposes.

As the trial judge on the matter, I held that the Victorian Women Lawyers' principal object was to remove barriers and increase opportunities for the participation and

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<sup>21</sup> *Victorian Women Lawyers' Association v Federal Commissioner of Taxation* (2008) 170 FCR 318.

<sup>22</sup> G F K Santow, 'Charity in its Political Voice – A Tinkling Cymbal or a Sounding Brass?' (1999) 18 *Australian Bar Review* 225.

<sup>23</sup> *Public Trustee v Attorney-General (NSW)* (1997) 42 NSWLR 600.

<sup>24</sup> Introduced by the *Taxation Laws Amendment Bill (No 2) 1990* (Cth).

advancement of women in the legal profession in Victoria. That objective was a purpose ‘beneficial to the community’ within ‘the spirit and intendment of the Preamble to the Statute of Elizabeth.’

An important decision on the question whether an object of public advocacy prevents characterisation of a body as a ‘charitable institution’ under the general law for the purposes of Australian taxation laws was *Aid/Watch Inc v Commissioner of Taxation*. Aid/Watch sought to promote the more efficient use of Australian and multi-national foreign aid directly to the relief of poverty. It engaged in research and public campaigns designed to engender debate and to bring about changes in government policy and activity relating to the provision of foreign aid. Although it had been endorsed as a ‘charitable institution’ by the Commissioner for the purposes of exemption from liability to taxation, the Commissioner revoked those endorsements in 2006 and disallowed Aid/Watch’s objection to the revocation. On appeal from the Full Court of the Federal Court, the High Court<sup>25</sup> held, by majority, that the generation of public debate concerning the efficiency of foreign aid directed to the relief of poverty was a purpose beneficial to the community and apt to contribute to the public welfare. The objects and activities of Aid/Watch qualified as ‘charitable’ under the fourth head of the charitable purposes recognised in *Pemsel*. The fact that the purposes and activities of Aid/Watch involved agitation for legislative and political change did not prevent its characterisation as a charitable institution.

The joint judgment in *Aid/Watch* reviewed the history of the political objects disqualification in the United Kingdom and referred to the position in the United States. The Court quoted from the American Law Institute’s Restatement of the Law Third, Trusts adopted in 2001 which included the proposition that:

A trust may be charitable although the accomplishment of the purpose for which the trust is created involves a change in the existing law.

The underpinning rationale for the political purposes limitation was explained by Dixon J in *Royal North Shore Hospital of Sydney v Attorney-General*<sup>26</sup> in which he said:

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<sup>25</sup> *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539.  
<sup>26</sup> (1938) 60 CLR 396.

A coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare. Thus, when the main purpose of a trust is agitation for legislative or political changes, it is difficult for the law to find the necessary tendency to the public welfare, notwithstanding that the subject of the change may be religion, poor relief, or education.<sup>27</sup>

In the joint judgment in *Aid/Watch* reference was made to the decisions of the High Court from the 1990s on the implied freedom of political communication which held that communication between electors and legislators and the officers of the Executive and between electors themselves on matters of government and politics is ‘an indispensable incident’ of our constitutional system. That is because the constitutional system mandates representative and responsible government, a universal adult franchise and a process for amendment of the *Constitution* in which the proposed amendment is to be submitted to the electors. In the joint judgment it was said:

The system of law which applies in Australia thus postulates for its operation the very ‘agitation’ for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*.<sup>28</sup>

The Court went on:

It is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.<sup>29</sup>

The purposes for which *Aid/Watch* was established were held to fall within the fourth category in *Pemsel*.

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<sup>27</sup> Ibid 420 cited in *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, 555 [42].

<sup>28</sup> Ibid 556 [45].

<sup>29</sup> Ibid.

The advocacy question in relation to charities leads into consideration of public advocacy by the regulator.

## **Regulatory purposes and public advocacy**

The primary function of any statutory regulator is to administer and enforce the law according to the authority conferred on it and for the purposes of that law. Public advocacy to encourage compliance with the law is uncontroversial. Contentious advocacy for expanded coverage, broader purposes and greater powers can give rise to the suspicion that, if unsuccessful in its advocacy the regulator may nevertheless be tempted to give expansive interpretations to its existing legislation — a phenomenon sometimes called ‘regulatory creep’. It is, of course, entirely legitimate for any regulator to seek the reform of the law to enable it to carry out its functions and serve the purposes of the law more effectively and efficiently.

A leading example of regulatory advocacy of both kinds is seen in the field of competition law. The first chairman of the Trade Practices Commission, the late Ron Bannerman, reflecting on the first decade of its operation in his 1983-1984 Report said:

Law gathers respect only through acceptance or enforcement. Acceptance of course assists enforcement. Conversely, sufficient enforcement may eventually bring acceptance, but that can be slow and expensive. Therefore a law needs to have or to acquire a sufficient constituency of support. It is a task for public administration in a new field to build support for the law and to develop acceptance of it from those directly affected.<sup>30</sup>

That role is one of public and institutional education in support of the law which the regulator is required to implement. It is a class of advocacy, an important tool in seeking compliance with the law. The ACNC has such a function of assistance and education in respect of registered entities and the public at large conferred by s 110.10 of its Act.

Beyond that kind of educative advocacy, the ACCC claims a more wide-ranging remit in the field of public policy development and law reform. In its 2016-2017 Annual Report, it described one of its activities as:

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<sup>30</sup> R M Bannerman, ‘Points from Experience 1967-1984’ in Trade Practices Commission, *Annual Report 1983-1984*, 184-85 para A; 157, para A 2.1.

[using] our expertise to advise on and advocate for competition in Australia working with government and other organisations and agencies on legislative or policy reforms affecting competition law.<sup>31</sup>

A sensitive area in which the ACCC engaged in such advocacy concerned proposed privatisations particularly in relation to the ports of Melbourne and Darwin and the Utah Point Bulk Handling Facility at Port Hedland. During its 2015-2016 reporting year, it voiced its concerns about actions taken by government to sell significant assets without appropriate market structures or regulatory arrangements in place. It argued that governments should use privatisation as an opportunity to put in place pro-competitive market structures.<sup>32</sup> In March 2017, the ACCC received an international award from the World Bank and the International Competition Network for its role in elevating competition policy to the National Economic Agenda. Particular reference was made to its advocacy work, ‘even in the absence of a formal mandate’ in promoting pro-competition measures in connection with the privatisation of public assets.

Privatisation is a matter of political sensitivity. The ACCC’s advocacy was not controversial from a policy perspective. It was careful not to take a position on the merits of privatisation, save implicitly as to timing where relevant market structures and regulatory arrangements are not in place. That said, it did enter public policy tiger country, the tigers being politicians and the constituencies whose contending views they represented. It is country in which the regulator must walk with considerable care. The ACCC walked through that country and came out with a trophy.

Earlier this year, the ACNC made a submission to the ACNC Review Panel. One of the questions the Panel had to examine was the extent to which the objects of the ACNC Act continued to be relevant. Those objects are:

- (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and

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<sup>31</sup> Australian Competition and Consumer Commission and the Australian Energy Regulator, Annual Report 2016-2017, 58.

<sup>32</sup> Australian Competition and Consumer Commission and the Australian Energy Regulator, Annual Report 2015-2016, 2.



- (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- (c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

The ACNC submission proposed an expansion of the objects of the Act to include:

- (a) to promote the effective use of the resources of not-for-profit entities; and
- (b) to enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.<sup>33</sup>

A key word was ‘effective’ which necessarily involves evaluative judgments about use of resources.

The ACNC proposal was seen by some in the sector as an attempted overreach seeking additional powers that would allow the ACNC to substitute its own views about the appropriate use of a charity’s resources for those of the charity. The controversy was fuelled by reference to some criticisms the Commissioner had made of advocacy activities by charities before his appointment as Commissioner.<sup>34</sup>

The Panel’s report noted that other submissions it received overwhelmingly opposed the additional objects proposed by the ACNC for a variety of reasons. Underpinning some of them was the challenge of assessing effectiveness of activities of a diverse range of entities carrying out a wide range of functions. That point was made in a submission from Suicide Prevention Australia, quoted by the Panel in its Report:

Effectiveness is subjective and contextual, and inextricably linked with organisation type, target group, jurisdiction and operating environment, among other things.

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<sup>33</sup> ACNC, Submission 19 January 2018 to the ACNC Review, Strengthening for Purpose: Australian Charities and Not-for-profits Commission, 21 cited in Report and Recommendations, August 2018, 25.

<sup>34</sup> Paul Karp, ‘Bizarre Overreach’: Charities fear regulator wants to control their spending, *The Guardian*, 24 January 2018.

Definitions of effectiveness are therefore highly dependent on these factors and differ from organisation to organisation.<sup>35</sup>

Research Australia focussed upon the practicality of the ACNC becoming involved in such a role '[n]ot only is such an object undesirable, in a sector as diverse as the charities sector, it is unnecessary and highly impracticable...'<sup>36</sup> This was a case in which the ACNC's advocacy took it into tiger country from which it emerged without a trophy.

It may be that in years to come the objectives of the ACNC will be widened and its coverage extended. That will be a function of public confidence and trust in it as a regulator. The early history of the ACCC and its present standing and responsibility point the way to that kind of development. It was a positive sign in the ACNC's initial success that acceptance by the sector that it withstood a political agenda for its abolition. That success was indicative of a degree of public trust, a commodity which is fundamental to institutions generally.

## **Regulation and public trust**

Public trust is fundamental to regulatory activity. Regulation of entities and activities which can deliver societal benefits seeks to ensure that appropriate standards are maintained which are not only protective of the public but provide the framework in which the benefits which can be derived from the regulated activity are realised. Charities, by definition, or at least the purpose-related definitions discussed in this paper, are intrinsically beneficial to society. They contribute to what might be called 'social capital'. They depend for their existence upon voluntary public support. Trust in their integrity and governance standards is essential to sustaining that support. An important purpose of regulation is the maintenance of that trust.

When regulation fails and public trust in a class of organisations or activities is undermined the results are rarely beneficial. The apparent short-comings of regulation in the financial services industry which have been disclosed in the Royal Commission, have the

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<sup>35</sup> Suicide Prevention Australia, Submission 19 February 2018 to the ACNC Review, Strengthening for Purpose: Australian Charities and Not-for-profits Commission, 2 cited in Report and Recommendations, August 2018, 26.

<sup>36</sup> Research Australia, Submission 28 February 2018 to the ACNC Review, Strengthening for Purpose: Australian Charities and Not-for-profits Commission 2 cited in Report and Recommendations, August 2018, 26.

likely consequence of a diminution of public trust not only in the service providers whose misconduct has been exposed, but also in the regulators responsible for policing their conduct.

Trust in statutory authorities is supported by an ethical framework which should be common to all holders of public office, be they legislators, executive officials and authorities or judicial officers. That ethical framework which is largely congruent with the legal framework, may be encompassed by the word 'legitimacy'. The ordinary meaning of the word 'legitimate' is 'conformable to law or rules; lawful, proper'. In the context of public office holders generally it directs attention to the purpose for which their office was created, its powers conferred and the conditions and limits which attach to the exercise of those powers. Those purposes, conditions and limits can define a working ethical framework. It may be reflected in a simple proposition namely that:

The holder of a public office must discharge its duties and exercise its powers for the purposes for which the office exists and for which the powers are conferred and only for those purposes and according to the conditions and within the limits of the power.

This is not a restrictive proposition. It can accommodate the exercise of public power through a wide range of widely defined purposes. It permits whatever can be done lawfully by public office holders. It may allow choices and priorities which might be contested but are not, on that account, unethical. In the case of a regulatory its compliance policies may take a variety of forms ranging from education to admonition, enforceable undertakings, the imposition of administrative penalties, civil penalty actions, criminal prosecution and cancellation of a licence or registration which is a necessary condition of lawful engagement in the regulated activity. The effectiveness of the mix may be debated but all are legitimate measures and the mix may vary from time to time.

The purposive proposition about the proper approach of a public office holder is connected to old ideas about public office as a species of public trust. There is a strong school of thought that the notion of a fiduciary relationship underpins the law governing the exercise of public power. Fiduciary relationships in private law include those which exist between a trustee and its beneficiaries and between a solicitor and a client. Fiduciary

obligations developed as part of the doctrines of equity in the Chancery Courts of England and were transported to Australia in the 19<sup>th</sup> century. They require, as Professor Sarah Worthington put it:

that beneficiaries are entitled to the single-minded loyalty of their trustees, or, more generally, that principals are entitled to the single-minded loyalty of their fiduciaries.<sup>37</sup>

Translating that statement to public office in a representative democracy, a public office holder is required to be loyal to the people whom he or she serves and to put their interests ahead of his or her own. A comment about judicial office by former Chief Justice Murray Gleeson in 2000 makes the point:

Judicial power which involves the capacity to administer criminal justice and to make binding decisions in civil disputes between citizens, or between a citizen and a government, is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate and the terms of the judicial oath.<sup>38</sup>

The trustees of charitable trusts, of course, are subject to the direct application of the equitable doctrines as well as the specific regulatory obligations imposed on them by statute law. And the broad ethical framework which I have formulated for public office holders really reflects little more than the existing principles of administrative law which underpin the judicial review of the exercise of official power.

Take the simple case of an official exercising a power under an Act of the Parliament. It might be a power to grant or revoke a licence or a visa, to deport someone or to let them stay. There is a vast array of such powers in our society under Commonwealth, State and Territory laws. In such cases, the decision-maker will comply with the ethical framework and with the requirements of administrative law if he or she acts according to what I call the

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<sup>37</sup> S Worthington, *Equity* (Oxford University Press, 2003) 121.

<sup>38</sup> Murray Gleeson, 'Judicial Legitimacy' Speech delivered at the Australian Bar Association Conference, New York, 2 July 2000.

logic of the law under which the power is conferred. That requires that the exercise of the power:

- is according to a reasoning process, albeit it may involve the exercise of a value judgment;
- is consistent with the statutory purpose;
- is not directed to a purpose in conflict with the statutory purpose;
- is based on a correct interpretation of the statute;
- has regard to matters which the statute requires to be considered;
- disregards matters which the statute does not permit the decision-maker to take into account;
- involves the finding of the required facts or states of mind necessary to the exercise of the relevant power;
- does not depend upon inferences which are not open or findings of fact which are not capable of being supported by the evidence or materials before the decision-maker;
- results from the application of processes which are required by the statute or by implication including requirements of procedural fairness;
- is not tainted in fact by actual bias or in appearance by apparent bias.

All of the above require diligent attention by the decision-maker to what is necessary to discharge the statutory task. Here ethics and law coincide. The ethical obligation can be generalised to a kind of promise keeping. It requires the public officer to do what he or she has impliedly promised to do by accepting the office to which he or she has been appointed. Democratic legitimacy follows from fidelity to the promise.

What is true for public officials in general is true for regulators in particular. Public trust in those regulated is an indicator of regulatory success. Public trust in the regulator is its precondition.