PUBLIC BENEFIT IN CHARITY LAW

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PREFACE

This book is an attempt to provide a theoretical framework for the diverse body of Chancery case-law and statutory provisions that together comprise the public benefit requirement in charity law. This is an important undertaking: public benefit runs through every aspect of the legal definition of charity in those jurisdictions whose charity law is based on the England model, and its influence can be traced back at least to the seventeenth century. Yet there has been no real consistency in how the term, or its constituent principles, has been conceived by the courts; nor has there been any sustained attempt to classify, justify, or critique those principles. Public benefit is an umbrella term used, variously, as the means of distinguishing between those abstract purposes that are capable of being charitable in law and those that are not; as the means of determining whether a particular purpose, as worded by a settlor or testator, falls within the scope of one of those abstract purposes; and as the means of defining the limits of its implementation. In certain cases, public benefit can be used to require an organization seeking charitable status to point to some objective merit in its endeavours; yet in certain other cases, there is no such requirement. Sometimes it is used to prevent a would-be charity from restricting access to its benefits; sometimes to ensure that certain benefits, such as private profit, do not accrue at all. Moreover, the courts have proved remarkably reluctant to reason by analogy between different charitable purposes when it comes to the implementation of the various principles, which has sometimes led to divergent ways of dealing with largely identical questions. The past decade has also seen the charitable sector attract considerable legislative interest in several jurisdictions, with public benefit often the focus of attention, yet it is remarkable how little light has been shone on matters as a result; in most cases, legislation has served not to clarify but merely further to confuse.

With this in mind, this book offers an analysis that seeks to unravel the different strands of the public benefit requirement in light of their different functions within the legal definition of charity and, crucially, their significance in light of the regulatory consequences of charitable status. After detailing (in Chapter 1) the emergence of public benefit in the years following the enactment of the Statute of Charitable Uses 1601, through its development in the nineteenth century, formalization in the twentieth century, and statutory reform in the twenty-first, I argue (in Chapter 2) that it is instructive to differentiate between four different sets of public benefit principles: those principles that determine the abstract purposes that constitute the different categories of charity (which I term, in the interests of clarity, *conceptual* public benefit); those further principles that are sometimes used to determine whether a

particular purpose that prima facie falls within one of the categories of charity is, in fact, a charitable purpose (*demonstrable* public benefit); those principles that determine the extent to which access to the benefits of a particular charitable purpose can legitimately be restricted (*cross-sectional* public benefit); and those principles that determine the extent to which an organization that meets the first three requirements may generate private benefit without jeopardizing its charitable status. These four sets of principles represent discrete, albeit interdependent, elements of the definition of charity—although they have often been blurred in the case-law, particularly in cases where the issues to be resolved did not require their distinction. Significantly, they also point to rather different answers when it comes to the questions of when, and how, we ought to regulate the charitable sector.

Central to the book's thesis is the idea that the conceptual public benefit that characterizes the categories of legal charity (considered in Chapter 3) correctly lies at the heart of the legal definition, and should be understood as identifying the kinds of civil society activity that merit the imposition of charity trustee duties on those who undertake them. Despite their apparent diversity, each of the various purposes that falls inside these categories tends to lead to problems of 'information asymmetry' between those who fund charitable services through donations or purchases, and those who control the charities that provide them—that is to say, much of the information that funders need to make effective decisions when engaging with the charitable sector is effectively beyond their reach because of the peculiar nature of the sector and the kinds of endeavours with which it is concerned. Whenever civil society activity is carried on for the benefit of anyone other than the donors who fund it—whether that benefit is for the wider community or otherwise—then it becomes difficult, if not impossible, for those donors to evaluate its quality. Those other civil society activities that are funded not by donations but by charging fees of those who enjoy the benefits, such as the provision of primary and secondary education by independent schools and the provision of healthcare by fee-charging voluntary hospitals, are of a complex and often intangible nature which similarly limits their easy evaluation. Appropriately, however, the problems that would likely arise from this inability to evaluate quality—a lack of engagement with the sector for fear that resources will be misappropriated or otherwise misapplied—are largely mitigated by the Chancery rules that govern the behaviour of charity trustees, such as the duty not to distribute private profit, the fiduciary duty of loyalty and the duty to act only for proper purposes, and the duty of care. These are made more effective yet by the statutory regulatory regimes that supplement the court's inherent supervisory jurisdiction in many common law jurisdictions.

By comparison, the second set of principles, comprising those authorities that sometimes require a purpose that otherwise falls within the categories of charity also to have an objectively demonstrable benefit (considered in Chapter 4) obscure this key feature of charity law. These principles—which are arguably not principles at all, given their vague nature and inconsistent application—operate to prevent certain

civil society organizations from obtaining charitable status even though they merit the imposition of trustee duties on those who control them, and supervision by regulatory agency, just as much as those organizations whose charitable status is settled. Similar criticisms can be levelled at many of the principles of cross-sectional public benefit, which determine the extent to which a charity can restrict access to its services (considered in Chapter 5): the size and shape of the class of persons eligible to benefit from a particular organization's services is not necessarily an effective marker of whether it is desirable to subject those in control of the organization to the duties of trusteeship or other regulatory oversight. Yet, conversely, both demonstrable public benefit and cross-sectional benefit are certainly relevant when it comes to considering the other side of charity regulation: the fiscal benefits that are made available to charities through the tax system. If the tax reliefs available to charities are understood, as I argue they should be, as a form of regulation in their own right whereby the state provides incentives to encourage the pursuit of certain civil society endeavours, then it is appropriate to consider whether a service that could be open to many is unnecessarily or unduly restricted so that few are eligible to benefit, or is carried on in a manner without obvious merit. In this regard it is unfortunate that the blunt nature of the English model of charity, whereby the imposition of charity trustee duties, oversight by a regulatory agency, and the availability of tax relief are not discrete regulatory options but rather come in a single package, can require those responsible for determining charitable status to compromise competing regulatory objectives that pull in different directions when ideally there ought not to be competition.

The rules that determine the extent to which a charity may generate private benefit even if it otherwise complies with the rules of conceptual, demonstrable, and cross-sectional public benefit (considered in Chapter 6) raise a third regulatory issue still. While many of the duties of trusteeship triggered by charitable status are designed specifically to prevent those in control of a charity from compromising its independence and trustworthiness in pursuit of private interests, in some cases it may be more effective to require an organization that does generate private benefit simply to disclose this to potential funders so that they may take it into consideration when considering whether to engage with the organization. If to exclude such an organization from the charitable sector is to exclude it from sustained regulatory oversight, this may not be the most sensible outcome.

The final part of the book focuses on two types of purposes that raise quite distinct public benefit issues and as such merit separate treatment: religious purposes (Chapter 7) and political purposes (Chapter 8). Regarding the former, the definition of religion in charity law varies considerably throughout the common law world and its effect in those jurisdictions that prefer a narrow definition can be to prevent certain faith-based bodies from obtaining charitable status; I argue that these bodies are affected by the same kinds of information deficits as charities and as such should be brought within the regulation of the charitable sector. Further, I argue that the rule

requiring religious bodies to show temporal rather than purely spiritual public benefit is inconsistent both with the law's understanding of what it means to be religious and with the treatment of spirituality elsewhere in charity law. Regarding the latter, most common law jurisdictions, with the notable exception of Australia, prohibit a charity from having political purposes, which means both that the advancement of a political doctrine per se is considered not to be for the public benefit at a conceptual level, and so falls outside the categories of charity, and also that a purpose which does prima facie fall under one of the heads of charity is considered to lack demonstrable public benefit if it is also political in nature. I argue that the various public benefit justifications provided by the courts for the prohibition in both its guises are unconvincing, and that the regulatory analysis of public benefit in the first part of the book suggests compelling reasons for its abolition.

Lord Normand once cautioned that the nature of public benefit is such that it has 'so often baffled efforts to reduce the law to systematized definitions'. We must not be daunted. The significance of finding that a particular civil society organization is charitable—particularly the regulatory and fiscal consequences flowing therefrom, without which charity as a legal construct has no real meaning—is such that the difficulties inherent in imposing some order on the chaos should not detract us from the virtues of that endeavour.

Any law book runs the risk that some significant development will occur between completion of the manuscript and publication. The timing of this book is such that it has not been possible to take account of the swift passage through the Australian Parliament of the Charities Act 2013. When the Act comes into force in 2014 it will introduce, for Commonwealth purposes, a non-exhaustive statutory list of charitable purposes. As with the recent statutory reforms in other jurisdictions, the purposes contained therein broadly reflect the current common law position in Australia. The Act also codifies elements of the common law public benefit requirement. Of particular note is section 7, which provides that certain purposes are presumed to meet all the elements of the public benefit requirement. These are the prevention and relief of sickness, disease, or human suffering; the advancement of education; the relief of poverty, distress, or disadvantage of individuals or families; the care and support of the aged or the disabled; and the advancement of religion. The provisions in the Extension of Charitable Purpose Act 2004 that exempt certain self-help groups and contemplative religious orders from the requirement of cross-sectional public benefit are repealed and re-enacted in section 10.

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