

Distinguishing Government from Charity in Australian Law

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Abstract

Government and charity are in the same business, which is to enable the pursuit of, or even directly to pursue, the common good. This article aims to identify an analytic distinction between government and charity notwithstanding that, being in the same business, they are functionally similar. More precisely, the article aims to identify the analytic distinction between government and charity that accords most satisfactorily with Australian law. To that end, the article discusses three concepts that courts in Australia and in England have invoked when seeking to draw a distinction between government and charity: purposes; control; and voluntarism. In Parts Two and Three of the article it is argued that the concepts of purposes and control are of limited assistance when drawing a distinction between government and charity. In Part Four of the article it is argued that, in light of the case law, the best view of what distinguishes government from charity in Australian law points to the fact that government is characterised by administration whereas charity is characterised by voluntarism. This conclusion, while not consistent with all of the decided cases, is consistent with the substantial majority of them.

1. Introduction

Philosophers will tell you that the business of government is — or at least ought to be — to enable the pursuit of, or even directly to pursue, the common good.¹ Any lawyer will tell you that ‘the pursuit of the common good’ sounds like a description of the business of charity according to modern Australian law, ‘charity’ in our law consisting of an oddly circumscribed group of purposes that, if carried out, will benefit the public.² Put broadly, then, government and charity — at least charity in

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1 For an account of how government might enable the pursuit of the good, see, generally, John Rawls, *A Theory of Justice* (first published 1971, revised ed, 1999); for an account of how government might directly pursue the good, see also Joseph Raz, *The Morality of Freedom* (1986).

2 These purposes are oddly circumscribed because they must fall within the ‘spirit and intendment’ of the preamble to the *Statute of Charitable Uses 1601* (43 Eliz 1 c 4): *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305. As to what purposes fall within the spirit and intendment of the preamble, see *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

the legal sense — are in the same business. My aim in this article is to identify an analytic distinction between government and charity, notwithstanding that, being in the same business, they are functionally similar. More precisely, my aim is to identify the analytic distinction between government and charity that accords most satisfactorily with Australian law. I therefore seek to draw the distinction out of decided cases, and it follows that I have little to say about ideal or non-legal distinctions between government and charity.³

Drawing a distinction between government and charity has, over the past 30 or so years, become both increasingly difficult and increasingly important, owing to profound changes in the relationship between the charity sector and the State.⁴ One change has taken the form of a growing reliance by parts of the charity sector on government funding, accompanied by an increasing use of agreements under which funding depends on certain outcomes being achieved, and a corresponding decrease in direct grants from government.⁵ This change has led to greater dependence on government, along with greater government control. It has made the task of distinguishing government from charity more difficult, because it has led to government and charity becoming more closely intertwined than ever before. Another change has been brought about by the well-documented withdrawal of the State, in Western countries at least, from the direct provision of welfare to the community. This has placed additional burdens on the charity sector, burdens which, in some cases, charities are able to bear only because of the tax advantages that they enjoy on account of their charitable status.⁶ This governmental retreat from welfare makes the task of accurately capturing the distinction between government and charity particularly important. To the extent that the burden of

3 It also follows that when I refer to ‘charity’, I mean charity in the legal sense unless I specify otherwise. For a characteristically brilliant account of charity in the non-legal sense, see John Gardner, ‘The Virtue of Charity and Its Foils’ in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 1.

4 The sector in question is sometimes referred to as the ‘not-for-profit sector’, the ‘third sector’ (see Senate Standing Committee on Economics, Commonwealth, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008), ch 2) or the ‘voluntary sector’. I prefer ‘charity sector’ simply because my focus in this article is on organisations that are – putting to one side the question whether they are too governmental – charitable in the legal sense. However, as I hope will become clear by the end of the article, there are advantages to be gained by using the word ‘voluntary’ when describing the charity sector. For an exploration of the distinctions between the charity sector and the voluntary sector more generally, see Jonathan Garton, ‘The Legal Definition of Charity and the Regulation of Civil Society’ (2005) 16 *King’s College Law Journal* 29.

5 For a discussion of these trends, see Jean Warburton and Debra Morris, ‘Charities and the Contract Culture’ [1991] *The Conveyancer* 419; Jane Lewis, ‘Reviewing the Relationship between the Voluntary Sector and the State in Britain in the 1990s’ (1999) 10 *Voluntas* 255; Michael Chesterman, ‘Foundations of Charity Law in the New Welfare State’ in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 249; Peter Luxton, *The Law of Charities* (2001), [1.18]–[1.19], [1.28]–[1.29]; Commonwealth, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) (‘The Sheppard Report’), chs 6 and 7; The Charity Commission for England and Wales, *Stand and Deliver: The Future of Charities Providing Public Services* (February 2007) (‘CC 2007’); Alison Dunn, ‘Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process’ (2008) 71 *Modern Law Review* 247.

6 See Ann O’Connell, ‘The Tax Position of Charities in Australia: Why Does It Have to Be So Complicated?’ (2008) 37 *Australian Tax Review* 17.

welfare rests on charities, and to the extent that charities are able to carry that burden only because of their tax advantages, the pursuit of the common good in the form of welfare depends on charities not losing tax advantages. It is therefore critical that an unduly narrow view of charity is not taken by taxing authorities and courts.⁷ In particular, it is critical that charities not lose their tax advantages because, for the wrong reasons, they are viewed as too governmental.⁸

My article discusses three concepts that courts in Australia and in England have invoked when seeking to draw a distinction between government and charity: purposes, control and voluntarism. I concentrate on English case law as well as Australian case law because of the great influence that the decisions of English courts have traditionally had on the law of charity in Australia.⁹ For this reason, I assume that decisions of English courts on the distinction between government and charity will be applied in Australia, unless Australian case law clearly indicates otherwise. In Parts 2 and 3 of the article, I argue, with reference to the case law, that the concepts of purposes and control are of limited assistance when distinguishing government from charity in Australian law. In Part Four of the article, I argue, again with reference to the case law, that the best explanation of cases in which a distinction has been drawn between government and charity points to the concept of voluntarism. My conclusion, in brief, is that what distinguishes government from charity in Australian law is that government is characterised by administration whereas charity is characterised by voluntarism. I acknowledge that this conclusion is not consistent with all of the decided cases but, in an area of law as notoriously incoherent as the law of charity, I argue that it is sufficient that the conclusion is consistent with the substantial majority of the decided cases.

2. *Purposes*

In large part, whether or not a gift, trust or organisation is charitable in Australian law depends on the character of its purposes.¹⁰ The question of purposes therefore appears to be a good starting point for thinking about the distinction between government and charity. Might it be said that, according to Australian law, charitable gifts, trusts and organisations have *charitable* purposes, while gifts to government, trusts the trustee of which is some part of government, and governmental organisations have *governmental* purposes? Something along these lines may be drawn out of the report on the law of charity submitted to the Commonwealth Government by the Sheppard Committee in 2001:

Government bodies have not been considered charitable entities because they are considered to have a single overarching purpose, to carry out the functions or responsibilities of government, and thus do not have the requisite dominant charitable purpose.¹¹

7 *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350 (Hammond J).

8 *Central Bayside General Practice Association Limited v Commissioner of State Revenue* (2006) 228 CLR 168, 213–4 (Kirby J) (*'Central Bayside (HCA)'*).

9 I also refer from time to time to decisions of the courts of New Zealand, including the Privy Council as the (former) court of highest appeal in that jurisdiction.

10 For an overview of the cases establishing this proposition, see Gino Dal Pont, *Charity Law in Australia and New Zealand* (2000), 8–13.

Similarly, the Charity Commission for England and Wales has formed the view that if an organisation with ostensibly charitable purposes nonetheless has an ‘unstated purpose that is concerned with giving effect to the wishes and policies of a governmental authority’, it will be governmental rather than charitable as a result.¹²

Before considering the merits of drawing a distinction between government and charity based on ‘purposes’, it is important to understand precisely what ‘purposes’ means. Here, two distinctions must be drawn. The first distinction is between that which has motivated someone to make a gift, settle a trust or establish an organisation, and the express or implied objectives of a gift, trust or organisation once made, settled or established. It is well-established that motives are irrelevant when considering the purposes of a gift, trust or organisation, and that only objectives will be taken into account.¹³ It follows that if, for example, an organisation has been established for objectives that are undeniably charitable, the fact that those who have established the organisation have done so in order to relieve a welfare burden that government would otherwise have had to bear ought be of no significance when determining whether the purposes of that organisation are charitable.¹⁴

The second distinction is between the objectives of an organisation and that organisation’s activities. In circumstances where an organisation established for objectives that are clearly charitable has, in its activities, deviated radically from those objectives, a court might be prepared to take those deviant activities into account when considering whether or not the organisation’s purposes are truly charitable.¹⁵ However, in the absence of such exceptional circumstances, an organisation’s activities, just like the motives behind its establishment, are irrelevant when considering its purposes. In the ordinary case, those purposes are to be determined according to the objectives of the organisation in question, which will usually be found in its constituent document.¹⁶ Consequently, if, for example, an organisation is established by statute for objectives that are clearly governmental, it ought to be of no significance when considering its charitable

11 The Sheppard Report, above n 5, 233.

12 The Charity Commission for England and Wales, *RR7 – The Independence of Charities from the State* (February 2001) (‘RR7’), [6].

13 *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120, 141–2 (Mason ACJ and Brennan J), 170 (Wilson and Deane JJ); *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157, 168.

14 RR7, above n 12, [3].

15 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600, 617 (Santow J). The Charity Commission for England and Wales is more willing than the Australian courts to consider an organisation’s activities when determining its charitable status: see Charles Mitchell, ‘Reviewing the Register’ in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 184.

16 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600, 615–7 (Santow J); RR7, above n 12, [5]; *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2003] VSC 285, [30]–[31] (Nettle J) (‘*Central Bayside (VSC)*’). An organisation’s activities may be relevant when considering questions broader than whether its purposes are charitable, such as whether the organisation is a ‘charitable institution’ within the meaning of the *Income Tax Assessment Act 1997* (Cth): see, generally, *Victorian Women Lawyers’ Association v Commissioner of Taxation* (2008) 170 FCR 318 (French J); *Commissioner of Taxation of the Commonwealth v Word Investments Ltd* (2008) 236 CLR 204.

status that the organisation in question has, as a matter of fact, engaged in activities in which charities typically engage.¹⁷ The organisation in question will be denied charitable status notwithstanding that its activities coincide with the activities of charitable organisations.

When thinking about the distinction between government and charity in terms of the purposes of a gift, trust or organisation, the focus should be on the express or implied objectives of the gift, trust or organisation in question. In this regard, it is clear enough that a trust or an organisation which has the express objective of carrying out government policy, whether established by government or not, is settled or established for a governmental purpose and is not charitable.¹⁸ It is also clear that a gift to a government department for its general purposes is not charitable,¹⁹ except, as I point out below, to the extent that it can be regarded as a gift for the relief of taxes. However, gifts, trusts and organisations for which charitable status is sought are not typically made, settled or established for an expressly governmental objective; in more typical cases, gifts, trusts and organisations are made, settled or established for objectives that are not expressly governmental but which are susceptible nonetheless to being interpreted as governmental. Drawing a distinction in such cases between government and charity based on purposes is difficult. Importantly, however, it is not impossible. For example, the Charity Commission for England and Wales appears to have overcome the difficulty by taking the view that in some cases an organisation with ostensibly charitable objectives might nonetheless have an unstated governmental purpose.²⁰ This technique — even if there is some artifice to it — enables a distinction to be drawn between government and charity in cases where an organisation's stated objectives reveal its purposes only in part.

With the right interpretive tools, it therefore appears to be possible to draw an analytic distinction between government and charity when considering the purposes of a gift, trust or organisation for which charitable status is sought. However, when trying to distinguish generally between government and charity based on purposes and in accordance with decided cases, one encounters a problem. The history of the law of charity shows that the purposes of government have sometimes been regarded as charitable. Arguably, the treatment of governmental purposes as charitable may be found in at least three types of case. First, there have been cases in which a gift has been made or a trust settled for the purpose of relieving taxes. Secondly, there have been cases of a gift to government for the purpose of reducing the national debt. Finally, there have been cases of a gift, again to government, for the purpose of benefiting a specified geographical area. I will consider each type of case in turn.

17 RR7, above n 12, [5].

18 With respect to trusts declared by government in pursuit of government policy, the position is clear: *Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619; *Tito v Waddell (No 2)* [1977] Ch 106 (Sir Robert Megarry VC); *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145.

19 *In re Cain (dec'd)* [1950] VLR 382, 387 (Dean J).

20 CC 2007, above n 5.

The relief of taxes is as well-established a charitable purpose as any, being mentioned expressly in the preamble to the *Statute of Charitable Uses 1601*.²¹ This early recognition of the relief of taxes as a charitable purpose has been echoed since. In *Attorney-General v Bushby*, Sir John Romilly MR characterised as ‘charity property’ a trust of land established in 1494 for the purpose of the ‘discharge of the tax of the commonalty of Grantham to King Henry the Seventh and his successors for ever’.²² In Australia, in *Monds v Stackhouse*, Latham CJ of the High Court affirmed the principle that a gift in aid of rates or taxes is charitable.²³ And recently, the Charity Commissioners for England and Wales accepted that it is a ‘good charitable purpose’ to relieve the community from taxes, so long as the public benefit test is met.²⁴ The relief of taxes is not typically a governmental purpose.²⁵ Nonetheless, it is arguable that there is a clear connection between the relief of taxes and the purposes of government: if taxes are *raised* for governmental purposes, then it follows that a gift or trust for governmental purposes is indirectly a gift or trust for the relief of taxes. If this argument holds, a gift or trust for governmental purposes is always (indirectly) charitable.²⁶ This reasoning is not explicit in the case law as it has developed. However, it may be implicit and, to the extent that it is, the cases on relief of taxes support the proposition, not only that governmental purposes may be charitable, but also that they are necessarily charitable.

It might be thought that this interpretation of the ‘relief of taxes’ cases is far-fetched, attributing to courts a view about governmental purposes in cases where such purposes were not directly under consideration. It might also be thought that the interpretation is at odds with dicta of Dean J of the Supreme Court of Victoria in *In re Cain (dec’d)*, to the effect that a gift to a government department for its general purposes cannot be charitable.²⁷ The same objections may not, however, be raised with respect to cases of gifts to government for the purpose of reducing the national debt. In *Thellusson v Woodford*, a Chancery bench appears to have upheld as charitable, without any misgivings, a gift to the Crown ‘to the use of the sinking fund’.²⁸ In *Newland v Attorney-General*, a gift to ‘His Majesty’s government in exoneration of the national debt’ was dealt with by Lord Eldon LC as a charitable gift.²⁹ Given that the discharge of the national debt is undoubtedly a governmental purpose, these two cases must be taken to support the proposition that at least one of the purposes of government is charitable.

21 The reference is to the ‘aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes’: *Statute of Charitable Uses 1601* (43 Eliz 1 c 4).

22 (1857) 24 Beav 299, 301; 53 ER 373.

23 (1948) 77 CLR 232, 241.

24 Decision of the Charity Commissioners of England and Wales in *Applications for Registration of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Cultural Trust* (21 April 2004), [6.1.5].

25 The relief of taxes might be a governmental purpose where the policy of the government in question is to reduce taxes.

26 David Brown, ‘Charity, the Crown and the Treaty’ [2003] *New Zealand Law Journal* 65, 70. Compare David Brown, ‘The Charities Act 2005 and the Definition of Charitable Purposes’ (2005) 21 *New Zealand Universities Law Review* 598, 629.

27 [1950] VLR 382, 387.

28 (1799) 4 Ves Jr 227, 233–5; 31 ER 117. During the 18th century, the ‘sinking fund’ was used in England to reduce national debt.

29 (1809) 3 Mer 684, 684; 36 ER 262.

Finally, there are the cases of a gift to government for the purpose of benefiting a specified geographical area. Early cases may be found in which a testamentary gift ‘to the Parish of Great Creaton’ in Northamptonshire; a similar gift for the purpose of ‘the improvement of the city of Bath’; and a trust for a variety of purposes connected with the beautification of the town of Great Bolton (now part of Greater Manchester), were upheld as charitable.³⁰ In none of those early cases was the donee or trustee in any sense part of government. However, on the basis of the early cases, a series of later cases established the principle that a gift to government for the benefit of the inhabitants of a specified geographical area, even an area as large as a whole country, was a charitable gift.³¹ The *ne plus ultra* of this series is thought to be the decision of the English Court of Appeal in *In re Smith*, in which a testamentary gift ‘unto my country England’ was upheld as charitable, the Court ordering that the fund be paid to a person nominated by the Crown under the Sign Manual.³² It has been suggested that *In re Smith* was wrongly decided and that the purposes contemplated by the testator in that case were not (wholly) charitable.³³ However, the more widely accepted view is that the gift in *In re Smith* was for purposes that, by implication, were charitable, even if anomalously so.³⁴

Whether *In re Smith* was correctly decided or anomalous, the case, along with all the other cases which establish the charitable nature of a gift to government for the benefit of a locality (including the nation as a whole), points to an important fact. In seeking to apply a gift for the benefit of a specified geographical area, government may — indeed, is likely to — apply that gift to governmental purposes, simply because government typically acts by pursuing governmental purposes.³⁵ Such a gift is nonetheless charitable. To take an example, imagine that the Commonwealth government receives a gift for ‘my country, Australia’. With the court’s approval, the Commonwealth might allocate the gift to particular

30 *West v Knight* (1669) 1 Ch Cas 134; 22 ER 729; *Howse v Chapman* (1799) 3 Ves Jr 542, 551; 31 ER 278 (Lord Loughborough LC); *Attorney-General v Heelis* (1824) 2 Sim & St 67 (Sir John Leach VC), 77. *Attorney-General v Heelis* (1824) 2 Sim & St 67-77; 57 ER 270 (Sir John Leach VC).

31 *Mitford v Reynolds* [1835–42] All ER Rep 331, 335–6 (a gift to ‘the government of Bengal’ for ‘public works at and in the city of Dacca’) (Lord Lyndhurst LC); *Nightingale v Goulbourn* (1848) 2 Ph 594, 595–6 (a gift to ‘the Queen’s Chancellor of the Exchequer’ for ‘the benefit and advantage of my beloved country Great Britain’) (Lord Cottenham LC); *Goodman v Mayor of Saltash* (1882) 7 App Cas 633, 642 (Lord Selborne LC); *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531, 584 (Lord Macnaghten); *Robinson v Stuart* (1891) 12 LR (NSW) Eq 47, 50–1 (Owen CJ in Eq); *In re Tetley* [1923] 1 Ch 258 262, 275 (‘patriotic purposes’) (Russell J); *Monds v Stackhouse* (1948) 77 CLR 232, 246 (Dixon J); possibly also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 582.

32 [1932] 1 Ch 153 (CA), 168–9 (Lord Hanworth MR), 171–3 (Lawrence LJ), 174–6 (Romer LJ).

33 Michael Albury, ‘Trusts for the Benefit of the Inhabitants of a Locality’ (1940) 56 *Law Quarterly Review* 49.

34 *Williams’ Trustees v Inland Revenue Commissioners* [1947] AC 447, 459–60 (Lord Simonds); *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, 213; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157, 171 (Lord Millett); Brown, ‘Charity, the Crown and the Treaty’, above n 26, 68.

35 Note, however, that government need not *always* act by pursuing governmental purposes: see below 13–15.

national infrastructure projects that have already been embarked on and funded by the revenue in accordance with announced government policies. In this example, there can be no doubt that carrying out the infrastructure projects in accordance with government policies is a governmental purpose, but the charitable status of the gift that is allocated to the infrastructure projects shows that carrying out the projects is not just a governmental purpose. It is instead a purpose with a dual character: it is both governmental *and* charitable.³⁶

In summary, then, although it is difficult to draw a distinction between governmental and charitable purposes in cases where a gift, trust or organisation is made, settled or established for purposes that are not expressly governmental, it is not impossible, particularly if a court is prepared to find that a gift, trust or organisation has an unstated governmental purpose. However, it is not possible to argue for a general distinction between government and charity based on purposes in Australian law because in some cases — cases entailing gifts and trusts for the relief of taxes, gifts to government for the purpose of reducing the national debt, and gifts to government for the purpose of benefiting a specified geographical area — purposes that are undeniably governmental have been found to be charitable as well.

3. *Control*

It has been said that in Australian law the test for distinguishing a governmental from a charitable organisation is one of control.³⁷ According to this test, the question to be asked when considering whether an organisation is governmental or charitable is whether or not government is able to, and does, control the organisation in question.³⁸ In answering this question, which is a question of fact, relevant considerations might include the extent to which government is able to dictate the objectives and activities of the organisation; the extent to which the organisation is monitored by and accountable to government; and the extent of government involvement in the decision-making structures of the organisation.³⁹ Given that in recent years government and charitable organisations that deliver welfare to the community have become more closely intertwined than ever before (for instance, through agreements under which government funding depends on the achievement by charitable organisations of certain outcomes), the question of control might be thought critical when considering the distinction between government and charity. However, although there is support for a control test in the case law, that support is not strong. Moreover, there are cases in which government

36 In *Central Bayside (HCA)* (2006) 228 CLR 168, 224, Callinan J stated that in Australia, some undoubtedly charitable purposes may only be carried out by or under the direction of government. His Honour referred to the building of roads, which is charitable because it is analogous to the ‘repair ... of highways’ expressly mentioned in the preamble to the *Statute of Charitable Uses 1601*. It follows that those purposes are inescapably both governmental and charitable.

37 The Sheppard Report, above n 5, 234, 239.

38 *Ibid*, 239.

39 *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2005] VSCA 168, [10] (Chernov JA) (*‘Central Bayside (VCA)’*).

control appears to have made no difference when drawing a distinction between government and charity.

Before turning to the cases supporting a control test, I wish to set aside one distraction, which is the idea that the extent to which an organisation is governmental is closely related to the extent to which government funds that organisation. In the *Central Bayside* case, Nettle J of the Supreme Court of Victoria was of the opinion that the fact of government funding is significant when determining whether an organisation is governmental or charitable.⁴⁰ However, this view was rejected in both the Victorian Court of Appeal and the High Court.⁴¹ Moreover, in at least one other recent Australian decision, the fact of government funding was found to be irrelevant to the question of charitable status.⁴² There is even authority suggesting that the fact of government funding supports a finding that an organisation has purposes that will benefit the public and is charitable as a result.⁴³ Therefore, although in practice organisations may feel constrained with respect to their purposes and activities because they rely on government funding,⁴⁴ it must be concluded that the fact of government funding is not relevant when considering whether such organisations are charitable in Australian law. It might be thought that an exception ought to be made in cases where an organisation is funded pursuant to an outcomes-oriented funding agreement. In such cases, an argument might be made that government controls the organisation in question in part because the ongoing provision of funding is dependent on the government being satisfied that certain outcomes have been achieved. However, in the *Central Bayside* case, members of the Victorian Court of Appeal and the High Court appeared to view outcomes-oriented funding agreements as no impediment to charitable status.⁴⁵ Moreover, as I will argue shortly, even the fact of government control of an organisation, particularly an organisation not created by statute, is a weak basis for concluding that that organisation is too governmental and therefore not charitable.

I turn now to the cases supporting a control test for distinguishing a governmental from a charitable organisation. In England, the leading decision setting out a control test is that of the Court of Appeal in *Construction Industry Training Board v Attorney-General*.⁴⁶ There, the question arose whether a

40 *Central Bayside (VSC)* [2003] VSC 285, [25].

41 *Central Bayside (VCA)* [2005] VSCA 168, [11], [49]–[54], [56] (Chernov JA); *Central Bayside (HCA)* (2006) 228 CLR 168, 185 (Gleeson CJ, Heydon and Crennan JJ), 212–4 (Kirby J).

42 *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 115 NTR 25. See also *Robinson v Stuart* (1891) 12 LR (NSW) Eq 47 (Owen CJ in Eq); The Sheppard Report, above n 5, 239.

43 *Attorney-General v M'Carthy* (1886) 12 VLR 535; *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 371 (Heerey J).

44 In CC 2007, [1.8], the Charity Commission for England and Wales reported survey findings in which nearly half of charities surveyed disagreed with the following statement: 'our charitable activities are determined by our mission rather than by funding opportunities.'

45 *Central Bayside (VCA)* [2005] VSCA 168 [53] (Chernov JA); *Central Bayside (HCA)* (2006) 228 CLR 168, 185 (Gleeson CJ, Heydon and Crennan JJ).

46 [1973] 1 Ch 173 (CA).

statutory entity whose purposes were undoubtedly charitable was nonetheless too governmental because it was under the control of the executive. A majority of the Court found that the entity in question was not under the control of the executive and therefore remained subject to the charity jurisdiction of the High Court of Justice.⁴⁷ By contrast, Russell LJ thought that the charity jurisdiction of the High Court had been ousted by the statute establishing the entity, which placed almost all control over that entity in the hands of the relevant government Minister.⁴⁸ In Australia, the Court of Appeal of the Supreme Court of the Northern Territory adopted a control test in *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*, concluding that the entity in that case was not controlled by government.⁴⁹ And in the recent *Central Bayside* litigation, the question of control loomed large. In the Supreme Court of Victoria, Nettle J stated his opinion that ‘the level of government involvement in a body ... may be relevant to the body’s status as a charity’.⁵⁰ In the Victorian Court of Appeal, similar thoughts were expressed by Chernov JA,⁵¹ and Byrne AJA said that the important question is whether an entity is a ‘mere creature or agent’ of government.⁵² Finally, in the High Court of Australia, Gleeson CJ, Heydon and Crennan JJ dealt with the case on the assumption that a body established for charitable purposes cannot be truly charitable if controlled by government.⁵³

Also supporting a control test is a group of cases dealing with the question whether an organisation is, for tax purposes, a ‘public benevolent institution’ under Australian law.⁵⁴ The law relating to public benevolent institutions overlaps with the law relating to charities. However, ‘public benevolent institution’ is not synonymous with ‘charity’ in Australian law: put broadly, a public benevolent institution must have an eleemosynary character, whereas it is not necessary for an organisation seeking charitable status to be eleemosynary.⁵⁵ Despite the differences between the law relating to public benevolent institutions and the law relating to charities, it is arguable that an analogy can and ought to be drawn between cases dealing with public benevolent institutions and cases dealing with charities on the question of government control.⁵⁶ Those who would draw such an analogy may point out that, in the public benevolent institution cases, organisations have been denied status as public benevolent institutions, and denied

47 Ibid 188 (Buckley LJ), 188–9 (Plowman J).

48 Ibid 184. Note that in *Central Bayside (HCA)* (2006) 228 CLR 168, 228, Callinan J was of the view that governmental control does not oust the charity jurisdiction of the court where the objectives of an organisation are charitable.

49 (1997) 115 NTR 25.

50 *Central Bayside (VSC)* [2003] VSC 285, [25].

51 *Central Bayside (VCA)* [2005] VSCA 168, [6].

52 Ibid [56].

53 *Central Bayside (HCA)* (2006) 228 CLR 168, 181.

54 *Metropolitan Fire Brigades Board v Commissioner of Taxation* (1990) 27 FCR 279; *Mines Rescue Board (NSW) v Commissioner of Taxation* (2000) 101 FCR 91; *Ambulance Service of New South Wales v Deputy Commissioner of Taxation* (2003) 130 FCR 477.

55 On the nature and tax treatment of public benevolent institutions, see generally Dal Pont, above n10, 37–41; Chesterman, above n 5, 258–61; O’Connell, above n 6.

56 *Central Bayside (VCA)* [2005] VSCA 168, [6] (Chernov JA).

access to tax advantages as a result, because they were subject to too much government control. *Mines Rescue Board (NSW) v Commissioner of Taxation* is typical of these cases. There, the Full Court of the Federal Court of Australia found the Mines Rescue Board (NSW) to be controlled by government to such an extent that it was not a public benevolent institution.⁵⁷ This finding was based on a variety of factors, including that the Board was established as a statutory body; that the relevant government Minister could instruct the directors of the Board; and that the Minister could remove those directors if she or he chose to do so.⁵⁸

It cannot be doubted that there is some support in the case law for a control test when distinguishing government from charity, but that support is not strong. To begin with, the High Court of Australia refused to endorse such a test unqualifiedly in the *Central Bayside* case. Although Gleeson CJ, Heydon and Crennan JJ were prepared to assume that a control test applied for the purposes of the case before them, they also left open the question whether an organisation established for charitable purposes might retain charitable status notwithstanding the fact of government control.⁵⁹ In the same case, Kirby J pointed out that even bodies established by statute and ‘part of government’ have been found to be charitable,⁶⁰ and Callinan J suggested that a gift might be charitable despite the fact that it is a gift to a ‘polity or creature’ of government.⁶¹ These dicta, taken together, represent the views of the full bench of the High Court of Australia in the leading case on the distinction between government and charity in Australian law. As such, they considerably weaken the support there is in Australian law for a control test.

The doubt cast by the High Court of Australia in the *Central Bayside* case on the appropriateness of a control test when distinguishing between government and charity is not without foundation in the case law. As I noted above, Kirby J pointed out in the *Central Bayside* case that even organisations established by statute have been found to be charitable. The most celebrated such case, to which Kirby J referred,⁶² is that of the British Museum, established by statute in 1753 and found in 1826 to be a charitable organisation in *The Trustees of the British Museum v White*.⁶³ The case of the British Museum also supports Callinan J’s reference in the *Central Bayside* case to gifts being charitable even though they are to a ‘polity or creature’ of government, a reference that finds further support in a series of cases concerning hospitals that were decided in the 1950s. In *In re Morgan’s Will Trusts* and *In re Frere (dec’d)*, testamentary gifts were made to British hospitals which, between the time of the making of the respective wills and the time of the testators’ deaths, had been nationalised under the *National Health Service Act 1946*.⁶⁴ In neither case did the fact that government had assumed control of the hospitals in

57 (2000) 101 FCR 91.

58 Ibid 101.

59 *Central Bayside (HCA)* (2006) 228 CLR 168, 187 (Gleeson CJ, Heydon and Crennan JJ).

60 Ibid 211 (Kirby J).

61 Ibid 226 (Callinan J).

62 Ibid 211 (Kirby J).

63 *Trustees of the British Museum v White* (1826) 2 Sim & St 594; 57 ER 473 (Sir John Leach VC). The British Museum was established under the *British Museum Act 1753* (26 Geo 2 c 22).

question affect in any way the charitable character of the gifts. Further, in *Re Sutherland, deceased*, the Full Court of the Supreme Court of Queensland ruled that a charitable trust for ‘public hospitals in Queensland’ could be carried out by making distributions to hospitals under government control.⁶⁵

In addition to casting doubt on the appropriateness of a control test when distinguishing government and charity in Australian law, the High Court in the *Central Bayside* case considered that the ‘public benevolent institution’ cases were of little use when thinking about the distinction between government and charity. Their Honours pointed out that the ‘public benevolent institution’ cases all involved organisations created by statute, and refused to draw an analogy between those cases and cases involving organisations not created by statute.⁶⁶ This refusal was significant, for a reason that I will return to below. For now, it will suffice to point out that, if no analogy may be drawn between the ‘public benevolent institution’ cases and cases involving non-statutory organisations, the ‘public benevolent institution’ cases do not support the application of a control test in cases of the latter type.

At the beginning of this Part, I noted the view of the Sheppard Committee that the test for distinguishing a governmental from a charitable organisation in Australian law is one of control. It must be concluded that this view is largely unsupported by the case law. Although there is some support for a control test, particularly in the judgments of Nettle J of the Supreme Court of Victoria and members of the Victorian Court of Appeal in the *Central Bayside* case, that support is weakened by the scepticism exhibited towards a control test by the High Court of Australia in its later decision in that case. In addition, the ‘public benevolent institution’ cases, in which a control test appears to have been applied by Australian courts, were found by the High Court in the *Central Bayside* case to be of precedential value only in cases of organisations established by statute. Finally, a control test is unable to account for those cases where a testamentary gift to a charitable organisation has retained its charitable character notwithstanding that control of the organisation might have been assumed by government.

4. *Voluntarism*

Based on the foregoing, in this final Part, I assume that what distinguishes government from charity in Australian law is not the character of the purposes for which a gift, trust or organisation is made, settled or established, nor the fact of government control of an organisation. Instead, I argue that the distinction between government and charity in Australian law is best understood with reference to the concept of voluntarism. That is not to say that courts have explicitly invoked the

64 9 & 10 Geo 6 c 81. See *In re Morgan's Will Trusts* [1950] Ch 637 (Roxburgh J); *In re Frere (dec'd)* [1951] Ch 27 (Wynn-Parry J).

65 *Re Sutherland, deceased* [1954] St R Qd 99.

66 *Central Bayside (HCA)* (2006) 228 CLR 168, 186 (Gleeson CJ, Heydon and Crennan JJ), 195 (Kirby J), 228–9 (Callinan J).

concept of voluntarism when drawing a distinction between government and charity; rather, the concept of voluntarism best explains what courts have been doing in cases where a distinction between government and charity has been drawn. In brief, my argument is that what courts have considered charitable is characterised by voluntarism, whereas what courts have considered governmental is not. In addition, although there is an old Chancery case that at first glance appears to be inconsistent with treating voluntarism as the basis for the distinction between government and charity in Australian law, that case, once properly understood, is no threat to a voluntarism analysis.

In order to see how this argument works, it is important to have a clear sense both of what voluntarism is, and of what it is not. First, what it is not. It is not altruism. In the *Central Bayside* case, Kirby J spoke of the ‘spark of altruism and benevolence’ that is ‘essential’ to charity.⁶⁷ Similarly, in its report to the Commonwealth Government on the law of charity in Australia, the Sheppard Committee regarded altruism as an important dimension of charity, recommending that the public benefit test for charitable purposes in Australian law be reformed to demand more explicitly that purposes, in order to be charitable, be altruistic.⁶⁸ Altruism — which I, like the Sheppard Committee, take to mean a regard for others as a principle of action⁶⁹ — often coincides with charity. Indeed, altruism is doubtless a significant motive for charity. However, it is a conceptual error to suppose that altruism is what defines charity, and to that extent it is wrong to imagine that altruism is capable of distinguishing that which is charitable from that which is governmental. To illustrate the point, imagine the case of a religious person who settles all her wealth on trust for the purpose of feeding the poor, not because of her regard for the plight of the poor, but rather because she believes that her religious duty is to give everything she has to the poor.⁷⁰ Her actions are not altruistic, yet it cannot be doubted that her trust is one for a charitable purpose, as the relief of poverty is one of the accepted heads of charity according to the celebrated judgment of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel*.⁷¹

Nor is voluntarism volunteerism, in the sense of the use of volunteer labour. Much of the work of the charity sector is performed by volunteers as opposed to paid staff, and much of the work of government is performed by paid staff as opposed to volunteers. However, although charitable organisations typically rely on volunteers whereas government does not, volunteerism is not what distinguishes charity from government. The work of a charitable organisation might be performed by paid employees, and this ought not to affect that organisation’s charitable status in any way. Indeed, many large charitable organisations maintain paid permanent staff and engage professional advisers for

67 Ibid 210 (Kirby J). See also *Central Bayside (VCA)* [2005] VSCA 168, [4] (Chernov JA).

68 The Sheppard Report, above n 5, 124–5.

69 Ibid 124. See also Thomas Nagel, *The Possibility of Altruism* (paperback edn, 1978) 3.

70 Such a duty may even be a duty of charity (in the non-legal sense): Gardner, above n 3, 8.

71 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

fees, and this ‘professionalisation’ of the charity sector has been remarked on in recent years.⁷² In its report, the Sheppard Committee stated that, given the variability in the use of volunteers across the charity sector, it would be inappropriate to introduce into the law any necessary connection between charity and volunteerism.⁷³ Not only did that statement indicate that volunteerism ought not to be the test of charity, but it implied, correctly, that volunteerism is not the test of charity as the law currently stands.

It has been argued that voluntarism is accompanied by self-giving,⁷⁴ and that it is connected with the social value of fraternity.⁷⁵ In addition, individual virtues, such as generosity,⁷⁶ commitment,⁷⁷ empathy,⁷⁸ and public-spiritedness,⁷⁹ are often manifested where voluntarism is present. However, the gist of voluntarism is choice. At the beginning of this article, I noted that government and charity are in the same business, which is fostering the common good. The common good might be pursued or enabled in a variety of ways,⁸⁰ but, for present purposes, only two are relevant. First, the common good might be pursued individually by persons making autonomous choices; and, second, it might be pursued collectively by the community as a whole via the deliberative and democratic processes of the State.⁸¹ The first way of pursuing the common good — the individually and autonomously chosen way — is appropriately described as voluntarism and, when it takes the form of the making of a gift, the settlement of a trust, or the establishment of an organisation for purposes that are charitable in the legal sense, it amounts to charity in Australian law. The second way of pursuing the common good — the collectively and democratically determined way — is not appropriately described as voluntarism. It is better described as administration, and it typically takes the form of the distribution and application of the revenue by entities created by statute or which derive their authority from the Crown. This second way of pursuing the common good does not amount to charity in Australian law.

The concept of voluntarism, thus understood, helps to explain many of the cases in which courts have been called on to draw a distinction between government and charity. For example, it provides an account of why courts have upheld gifts to government for charitable purposes like the relief of taxes, the discharge of the

72 Jonathan Garton, ‘Charities and the State’ (2000) 14 *Trust Law International* 93, 96–7.

73 The Sheppard Report, above n 5, 125. Unfortunately, the Sheppard Committee used the language of ‘voluntarism’ to make this point, thereby obscuring its meaning.

74 Susan R Moody, ‘Self-Giving in “Charity”’: The Role of Law’ in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 79.

75 Rob Atkinson, ‘Problems with Presbyterians: Prolegomena to a Theory of Voluntary Associations and the Liberal State’ in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 125.

76 Mitchell, above n 15, 204.

77 Lewis, above n 5.

78 Mitchell, above n 15, 204.

79 Gardner, above n 3, 15–9.

80 See generally Mark Freedland, ‘Charity Law and the Public/Private Distinction’ in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 111.

81 These different ways of pursuing the common good might also correspond to the non-legal meanings of charity and justice respectively: see Gardner, above n 3, 35.

national debt, or the benefit of a specified geographical area, even where those purposes are also governmental.⁸² What gives such gifts their charitable status is their voluntary character as gifts, which is not diminished by the fact that government is their donee. By contrast, in cases of gifts to government for general governmental purposes, courts appear to have taken the view that a testator, by making such a gift, has made an individual and autonomous choice but that the choice has been for administration with respect to the subject matter of the gift. To the extent that the choice has been for administration, the testator has effectively cancelled whatever charitable character the gift might otherwise have had.⁸³

Two cases illustrate this point. First, there is the decision of the High Court of Australia in *Diocesan Trustees of the Church of England in Western Australia v Solicitor General*.⁸⁴ In that case, testamentary gifts had been made to the trustees of 'lunatic asylums' and 'poor houses' in Western Australia. At the time, Western Australia had only one 'lunatic asylum' and two 'poor houses', and all three were governmental institutions. In ordering a scheme for distribution, the High Court was of the view that the gifts should be applied to purposes that would not ordinarily be funded out of the revenue.⁸⁵ As Barton J put it, 'care will be taken [when settling the scheme] that the moneys will be used for the benefit of the inmates, and not for the ease of the Government in its expenditure.'⁸⁶ And O'Connor J added that:

there are many ways in which private charity sympathetically and wisely administered may render the daily lives of both classes of inmates brighter and happier than they can be under the ordinary routine of Government administration.⁸⁷

These statements imply a distinction between those purposes that could be achieved only by the voluntarism of the testator and those purposes that could be achieved by government administration. The High Court was prepared to regard the gifts as charitable only to the extent that they would be applied to purposes of the former type.

The second case that illustrates the significance of voluntarism to the distinction between government and charity in cases entailing gifts to government is *In re Cain (dec'd)*.⁸⁸ A testator made a gift to 'the Children's Welfare Department' of the State of Victoria. Along with pointing out that the case before him was not analogous to those cases where gifts had been made to government for the purpose of benefiting a particular geographical area, Dean J of the Supreme

⁸² See above 8–13.

⁸³ Courts need not have taken this view; they might, instead, have understood a choice for administration to be nonetheless voluntary and therefore charitable. See below n 108, and accompanying text.

⁸⁴ *Diocesan Trustees of the Church of England in Western Australia v Solicitor General* (1909) 9 CLR 757.

⁸⁵ *Ibid* 763, 765–6 (Griffith CJ), 768 (Barton J), 772 (O'Connor J).

⁸⁶ *Ibid* 768 (Barton J).

⁸⁷ *Ibid* 772 (O'Connor J).

⁸⁸ [1950] VLR 382.

Court of Victoria stated that a gift to a government department for its general purposes could not be charitable.⁸⁹ Putting aside the possibility that a gift to a government department for its general purposes might be a charitable gift for the relief of taxes, this statement was consistent with the idea that a testator might cancel the charitable character of her own gift by choosing administration with respect to the subject matter of the gift. However, of most interest in *In re Cain (dec'd)* is what Dean J said next:

If the Department is able and willing to undertake for the benefit of children under its care some activities over and above its normal duties and is prepared to apply the present gift to that end, then, if such a course is fairly within what the testator intended, the gift would be charitable.⁹⁰

His Honour ruled that this course of action was within the testator's intention and ordered the preparation of a scheme of distribution for the approval of the court.⁹¹ Dean J was prepared to regard a gift to government as charitable insofar as the voluntary character of the gift remained distinct and paramount: in other words, to the extent that the gift could be carried out without treating the testator's choice as a choice for administration with respect to the subject matter of the gift.

The concept of voluntarism also helps to explain cases in which the question of government control has arisen. As I pointed out above, in the *Central Bayside* case, the High Court of Australia refused to endorse a control test unqualifiedly.⁹² This suggests that their decision might be better explained according to a concept other than control. The judgments of the High Court in the *Central Bayside* case indicate that what influenced the Court's decision to recognise the appellant, an organisation that pursued a variety of purposes relating to general medical practice in suburban Melbourne, as charitable, was the presence of voluntarism. For example, Gleeson CJ, Heydon and Crennan JJ stated that:

The history of general practice divisions [of which the appellant was one] suggests that *medical practitioners originally began to cooperate for charitable purposes of their own volition*. The Commonwealth Government perceived that those purposes, which it shared, could be more effectively carried out by government-influenced reorganisation of, and government funding for, the activities of local private medical practitioners, than by enlisting the aid of more remotely located public servants.⁹³

According to Kirby J:

At all times, as a "body", *the appellant was a private corporation, constituted independently of government*. It was only tied to ... governmental purposes so long as those purposes coincided with benefits to the public, the patients and the members, as perceived and accepted by the constituent body of the appellant.⁹⁴

⁸⁹ Ibid 386–7.

⁹⁰ Ibid 387.

⁹¹ Ibid 388.

⁹² See above 10.

⁹³ *Central Bayside (HCA)* (2006) 228 CLR 168, 184–5 (Gleeson CJ, Heydon and Crennan JJ) (emphasis added).

⁹⁴ Ibid 214 (Kirby J) (emphasis added).

Each of these statements implied a distinction between that which is chosen voluntarily (charity) and that which is determined administratively (government). However, it was Callinan J who stated the point most clearly:

*The appellant in this case was entirely voluntarily established. It is not, and has never been, part of a government department. It does not owe its existence to a statute. It is quite separate from government.*⁹⁵

Another aspect of the *Central Bayside* case which the concept of voluntarism helps to explain, is the refusal of the High Court to draw an analogy between that case and the ‘public benevolent institution’ cases. Earlier, I noted that the Court refused to draw such an analogy because the entities before the courts in the ‘public benevolent institution’ cases were all established by statute whereas the appellant in the *Central Bayside* case was not so established.⁹⁶ I also suggested that this was significant, and the reason for its significance should now be clear. An entity that is established by statute lacks a voluntary character; being established by the collective and democratic processes of the State, it is a creature of administration. As a result, it cannot be charitable. So the fact that the appellant in the *Central Bayside* case was not established by statute was only superficially the reason why the High Court refrained from drawing an analogy between the situation of the appellant and the situations of the entities in the public benevolent institution cases. The real, underlying, reason was that the appellant was established by voluntarism whereas the entities in the public benevolent institution cases were not.⁹⁷

It might be thought that a voluntarism analysis of the distinction between government and charity in Australian law runs into an obstacle in the form of the old Chancery case of *Attorney-General v Brown*.⁹⁸ Under an Act of Parliament enacted during the reign of George III, commissioners were appointed to oversee the paving, lighting and cleaning of the town of Brighton, as well as the repair of ‘groyns’ which functioned to keep the sea from encroaching on the town. The commissioners were authorised under the Act of Parliament to impose a levy on coal that was landed at Brighton, the purpose of the levy being to fund the purposes for which the commissioners were appointed. Various complaints were brought against the commissioners by the Attorney-General. The Lord Chancellor, Lord Eldon, had to decide whether the Attorney-General had standing to bring these complaints before him. The Attorney-General argued that the commissioners had

95 Ibid 229 (Callinan J) (emphasis added).

96 See above 10–11.

97 Indeed, this conclusion appears to be reinforced by dicta from Allsop J of the Federal Court of Australia in his first instance decision in *Ambulance Service of New South Wales v Deputy Commissioner of Taxation* [2002] FCA 1023. Having found (at [151]–[152]) that the Ambulance Service of New South Wales was too governmental to be a public benevolent institution, his Honour noted (at [155]) that the Service relied in small measure on voluntarism in the form of gifts from members of the public. In the following paragraph (at [156]) his Honour stated, ‘I have not found the resolution of the question at all easy.’ It would appear that his Honour’s disquiet was attributable in part to this small measure of voluntarism.

98 (1818) 1 Swans 265; [1814–23] All ER Rep 382.

been appointed to carry out charitable purposes, and that the jurisdiction of Chancery was enlivened as a consequence. The commissioners argued that the system set up by the legislature in no way involved charity. The report of the case summarised their argument as follows:

Here is no gift; no transfer of a fund; it is a mere compulsory levy, authorized by the legislature; a local tax. What analogy exists between such an exercise of sovereign power, and the act of an individual proprietor devoting a portion of his property to public purposes?⁹⁹

In other words, the argument of the commissioners was that the town improvement scheme took the form of administration, not voluntarism.

Lord Eldon was of the view that he had jurisdiction in the case. He pointed to previous instances in which the raising of levies by Act of Parliament for public purposes was characterised as charity; in particular he pointed to examples of levies being imposed on commodities landed at ports the repair of which the levies were raised to facilitate.¹⁰⁰ And he quoted the following from *Duke's Exposition of the Statute of Elizabeth*:

Money given by a private donor for repairing a church or chapel is a charitable use; and if this is the law, there is no reason why money given by the public, if it is applied to a charitable purpose, should not be equally within the statute of Elizabeth.¹⁰¹

Attorney-General v Brown therefore appears to stand for the proposition that the core case of administration by government — raising taxes by statute to fund public purposes — might be charitable. If Lord Eldon's analysis stands, it challenges the view that what distinguishes government from charity in Australian law is voluntarism.

However, that analysis does not stand. In *Attorney-General v Heelis*, another town improvement case decided only a few years after *Attorney-General v Brown*, Sir John Leach VC appeared to endorse Lord Eldon's earlier decision.¹⁰² However, a close reading of the decision of the Vice-Chancellor reveals that he drew a significant distinction that was not drawn by Lord Eldon: a distinction between a gift of the legislature or of the Crown for the purpose of improving a town, and the imposition of a tax or a levy by the legislature for that purpose. Only the former was charitable, according to Sir John Leach.¹⁰³ It must be said that it is difficult, in a modern democratic State, to conceive of the legislature, or even the Crown, making a gift in the voluntary fashion contemplated by the Vice-Chancellor. But this ought not to detract from the fact that the distinction drawn by Sir John Leach in *Attorney-General v Heelis* was a distinction between

⁹⁹ Ibid 279.

¹⁰⁰ Ibid 308.

¹⁰¹ Ibid 297.

¹⁰² (1824) 2 Sim & St 67; 57 ER 270.

¹⁰³ Ibid 76–8.

voluntarism and administration. To that extent, *Attorney-General v Heelis* dilutes whatever challenge *Attorney-General v Brown* presents to a voluntarism analysis. Furthermore, in two cases decided in the 1820s, *Attorney-General v Mayor of Dublin* and *Attorney-General v The Mayor and Corporation of Carlisle*, the Court of Chancery pointed out that there had never been any need in *Attorney-General v Brown* to demonstrate the existence of charity to invoke the jurisdiction of Chancery, because Chancery had jurisdiction over the case anyway.¹⁰⁴ In light of these decisions, it is strongly arguable that *Attorney-General v Brown* has negligible or even no value as a precedent when it comes to distinguishing between government and charity, particularly as Lord Eldon himself was one of the judges in *Attorney-General v Mayor of Dublin*.

Once *Attorney-General v Brown* is properly understood, there is no obstacle to concluding that the best view of what distinguishes government from charity in Australian law points to the concept of voluntarism. This conclusion should not be taken to imply that a voluntarism analysis is consistent with all of the decided cases. For example, in *Construction Industry Training Board v Attorney-General*, a majority of the English Court of Appeal found an organisation that had been established by statute and was therefore a creature of administration to be charitable.¹⁰⁵ In the *Central Bayside* case, Kirby J stated that even bodies established by statute could be charitable.¹⁰⁶ And in *In re Cain (dec'd)*, Dean J of the Supreme Court of Victoria took the view that a gift to a government department for its general purposes could not be charitable, presumably even if all of those purposes, considered in isolation, were of charitable character.¹⁰⁷ It is arguable, in light of a voluntarism analysis, that these approaches to the distinction between government and charity were founded on error; indeed, in the *Central Bayside* case, members of the High Court of Australia raised just that possibility with respect to *In re Cain (dec'd)*.¹⁰⁸ However, rather than making that argument, I am content to point to the fact that a voluntarism analysis is consistent with the substantial majority of the decided cases, including the decision of the High Court in the leading *Central Bayside* case. In *Oppenheim v Tobacco Securities Trust Co Ltd*, Lord Simonds, who understood the law of charity better than almost anyone before or since, stated that '[n]o-one who has been versed ... in this difficult and very artificial branch of the law can be unaware of its illogicalities.'¹⁰⁹ With that in mind, consistency with most of the decided cases might be the best that any analysis of a topic in the law of charity can hope for.

104 *Attorney-General v Mayor of Dublin* (1827) 1 Bligh NS 312, 346–8 (Lord Redesdale), 357–9 (Lord Eldon LC); 4 ER 88; *Attorney-General v The Mayor and Corporation of Carlisle* (1828) 2 Sim 437, 449–50; 57 ER 848.

105 [1973] 1 Ch 173 (CA), 188 (Buckley LJ), 188–9 (Plowman J).

106 *Central Bayside (HCA)* (2006) 228 CLR 168, 211 (Kirby J).

107 *In re Cain (dec'd)* [1950] VLR 382, 386–7 (Dean J).

108 *Central Bayside (HCA)* (2006) 228 CLR 168, 181 n 37 (Gleeson CJ, Heydon and Crennan JJ).

109 [1951] AC 297, 307.

5. *Conclusion*

As I have sought to demonstrate in this article, drawing a meaningful distinction between government and charity in Australian law depends on the concept of voluntarism. However, while drawing that distinction is important, it is not uniquely so. Another distinction that demands attention is that between charity and commerce; a moment's attention reveals that this latter distinction does not depend on voluntarism, as charity and commerce are both characterised by individual and autonomous choice. What the distinction between charity and commerce does depend on remains an open question in Australian law, even in light of the High Court of Australia's recent consideration of the matter in *Commissioner of Taxation of the Commonwealth v Word Investments Ltd.*¹¹⁰ The *Word Investments* case teaches us that identifying charity as a species of voluntarism only partly explains what makes charity distinct in our law from other modes of social interaction. However, as I hope to have shown in this article, pointing to voluntarism as that which makes charity distinct from government is an important component of any complete explanation of the nature of charity in Australian law, whatever else that explanation contains.

110 (2008) 236 CLR 204.