CENTRAL BAYSIDE GENERAL PRACTICE ASSOCIATION LIMITED.. ..... APPELLANT;
APPELLANT,

AND

COMMISSIONER OF STATE REVENUE OF THE STATE OF VICTORIA.. ..... RESPONDENT.
RESPONDENT,

[2006] HCA 43

ON APPEAL FROM THE SUPREME COURT OF VICTORIA

HC of A 2006

May 17; *Aug* 31 2006

Gleeson CJ, Kirby, Callinan, Heydon and Crennan JJ

Pay-roll Tax — Exemption — Charitable body — Not-for-profit company — Activities directed to improving health care in specified area — Pay-roll Tax Act 1971 (Vic), s 10(1)(bb).

Charity — Government funding — Whether precludes charitable status.

Section 10(1)(bb) of the *Pay-roll Tax Act 1971* (Vic) provided that the wages liable to pay-roll tax under the Act did not include wages paid or payable by a charitable body to a person during a period in respect of which the body satisfied the Commissioner that the person was engaged exclusively in work of the body of a charitable nature.

A Victorian not-for-profit company limited by guarantee was funded almost entirely by Commonwealth grants, 45 per cent of which came from an "Outcomes Based Funding" grant. The company's objects and activities were directed to improving health care in a specified area, and were consistent with government policy. The Commissioner of State Revenue refused to grant the company an exemption from pay-roll tax on the ground that it was not a charitable body for the purposes of s 10(1)(bb). The Commissioner contended that the company was so much under the control or influence of the government that it must be regarded as acting in furtherance of the government's objectives as well as its own. That the company's purposes were beneficial to the community was not in issue.

Held, that the company was a charitable body in that its purpose was charitable, even though the substantial source of the funds it used to carry out that purpose was the government.

Per Gleeson CJ, Heydon and Crennan JJ. The word "charitable" having a technical meaning, that is, as defined in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 by reference to the spirit and intendment of the preamble to the *Statute of Charitable Uses Act 1601*, the general rule applied so that it should be understood in that sense in s 10(1)(bb) in the absence of any apparent contrary intention.

Chesterman v Federal Commissioner of Taxation (1925) 37 CLR 317, applied.

Decision of the Supreme Court of Victoria (Court of Appeal): *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151; 2005 ATC 4586, reversed.

APPEAL from the Supreme Court of Victoria.

The Commissioner of State Revenue of the State of Victoria determined that Central Bayside Division of General Practice Ltd (Central Bayside) was not exempt from pay-roll tax as it was not a charitable body. Central Bayside's objection to this determination was disallowed. On referral to the Victorian Civil and Administrative Tribunal (Mr Geoffrey Gibson) the determination was upheld. Central Bayside appealed from that decision to the Supreme Court of Victoria under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). Nettle J (1) held that Central Bayside was not a charitable body. The Court of Appeal (Chernov JA and Osborn A-JA, Byrne A-JA dissenting) dismissed an appeal by Central Bayside from that decision (2). Central Bayside was granted special leave to appeal from the Court of Appeal to the High Court by Heydon and Crennan JJ. The Commonwealth of Australia was given leave to be heard as amicus curiae.

B J Shaw QC (with him *J J Batrouney* SC and *L G De Ferrari*), for the appellant. If a body has charitable objects it is a charitable body, even if it be wholly or partially funded by government, even if it is subject to substantial or complete governmental control, and even if it performs work or has functions which government may perform or carry out (3). The premise that there is something about government which is antithetical to charity is erroneous. The purposes of a government department are not charitable and a government department is not a charitable institution because the purpose or object of the department is to implement relevant government policies. However that does not mean that a body which has otherwise charitable purposes will fail to be a charitable body because its

(1) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2003) 53 ATR 473; 2003 ATC 4835.

(2) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151; 2005 ATC 4586.

(3) *In re Cain; National Trustees Executors & Agency Co of A/asia Ltd v Jeffrey* [1950] VLR 382; *Robison v Stuart* (1891) LR 12 (NSW) Eq 47; *Attorney-General (Vic) v M'Carthy* (1886) 12 VLR 535; *Re Sutherland; Queensland Trustees Ltd v Attorney-General (Qld)* [1954] St R Qd 99; *In re Morgan's Will Trusts; Lewarne v Minister for Health* [1950] Ch 637; *In re Frere; Kidd v Farnham Group Hospital Management Committee* [1951] Ch 27; *Re Dean's Will Trusts; Cowan v Board of Governors of St Mary's Hospital, Paddington* [1950] 1 All ER 882; *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304; 3 ALR 486; *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 371.

purposes are purposes which government supports and seeks to have implemented and the implementation of which it funds through the body. It is not the law that any body or institution which performs any work or function of the kind government performs cannot be a charitable body. If that were so, no school could be a charitable body. The exclusion of State instrumentalities in s 10(1)(bb) would be otiose if, absent the exclusion, such instrumentalities might not have been included in the phrase "a charitable body". Cases concerning public benevolent institutions are irrelevant as the concept of public benevolent institution is different from that of charitable body.

The appellant was an ally rather than an agent of government as no governmental control was exercised over its management, it played an active role in itself selecting the particular projects it undertook for the benefit of the community, and its management was undertaken by elected members without stipend from the Commonwealth. The outcomes-based funding was no more than the government making funds available to a charity for its charitable purposes while specifying the manner in which it wishes the funds to be used to achieve those purposes and requiring that it be kept informed that the funds have been expended accordingly.

M M Gordon SC (with her *P R D Gray*), for the Commonwealth as amicus curiae. The phrase "charitable body" in s 10(1)(bb) has a technical legal meaning (4) in the absence of contrary intention (5). The test of whether a body is a charitable body focuses on its purposes (6) and in particular, whether those purposes come within the spirit of the Preamble to the Statute of Elizabeth (7). First it is necessary to identify the main purposes for which the body exists (8). Such purposes are the body's irrespective of whether they are also, or

(4) *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317.

(5) *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224.

(6) *Hobart Savings Bank & Launceston Bank for Savings v Federal Commissioner of Taxation* (1930) 43 CLR 364; *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436; *Congregational Union of NSW v Thistlethwayte* (1952) 87 CLR 375; *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380; *Stratton v Simpson* (1970) 125 CLR 138; *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659; *Trustees of Church Property of the Diocese of Newcastle v Lake Macquarie Shire Council* [1975] 1 NSWLR 521; *Presbyterian Church (NSW) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387.

(7) *Charitable Uses Act 1601* (Imp); 43 Eliz I c 4.

(8) *Hobart Savings Bank & Launceston Bank for Savings v Federal Commissioner of Taxation* (1930) 43 CLR 364; *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436; *Sydney Homœopathic Hospital v Turner* (1959) 102 CLR 188; *Royal College of Nursing v St Marylebone Corporation* [1959] 3 All ER 663; *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659; *Cronulla-Sutherland Leagues Club Ltd v Federal Commissioner of Taxation* (1990) 23 FCR 82.

were first, the purposes of government. Secondly, those purposes must be characterised as charitable or not (9): to this, the source of the body's funds is irrelevant (10). To exclude from the phrase "charitable body" bodies which would be charitable but for the consistency of their objects or activities with government policy or the source of their funding would be an unwarranted redefinition of the phrase. Indeed, consistency with government policy is a mark of the public benefit of a purpose. The express exclusion in s 10(1)(bb) of state instrumentalities would be superfluous if charitable bodies were generally to be excluded on the basis of proximity to the government. Government and charity cannot be differentiated by reference to the nature and character of the services provided or the activities undertaken. Public benevolent institutions are not relevant to this case. The Act treats them separately from charitable bodies as they are a statutory, not a general law, concept, are for the relief of poverty, sickness, destitution or helplessness and have an eleemosynary element in their character (11), unlike charitable bodies (12). On the facts, the company was not an agent or instrumentality of government (13). The Commonwealth did not control the conduct of the affairs of the company (14). The company was not a statutory body (15) or formed by the executive government. The company was not authorised to bind the Commonwealth in legal relations with others (16). The company was not subject to the financial controls imposed by statute on government bodies. The outcomes-based grant imposed contractual considerations rather than the legal coercion or compulsion that would be associated with control exercised by government over its agents or instrumentalities.

I J Hardingham QC (with him *S G O'Bryan* SC and *R J Orr*), for the respondent. A government department is not a charitable body when it acts to implement government policy. Similarly a body which has charitable objects, but which acts so much under the control or

(9) *Hobart Savings Bank & Launceston Bank for Savings v Federal Commissioner of Taxation* (1930) 43 CLR 364.

(10) *Jacobs' Law of Trusts in Australia*, 6th ed (1997) Ch 10, p 185 [1004], citing *Robison v Stuart* (1891) 12 LR (NSW) Eq 47 at 49-50 and *Perpetual Trustee Co Ltd v Shelley* (1921) 21 SR (NSW) 426 at 441.

(11) *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224; *Public Trustee (NSW) v Federal Commissioner of Taxation* (1934) 51 CLR 75; *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388.

(12) *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317; *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659.

(13) *Deputy Federal Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219.

(14) *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 83 [64].

(15) *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.

(16) *Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41; *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644; *Scott v Davis* (2000) 204 CLR 333.

influence of government that it could be seen to be acting to implement government policy rather than in the independent performance of its own charitable objects, will not be acting charitably. The body would be acting to further the government's purpose and objectives for the government's benefit rather than to further its own purposes and exclusively for the community's benefit. This would be the case even if the activities performed by the body would be characterised as charitable if performed in furtherance of its own objects. An organisation will not be a public benevolent institution within the meaning of s 10(1)(ba) of the *Pay-roll Tax Act* if the government exercises sufficient control and influence over its activities for the organisation to be seen to act in the discharge or furtherance of government policy rather than independently for the benefit of the community or a section thereof (17). The proposition that if a body has charitable objects it is a charitable body, even if it be wholly or partially funded by government and even if it is subject to substantial or complete government control, is not supported by authority (18). The exclusion of State instrumentalities from s 10(1)(bb) is a matter of legislative caution, not intended to imply that such instrumentalities might otherwise have been included in the phrase "charitable body" (19). It is unlikely that government departments should prima facie have been included in that expression (20). Outcomes-based funding enabled government to exercise more effective control over divisions of general practice. The outcomes to be achieved by recipients of funding under outcomes-based funding agreements are in keeping with the current aims of government. The company, in entering into such an agreement, submitted to the control and management of the Commonwealth. [He also referred to *Maughan v Federal Commissioner of Taxation* (21) and *Cronulla-Sutherland Leagues Club Ltd v Federal Commissioner of Taxation* (22).]

B J Shaw QC, in reply.

Cur adv vult

31 August 2006

(17) *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224; *Public Trustee (NSW) v Federal Commissioner of Taxation* (1934) 51 CLR 75; *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (1990) 27 FCR 279; *Mines Rescue Board (NSW) v Federal Commissioner of Taxation* (2000) 101 FCR 91; *Ambulance Service (NSW) v Federal Commissioner of Taxation* (2003) 130 FCR 477.

(18) *In re Frere; Kidd v Farnham Group Hospital Management Committee* [1951] 1 Ch 27.

(19) Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 November 1992, p 566.

(20) *In re Cain; National Trustees Executors & Agency Co of A/asia Ltd v Jeffrey* [1950] VLR 382.

(21) (1942) 66 CLR 388.

(22) (1990) 23 FCR 82.

The following written judgments were delivered: —

1 GLEESON CJ, HEYDON AND CRENNAN JJ. The question is whether the wages paid in the period 1 July 2001 to 30 June 2002 by the appellant, Central Bayside General Practice Association Ltd, are exempt from pay-roll tax under the *Pay-roll Tax Act 1971* (Vic), s 10(1)(bb). That question in turn depends on whether the appellant was in that period a "charitable body" (23).

2 On 14 December 2001 the State Revenue Office determined that these questions should be answered in the negative, and refused to grant the appellant an exemption from pay-roll tax. The appellant objected to that decision on 29 January 2002, but a delegate of the Commissioner of State Revenue disallowed the objection on 16 July 2002. On 10 September 2002 the appellant requested the Commissioner to refer the matter to the Victorian Civil and Administrative Tribunal. The Taxation Division of the Tribunal agreed that the questions should be answered in the negative. So did the Commercial and Equity Division of the Supreme Court of Victoria (Nettle J) (24) and the Court of Appeal of the Supreme Court of Victoria (Chernov JA and Osborn A-JA, Byrne A-JA dissenting) (25).

3 At the commencement of argument in the appellant's appeal to this Court, the Commonwealth of Australia was given leave to be heard as amicus curiae. It argued in support of the appellant. For the reasons given below the appeal should be allowed.

The constitution and activities of the appellant

4 In order to understand the course of the proceedings below and the arguments advanced in this Court, it is necessary to examine the constitution and activities of the appellant.

5 *Appellant's object.* The appellant was registered as a company limited by guarantee in Victoria on or around 7 February 1994 under the provisions of the *Corporations Law* (Vic). In the course of the relevant tax year, on 13 November 2001, the appellant adopted a new constitution. This was similar to its initial memorandum and articles of association, and no point was made of any differences. Clause 5.2 provided:

(23) Section 10(1)(bb) provides: "(1) The wages liable to pay-roll tax under this Act do not include wages paid or payable — … (bb) by a charitable body (other than a school or educational institution or an instrumentality of the State) to a person during a period in respect of which the body satisfies the Commissioner that the person is engaged exclusively in work of the body of a charitable nature …"

(24) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2003) 53 ATR 473; 2003 ATC 4835.

(25) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151; 2005 ATC 4586.

"The company must not distribute any of its profit, income or assets directly or indirectly to its members."

Clause 5.1 provided:

"The company may only use its income, assets and profit for its object."

Clause 4.2 provided:

"The company may only exercise its powers for its object."

Clause 3 described the object of the appellant as being "to improve patient care and health, primarily in the Central Bayside area of Melbourne" by the following nine methods:

"(a) improving communication between general practitioners and other areas of the health care system;

(b) more effectively integrating general practice with other elements of the health care system;

(c) enabling general practitioners to contribute to health planning;

(d) providing better access to available and appropriate general practitioner services for patients, and reducing inappropriate duplication of services;

(e) meeting the special (and localised) health needs of groups (such as Aboriginal and Torres Strait Islanders and those with non-English speaking backgrounds) and people with chronic conditions, particularly where these needs are not adequately addressed by the current health care system;

(f) advancing general practice, and the health and well-being of general practitioners;

(g) enhancing educational and professional development opportunities for general practitioners and undergraduates;

(h) increasing general practitioner focus on illness prevention and health promotion; and

(i) improving the effectiveness and efficiency of health services at the local level."

6 *Appellant's activities.* The Central Bayside area covers 92 km^2 of suburban Melbourne. The activities actually carried out in the relevant year included improving the health information systems used in general practices; extending immunisation coverage within the Central Bayside area; assisting in the professional development of members; assisting and encouraging general practitioners within the Central Bayside area to upgrade their accreditation; implementing a model of care programme in general practice based on decision support software; engaging in collaborative projects with the Pharmacy Guild of Australia to facilitate cooperation between general practitioners and pharmacists in managing patient health and developing a community-based model of falls and falls injury prevention for frail and aged persons.

7 *Appellant's members.* The appellant has two categories of members – primary and associate. Any general practitioner of medicine who

practises in the Central Bayside area and supports the object of the appellant is eligible for primary membership: cl 7.1. Any person who supports the object of the appellant is eligible to be an associate member: cl 7.2. There is no provision for government representation among the members. In November 2002 all of the appellant's members were general practitioners: 180 general practitioners in practice in the Central Bayside area were primary members and seventy general practitioners who were not in practice in that area were associate members. By cll 12.1 and 12.2 the liability of members was limited to a duty to contribute up to $10 each on winding up.

8 *Appellant's directors.* The board of directors is responsible for the management of the appellant: cl 42.1. There are nine directors elected at the annual general meeting, with power for the board to co-opt an additional director: cll 29.1, 30.2 and 31.1. There are no government appointees on the board.

9 *Distribution of assets on winding up.* Clause 62 provided:

> "62.1 If the company is wound up, its remaining assets must not be distributed to any member.
>
> 62.2 Instead the remaining assets must be given to a body, trust or fund that:
>
> (a) has a similar object to the company; and
>
> (b) also prohibits the distribution of profit, income and assets to its members to at least as great an extent as this constitution."

10 Finally, cl 53 provided:

> "The funds of the company may be derived from grants, fund-raising activities, subscriptions, interest and any other sources approved by the Board."

11 *Commonwealth grants to the appellant.* The total revenue of the appellant in the relevant year was $1,048,979. Of that, $1,006,997 came from Commonwealth grants. Approximately 45 per cent of that figure came from a Commonwealth grant called an "Outcomes Based Funding" grant (OBF grant). The other grants were predominantly project based. The distinction is that the latter kind of grant funds a particular activity, whatever the outcome, and the former type of grant funds activities directed to the achievement of specified outcomes.

12 *OBF Agreement.* OBF grants were supplied to the appellant under an OBF Agreement made in 1999 between the Commonwealth "as represented by" the Department of Health and Ageing (the Department). For reasons discussed below (26), in that agreement the appellant was described as "the Division". Recital A of the agreement stated that the Department provided funding to bodies like the appellant "to enable general practitioners to conduct activities to improve integration with other elements of the health system and to address identified local health needs". Clause 2.1 compelled the

(26) See [14].

appellant to conduct "Programs of Activity" as described in Sch 1 in accordance with the requirements set out in Sch 1. Clause 2.3 provided:

> "The Division will comply with the requirements regarding identified Outcomes for Outcomes-Based Funding as specified in Schedule 2."

Schedule 1, cll 1-8 provided:

> "1. The Division shall conduct the Programs of Activity as described in the following documents:
>
> • The Division's *extended Strategic Plan for the period 1 July 1999 to 30 June 2003* (Attachment 1 to this Agreement);
>
> • The *Division's approved Business Plan for the period 1 July 2002 to 30 June 2003* (Attachment 2 to this Agreement).
>
> 2. The Division shall undertake Programs of Activity in accordance with the requirements set out in the *Implementation Guide for Outcomes Based Funding – May 1999* (Attachment 3 to this Agreement).
>
> 3. The Division shall provide Programs of Activity which are based on a national framework for Divisions within which decision making and priority setting is focussed on activities in four distinct areas:
>
> 1. Population Health
> 2. Services by General Practitioners to patients
> 3. Services to General Practitioners by the Division
> 4. Infrastructure
>
> 4. The Division shall undertake activities which are linked to the above *four sectors* in the Division's current Business Plan to achieve the Outcomes identified in the Division's *extended Strategic Plan 1999-2003*.
>
> 5. The Division shall prepare a Business Plan that is consistent with the *extended Strategic Plan* for each year of operation of this Agreement.
>
> 6. The Division's *approved Annual Business Plan for 2002-2003* submitted to the Department appears as Attachment 2 to this Agreement.
>
> 7. The Divisions shall submit their *Annual Business Plan for 2000-2003* to the Department for approval as follows:
>
> Business Plan 2000-2001 Due 31 March 2000
> Business Plan 2001-2002 Due 31 March 2001
> *Business Plan 2002-2003 Due 31 March 2002*
>
> 8. When approved the Business Plan shall be deemed to form part of this Agreement (Attachment 2) and will replace the Business Plan for the previous year."

Attachments 1, 2 and 3 were not in evidence; however, it is clear that

the "Programs of Activity" to be funded were suggested by the appellant in its "extended Strategic Plan" and its annual "Business Plans". That flows from cl (A) of Sch 2 which obliged the appellant to "conduct activities … that are designed to achieve the identified Outcomes as set out in the [appellant's] *extended Strategic Plan 1999-2003* and [its] current Business Plan". Clause (B) of Sch 2 provided:

> "The identified Outcomes shall be in keeping with:
>
> (i) the Current Aims and Intended Outcomes of the Divisions of General Practice Program as set out in this Schedule; and
>
> (ii) the Implementation Guide for Outcomes Based Funding – May 1999 (Attachment 3 to this Agreement)."

The "Current Aims and Intended Outcomes of the Divisions of General Practice Program" were then described in rather general terms. The "main aim", for example, was:

> "To improve health outcomes for patients by encouraging GPs to work together and link with other health professionals to upgrade the quality of health service delivery at the local level."

13 In short, the function of the appellant was to devise a Strategic Plan and Business Plans identifying relevant outcomes. Once the Strategic Plan and Business Plans were approved by the Department, they became part of the Agreement. The appellant's duty was then to conduct activities designed to achieve the outcomes described in those plans.

14 *The evolution of* "*divisions*". The expression "division", when used in relation to general medical practitioners, refers to an organisational structure enabling general practitioners to work together to improve health care, meet local goals and targets, promote preventative care and respond more rapidly to changing community health needs. From the mid-1970s hospital-based departments of general practice began to emerge as a focus for the hospital-related activities of general practitioners. By 1991, there were thirty-one departments of general practice, but their development was hindered by a lack of substantial infrastructure funding. In 1992 the Commonwealth Government began to provide funding for the establishment of divisions of general practice, and by 1993, there were 100 divisions in place, covering about 80 per cent of the geographical area of Australia. By the late 1990s there were a total of 123 divisions across the country receiving Commonwealth funds with a general practitioner membership level of over 80 per cent.

15 One technique by which Commonwealth money is made available to fund divisions is the making of OBF grants on the terms of OBF Agreements in the form of the one to which the appellant is a party. There is similarity between these OBF Agreements in the sense that each OBF Agreement is in an identical standard form, but for two differences. First, in each case a different division is party to the OBF

Agreement with the Commonwealth. Secondly, each division's extended Strategic Plan and approved Business Plans are likely to differ (27).

The proceedings below

16 The course of the proceedings below was affected to some extent by a change in the Commissioner's position.

17 *Dealings between the appellant and the revenue authorities.* Why, in its decision of 14 December 2001, did the State Revenue Office refuse to grant the appellant an exemption from pay-roll tax on the basis that s 10(1)(bb) of the Act did not apply? It gave the following reason: that the appellant was "predominantly a professional body with the aim of promoting the interests of its members". In its notice of determination of 16 July 2002 disallowing the appellant's objection to the decision of 14 December 2001 and declining to grant an exemption from pay-roll tax, the Commissioner, through a delegate, adhered to a similar position. The Commissioner said that the appellant "exists for the benefit of its members independently of whether benefits flow to the public".

18 *Proceedings before the Tribunal.* Before the Tribunal, the Commissioner attempted to rely on a new ground: "[T]hat the Commissioner was not satisfied that the relevant employees were engaged exclusively in work … of a charitable nature." The Tribunal declined to allow that point to be agitated. The Commissioner maintained the contention that the appellant existed principally for the benefit of its members. The Tribunal rejected that contention, and said that the appellant existed for purposes beneficial to the community. However, it held that the appellant's purposes were not charitable (28),

(27) The propositions in the last three sentences are not directly supported by the evidence, for only a pro forma OBF Agreement was in evidence, and the Strategic Plan and Business Plans of no division, not even the appellant, were in evidence. However, the propositions stated may be inferred from the form of the appellant's OBF Agreement, from the differences in circumstances between the various parts of Australia, and from the fact that there is evidence that the 123 divisions which by 1998 covered the whole of Australia were "quite heterogeneous divisions varying in size, number of GP members, resources, organisational structures, management expertise and range of activities". These factors suggest that the Strategic Plan and Business Plans of each division are likely to differ. The truth of the propositions in the text was conceded by the Commissioner.

(28) The Tribunal, the four judges of the Supreme Court of Victoria, and counsel in their arguments in this Court proceeded upon the assumption that "charitable" in s 10(1)(bb) was used by the Victorian Parliament in its technical legal sense – that is, as defined by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 by reference to the spirit and intendment of the preamble to the *Statute of Charitable Uses Act 1601*. That assumption reflected the general rule that, the word "charitable" being a word that has a technical legal meaning, when it is used in a statute it should be understood in its legal sense unless a contrary intention appears. It was not suggested that a contrary intention appears in the statute presently under consideration. It is not easy to see a basis upon which such a suggestion might have been made with any degree of plausibility. The general rule just mentioned has been accepted as the law in this

on the ground that services provided by the appellant were "provided in substance at the expense of the Federal Government and, most importantly, as an integrated part of a scheme of national health management presided over by the Federal Government". The appellant was "too close to being an arm of government or a part of bureaucracy … to be an organisation whose objects come within the concept of charity …". It was "not just an ally of government but an essential part of it".

19 *Proceedings before Nettle J*. Before Nettle J, the Commissioner abandoned reliance on the contention that the appellant's main purpose was to protect and advance the interests of its members. Nettle J doubted the soundness of this course (29) but did not in terms depart from it (30). He did, however, disagree with the Tribunal's view that the appellant was "an essential part" of government, or "close to being an arm of government": he said it was not a department or other instrumentality of government, that it was in its own hands as to whether it would seek government funding and subject itself to any conditions attached to the funding, and that the Commonwealth's only control over it was the power of the purse (31). Nettle J said that the question whether the appellant was a charitable body turned on its main purposes, and they depended on its constitution, activities, history and control. He said that having regard to these matters "and in particular, to the extent to which the Division's activities of providing services to its members are funded and thereby controlled by the Commonwealth", he was not persuaded that the appellant was a charitable body (32).

(cont)

country at least since the decision of the Privy Council in *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317. 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. It is the understanding that has been acted upon by those who have presented, argued and decided the present case. It accords with principle and with fairness. There is no occasion to call the rule in question, especially in the absence of any formulation of a reasonably clear alternative, and an examination, by the usual procedures of adversarial litigation, of its implications.

(29) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2003) 53 ATR 473 at 476 [8], 481 [13]-[14]; 2003 ATC 4835 at 4837, 4841. So did the Court of Appeal: *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 153 [3]; 2005 ATC 4586 at 4588 per Chernov JA.

(30) Nor did the Court of Appeal: *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 159-160 [21]; 2005 ATC 4586 at 4593 per Chernov JA. The Court of Appeal declined to hear argument from the Commissioner that the abandonment of the contention before Nettle J was erroneous: *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 153 [3]; 2005 ATC 4586 at 4588 per Chernov JA; at 161-162 [27]; 4594-4595 per Byrne A-JA.

(31) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2003) 53 ATR 473 at 486 [29]; 2003 ATC 4835 at 4845.

(32) *Central Bayside Division of General Practice Ltd v Commissioner of State*

20 *Proceedings in the Court of Appeal.* In the Court of Appeal, Chernov JA dismissed the appeal on the ground that the appellant's "core activities are performed pursuant to the dictates of government" (33). These dictates were said to lie in the terms of the OBF Agreement (34). Osborn A-JA dismissed the appeal on the ground that the appellant was "a creature and agent of government"; he agreed with Chernov JA's reasons and added some of his own (35). Byrne A-JA dissented. He concluded that the appellant was not "the mere creature or agent of the Commonwealth government". He said (36):

> "No government control is exercised over its management. It plays an active role in itself selecting the particular projects which it undertakes for the benefit of its community. These features and the fact that its management is undertaken by its elected members without stipend from the Commonwealth shows that its relationship is more … that of an ally than that of an agent."

Concessions by the Commissioner

21 The Commissioner disclaimed any submission that the appellant was not a charitable body merely on the ground that: (a) most of its funds came from the Commonwealth Government; (b) it performed work or functions which the government might have performed or ordinarily performed; (c) the funding provided by the government to the appellant was designated to be used for particular purposes; or (d) the government supported the appellant's purposes and sought to have them implemented and furthered by funding the appellant.

22 The Commissioner also implicitly conceded that nothing in the constitution of the appellant – creating a corporation having a board of directors and members without any government representatives; with an object expressed in the language of charity; with provisions preventing the expenditure of the appellant's income or assets otherwise than in furtherance of its object; and with provisions requiring the assets on winding up not to go to members but only to go to a body, trust or fund with a similar object – prevented it being a charitable body.

The Commissioner's case

23 In the light of these concessions, the Commissioner's case was a narrow one. The appellant posed as the key issue whether a body like

(cont)

Revenue (Vic) (2003) 53 ATR 473 at 486 [33]; 2003 ATC 4835 at 4845.

(33) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 160 [21]; 2005 ATC 4586 at 4593.

(34) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 158-159 [18]; 2005 ATC 4586 at 4592.

(35) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 171-172 [61]-[62]; 2005 ATC 4586 at 4602-4603.

(36) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 170 [57]; 2005 ATC 4586 at 4601.

the appellant, the sole purpose of which was in this Court conceded to be charitable, was precluded from being a "charitable body" within s 10(1)(bb) because of its relationship with the Commonwealth Government. The Commissioner contended that it was precluded because it acted so much under the control or influence of government that it could be seen to be acting in furtherance of government objectives rather than, or as well as, in the independent performance of its own objects. Counsel for the Commissioner said that his case in a nutshell was that if no more appeared than that the appellant's members formed the appellant and caused it to carry out the activities it in fact carried out, it would be a charitable body, but because about 93 per cent of its income came from Commonwealth funding, with about half of those funds being OBF grants received pursuant to its OBF Agreement, there was control and influence by government to such an extent that the appellant was carrying out, not its own purposes, but the purposes of the Department, which, since it was a government department, could not have charitable purposes (37).

Issues to be put aside

24 The parties were at issue on the question whether a body with charitable objects could not be a charitable body if it were subject to substantial or complete government control, and, on a related question, whether a body, to be charitable, must independently carry out its charitable purpose. It is convenient at this stage to assume affirmative answers to these questions, that is, answers favourable to the Commissioner, and to turn instead to the question whether in truth there was here governmental control and influence to such an extent that the appellant was carrying out the Department's purposes rather than its own purpose.

The Commissioner's sub-arguments

25 The Commissioner's contention was advanced through particular sub-arguments.

26 *Acting at the behest or bidding or as the puppet of the Government.* First, the appellant was said to act only at the behest, or at the bidding, or as the puppet, of the Department. However, it turned out that these expressions related only to the process by which the appellant entered its OBF Agreement and to the regime of obligations which that Agreement imposed, and lacked any content independent of those matters.

27 *Incapacity to negotiate.* The Commissioner contended that divisions like the appellant did not "negotiate … [the OBF] Agreements". It was

(37) No counsel advanced argument to suggest that Dean J had been wrong in holding in *In re Cain; National Trustees Executors & Agency Co of A/asia Ltd v Jeffrey* [1950] VLR 382 at 387 that "a gift for carrying on the ordinary activities of a Government department pursuant to a statute … is not a gift for charitable purposes, even if the activities are such that if carried on by private persons they would be charitable".

said that the Agreements were "uniform and are presented by the Commonwealth on a take it or leave it basis". If a division refused to sign it would "wither on the vine" because it would cease to receive Commonwealth funding.

28 There are three answers to this argument.

29 The first answer is that while the OBF Agreements are in large measure in a standard form, the central obligations created for a division like the appellant depend on the "Programs of Activity" as described in the relevant division's extended Strategic Plan and approved Business Plans. Although the plans submitted by the divisions will not become part of a division's OBF Agreement unless the Commonwealth agrees, the plans are devised by each division to suit its own purposes, resources, problems and personnel. It is for each division to identify for what it wants the Commonwealth funding. The Commissioner denied that the divisions had any autonomy, because they were obliged by cl 3 of Sch 1 to provide programmes of activity based on a national framework within which decision making and priority setting was focused on activities in four areas (namely, population health, services by general practitioners to patients, services to general practitioners by the division, and infrastructure). The Commissioner submitted that these four areas were not nominated by the divisions but were instead presented by the Department. The problem with this approach is that the Commissioner failed to indicate anything restrictive about those four very general areas, which appear to cover the universe of relations between a division and general practitioners and between general practitioners and the population. Byrne A-JA was correct to conclude that the appellant "plays an active role in itself selecting the particular projects which it undertakes for the benefit of its community" (38).

30 The second answer is that the evidence does not reveal that there was in fact any incapacity to negotiate. There was no legal compulsion on the appellant to seek funding from the Commonwealth, and the evolution of divisions suggests that the Commonwealth felt some pressure to ensure that divisions like the appellant entered OBF Agreements so that the Commonwealth's desires could be carried out. The Commonwealth referred to evidence by the Chief Executive Officer of the appellant that after the late 1990s the Commonwealth "moved to a [system of] block grant[s] and set some broad outcome indicators and said, 'You shall do a variety of things that will meet these outcomes'". This summary was directed only to the distinction between activity funding and outcome funding, not to the precise way the Commonwealth behaved in its communications with divisions. That apart, as the Commissioner accepted, there was no admissible evidence of how the appellant and the Department had behaved when

(38) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 170 [57]; 2005 ATC 4586 at 4601.

the appellant proposed its extended Strategic Plan and its Business Plans, and whether any process of bargaining or amendment to those Plans had taken place or could take place.

31 The third answer is that even if it were the case that the Commonwealth declined to negotiate about Strategic and Business Plans, and even if a failure by the appellant or any other division to enter an OBF Agreement would impair or destroy its capacity to function, it does not necessarily follow that the fact of entry by the appellant into an OBF Agreement of itself establishes that the appellant is under the control of the government. However, its terms might create that control, and the Commissioner submitted that in this case they did.

32 *Ongoing contractual management and control.* The Commissioner relied on two aspects of the OBF Agreement. One was that it compelled the appellant to conform with the Strategic Plan and the Business Plans. The second was that the Agreement provided for periodic reporting by the appellant (cl 7.1 and Sch 3), provided for liaison by the appellant with the Department as required (cl 8.1), provided for the Department to have access to the appellant's premises and records (cl 19), prohibited subcontracting without the Department's consent (cl 22), gave the Department power to procure the replacement of personnel undertaking work in relation to Programs of Activity (cl 23) and gave the Department power at any time to terminate the Agreement or reduce the scope of the Programs of Activity (cl 24.1).

33 It is common for the donors of funds for charitable purposes to attach conditions to the gift or to stipulate mechanisms pursuant to which the funds are to be expended. These conditions or stipulations do not affect the charitable character of gifts. In addition, the Department is obliged by s 44 of the *Financial Management and Accountability Act 1997* (Cth) to manage its affairs in a way that promotes the efficient, effective and ethical use of its resources. Recital C of the OBF Agreement refers to this obligation:

> "The Department is required by law to ensure the accountability of Program Funds and accordingly, the Division is required to be accountable for all Department Funds received."

The expression "Program Funds" means funding supplied by the Department under Sch 4 for the programmes of activity to be carried out by the appellant pursuant to Schs 1 and 2. The clauses which make the appellant accountable are not properly characterised as forms of control by the Department, but simply as methods of ensuring that the Department itself complies with the law.

34 *Ongoing review by the Department.* The Commissioner relied on a letter of 14 September 2001 from the Department foreshadowing the "development of a strategic planning and performance reporting framework". The Commissioner also relied on a letter dated April 2002 from the Department to the appellant (and presumably all other divisions) indicating that the Department proposed "to undertake a more considered approach in developing future funding agreements

with Divisions and identifying the services the Commonwealth wishes to purchase from Divisions". Finally, the Commissioner relied on the existence of a Commonwealth Government review of the future role of Divisions of General Practice.

35 The Commissioner did not make clear how these events supported the argument. They add nothing to the arguments relating to the capacity of the Commonwealth to attach conditions to the advance of funds by inserting appropriate terms in the OBF Agreements. The Commissioner relied on Osborn A-JA's statement that the Chief Executive Officer of the appellant "implicitly accepted" in evidence "that it would be the Commonwealth Government which determined the ongoing role of the Division" (39). That overlooks the fact that the role of divisions will in truth evolve as a compromise between the desires of the Commonwealth and those of the divisions.

36 *Implementing government purposes.* The Commissioner, while accepting that a public hospital which received all its income from grants by the Commonwealth or a State subject to conditions was a charitable body, failed to explain how the appellant was different. The Commissioner said that the hospital was acting primarily in furtherance of its own purposes, but that the appellant did not: it "acted to implement certain government purposes directly". The Commissioner said that the government prescribed the purpose: in fact the appellant prescribed the purpose and the government agreed.

37 The Commissioner also accepted that if a wealthy foundation had approached the appellant and offered it money for the purposes and in the terms set out in the OBF Agreement, that would be a valid charitable gift, because the donor would not have "independent non-charitable purposes" of its own which it would require to be furthered. But just as the appellant's purposes would be identical with the foundation's, so the appellant's purposes are identical with those of the Department.

38 The Commissioner submitted that the difference between a hospital receiving funds from the government, or the appellant receiving funds from a foundation, on the one hand, and the appellant receiving funds under the OBF Agreement, on the other, was that in the latter instance "the whole system was set up to implement government policy".

39 The appellant, while receiving funds under the OBF Agreement, was not independently pursuing its own charitable purposes, but was rather implementing government policy, even if its purposes "are consonant with or coincide with government policy". This argument is unsound. The appellant had a certain charitable purpose. The government wanted to advance the very same purpose. The appellant decided to advance its purpose by receiving funds from the government and spending them in the manner it did. These events did not cause the appellant to cease to

(39) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 172 [62]; 2005 ATC 4586 at 4602.

be a charitable body merely by reason of the fact that the government is not a charitable body. Many charities implement government policy in the sense that their goals – providing education, aiding the sick and the poor – are the same as those of the government. Thus "a trust for the benefit of inmates in government mental asylums, or for the benefit of children under the care of the Children's Welfare Department would be charitable" (40). The history of general practice divisions 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.

40 The appellant submitted that the Commissioner's stand rested on a confusion between the purpose of the appellant in acting "to improve patient care and health", which is a purpose shared by the Commonwealth, and the purpose of a body to give effect to government purposes, whatever they might be. The mere fact that the appellant and the government both have a purpose of improving patient care and health does not establish that the appellant has the purpose of giving effect to government purposes, abdicating any independent fulfilment of its own. The appellant's purpose is charitable. It remains charitable even though the government is the source of the funds it uses to carry out that purpose. Its consent to the attachment by the government of conditions to the employment of those funds does not establish that the appellant is not independently carrying out its purpose.

41 These submissions are correct. To carry out the object of the appellant may be said to assist the achievement of government policy, but it does not follow that the appellant's object has changed from improving patient care and health to achieving government policy. The appellant's object continues; all that has happened is that it has seen entry into a beneficial agreement with the government as a means of achieving that object.

42 It follows from the rejection of the Commissioner's arguments that Chernov JA, with respect, erred in holding that the appellant carried out its functions "in order to discharge the responsibility assumed by government to support and ensure the provision of efficient, integrated, quality local health care" (41). Rather, the appellant carried out its functions in order to fulfil its object, improving patient care and health,

(40) *In re Cain; National Trustees Executors & Agency Co of A/asia Ltd v Jeffrey* [1950] VLR 382 at 388 per Dean J, citing *Diocesan Trustees of the Church of England in Western Australia v Solicitor-General (WA)* (1909) 9 CLR 757 at 772 per O'Connor J.

(41) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 159 [20]; 2005 ATC 4586 at 4593.

and the government entered the OBF Agreement in order to discharge its own responsibility for patient care and health.

43 It also follows that Chernov JA, with respect, erred in concluding that the appellant's core activities were performed pursuant to the dictates of government. Even if, by fulfilling its own purpose, the appellant performed "the work or function of government" (42), that did not prevent it from being a charitable body.

44 Osborn A-JA erred, with respect, in concluding that the appellant was "a creature and agent of government". The precise sense in which these expressions were employed was not indicated, but an otherwise charitable body which accepts conditional grants in order to fulfil its object does not thereby become in any sense an agent, let alone a creature, of government. His Honour also erred in concluding that the Commonwealth controlled the appellant's activities.

45 Accordingly, the appeal must be allowed.

"Public benevolent institution" cases

46 The Commissioner relied on three cases (43) for the proposition that it is "inappropriate to characterise activity organised or controlled by government, or predominantly by government, and thus activity effectively funded by taxpayers, as activity of a public benevolent institution according to its established meaning" (44). From that proposition it inferred the proposition that activity organised and controlled by government which was funded by taxpayers was not charitable.

47 The analogy between the institutions in those cases and the appellant breaks down, because in those cases the relevant institutions were created by statute, were subject to extensive ministerial control and were "virtually part of a Department of State" (45) or represented the Crown (46), or were "governmental" bodies (47). The appellant was not created by, and is not subject to, any statute generating those characteristics.

(42) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 160 [22]; 2005 ATC 4586 at 4593.

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

(44) *Ambulance Service (NSW) v Federal Commissioner of Taxation* (2003) 130 FCR 477 at 493 [48] per Hill, Goldberg and Conti JJ.

(45) *Ambulance Service (NSW) v Federal Commissioner of Taxation* (2003) 130 FCR 477 at 487 [28] per Hill, Goldberg and Conti JJ, quoting Allsop J in *Ambulance Service (NSW) v Deputy Federal Commissioner of Taxation* (2002) 50 ATR 496 at 526 [151]; 2002 ATC 4681 at 4708.

(46) *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (1990) 27 FCR 279 at 280-281; *Mines Rescue Board (NSW) v Federal Commissioner of Taxation* (2000) 101 FCR 91 at 92 [2]; *Ambulance Service (NSW) v Federal Commissioner of Taxation* (2003) 130 FCR 477 at 480-481 [9].

(47) *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (1990) 27 FCR 279 at 280.

A further submission by the appellant

48 Apart from the submissions advanced by the appellant supporting the conclusion that the appeal must be allowed, it argued that a body with charitable objects was a charitable body "even if it is subject to substantial or complete government control". The Commissioner contended that no statement in the authorities supported that submission. This is not strictly correct. Question 5 in one of the authorities referred to by the appellant, *Re Sutherland, deceased; Queensland Trustees Ltd v Attorney-General (Qld)* (48), was:

> "Whether hospitals which are wholly maintained at the public expense and are subject to the entire control of government officers are qualified for selection by the plaintiffs to participate in the [income of the trust funds]?"

The Full Court of the Supreme Court of Queensland answered that question "Yes". However, the authority is of very limited weight, since no party before the Court contended for a different answer. The appellant relied on other authorities (49), but they do not explicitly support the proposition, partly because they do not make clear the degree of government control, if any, present, partly because questions of government control were not central to the reasoning, and in one instance, because the outcome turned on the terms of legislation (50). In view of the fact that the appeal must be allowed on other grounds, it is undesirable and unnecessary to decide on the correctness of this submission, or to determine the related issue of whether a body, to be charitable, must independently carry out its charitable purpose.

Orders

49 The following orders should be made.

1. Appeal allowed.
2. The respondent to pay the costs of the appellant in this Court.
3. Set aside the orders of the Court of Appeal, Supreme Court of Victoria, made on 1 July 2005 and, in their place, order:
   (a) Appeal allowed.
   (b) Set aside the orders of the Supreme Court of Victoria made on 15 August 2003.
   (c) The appellant's appeal from the decision of the Victorian Civil and Administrative Tribunal made on 22 November 2002 be allowed.

(48) [1954] St R Qd 99 at 101.

(49) *Attorney-General v Heelis* (1824) 57 ER 270 at 274; *Attorney-General (Vic) v M'Carthy* (1886) 12 VLR 535; *Robison v Stuart* (1891) 12 LR (NSW) Eq 47 at 49-51; *In re Morgan's Will Trusts; Lewarne v Minister of Health* [1950] Ch 637; *In re Frere; Kidd v Farnham Group Hospital Management Committee* [1951] Ch 27 at 32; *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 371.

(50) *Construction Industry Training Board v Attorney-General* [1973] Ch 173.

(d) The notice of determination issued by the respondent dated 16 July 2002 to disallow the appellant's objection dated 29 January 2002 be set aside.

(e) The appellant's objection dated 29 January 2002 against the respondent's decision dated 14 December 2001 be allowed.

(f) The respondent pay the costs of the proceedings in the Court of Appeal of the Supreme Court of Victoria and in the Supreme Court of Victoria.

50 KIRBY J. This appeal from a judgment of the Court of Appeal of the Supreme Court of Victoria (51) presents a question as to the meaning of an exemption for a "charitable body" in State revenue law.

51 Central Bayside General Practice Association Ltd (the appellant) claims that it is a "charitable body", and thus entitled to the exemption. The Commissioner of State Revenue (Vic) (the Commissioner) (the respondent to this appeal) contests the appellant's entitlement. So far, the Commissioner's conclusion has been upheld by the Victorian Civil and Administrative Tribunal (the Tribunal) (52); by a single judge of the Supreme Court of Victoria (Nettle J) (53); and by majority decision of the Court of Appeal (54). By special leave, the appellant now seeks reversal by this Court of the order that it does not qualify for the exemption.

52 I agree in the conclusion expressed by the other members of this Court. The appellant does qualify. However, because my reasoning takes a different course, it is necessary to explain the way in which I have arrived at identical orders. In doing so, I will call attention, as others have done in the past (55), to unsatisfactory features of the general law on charities, which the parties to the appeal did not question, but accepted.

The facts

53 *Appellant's activities and claim*: The facts relevant to the decision in this appeal are set out in some detail by Gleeson CJ, Heydon and Crennan JJ (56), and by Callinan J (57). Their Honours' reasons severally describe the legal character of the appellant as a

(51) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151; 2005 ATC 4586.
(52) Decision of the Victorian Civil and Administrative Tribunal (Taxation Division), G Gibson, Member, 22 November 2002 (Decision of the Tribunal).
(53) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2003) 53 ATR 473; 2003 ATC 4835.
(54) Chernov JA, Osborn A-JA, Byrne A-JA dissenting.
(55) *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 at 305-306; 3 ALR 486 at 488.
(56) Reasons of Gleeson CJ, Heydon and Crennan JJ at [1]-[15].
(57) Reasons of Callinan J at [148]-[160].

not-for-profit company limited by guarantee established for specified objects, with a mission statement and goals set out in its constituting documents.

54 The membership and governance of the appellant are also described in those reasons, together with the general nature of its activities. Putting them broadly, they were to support general practitioners within the Central Bayside area of suburban Melbourne by improving their health information systems; assisting their professional development; and facilitating accreditations; improving their access to information systems; and increasing cooperation with one another, with pharmacists and with others (including in a specific project addressed to falls and falls injury prevention in frail and aged persons) (58). These activities were designed to encourage, directly or indirectly, an outreach to the local community by the general practitioners concerned; and the treatment of patients living in that community.

55 The evidence establishes that a relationship exists between the appellant and the federal Department of Health and Ageing (the Department). This feature of the appellant's operation has occasioned close and repeated attention by the law. As appears in the other reasons, the resulting relationship provided the overwhelming bulk of the appellant's income in the year of revenue in question in these proceedings (59). The income was effectively tied to purposes specifically designated by the terms of the departmental grant (Outcomes-Based Funding or "OBF grants"); or by grants for other specifically approved purposes (project-based grants) (60).

56 The arrangements with the Department included requirements to submit strategic and business plans to the Department, together with regular reports on the fulfilment of the approved purposes. In addition, the appellant faced the possibility of on-site inspections by departmental officers. Such inspections were designed to ensure that the Department could be accountable for the expenditure of the federal funds directed to the appellant, and that the appellant's approved activities would fulfil its own programmes at the same time as they contributed towards the aggregate activities of similar "divisions of general practice", established throughout the nation. Such divisions had begun operation in 1992 for the stated purpose of improving the delivery of general medical practice services to patients. They were established with the support of federal funding. By the time of the year of revenue, 123 such divisions had been established throughout Australia. Together they enjoyed a participation rate of about 80 per cent of general practitioners in Australia.

(58) Reasons of Gleeson CJ, Heydon and Crennan JJ at [5]-[6].
(59) Amounting to approximately 93 per cent of all income. See reasons of Callinan J at [157].
(60) See reasons of Callinan J at [158]. Forty-three per cent of total income was outcome-based funding grants. The balance of federal funding was project-based.

57 The appellant contended that it was properly to be characterised as a "charitable body". It made this assertion by reference to the charitable objects expressed in its founding documents; the not-for-profit constitutional provisions governing its organisation; and the ongoing public benefit which it gave to patients (including to particular groups such as the old and frail, Aboriginal and Torres Strait Islanders and non-English speaking patients (61)). For this reason, it claimed that it was entitled to exemption from the liability otherwise arising under the *Pay-roll Tax Act 1971* (Vic) (the Act), to pay tax on wages paid to its employees.

58 *Shifting basis of the dispute*: Originally, the Commissioner rejected the appellant's claim for an exemption on the basis that the proper characterisation of the appellant was that of a "professional body with the aim of promoting the interests of its members". A body so characterised would not, on a conventional approach, be classified as a "charitable body", even though it might incidentally perform charitable activities.

59 Before the Tribunal, however, the Commissioner shifted his ground. He contested the classification of the appellant as a "charitable body" on the basis that its purposes were not exclusively charitable but amounted to services provided, in effect, as part of "an integrated … scheme of national health management presided over by the Federal Government" (62). The Tribunal, expressing misgivings, upheld this argument. Its decision survived two levels of appeal in the Supreme Court of Victoria. Those appeals were limited to a point of law. Before the Supreme Court, the Commissioner did not press his original argument that the true character of the appellant was that of a body promoting the interests of its members. Doubts about the correctness of that concession were voiced both by the primary judge (63) and by Chernov JA in the Court of Appeal (64). However, that issue has not been agitated before this Court.

The decisional history and common ground

60 *Decisional history*: The history of the proceedings is described in other reasons (65). Although the Tribunal, the primary judge and the majority in the Court of Appeal severally expressed themselves in somewhat different terms, the essential reasons for rejecting the appellant's claim to be a "charitable body" were the same. All of the decision-makers (including Byrne A-JA, who dissented in the Court of Appeal) assumed that the word "charitable", contained in the Act, was to be given a meaning derived by analogy from the preamble to the

(61) See cl 3 of the constitution of the appellant in the reasons of Gleeson CJ, Heydon and Crennan JJ at [5].
(62) Decision of the Tribunal at [25].
(63) (2003) 53 ATR 473 at 476 [8], 481 [13]-[14]; 2003 ATC 4835 at 4837, 4841.
(64) (2005) 60 ATR 151 at 153 [3]; 2005 ATC 4586 at 4588.
(65) Reasons of Gleeson CJ, Heydon and Crennan JJ at [16]-[20]; reasons of Callinan J at [161]-[168].

Statute of Elizabeth (the *Charitable Uses Act 1601* (UK) (66)), as explained by Lord Macnaghten in the decision of the House of Lords in *Commissioners for Special Purposes of the Income Tax v Pemsel* (67).

61 According to this approach, the decision-maker was required to search for the "spirit and intendment" of the Elizabethan statute (68) or, as otherwise put, to ascertain whether the appellant lay within the "equity" of that statute (69). It was accepted that, ultimately, this task enlivened a question for judgment and evaluation in the circumstances of the particular case (70). Upon this basis, the Tribunal, the primary judge and the majority in the Court of Appeal concluded that the appellant was not a "charitable body". Effectively, this was because the evidence revealed that it was "too close to the Commonwealth" so that, essentially, it was carrying out federal government or legislative policy and not acting for charitable purposes (71).

62 Upon this view of the facts, the appellant was held to be effectively responding to the "dictates" of the Department, exerted through the power of the purse (72). It was thus a "creature" or "agent" of the federal Government (73). Whilst doubtless many of its activities and purposes were consonant with a "charitable" classification, the "body" itself could not be so characterised. In effect, it was carrying out national governmental policy. This was held to deprive it of the "charitable" character that was necessary to qualify for the exemption under the Act.

63 *Common ground*: I have mentioned the common ground that existed between the parties, below and in this Court, concerning the way in which the word "charitable", appearing in the Act, was to be interpreted. This was common ground upon a matter of law. That puts it in a class different from common ground on issues of fact. I will return to this point.

64 In the meantime, it is useful to take note of the common ground that also existed between the Commissioner and the appellant about the facts. The Commissioner acknowledged that the appellant was not, as such, a department or instrumentality of the federal Government. So much was plain from the relevant legislation. He accepted that the appellant's activities were for the benefit of the community. The Commissioner also accepted that the appellant received, and could seek, funds other than those provided by the Department. Moreover, it

(66) 43 Eliz I c 4.
(67) [1891] AC 531 at 581.
(68) (2003) 53 ATR 473 at 486 [32]; 2003 ATC 4835 at 4845.
(69) (2005) 60 ATR 151 at 160 [22]; 2005 ATC 4586 at 4593.
(70) *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 666 per Barwick CJ.
(71) (2005) 60 ATR 151 at 160-161 [23]; 2005 ATC 4586 at 4593-4594.
(72) (2005) 60 ATR 151 at 159-160 [21]; 2005 ATC 4586 at 4593.
(73) (2005) 60 ATR 151 at 171 [61]; 2005 ATC 4586 at 4602 per Osborn A-JA.

was not bound in law to accept those funds. It could reject them if it so decided in accordance with its constitution.

65 The Commissioner further accepted that the only means by which the Commonwealth could exert control over the appellant was through its financial power. However, he submitted that this was sufficient. The extremely high reliance placed on federal funds (which constituted almost the entirety of the appellant's income); and the subjection of the appellant to approval, monitoring and potential intervention, all added up to effective control in practical terms. That fact was supported by the existence of a large, integrated national scheme, within which the appellant formed only one of many units pursuing an overall objective orchestrated by the Department. Upon this view, it was not necessary for the Department to appoint representatives to the appellant's board so as to control it. The appellant's pursuit of federally approved projects was assured by the fact that any deviation would be sanctioned by the unwelcome reduction, or withdrawal, of federal funds.

66 These are the arguments that convinced the Tribunal and the courts below. However, into the exotic consideration of a statute enacted by the Parliament of England in the reign of the first Queen Elizabeth, I must now intrude the practical realities of the statute applicable to this appeal, enacted by the Parliament of Victoria in the reign of the second Queen Elizabeth.

The legislation

67 The courts below gave virtually no attention to the detail of the legislation in question in this case. Neither did the written arguments of the parties or initial oral arguments before this Court. That legislation was enacted by the Parliament of Victoria in 1971. Its purpose was to impose a general obligation to pay payroll tax upon "wages", subject to State regulation. Section 10 of the Act affords an "exemption from pay-roll tax", as follows:

> "(1) The wages liable to pay-roll tax under this Act do not include wages paid or payable —
>
> (a) by the Governor of a State;
>
> (b) by a religious institution to a person during a period in respect of which the institution satisfies the Commissioner that the person is engaged exclusively in religious work of the religious institution;
>
> (ba) by a public benevolent institution to a person during a period in respect of which the institution satisfies the Commissioner that the person is engaged exclusively in work of the institution of a public benevolent nature;
>
> (bb) by a charitable body (other than a school or educational institution or an instrumentality of the State) to a person during a period in respect of which the body satisfies the Commissioner that the person is engaged exclusively in work of the body of a charitable nature;

(bc) by a public hospital to a person during a period in respect of which the hospital satisfies the Commissioner that the person is engaged exclusively in work of the hospital of a kind ordinarily performed in connexion with the conduct of public hospitals."

68 There follow further exemptions extending to particular cases of great specificity. There is an exemption for certain private hospitals (para (c)); certain schools, colleges and school councils (paras (d), (da), (daa) and (db)); specified municipal councils (save for wages paid for activities of identified profit-making kinds) (para (e)); consular and like staff (para (f)); United Nations agency staff (para (g)); the Commonwealth War Graves Commission (para (h)); the Australian-American Educational Foundation (para (i)); defence personnel or employers employing such personnel whilst on leave (para (j)); and defined corporations acting in connection with municipal councils (para (l)).

69 As is evident from the foregoing list, the category of exemption claimed by the appellant was added to the Act after its original enactment. In so far as the specific reference to a "charitable body" grants an exemption, it expressly excludes schools and educational institutions or instrumentalities of the State. In order to qualify for an exemption, such bodies have to attract one of the other specific paragraphs and satisfy their terms.

70 According to the *Pemsel* test, "'[c]harity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads" (74). However, the drafter of s 10(1) of the Act was not content to leave "charitable bodies", defined in such general terms, to do the entire work of exemption. Indeed, the notion of "charitable body" was not originally expressed in the Act at all. Depending on the particular circumstances, several of the expressed categories of exemption might come within the charitable notions of "relief of poverty", "advancement of education" and even (in s 10(1)(b) of the Act) "the advancement of religion". Many, in a general sense, would be for "purposes beneficial to the community not falling under any of the preceding heads". Yet the Parliament of Victoria took no chances. As can be observed, s 10(1) includes a collection of highly particular categories and institutions which, in aggregate, seem to owe more to political bargaining and compromise than to a semi-coherent scheme of the kind that *Pemsel* was endeavouring to sustain.

(74) *Pemsel* [1891] AC 531 at 583.

The issues

71 As I approach this appeal, four issues require consideration:

(1) *The statutory primacy issue*: Having regard to the way in which the parties argued this matter before the Tribunal, in the courts below and in this Court, is it permissible for this Court to examine for itself the meaning of "charitable body", as that phrase appears in s 10(1)(bb) of the Act, so as to give meaning to that phrase in its statutory context? Is it permissible to question the assumption that the parties have made that the word "charitable" when used in s 10(1)(bb) of the Act is to be given a "technical" or "legal" meaning, by analogy to the Statute of Elizabeth, in accordance with *Pemsel*?

(2) *The meaning of charity issue*: Depending on the answer to issue (1), what meaning should be given to the words "charitable body" in s 10(1)(bb) of the Act? Is that phrase to be accorded the meaning expressed in *Pemsel*, or is the true starting point for legal analysis in this appeal a recognition of the primacy of the Act and an ascertainment of the meaning of the phrase "charitable body" in the ordinary way, by giving content to the language, context and purposes of the Act? In light of the meaning given, does the appellant answer to the description of a "charitable body"?

(3) *The governmental exemption issue*: Depending on the answer to issue 2, is it inherent in a "charitable body" that such a body does not emanate from, and is not controlled by, government? If its purposes, directly or indirectly, involve the carrying into effect of governmental objectives, is the body incapable of answering to the description of a "charitable body"? If the character of "charitable" is to be ascertained by analogy with the preamble of the Statute of Elizabeth, with its references to "repairs of bridges, ports, havens, causeways, churches, sea banks and highways" (75), given the advance of governmental activities into these and other functions, is the disqualification inapplicable, at least in Australia, where such activities have long been performed by government and its agencies? In any event, does the contemporary Australian notion of "charitable" include activities performed by bodies acting *indirectly* as agents of governmental policy, so long as the body is created, and acts, independently of government control?

(4) *The exemption of the appellant issue*: Having regard to the answers to the foregoing issues, did the majority of the Court of Appeal err in affirming the Commissioner's refusal to exempt the appellant from payroll tax under s 10(1)(bb) of the Act?

(75) The Statute of Elizabeth is set out in modern English rendition in *McGovern v Attorney General* [1982] Ch 321 at 332 per Slade LJ.

72 *Excluded issues*: There are three further issues that should be mentioned at this stage, although I will put them out of account as issues in the proceedings.

73 First, no constitutional or federal statutory issue was raised by either party. For example, no attempt was made by the appellant to suggest that an endeavour by the Parliament of Victoria to impose payroll tax on the wages of employees of a body that was performing functions authorised by or under federal law was inconsistent with the commands of such federal law, and thus, invalid for constitutional reasons (76). Any such submission would have been inconsistent with the appellant's endeavour to distance itself from the Commonwealth and the Department so as to avoid the suggested disqualification. It is therefore safe to put this issue to one side.

74 Secondly, I can also put aside the concerns expressed in the courts below about the Commissioner needlessly abandoning his initial argument that the true character of the appellant was that of a professional association, established for the benefit of its members, and only incidentally or secondarily a body with purposes and activities of a charitable character, for the general public or a substantial section thereof. That issue was not reopened in this Court. I am content to disregard it even though it appears far from unarguable.

75 Thirdly, the Commissioner did attempt to invoke, in support of his submissions, a number of cases arising under the "public benevolent institution" exemption which appears in s 10(1)(ba) of the Act. In so far as the cases cited have any relevance to the issue before this Court, I do not regard them as helpful, save in so far as they demonstrate the importance of construing the contested phrase in its own statutory context. I agree, on this point, with what is said in other reasons (77). The cases are distinguishable. The four issues that I have identified remain to be addressed.

The primacy of the statute

76 *Implausible issue or judicial obligation?* In their joint reasons, Gleeson CJ, Heydon and Crennan JJ have suggested that "[i]t is not easy to see a basis upon which [the *Pemsel* rule could be questioned] with any degree of plausibility" (78). I do not agree with this opinion.

(76) *Constitution*, s 109.
(77) Reasons of Gleeson CJ, Heydon and Crennan JJ at [46]-[47]; reasons of Callinan J at [180]-[181].
(78) Reasons of Gleeson CJ, Heydon and Crennan JJ, fn 28.

Ultimately, my disagreement rests on a view of the *Constitution*, of the role of the Judicature it creates, and specifically of the functions of this Court.

77 A fundamental assumption of the *Constitution* of the Commonwealth is maintenance of the rule of law (79). Inherent in that obligation is the notion that courts, disposing of matters within the Judicature, will give effect to the commands of the several legislatures of the States and the Commonwealth, as expressed in the statutes which they enact, or in the subordinate laws which they thereby authorise. The Act in question in this case is such a statute. Its validity has not been questioned. On its face, it is valid and applicable. This Court must therefore give effect to it. It must do so according to its terms.

78 This Court has no authority to ignore or neglect a meaning of legislation which the Parliament intended. Whilst respect is paid to the issues which the parties define, it is ultimately not for the parties to make "concessions" concerning the content of the law. No court can accept, and act upon, an incorrect understanding of the law. Nor can parties expect that judges will simply go along unquestioningly with an erroneous understanding of the law, particularly where these understandings arise because they have not been questioned by the parties (80).

79 As averted to earlier, the position differs when a court is considering matters of *fact*, as opposed to matters of *law*. If the parties agree on the state of the facts, it would ordinarily work a procedural unfairness for a court to ignore the parties' agreement and to proceed to decide facts in a manner contrary to the way in which the case has been litigated (81).

80 However, no such procedural impediment arises when the court is faced with issues of law. The judicial duty to the law is paramount. Any potential procedural unfairness arising from a different view of the law can be overcome by raising the matter for argument and affording the parties the opportunity to put their submissions. This was certainly done when this appeal reached this Court. The concern that I felt about the assumed meaning of the phrase "charitable body" in s 10(1)(bb) of the Act was squarely identified. It involves the discharge by this Court of its constitutional function of disposing of the appeal according to law. If judges do not question doubtful assumptions about the law they will just go on, sheep like, repeating legal mistakes inherited from past generations. There have been many advances in the approach to the interpretation of legislation adopted by this Court in recent years. A

(79) *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103].
(80) cf *Roberts v Bass* (2002) 212 CLR 1 at 54 [143].
(81) *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9.

nation's final court, as I conceive it, must be willing to test past legal assumptions and to correct error if it is demonstrated by the course of proceedings.

81 *Statutory primacy*: The present appeal is, in fact, a clear instance of an error in approach to legal analysis which is relatively common and which this Court, over the past decade, has been at pains to correct.

82 I made this point in *Brodie v Singleton Shire Council* (82):

> "[T]he duty of a court is to the law. If a valid statute is enacted with relevant effect, that duty extends to giving effect to the statute, not ignoring it. No principle of the common law can retain its authority in the face of a legislative prescription that enters its orbit with relevant effect. The proper starting point for the ascertainment of the legal duties … is the statute."

83 In the same year, in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (83), Gaudron, Gummow, Hayne and Callinan JJ insisted that the inquiry presented by the issues in that appeal "must begin with the relevant statutory provisions" (84). I agreed, and remarked (85):

> "The arguments in a number of recent appeals demonstrate a tendency to give priority to judicial exposition of legislation over analysis of what the legislation actually provides. It is as if the legal mind finds it more congenial to apply the law as stated by judges rather than the law as stated by a legislature. This tendency must be resisted, as must the related tendency, when construing our own legislation, to look to English judicial authority on English legislation, sometimes enacted more than a century ago."

These remarks gain added force when the judicial exposition in question is one that was uttered more than a century ago in England, in relation to a statute enacted more than four centuries ago.

84 Time and time again, this Court has reinforced the foregoing instruction. It is self-evident, but apparently it needs to be restated. Where the law in issue is expressed in the form of an Act of an Australian legislature, it is in the words of that statute that the content of the legal obligation is to be found, not in judicial synonyms, restatements or approximations. Upon this matter, this Court has until

(82) (2001) 206 CLR 512 at 602 [231].
(83) (2001) 207 CLR 72.
(84) (2001) 207 CLR 72 at 77 [9].
(85) (2001) 207 CLR 72 at 89 [46] (footnote omitted).

now spoken with a single voice (86). It should be consistent in applying the same rule to the present appeal. It is not implausible to do so. It is our legal duty.

85 *Special considerations*: There are a number of special considerations that reinforce the correctness of this approach in the present instance. They combine to cast doubt on the interpretation of a phrase in s 10(1)(bb) of the Act in question in this appeal by unquestioning reference to the authority of English judges (including in the Privy Council (87)), insisting that Australian legislative texts, making reference to "charity" or "charitable", should be interpreted in accordance with the approach stated by the House of Lords in *Pemsel*.

86 First, the words in issue appear not in a general statute concerned with the law of charities or charitable trusts at large (88). They exist in the particular context of a specific law with respect to the raising of revenue for the general purposes of the government of an Australian State and in connection with the budget process of that government.

87 Presenting the Bill that introduced para (bb) in s 10(1) of the Act, the then Treasurer explained to the Legislative Assembly of the Victorian Parliament adjustments in various State taxes, including payroll tax, alteration in the threshold at which employers would begin to pay such tax and alteration in the exemptions, including the introduction of an exemption applicable "to charitable bodies other than educational institutions, schools, government departments and public statutory bodies" (89). The Minister stated that "the urgency to

(86) *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11], 545 [63]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15], 111-112 [249]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 266 [159], 269 [164]; *Conway v The Queen* (2002) 209 CLR 203 at 227 [65]; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 542-544 [143]-[148]; *Western Australia v Ward* (2002) 213 CLR 1 at 60 [2], 66 [16], 69 [25], 249-250 [588]; *Wilson v Anderson* (2002) 213 CLR 401 at 430 [47], 459-460 [144]-[146]; *Joslyn v Berryman* (2003) 214 CLR 552 at 595-596 [137]; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 359 [127]; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 6-7 [7]-[9]; *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 at 138 [87]; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 107 at 167-168 [90]-[94]; *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 649-650 [181]; *R v Lavender* (2005) 222 CLR 67 at 101-102 [107]; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 206 [30]; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 645 [54]; *Combet v The Commonwealth* (2005) 224 CLR 494 at 567-568 [135]; *Neindorf v Junkovic* (2005) 80 ALJR 341 at 350-351 [42]; 222 ALR 631 at 641; *Weiss v The Queen* (2005) 224 CLR 300 at 312-313 [31].

(87) *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317 reversing *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362. See also *Ashfield Municipal Council v Joyce* [1978] AC 122 (PC).

(88) See, eg, *Charities Act 1978* (Vic).

(89) Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 November 1992, p 566, the Hon A R Stockdale MP, Treasurer, delivering the Second Reading Speech to the *State Taxation (Amendment) Bill 1992* (Vic).

commence the restoration of the State's finances necessitates the passage of a significant amount of legislation within a limited parliamentary session. This leaves the government no alternative but to adopt this compendium measure." There was no reference before the elected representatives, either in the Minister's speech or in the accompanying documents, to the Statute of Elizabeth, the decision in *Pemsel* or the importation of their categories into the adjustments of this particular and urgent State fiscal legislation. Without explanation, it seems most unlikely that members of the Victorian Parliament would have read para (bb) as connoting a reference to *Pemsel*. To render the State legislature accountable to the electors, particularly in the matter of taxation, as the postulate of democratic government requires, it does not seem sufficient that parliamentary counsel might have known of *Pemsel* or that expert tax lawyers are aware of what it says. At the least, the postulate of democratic accountability for a law enacted by a Parliament of lay members suggests that we should question such an assumption.

88 Secondly, the text into which para (bb) was inserted already included, in several of the other paragraphs, references to exemptions which duplicate, cut across or partially cover the four categories identified in *Pemsel* which, it is suggested, were imported by the use of the phrase "charitable body" in the new para (bb). Inserting that phrase into a modern statute, by way of amendment, when other categories of a "charitable" character, so defined, are expressly exempted, would not appear to make sense. According to ordinary canons of statutory interpretation, it would not be assumed that para (bb) was inserted into s 10(1) as a redundancy or as a means of duplicating existing exemptions. Yet if there is imported with the reference to "charitable body" in para (bb) the "technical" or "legal" categories described in *Pemsel*, a significant part of the supposed purpose of the paragraph is rendered otiose because of the other express provisions in the subsection.

89 Thirdly, the character of the exemption for payroll tax must be understood in light of the fact that such a tax, being imposed on wages, is of a recurrent nature. It falls due for consideration with each recurring payment. The word "wages" is itself very broadly defined in the Act (90). The recurrent character of this form of taxation appears to contradict the notion of a settled and immoveable denotation for a "charitable body" that has never changed, at least in its basic categories, since *Pemsel* was decided by the House of Lords in 1891 and by inference long before.

90 Fourthly, it defies commonsense and ordinary intuition to suggest that the understanding by the Victorian Parliament, in the context of a 1992 amendment inserting the phrase "charitable body" in the law, would necessarily be the same as the understanding of that phrase in

(90) The Act, s 3.

England when *Pemsel* was decided in 1891. Even more so, it seems unlikely that the phrase would have had the identical meaning in the social circumstances of England in 1601 when the preamble to the Statute of Elizabeth was drawn up. There is no reference in *Pemsel* or in the preamble to many considerations that might be apt to embody the meaning of a "charitable body" in contemporary Australian society. For example, there is no mention of the defence of fundamental human rights and human dignity; the maintenance of the benefits of science and technology; the protection of refugees and other vulnerable persons; the need for specific assistance for indigenous peoples; the protection of the welfare of animals; the advancement of culture, arts and heritage; the defence of the environment and so forth. To impose rigid categories derived from an English statute of the early seventeenth century (re-endorsed in 1891 at an historical moment when unity of the common law throughout the British Empire was thought essential) seems arguably incompatible with this Court's duty to adopt a purposive interpretation of legislation enacted by an Australian legislature.

91 *Conclusion – consistent approaches*: It follows that there is no reason, in principle, why the problem of statutory interpretation presented by the present appeal should be approached in a way different from other cases involving statutory interpretation, considered by this Court in recent times (91). The starting point is the statute. This includes its language but also the context of the contested phrase; the given reasons for the introduction of the particular provision; the light thrown on its meaning by surrounding provisions; the general purpose and object of the statute viewed in its time; and the constitutional context of the enactment of a law imposing taxation by which a State government, proposing that law, is rendered accountable to the electors.

92 There may be reasons why a court such as this might ultimately conclude that it cannot perform the function of devising a modern definition of "charitable body", apt to the particular circumstances of the Victorian legislation in issue in this appeal. For example, that conclusion might present where the court lacks detailed assistance from the parties or the presence of a contradictor. However, in my view it is proper, in the first instance, to comply with the settled methodology of this Court in deriving the meaning of the phrase "charitable body" in the statute in question. By that methodology, the ascertainment of the meaning must begin with the legislation and with proper analysis of its text. Revenue law is part of the general law. It is subject to the same general principles governing the ascertainment of its specific parliamentary purposes (92). It is not implausible to bring

(91) See, eg, *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 262 [28]; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 328-329 [22].

(92) *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 146 [84];

this body of law back to the general approach of the Court. Consistency in matters of general principle is a hallmark of the rule of law. Revenue and charity law are not exempt.

Occasion to reopen the meaning of "charitable"

93 Once it is accepted that the Court must give meaning to the words "charitable body" in the context of s 10(1)(bb) of the Act, in the way typical to ascertaining the meaning of Australian statutes, there are a number of reasons for breaking from a search for the "spirit and intendment" of the preamble to the Statute of Elizabeth as the criterion for answering that question (93).

94 Some of the reasons have already been foreshadowed. It is unlikely that an Australian Parliament, acting without instruction and comprising ordinary citizens, would appreciate and intend that enacting a statute not specifically concerned with charitable trusts automatically imports a classification devised in England four centuries ago.

95 Least of all could this be regarded as likely if the legislators knew that, in the United Kingdom, where the statutory formula was first adopted in 1601, the Statute of Elizabeth itself was repealed by the *Mortmain and Charitable Uses Act 1888* (UK) (94), passed before the federation of the Australian colonies. Although that repeal preserved the preamble (by s 13(2)), which thereby remained in operation, the 1888 Act, including the preamble, was itself later repealed by the *Charities Act 1960* (UK) (s 38). The words of Gonthier J in the Supreme Court of Canada are equally applicable in the Australian context: "no statutory authority for the preamble now exists" (95).

96 For judges, no longer subject to the authority of Imperial or English courts, to maintain obedience to conceptions of "charity" and "charitable bodies", expressed in such different times, seems, on the face of things, an irrational surrender to the pull of history over contemporary understandings of language used in a modern Australian statute.

97 Further, much criticism has been directed towards the continued use of the categories established by the Statute of Elizabeth, and reasoning by analogy from the preamble to that statute. In 1966, several Australian reports reviewed the law relating to charitable trusts (96).

(cont)

cf *Steele v Deputy Federal Commissioner of Taxation* (1999) 197 CLR 459 at 477 [52]; *Federal Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 228 CLR 1, my own reasons at [12].

(93) *Pemsel* [1891] AC 531 at 543.

(94) 51 and 52 Vict c 42, s 13(1).

(95) *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 40 [32].

(96) In 1966, the Chief Justice's Law Reform Committee of Victoria in its report on *Charitable Trusts* (1962-1966) had recommended in para [32] that no attempt be made to enact a statutory definition of "charity". Queensland Law Reform Commission, *Trust, Trustees, Settled Land and Charities*, Report No 8 (1971); Law Reform Commission of Tasmania, *Unclaimed Charitable Funds*, Report No 3 (1975); Victorian Legal and Constitutional Committee, *Report to the Parliament*

No substantive change ensued. However, in 2000 a federal inquiry was established into the legal definition of "charity". This resulted in the *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001). The report concluded that, although use of the preamble to the Statute of Elizabeth had been "valuable", it had "now outlived its usefulness". The report declared that the process of determining "whether a purpose is within the 'spirit and intendment' of the Preamble or is analogous to a charitable purpose is ambiguous and could lead to inconsistencies". The report further noted that removal of reference to the Statute of Elizabeth had been recommended in England by reports delivered in 1952 and 1976 (97) and that this Court, in 1974, had referred to the possible need for reform (98). A detailed statutory definition was proposed for Australian federal purposes, including for revenue purposes. However, after a process of consultation undertaken by the Board of Taxation, the ensuing federal Act (99) effected only relatively modest and special amendments to the previous law (100).

98 In England, following earlier reports recommending changes to the law, an inquiry in 2002 recommended a new approach to the meaning of "charitable", with a fresh definition of "charity" including several features missing from the approaches adopted in earlier centuries. A Bill to implement the report for England and Wales is before the United Kingdom Parliament. A separate inquiry into the issue has been undertaken in Scotland (101).

99 In Canada the defects of the *Pemsel* categories were noted by the majority of the Supreme Court in the *Immigrant and Visible Minority Women* case (102). That case concerned the entitlement to registration as an organisation with "charitable" status under the *Income Tax Act 1985* (Can). The body was established for the purpose of assisting immigrant and visible minority women to obtain employment.

100 The majority of the Supreme Court rejected the Society's appeal against the Minister's refusal of its application. However, they noted "repeated calls for the expansion or replacement of the test to reflect more completely the standards and values of modern Canadian

(cont)

on the Law Relating to Charitable Trusts (1989); and Law Reform Commission of Tasmania, *Variations of Charitable Trusts*, Report No 38 (1984).

(97) The *Nathan Report* (1952); the *Goodman Report* (1976). See also Chesterman, *Charities, Trusts and Social Welfare* (1979), pp 403-404.

(98) *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 at 306; 3 ALR 486 at 489.

(99) *Extension of Charitable Purpose Act 2004* (Cth).

(100) Concerning provision of child care services on a non-profit basis (s 4(1)); open self-help groups (s 5(1)(a)); and closed and contemplative religious orders that regularly undertake "prayerful intervention" at the request of members of the public (s 5(1)(b)).

(101) See *Kemp Report* (1997) by the Scottish Council for Voluntary Organisations and *Scottish Charity Law Review Committee Report* (2001).

(102) *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 106 [149].

society". They endorsed remarks of Strayer JA in *Human Life in Canada Inc v Minister of National Revenue* (103) to the effect that the definition of charity remains "an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators, and the courts". The majority in the Supreme Court observed that "[i]n the absence of legislative reform, Canadian courts must contend with the difficulty of articulating how the law of charities is to keep 'moving' in a manner that is consistent with the nature of the common law" (104). The minority in the Supreme Court accepted the need for such movement as axiomatic (105).

101 One paper, cited in the Supreme Court (106), by Mr E B Bromley, a Canadian expert on the law of charities, remarked (107):

> "The time has come … to redefine radically the legal parameters of what is charitable by simply breaking with Lord Macnaghten's four heads and articulating a restatement of the law as it is in practice today rather than tortuously trying to fit everything into the categories set out in *Pemsel*. In an ironic fashion, such a radical restatement of current reality without undue allegiance to existing case law would be more consistent with Lord Macnaghten's judgment than simply repeating and adhering to his four categorisations."

To like effect, Professor David Duff called for a reformulation that would lay emphasis on public benefit; uphold social and cultural pluralism; and "reject the political purposes doctrine" (108).

102 A further reflection of the perceived inadequacies of the *Pemsel* approach was the recent adoption in New Zealand of the *Charities Act 2005* (NZ). Although this enactment appears to preserve the use of the traditional four heads of charity expressed in *Pemsel* (109), it introduces reforms designed to protect special Maori charities and to forestall invalidation of a "charity" by the inclusion amongst its purposes of ancillary non-charitable purposes (including, for example, advocacy) (110).

103 Not all countries of the common law world have continued to adhere to *Pemsel*. In India, although the influence of *Pemsel* may still be seen

(103) [1998] 3 FC 202 at 214 [8].
(104) *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 107 [150].
(105) *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 91 [125] per Gonthier J.
(106) [1999] 1 SCR 10 at 51 [50].
(107) Bromley, "Contemporary Philanthropy – Is the Legal Concept of 'Charity' Any Longer Adequate?", in Waters (ed), *Equity, Fiduciaries and Trusts* (1993) 59, at pp 65-66.
(108) Duff, Tax Treatment of Charitable Contributions in Canada: Theory, Practice, and Reform, *Osgoode Hall Law Journal*, vol 42 (2004) 47, at p 68.
(109) *Charities Act 2005* (NZ), s 5(1).
(110) *Charities Act 2005* (NZ), s 5(3).

in revenue legislation (111), local cultural concepts appear to have been accepted and grafted onto the old law (112).

104 *A wrong turning?* In 1923, in *Chesterman v Federal Commissioner of Taxation* (113), this Court was asked to give meaning to s 8(5) of the *Estate Duty Assessment Act 1914* (Cth). That subsection exempted bequests and gifts "for religious, scientific, charitable or public educational purposes".

105 A majority of the Court (Isaacs, Rich and Starke JJ, Knox CJ and Higgins J dissenting) rejected the submission that "charitable purposes" was to be read in a "technical legal sense". Isaacs J pointed to the "non-technical interpretation" of "charitable purposes" that had been adopted in a decision of the English Court of Appeal published only eight months after the decision in *Pemsel* (114). His Honour was strongly influenced by the context and language of the Australian legislation in issue. So was Starke J who, in language similar to that used above, pointed to the need to construe each statute "by itself for the purpose of ascertaining its meaning" and to have regard to any other exemptions which would "cover a large number of 'charities' in the strict legal sense" (115). The reasons of Rich J were to like effect (116). There had been earlier Australian decisions in which local judges had endeavoured to be faithful to what they took to be the particular purposes of the Australian statutory text as enacted by Australian legislators (117).

106 These entirely orthodox approaches, attentive both to legal principle and to local conditions, were overruled when *Chesterman* reached the Privy Council (118). That Court insisted on obedience to the "legal meaning expressed by Lord Macnaghten in *Pemsel's Case*" (119). Fifty years later, the same approach was restated in a Privy Council decision from the Court of Appeal of New South Wales (120).

107 It was natural, in a legal environment in which this Court's decisions were subject to appeal to the Privy Council, that obedience to the *Pemsel* rule would continue, virtually unquestioned. But since that supervision has ceased (121), this Court is free to reach its own

(111) *Municipal Corporation of Delhi v Children Book Trust* (1992) AIR SC 1456.
(112) *CIT v FICC* (1981) AIR SC 1408 at 1414-1415 per Venkataramiah J.
(113) (1923) 32 CLR 362. See also *Swinburne v Federal Commissioner of Taxation* (1920) 27 CLR 377 at 384.
(114) (1923) 32 CLR 362 at 382, citing *Inland Revenue Commissioners v Scott* [1892] 2 QB 152 at 165.
(115) (1923) 32 CLR 362 at 399.
(116) (1923) 32 CLR 362 at 397-398.
(117) See, eg, *Queen's College, Trustees of v Mayor of Melbourne* [1905] VLR 247 at 255, noted in *Ashfield Municipal Council v Joyce* [1978] AC 122 at 139.
(118) *Chesterman* (1925) 37 CLR 317.
(119) (1925) 37 CLR 317 at 319.
(120) *Joyce* [1978] AC 122 at 136-139; cf *Salvation Army (Vic) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 at 174-175, adhering to *Pemsel*.
(121) *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Australia Act 1986* (Cth), s 11(1).

conclusions. It may, if it chooses, return to its own earlier authority in *Chesterman*. That authority is, after all, more respectful to the purposes discerned from the particular legislation and to the ordinary principles governing the construction of statutes that give primacy to the parliamentary words over judicial authority.

108 The foregoing reasons therefore provide a sound basis for reopening the meaning of "charitable body" in the present appeal. The issue is not immaterial to the outcome of this appeal given that, upon one view, a narrower, popular meaning for the word "charitable", understood in its ordinary sense, would exclude the appellant, especially if the phrase "charitable body" is interpreted in a revenue statute which imposes a general tax and permits exemptions only in specified and very particular circumstances.

109 In light of the criticism that has been directed at *Pemsel*, both in Australia and in other common law countries, it is by no means self-evident that *Pemsel* provides the starting point for defining the word "charitable".

Reasons for adhering to Pemsel

110 Had this Court's decision in *Chesterman* not been overruled by the Privy Council in 1925, it is possible that a more satisfactory approach to the meaning of "charity" and "charitable" would have been fashioned in Australian courts and legislation over the years. In the event, a new kind of judicial mortmain was imposed on the law of charities, relevant to the content of federal and State legislation in Australia. Although, as I have shown, there are reasons that would support, even now, an attempt to fashion a new principle for application to the Act of the Victorian Parliament in question in this appeal, for the reasons which follow, I have concluded that such an attempt should not be made.

111 First, it is by no means clear that the Victorian Parliament intended in this case to depart from the definition supplied by *Pemsel*. Recent amendments in the Australian federal context and in New Zealand have proved extremely limited. This may demonstrate the complexity and controversy of bolder reforms. Alternatively, it may reinforce a conclusion that the present law is not considered sufficiently anomalous, inefficient or unjust as to require general statutory intervention. If, as a result of the outcome of these proceedings, the Commissioner or the Government and Parliament of Victoria are disturbed, it will be open to them to seek and adopt a further amendment to the Act. The many amendments enacted, and the highly particular provisions appearing there, indicate that such amendments can easily be made where the political will exists. In effect, this constitutes the best answer available to the suggestion that the "technical" or "legal" definition of "charitable" is prone to mislead the elected representatives and Parliament when approving a law raising taxes from the people.

112 Secondly, the one indisputably correct statement that Lord Macnaghten made in *Pemsel* was that "no one as yet has succeeded in defining the popular meaning of the word 'charity'" (122). At least, no one has succeeded in providing a definition that enjoys universal acceptance. To reconceptualise the notion of charity and to apply it to the phrase "charitable body" in the Act, would desirably require assistance from the parties; a study of much comparative material; and close analysis of such material. In a case where neither the parties nor the Commonwealth intervening, was willing to undertake that task, I am not convinced that this Court, unaided, should attempt to do so on its own.

113 Thirdly, the issue of whether the Privy Council's decision in *Chesterman* should be reversed was carefully re-examined by that Court in *Joyce*. Lord Wilberforce, who could not be described as a narrow or parochial legalist, took pains to refer to many decisions of this Court, and other Australian courts, which, once the Rubicon of *Chesterman* was crossed, had faithfully followed the *Pemsel* approach (123). He offered several reasons of legal principle and policy for adhering to the old approach. He did not confine himself to a demand for unquestioning adherence to judicial authority.

114 Fourthly, a judicial re-expression would have wide-ranging implications, affecting the legal affairs of many persons, ordered on the assumption of adherence to the *Pemsel* approach. One of the reasons of policy advanced in *Joyce* (also mentioned in this appeal by Gleeson CJ, Heydon and Crennan JJ (124)) is that numerous charitable bodies have organised their affairs to bring themselves within the technical or legal definition, so as to secure the advantage of the exemption (125). The *Pemsel* approach has also been applied beyond the context of revenue law. In light of these considerations, in a case such as this, judges should submit to the constraints of authority (126), even where they have serious doubts about the correctness of that authority.

115 Fifthly, in the one instance in which a final appellate court has been invited to review the approach in *Pemsel*, and to substitute a more modern and local judicial definition, the Supreme Court of Canada declined to accept the invitation. In the *Immigrant and Visible Minority Women* case (127), the majority (128) accepted the appellant's criticism

(122) *Pemsel* [1891] AC 531 at 583.
(123) *Joyce* [1978] AC 122 at 136-139.
(124) Reasons of Gleeson CJ, Heydon and Crennan JJ, fn 28, referring to considerations of convenience.
(125) A list of organisations that have qualified for the exemption can be found in *Joyce* [1978] AC 122 at 139.
(126) *Young Men's Christian Association v Sydney City Council* (1954) 20 LGR (NSW) 35 per Sugerman J, noted in *Joyce* [1978] AC 122 at 139.
(127) *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10.
(128) Iacobucci J, Cory, Major and Bastarache JJ concurring.

of the *Pemsel* categories and approach. However, they concluded that, for the Court to attempt a re-expression of the law, having so many applications of great variety, would go beyond the proper judicial function to re-express the general law (129). Given the ramifications, the majority considered that any such re-expression should be left to Parliament.

116 Sixthly, the existing categories already afford a broad scope for a modern or liberal interpretation of "charity", a point acknowledged by a minority of the Supreme Court of Canada in the *Immigrant and Visible Minority Women* case (130). Whilst not disagreeing with the majority's criticisms of *Pemsel*, the minority concluded that, especially in the fourth stated category (trusts for other purposes beneficial to the community, not falling under any of the preceding heads), and in the technique of reasoning by analogy from the categories collected in the preamble to the Statute of Elizabeth, *Pemsel*, in practice, afforded a potentially broad and facultative approach to the meaning of "charity" and "charitable" (131).

117 Indeed, it is arguable that *Pemsel* may have actually condoned adjustment and modernisation of the notion of "charity". A return to the ordinary meaning of the word might constrict that process. Dictionary definitions tend to assign as the primary meaning of "charity", "almsgiving; the private or public relief of unfortunate or needy persons; benevolence" (132). "Charitable" is primarily defined as "generous in gifts to relieve the needs of others" (133). If, as a matter of legal policy, it is considered that the term "charitable", in contemporary revenue laws, should be permitted to expand so as to cover a wider range of community interests, the *Pemsel* approach may be more conducive to this outcome than an embrace of the demotic meaning of the statutory words. It is possible that colloquial use of the notion of "charity" has kept pace with modern community interests in the legal context in a way that dictionary definitions do not reflect. I tend to think it has. But not everyone shares this belief. Reopening the question (which many parliaments appear to have been willing to leave to the courts) might produce a more restrictive and deleterious policy outcome than is represented by persistence with the approach that *Pemsel* mandates (134).

(129) [1999] 1 SCR 10 at 107 [150] applying *R v Salituro* (1991) 3 SCR 654 at 670.

(130) *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 59 [81] per Gonthier J, L'Heureux-Dubé and McLachlin JJ concurring.

(131) *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 90-91 [124]-[125].

(132) *Macquarie Dictionary*, 3rd ed (1997), p 372.

(133) *Macquarie Dictionary*, 3rd ed (1997), p 372.

(134) It is insufficient merely to show that the claimant is established for the "public benefit" in the ordinary sense of that term. It remains necessary for it to demonstrate how its purposes are beneficial in a way that the law regards as

118 *Outcome – change unnecessary*: For these reasons, I am content to follow past authority and to treat the reference to "charitable body" in s 10(1)(bb) of the Act as a reference to such a body defined in the *Pemsel* sense. I concede that this is a counter-intuitive conclusion, given the normal way in which this Court approaches the construction of language in statutes of an Australian Parliament, where the Parliament itself has not provided a special definition to authorise an artificial meaning. The result is odd and the consequential meaning of "charitable" is derived in such a very strange way that I venture to suggest that few citizens know of it and most lay persons, when told, would find it astonishing.

119 A return to an understanding of "charitable" in this context, according to the understanding of ordinary language, might result in a finding adverse to the appellant. But because I have concluded that this Court should adhere to past authority on the "legal" or "technical" meaning of "charitable", that outcome is avoided. A "charitable body", as the phrase is used in s 10(1)(bb) of the Act, is not confined to a body whose purposes and activities are concerned with gift-giving and help to "needy" or disadvantaged persons. Within the fourth category described by *Pemsel*, the appellant has been established for purposes which, though not falling under the three earlier heads, are nonetheless beneficial to the community.

120 Subject, therefore, to the suggested exclusion of the appellant by reason of its close association with the Department, and its implementation of federal governmental policy, the appellant qualifies as a "charitable body". It is thus entitled to exemption from Victorian payroll tax.

The ambit of the governmental disqualification

121 *Reasons for exclusion*: In deciding whether an organisation, claiming to be a "charitable body" fits that description, the starting point for analysis is to identify the organisation's (ie the "body's") purposes. Obviously, the constitution of the body will be important for this purpose. However, it cannot be conclusive. The constitution will often have been drafted by lawyers with an eye to the revenue implications of the document. That is why it is material to have regard also to the activities of the organisation, as an assurance that the nominated "purposes" are genuine and express the real, as distinct from purely nominal, objectives for which the body is established.

122 The difficulty of identifying the character of an activity as charitable was explained by the Supreme Court of Canada (135):

"The difficulty is that the character of an activity is at best

(cont)

charitable. See *D'Aguiar v Inland Revenue Commissioners Guyana* [1970] TR 31 at 33 (PC).

(135) *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 108 [152]-[153]. See also *Attorney-General v Brown* (1818) 1 Swans 265 [36 ER 384]; *Attorney-General v Eastlake* (1853) 11 Hare 205 [68 ER 1249].

> ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature … Unfortunately, this distinction has often been blurred by judicial opinions which have used the terms 'purposes' and 'activities' almost interchangeably. Such inadvertent confusion inevitably trickles down to the taxpayer organisation, which is left to wonder how best to represent its intentions to [the revenue] in order to qualify for [exemption]."

123 The disqualification of organisations from description as "charitable bodies", on account of their connection with government, is linked to the characterisation of their "purposes". If the "purposes" fall within the *Pemsel* criteria, the body will be classified as "charitable". If, however, the "purposes" are no more than to implement governmental, including legislative, objectives, those features will colour the character of the body. It will then be designated as one to implement governmental policies, whether charitable or non-charitable. It will not qualify as a "body" whose purposes are identifiably "charitable".

124 It was this distinction that was emphasised by Dean J in *In re Cain* (136). One of the bequests of the will considered in that case was to the Children's Welfare Department at a nominated address, which was that of a State government department known by that name. The next-of-kin contended that the gift was void as not charitable. Various old cases on testamentary gifts to ministers and public officials (137) were examined for the instruction that they provided. It appears to have been accepted that a gift to the State of Victoria or to the Government of Victoria would not be charitable. But what of a gift to the Child Welfare Department? Dean J said (138):

> "In my opinion, if the present gift be construed as a gift for carrying on the ordinary activities of a Government department pursuant to a statute, the gift is not a gift for charitable purposes, even if the activities are such that if carried on by private persons they would be charitable. Such activities are simply part of the government of the country … [The department] is concerned primarily with the welfare and protection of children. It is performing functions which Parliament, as a matter of public policy, has committed to it. It cannot, whilst performing its statutory duties, have any greater claim to be charitable than the Railways Department, the Department of Public Works, or the Crown Law Department."

(136) [1950] VLR 382.

(137) See, eg, *Nightingale v Goulbourn* (1848) 2 Ph 594 at 596 [41 ER 1072 at 1073], referred to at [1950] VLR 382 at 386.

(138) [1950] VLR 382 at 387.

125 Notwithstanding these observations, and consonant with an approach favourable to upholding testamentary dispositions wherever possible, Dean J concluded that the gift was good because, according to the evidence, it would not be used "in ease of Government expenditure" (139), but "an appropriate method of using it to benefit children under [the Department's] care in some manner not likely to be carried into effect in the ordinary application by the Department of its grants from consolidated revenue" would be devised. Adherence to the charitable purpose would remain under the control of the court.

126 The reasoning behind this analysis suggests a bifurcation between bodies that carry out governmental policy, using funds derived from Consolidated Revenue; and bodies that receive public funds but are not part of the machinery of government. For bodies that are part of such machinery, the charitable "purposes" necessary to attract characterisation as a "charitable body" are absent. Their purposes are governmental. Such bodies are therefore no more than an agent of government. Their activities may be beneficial to individuals and to the community, but they are still performing activities decreed by government. They lack the spark of altruism and benevolence that is essential to characterisation as "charitable". They are, in Dean J's words, "simply part of the Government of the country".

127 *The Commissioner's arguments*: The Commissioner's argument, that the appellant failed on this basis, was not without persuasive force, as is evident from its success in the Tribunal, before the primary judge and in the Court of Appeal.

128 The strongest evidentiary support for the characterisation which the Commissioner urged derived from the following facts:

- almost the entirety of the income of the appellant came from the Department;
- that income came under conditions largely or wholly tied to the pursuit of approved departmental policies;
- the appellant was subject to monitoring and reporting obligations;
- the appellant was liable to coercive scrutiny; and
- the appellant was part of an integrated national scheme adopted at a federal level to promote the attainment of objectives in all parts of the Commonwealth, within plans approved by the Department and inferentially endorsed by the federal Minister accountable to the Federal Parliament for the policies and funds thereby involved.

129 In these circumstances, I can understand the reasons that led the three decision-makers below to find against the appellant's claim for exemption under s 10(1)(bb) of the Act. Specifically, I could understand the Commissioner deciding that, if the federal Minister wished to provide federal funds through a private corporation for the

(139) [1950] VLR 382 at 388.

implementation of formulated federal health policies, with employees receiving wages, the wages of such employees should be treated like those of any other employer and should not attract the special exemption limited to a "charitable body". It was this characterisation of the "purposes" and "activities" of the appellant that resulted in the conclusions unfavourable to exemption that have occasioned this appeal.

130 *Significance of the* "*body*": In performing the task of characterisation enlivened by the Commissioner's ground of objection to the appellant, it is important to remember that the statutory question presented by s 10(1)(bb) of the Act is whether the organisation claiming exemption is a "charitable body". It is the character of the "body" that is important for deciding whether the Act's description is satisfied. Obviously, the appellant is not, as such, a governmental body. It is not part of government, established by statute to effect governmental purposes as such. In any case, even bodies so established have sometimes been held capable of being treated as "charitable".

131 For example, in *British Museum v White* (140), a devise to the British Museum was held to be charitable although it was argued that the Museum was not a charitable institution because it was founded by the munificence of the State. Sir John Leach V-C said it was "a gift to an institution, established by the Legislature, for the collection and preservation of objects of science and of art, partly supplied at the public expense, and partly from individual liberality, and intended for the public improvement". This, and several other cases in England (141) and in Australia (142) follow this line of reasoning.

132 The type of distinction identified in the early cases may be seen in most recent times, and in Australia, by contrasting *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (143) and *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (144).

133 In the former case, the question was whether the Fire Brigade Board, established under Queensland legislation, was a "public benevolent institution". The Federal Court of Australia held that it was not. That Court characterised the Fire Brigades Board as a governmental body which, in the language of *In re Cain*, was simply exercising the functions of government. Whilst the expression "public benevolent institution" is not the same as "charitable body", there is sufficient similarity to make the approach in that case noteworthy.

134 However, this decision was distinguished by the Court of Appeal of the Northern Territory in the *Alice Springs Council* case. An Aboriginal corporation claimed (and the Town Council contested) that it was entitled to exemption from rates in respect of "land used or occupied

(140) (1826) 2 Sim & St 594 [57 ER 473].
(141) See, eg, *Attorney-General v Heelis* (1824) 2 Sim & St 67 [57 ER 270].
(142) *Robison v Stuart* (1891) 12 LR (NSW) Eq 47 at 50.
(143) (1990) 27 FCR 279.
(144) (1997) 94 LGERA 330; 115 NTR 25.

for the purposes of … charity". The corporation had objects and purposes which extended to the provision of help to needy Aboriginal people as well as to its members. The corporation used premises on its lands for the accommodation of generally impoverished visitors who wished to stay in Alice Springs for short intervals. Mildren J, who gave the principal reasons of the Court of Appeal, rejected the argument that the corporation should, like the Fire Brigades Board in the earlier case, be characterised as an agency of government. He said (145):

> "In this case no ministerial control could be exercised over any of the associations, either by virtue of the Acts under which they are constituted, or by the provisions of the constitutions. The mere fact that the associations are directly government funded does not deprive them of the character of being charities. I do not consider that the argument that the associations are merely carrying out the functions of government can be sustained."

I agree with this approach.

135 *Comparative law*: When considering the question whether a body is "charitable" for legal purposes, courts of other common law countries have not treated as decisive the fact that it receives funds, even substantial funds, from government or in some ways contributes to effectuating the policy of government under the encouragement of subventions.

136 Tax concessions under federal law in the United States of America do not contain express exclusions from "charitable" status for recipients of government funds. Typically, the disqualifications provided by statute relate to the provision of private benefits to members; participation in propaganda activities; attempts to influence or alter legislation; or participation in political campaigns (146). In a number of cases, the presence of governmental representation on a chartered private company established by government and supported by government funds has not prevented the corporation from being classified as a "charitable" organisation for tax purposes (147).

137 In the United Kingdom, an exempt charity for income tax purposes is "any body of persons or trust established for charitable purposes only" (148). In the *Charities Act 1993* (UK) a "charity" is defined as "any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the Court's jurisdiction with respect of charities" (s 96(1)). The phrase "charitable purposes" is, in turn, defined to mean "purposes which are exclusively charitable according to the law of England and Wales" (s 97(1)). In this way the definition dating back to the Statute of Elizabeth, as explained in *Pemsel*, continues to apply. However, the

(145) (1997) 94 LGERA 330; 115 NTR 25 at 41.
(146) See *Internal Revenue Code* (2000) USC 26, §501(c)(3).
(147) *Morales v New Jersey Academy of Aquatic Sciences* (1997) 694 A (2d) 600; *Nazzaro v United States* (2004) 304 F Supp 2d 605.
(148) *Income and Corporation Taxes Act 1988* (UK), s 506(1).

case law does not reveal a prohibition, as such, against governmental association or funding, of the kind adopted by the Court of Appeal of Victoria in this case.

138 In 2001, the Charity Commissioners for England and Wales formulated guidelines that addressed the potential loss of a "charitable" character occasioned by too close an association with, or dependence upon, government (149). These guidelines make it clear that an institution is not prevented from being an institution established for charitable purposes simply because it has been "set up by government". Nor is it a bar to such status that the body is created with a view to taking on a governmental function, so long as the body's purposes are exclusively "charitable" in the general sense. Moreover, under the guidelines, the motive of the promoter is irrelevant in determining whether the body is a "charity". It is critical that the body must be independent, such that it exists to carry out its own charitable purposes and not simply for the purpose of implementing policies or directions of the government.

139 In New Zealand, under the *Charities Act 2005* (NZ), registration for the purpose of concessions under the *Income Tax Act 2004* (NZ) and the *Gift Duties Act 1968* (NZ) depends on demonstration of a "charitable purpose". This is defined to include criteria that, in part, repeat those adopted in *Pemsel* (150).

140 In Canada the *Income Tax Act 1985* (Can) provides for the registration of charities. To be registered for this purpose, the charities must satisfy stated criteria (151). These include the requirement that more than 50 per cent of the controlling officers of the body be independent of private or public "foundations" and that no controlling group contribute more than 50 per cent of the capital. However, the latter restriction does not apply to capital contributed by government. No exclusion for governmental association or funding is expressed in the Canadian legislation; nor is it evident in the Canadian case law.

141 Obviously, many of these instances depend on their own special legislation. They suggest that generally the establishment, control or funding of a body by government may be relevant to the characterisation of that body's purposes and objects as "charitable" or otherwise. However, if a body is established separately from government, with substantial independence in its organisation, it is not necessarily disqualified from characterisation as "charitable" merely because it receives substantial government funds.

142 Government funding for public benefit through private sector organisations has expanded greatly in recent years in many countries, including in Australia. This development has occurred as a means of securing perceived advantages, including decentralisation; and securing

(149) England and Wales, Charity Commissioners, *The Independence of Charities from the State*, Review of the Register publication RR7 (2001).
(150) *Charities Act 2005* (NZ), s 5(1).
(151) *Income Tax Act* RSC 1985 (Can), c 1, 5th supp, s 149(1)(f).

the efficiency that small, local, private sector bodies can achieve. From the standpoint of legal policy, it would be undesirable for the law to needlessly expand the disqualification of such bodies from the advantages that they enjoy as "charities" under revenue law where their purposes otherwise qualify. If, because of a particular governmental association, and for inter-governmental, political or other reasons, governments wish to remove exemptions from bodies that otherwise meet the requirements of being "charitable" within the general law as it has been expounded by the courts, they can easily do so by securing the amendment of the legislation. In the matter of exemptions for charities and in defining exempted charities, Australian legislatures have a record of enacting very particular provisions when they deem it to be necessary. There is no need for the courts to descend to such particularity.

The appellant is a "charitable body"

143 When attention is directed to the characterisation of the "body" which is constituted by the appellant, and the question is asked whether or not it is "charitable", within s 10(1)(bb) of the Act, the better answer is therefore that it is "charitable". True, the appellant receives most of its funds from government, but so too did the Aboriginal corporation in the *Alice Springs Council* case, and so did many other bodies held by this Court to be charitable. If attention is focused on the "purposes" of the body, rather than its funding as such, those purposes emerge as "charitable" within the fourth category in *Pemsel*. They are performed for the public benefit in the sense there described. Care was taken in constituting the appellant to preserve its ultimate independence from government if ever the position should arise that government wished the appellant to perform activities inimical to its members, their patients or services conceived and expressed through the board.

144 The appellant's board contained no representative of the Department or the government. True, the financial and other arrangements imposed by the association with the Department were rigorous. But that is how it must be in the expenditure of funds for which the Department, and its Minister, are accountable, through the Parliament, to the electors from whom taxes are raised. At all times, as a "body", the appellant was a private corporation, constituted independently of government. It was only tied to the 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. The appellant was fulfilling its own objectives and purposes, which were conceded to be beneficial to the public. The appellant was not simply carrying out the objects of government. Still less was it part of the "government of the country" (152).

145 It follows that the suggested ground of disqualification from entitlement to the exemption claimed by the appellant was not

(152) *In re Cain* [1950] VLR 382 at 387 per Dean J.

established. The Court of Appeal erred in law in deciding otherwise. Wider questions concerning the ambit of the suggested disqualification for governmental association need not be answered in this appeal.

Orders

146 I therefore agree in the orders proposed by the other members of the Court.

CALLINAN J.

The question

147 The question in this appeal is whether the appellant, although its objects and activities are clearly charitable, is obliged to pay pay-roll tax under the *Pay-roll Tax Act 1971* (Vic) (the Act). By s 10(1)(bb) of the Act, a "charitable body" is exempted from that obligation if its employees are exclusively engaged in work of a charitable nature on behalf of their employer. Whilst it is not contended by the respondent that the appellant's objects and activities are not charitable, it argues, as the Victorian Civil and Administrative Tribunal (the Tribunal), a judge of the Supreme Court of Victoria (Nettle J) and the Court of Appeal of the Supreme Court of Victoria (Chernov JA and Osborn A-JA, Byrne A-JA dissenting) have all found, that it should be denied the exemption, because it acts so much under the control or influence of government that it must be regarded as acting in furtherance of objectives of government, rather than in the independent pursuit of its own objects.

The facts

148 The appellant is a company limited by guarantee. Its objects, legal capacity and powers are set out in paras 3 and 4 of its *Constitution*:

> "3 *Object*
>
> The object of the company is to improve patient care and health, primarily in the Central Bayside area of Melbourne, by:
>
> (a) improving communication between general practitioners and other areas of the health care system;
>
> (b) more effectively integrating general practice with other elements of the health care system;
>
> (c) enabling general practitioners to contribute to health planning;
>
> (d) providing better access to available and appropriate general practitioner services for patients, and reducing inappropriate duplication of services;
>
> (e) meeting the special (and localised) health needs of groups (such as Aboriginal and Torres Strait Islanders and those with non-English speaking backgrounds) and people with chronic conditions, particularly where these needs are not adequately addressed by the current health care system;
>
> (f) advancing general practice, and the health and well-being of general practitioners;

(g) enhancing educational and professional development opportunities for general practitioners and undergraduates;

(h) increasing general practitioner focus on illness prevention and health promotion; and

(i) improving effectiveness and efficiency of health services at the local level.

4 *Legal Capacity and Powers*

4.1 The company has:

(a) the legal capacity and powers of an individual, and

(b) all the powers of an incorporated body, as provided by section 124 of the Corporations Act.

4.2 The company may only exercise its powers for its object."

149 Its status as a non-profit company is established by para 5 of the objects:

"5 *Not For Profit*

5.1 The company may only use its income, assets and profit for its object.

5.2 The company must not distribute any of its profit, income or assets directly or indirectly to its members.

5.3 Clause 5.2 does not prevent the company from paying its members (including its directors):

(a) reimbursement for expenses properly incurred by them, and

(b) for goods supplied and services provided by them,

if this is done in good faith on terms no more favourable than if the member were not a member."

150 The liability of each member of the appellant is limited to $10. Any medical practitioner in the relevant area may be a member (cl 7.1). There is also provision for associate membership (cl 7.2), but not for any governmental membership, or representation on the board of directors (cl 42.1). The appellant has made a "mission statement" and has also stated its "goals":

"*Mission Statement*

To establish and maintain an association of General Practitioners within the Bayside area to promote optimal, continuing patient care by General Practitioners for all residents at a local level.

Goals

• To promote and support the role of GPs as the medical care manager of individuals in the community.

• To provide services to GPs, including:

(a) Continuing Medical Education and Quality Assurance Activities;

(b) Enhancement of practice management support systems.

• To improve the integration of GP services into a range of primary, secondary and tertiary and other health care services in the region.

• To maintain and extend GP involvement in the full range of health care provision with particular emphasis on preventative strategies and health promotion.

• To establish a significant GP role in decision making in health care planning.

• Improve IT/IM utilisation rates by GPs and GP practices and to increase the use of IT by current users."

151 The appellant entered into a funding agreement with the Department of Health and Ageing (the Department) on behalf of the Commonwealth. The agreement recites:

"A. The Department operates a Program, being the Divisions of General Practice Program, which provides funding under block grant arrangements to Divisions of General Practice to enable general practitioners to conduct activities to improve integration with other elements of the health system and to address identified local health needs.

B. The Department accepts that the Division is an eligible body for the purposes of the Program, and the Department may give financial assistance to enable the Division to undertake the approved Programs of Activity as set out in the Division's *extended Strategic Plan for the period 1 July 1999-30 June 2003 and Business Plan for the period 1 July 2000-30 June 2003*.

C. The Department is required by law to ensure the accountability of Program Funds and accordingly, the Division is required to be accountable for all Department Funds received.

D. The Department wishes to pay Funds under the Program to the Division for the purposes, and subject to the terms and conditions, set out in this Agreement."

(Emphasis in original.)

152 The agreement requires the appellant to prepare and follow a "business plan" and to have its receipts and expenditures audited. Clause 2 of the agreement is as follows:

"2 *Conduct of Programs of Activity*

2.1 The Division shall conduct the Programs of Activity to a standard acceptable to the Department and in accordance with the requirements as set out in Schedule 1.

2.2 The Division shall perform its obligations under this Agreement at the times and in the manner specified.

2.3 The Division will comply with the requirements regarding identified Outcomes for Outcomes-Based Funding as specified in Schedule 2.

2.4 The Division will notify the Department in writing of any alteration to the *Strategic Plan*.

2.5 If for any reason the Division is unable to commence or continue work on the Programs of Activity or forms the opinion that

progress will be significantly delayed, the Division shall immediately notify the Department in writing and consult with the Department to deal with the matter.

2.6 The Division, as and when required by the Department, shall cooperate with, participate in, or undertake evaluations of the Division's activities including the Annual Division's Survey, Minimum Data Set and Workforce Data. The evaluations will be in a format specified by the Department.

2.7 If the Division is a corporation, the Division warrants that its Memorandum and Articles of Association are not, and shall not be, inconsistent with the Agreement."

(Emphasis in original.)

153 Clause 4 is relevant:

"4 *Funding Use and Accounts*

4.1 The Funding shall be expended by the Division only for the purposes of performing the Programs of Activity and in accordance with the terms and conditions set out in this Agreement.

4.2 In relation to Clause 4.1, the Division shall not merely disperse Funds to General Practitioners but shall ensure that any payments made for General Practitioners are for activities performed on specified Programs of Activity being undertaken by the Division under the terms of this Agreement.

4.3 *The Division must immediately deposit all Funds received into an account controlled solely by the Division with a financial institution such as a bank, building society or credit union operating in Australia. The Division must notify the Department of the identifying details of that account. The Division must identify separately in its financial records the receipt and expenditure of Funds received under the Agreement for each of the agreed Programs of Activity.*

4.4 The Division shall cause to be kept proper accounts and records of its transactions and affairs in relation to use of the Funding, in accordance with accounting principles generally applied in commercial practice and as required by law, and shall do all things necessary to ensure that all payments out of its moneys are correctly made and properly authorised and adequate control is maintained over the incurring of liabilities.

4.5 The Funding shall not be used as security for the purposes of obtaining commercial loans or entering into hire purchase arrangements nor for the purpose of meeting existing loan obligations.

4.6 Interest earned by the Division on the Funding shall be used and dealt with by the Division as if the interest earned were part of the Funding."

(Emphasis in original.)

154 Clause 15 should be set out:

"15 *Compliance with Commonwealth Policies*

15.1 The Division shall, when using the Commonwealth's premises or facilities, comply with all reasonable directions and Departmental procedures relating to occupational health and safety and security in effect at those premises or in regard to those facilities, as notified by the Commonwealth or as might reasonably be inferred from the use to which the premises or facilities are being put.

15.2 The Division shall comply with its obligations, if any, under the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* and shall not enter into a subcontract under this Agreement with a subcontractor named by the Director of Affirmative Action as an employer currently not complying with that Act."

155 Clause 24 is also of relevance:

"24 *Termination and Reduction*

24.1 The Department may, at any time by written notice, terminate this Agreement or reduce the scope of the Programs of Activity. If this Agreement is so terminated or reduced in scope, the Department shall, subject to Clauses 24.3 and 24.4, be liable only for:

(a) payments under the payment provisions of this Agreement that were due for the conduct of the Programs of Activity before the effective date of termination or reduction; and

(b) any reasonable costs incurred by the Division and directly attributable to the termination or reduction.

24.2 Upon receipt of a notice of termination or reduction the Division shall:

(a) stop work as specified in the notice;

(b) take all available steps to minimise loss resulting from that termination or reduction and to protect Commonwealth Material and Agreement Material;

(c) in the case of reduction in the scope of the Programs of Activity, continue work on any part of the Programs of Activity not affected by the notice; and

(d) immediately repay to the Department so much of the Funds unexpended or not acquitted to the satisfaction of the Department as relate to any part of the Programs of Activity affected by the notice.

24.3 In the event of reduction in the scope of the Programs of Activity the Department's liability to pay any of the Funds or provide assistance under Clause 3 shall, in the absence of agreement to the contrary, abate proportionately to the reduction in the Programs of Activity.

24.4 The Commonwealth shall not be liable to pay compensation in respect of a termination or reduction under this Clause 24."

156 The area in which the appellant operates is part of suburban Melbourne. "Divisions" of the kind of which the appellant is one were created, if not as a result of a government initiative, certainly with at

least the encouragement and support of government from as early as 1992. It seems likely that they would not have been brought into existence, or would not function as they do, were it not for that encouragement and support, including, significantly, financial support for their programmes. Among the actual activities undertaken by the appellant are the expansion of access to immunisation, the provision of continuing medical education to general practitioners, the improvement of medical software systems, the enhancement of co-operation with pharmacists, the development of a "falls prevention programme", and the improvement of access by medical practitioners to timely and objective information about therapeutics.

157 In the relevant tax year (1 July 2001 to 30 June 2002) the total receipts of the appellant were $1,048,979. The "sales revenues" were $1,087,813 (less $45,132 "unearned income on projects"). The source of $1,006,997 of those funds (about 93 per cent of the total receipts) was by way of grant from the Commonwealth government.

158 About 43 per cent of the appellant's total income (less than half of the amount received from grants) was received from the Commonwealth under "outcomes based funding" (OBF). The other grants were described as being predominantly "project-based".

159 A programme of funding from the Commonwealth to divisions of general practice under OBF agreements started in 1999. The first triennial OBF agreement was extended to 30 June 2003.

160 It is not disputed that the appellant is bound to conduct activities intended to achieve the identified outcomes set out in its strategic plan and business plan (as approved by the Department) and incorporated in the agreement between it and the Department. In turn, these outcomes must be in keeping with the current aims of the division of general practice. The block grant from the Commonwealth, that is, 43 per cent of the appellant's income did not specify actual projects or actual project outcomes. The majority of the appellant's grant funding related to specific projects. Some of the projects were devised by the appellant. In some cases, the appellant would actively pursue funding for a particular project which it had decided was important to the community. In other cases, expressions of interest might be invited or tenders called. The appellant would then propose a project in response to the call for expressions of interest, or accept the tender. Grants for specific projects might be augmented from a variety of sources including "health promotion agencies" of which the Pharmacy Guild is one.

Case history

161 On 24 September 2001, the appellant wrote to the Minister for Regional Development requesting that it be considered for exemption for pay-roll tax purposes. On 14 December 2001, the respondent (to whom the request had been forwarded) ruled that the appellant was not a charitable body for the purposes of s 10(1)(bb) of the Act. On 29 January 2002, the appellant objected to the decision. On

16 July 2002, the respondent disallowed the objection. The appellant requested the respondent to refer the matter to the Tribunal. On 22 November 2002, the Tribunal affirmed that the appellant was not a charitable body for the purposes of s 10(1)(bb) of the Act.

The Supreme Court of Victoria

162 The appellant sought leave to appeal against the Tribunal's decision. That application came on for hearing by the Supreme Court (Nettle J). On 15 August 2003, his Honour made orders that leave to appeal be granted and that the appeal be dismissed with costs.

163 Nettle J did not disturb a finding of the Tribunal that the appellant was a body that existed for purposes "beneficial to the community". His Honour held that the appellant was not a department or other instrumentality of government; it was a matter for it whether it would seek funds from government, and accordingly subject itself to the conditions of any grant. The Commonwealth's control over the affairs of the appellant was no more than the power of the purse.

164 But his Honour nonetheless concluded that the appellant was not an exempt body (153):

> "Having regard to the constitution, activities, history and control of the Division, and in particular, to the extent to which the Division's activities of providing services to its members are funded and thereby controlled by the Commonwealth, I am not persuaded that the Division is sufficiently analogous to any recognised charity or is otherwise to be regarded as within the equity of the Statute."

The Court of Appeal

165 The appellant then sought and obtained leave to appeal from the decision of Nettle J. On 1 July 2005, the Court of Appeal of the Supreme Court of Victoria, by majority (Chernov JA and Osborn A-JA, Byrne A-JA dissenting) dismissed the appellant's appeal with costs.

166 In the Court of Appeal, Chernov JA said (154):

> "… the analysis involved in determining whether such a body is performing the function of government must be the same (or substantially so) irrespective of whether it claims to be a public benevolent institution or a charity. In either case, the process involves the characterisation of the body's activities to see, not only whether they are ordinarily performed by government, but more importantly to ascertain if they are so controlled by it that the body can be properly regarded as carrying out the function or work of government."

167 The characterisation that his Honour preferred was as a body that performed the work or function of government. The reasoning of

(153) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2003) 53 ATR 473 at 486 [33]; 2003 ATC 4835 at 4845.

(154) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 154 [6]; 2005 ATC 4586 at 4589.

Osborn A-JA was to a similar effect, that the appellant was "so much a creature or agent of government that it should be denied the status of a charity" (155).

168 In dissent and, as will appear, correctly in my opinion, Byrne A-JA said this (156):

> "I return once again to the facts of this case. It is clear that Central Bayside is not the mere creature or agent of the Commonwealth Government. No government control is exercised over its management. It plays an active role in itself selecting the particular projects which it undertakes for the benefit of its community. These features and the fact that its management is undertaken by its elected members without stipend from the Commonwealth shows that its relationship is more that of an ally than that of an agent. In this respect it is like any organisation whose principal object and activities are charitable. It is a charitable body."

The appeal to this Court

169 Before proceeding, it is necessary to set out the relevant statutory provision, s 10(1)(bb) of the Act:

> "10 *Exemption from pay-roll tax*
>
> (1) The wages liable to pay-roll tax under this Act do not include wages paid or payable —
>
> …
>
> (bb) by a charitable body (other than a school or educational institution or an instrumentality of the State) to a person during a period in respect of which the body satisfies the Commissioner that the person is engaged exclusively in work of the body of a charitable nature …"

It is not in contention that the reference in the section to a "body of a charitable nature" is a reference to a body that is charitable in the same sense as "charitable" has been traditionally understood at law and in equity. That understanding is that the relevant purposes of the board or trustees in question must be purposes beneficial to the community within, among other classes, relevantly, the fourth class of charity referred to in *Pemsel's Case* (157) in which Lord Macnaghten, whose words on the topic have not, so far as I am aware, been doubted, said this (158):

> "That according to the law of England a technical meaning is attached to the word 'charity,' and to the word 'charitable' in such expressions as 'charitable uses,' 'charitable trusts,' or 'charitable

(155) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 171 [60]; 2005 ATC 4586 at 4602.

(156) *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue (Vic)* (2005) 60 ATR 151 at 170 [57]; 2005 ATC 4586 at 4601.

(157) *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

(158) [1891] AC 531 at 580-583.

purposes,' cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void. Whatever may have been the foundation of the jurisdiction of the Court over this class of trusts, and whatever may have been the origin of the title by which these trusts are still known, no one I think who takes the trouble to investigate the question can doubt that the title was recognised and the jurisdiction established before the [Statute of Elizabeth] [(159)] and quite independently of that Act. The object of that statute was merely to provide new machinery for the reformation of abuses in regard to charities. But by a singular construction it was held to authorise certain gifts to charity which otherwise would have been void. And it contained in the preamble a list of charities so varied and comprehensive that it became the practice of the Court to refer to it as a sort of index or chart. At the same time it has never been forgotten that the 'objects there enumerated,' as Lord Chancellor Cranworth observes (160), 'are not to be taken as the only objects of charity but are given as instances.' Courts of Law, of course, had nothing to do with the administration of trusts. Originally, therefore, they were not concerned with charities at all. But after the passing of the Act 9 Geo 2, commonly known as the Statute of Mortmain, which avoided in certain cases gifts to 'uses called charitable uses,' alienations and dispositions to charitable uses sometimes came under the cognisance of Courts of Law, and those Courts, as they were bound to do, construed the words 'charitable uses' in the sense recognised in the Court of Chancery, and in the Statute of Elizabeth, as their proper meaning. I have dwelt for a moment on this point, because it seems to me that there is a disposition to treat the technical meaning of the term 'charity' rather as the idiom of a particular Court than as the language of the law of England. And yet of all words in the English language bearing a popular as well as a legal signification I am not sure that there is one which more unmistakeably has a technical meaning in the strictest sense of the term, that is a meaning clear and distinct, peculiar to the law as understood and administered in this country, and not depending upon or coterminous with the popular or vulgar use of the word …

No doubt the popular meaning of the words 'charity' and 'charitable' does not coincide with their legal meaning; and no doubt it is easy enough to collect from the books a few decisions which seem to push the doctrine of the Court to the extreme, and to

(159) *Charitable Uses Act 1601* (43 Eliz I c 4) (the Statute of Elizabeth).
(160) *University of London v Yarrow* (1857) 3 Jur NS 421 [44 ER 649 at 652].

> present a contrast between the two meanings in an aspect almost ludicrous … 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."

170 The Preamble to the Statute of Elizabeth gives as some examples, "repair of bridges, ports, havens, causeways … and highways" and it has accordingly long been held that the fourth category includes trusts for the provision of roads (161) and bridges (162). I mention these for this reason. In modern times, and indeed for a long time now, a road or a bridge, certainly in Australia, could not be constructed without at least the approval, if not the active participation in the provision of it by either a State or Federal government or a local authority established by the latter. As I pointed out in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (163):

> "… [the creation of new roads] cannot be done unilaterally by the [provider]: the Crown or the local authority must be willing for this to occur and to accept the road as a public road, and to permit it to intersect, or make a junction with an existing public road."

It should also be noted that activities carried out in other countries by private enterprise have been more readily performed by governments and statutory authorities in this country. It might, as a practical matter, be necessary for a donor therefore, wishing to make a charitable gift within the fourth category, to place funds or property in the hands of government or a statutory authority with a charitable purpose impressed on it (164).

171 Exactly such an occurrence led to the litigation in *Brisbane City Council v Attorney-General (Qld) (Ex rel Scurr)* (165) in which the Privy Council advised that a conveyance of land for "showground, park and recreation purposes" to the Brisbane City Council, a creature owing its existence entirely to, and governed by, State legislation, upon a condition that a named show society be given exclusive use of the

(161) See, eg, *Eltham Parish v Warreyn* (1734) Duke 67.

(162) See, eg, *Forbes v Forbes* (1854) 18 Beav 552 [52 ER 216], which involved a bequest of £2,000 to the testator's executors, on trust to build a bridge in Scotland over the river Don.

(163) (2004) 221 CLR 30 at 84 [147].

(164) See also Luxton, *The Law of Charities* (2001), p 144 [4.89] where, after referring to the Preamble's mention of bridges etc, it is said: "By analogy, purposes within the spirit of the Preamble include public works and amenities, and therefore comprise many services and provisions that are today undertaken by public (or privatized) authorities."

(165) [1979] AC 411.

land for two weeks each year without charge, gave rise to a charitable trust within the fourth category of charitable purposes defined in *Pemsel's Case*.

172 In giving the advice of the Board, Lord Wilberforce relevantly said (166):

> "It is common ground that the trust is only a valid charitable trust if it falls within the fourth class of charitable purposes defined in [*Pemsel's Case*] (167) as a trust beneficial to the community within the spirit and intendment of the preamble to 43 Eliz 1, c 4. The lack of precision of the latter's words has to be made good by reference to decided authorities which, as has been said, are legion and not easy to reconcile (168). It has been said in the Court of Appeal in England that, if a purpose is shown to be beneficial to the community or of general public utility, it is prima facie charitable, an approach which might help to simplify the law, but this doctrine, even assuming it to be established in the law of England, does not yet seem to have been received in Australia (169). Their Lordships will therefore follow the route of precedent and analogy in the present appeal."

173 In 1948 (170) and on two relatively recent occasions this Court too has effectively held that a local authority, notwithstanding its political character and subjection to State governmental control may, indeed may be obliged to, accept and hold property for a purpose of a public charitable kind. This appears from *Bathurst City Council v PWC Properties Pty Ltd* in which the Court said this (171):

> "The vesting of land in a town centre in a local authority for the purpose of a publicly accessible free car park has some elements at least of a charitable trust for public purposes. The question, as formulated by Barwick CJ in *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (172), is whether a purpose beneficial to the community is 'within the equity of the preamble to the Statute of Elizabeth'. The Preamble refers to 'Bridges, Ports, Havens, Causeways … and Highways'. Freely accessible car parks on one view might be regarded as 'Havens' from the 'Highways' or as so necessarily incidental to the latter in

(166) [1979] AC 411 at 422.
(167) [1891] AC 531.
(168) *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455. It has been said in the Court of Appeal in England in *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 at 88 per Russell LJ and endorsed by the other members of the Court.
(169) See *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 666-667 per Barwick CJ.
(170) *Monds v Stackhouse* (1948) 77 CLR 232, particularly at 240-241, 246-247, 250-251. See also the discussion about charitable trusts for the provision of public works in Warburton, *Tudor on Charities*, 9th ed (2003), pp 100-101 [2-074].
(171) (1998) 195 CLR 566 at 582-583 [35]-[37] per Gaudron, McHugh, Gummow, Hayne and Callinan JJ.
(172) (1971) 125 CLR 659 at 667.

modern times as to be almost indistinguishable in public purpose and utility from them: there is an analogy between a highway and a car park affording a haven from, and a secure place of resort near and accessible to, a highway (173).

An example of the recognition of a charitable trust of this nature may be provided by the judgment of Hart J in *Mareen Development Pty Ltd v Brisbane City Council* (174). Clause 12 of an *Ordinance of the City of Brisbane* provided that an applicant for approval of a subdivision was to transfer to the Council three link strips at the end or on the side of existing dedicated roadways. In the Full Court, Hart J referred to the acquisition made by the Council free of cost and, speaking of the strip in question, concluded (175):

> "It could not have been the intention of the Ordinance that the Council was to make a profit from them from future subdividers. In these circumstances I think it holds the strip in trust for Town Plan purposes."

It is true that those, such as PWC in the present case, conducting commercial activities may derive a benefit somewhat greater than the general public from a proximate car park. However, the fact that some non-charitable purposes may co-incidentally be served does not of itself destroy the legal character of a charitable trust (176)."

174 What I have referred to would at least suggest that in some circumstances it may be that a gift, or a payment, if not to a government, but to some other polity or a creature of it, carrying out entirely statutorily mandated objects, will not fail to be charitable on that account, a matter not for decision in this case. But it is clear that the objects of government and its creatures are by no means necessarily antithetical to charitable objects and activities.

175 The reasoning in and outcome of the cases in this Court to which I have so far referred, and in *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (177) show that Australian jurisprudence with respect to the expression "charitable purpose" manifests at least as ample an approach as English jurisprudence. There Barwick CJ said (178):

(173) See the discussion by Lords Reid and Wilberforce of the legitimacy in finding an analogy between an object already held to be charitable and a new object in *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 147, 156 respectively, and the discussion by McTiernan, Menzies and Mason JJ in *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 at 305; 3 ALR 486 at 488-489.

(174) [1972] Qd R 203; see the judgment on refusal of special leave to appeal (1972) 46 ALJR 377.

(175) [1972] Qd R 203 at 216.

(176) See *Monds v Stackhouse* (1948) 77 CLR 232 at 240-241; *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375 at 441-443; *In re Resch's Will Trusts* [1969] 1 AC 514 at 541; *Brisbane City Council v Attorney-General (Qld) (Ex rel Scurr)* (1978) 52 ALJR 599; [1979] AC 411 at 424.

(177) (1971) 125 CLR 659.

(178) (1971) 125 CLR 659 at 667.

> "Not every purpose beneficial to the community is a charitable purpose but only those which are within the equity of the preamble to the Statute of Elizabeth. The purpose must not merely be beneficial: it must also be charitable (179). In this connection however we are reminded by Lord Wrenbury in *Chesterman v Federal Commissioner of Taxation* (180) that 'the word "charitable" in the Elizabethan sense is larger and more comprehensive than the other words in the context'."

Later his Honour said this (181):

> "Yet it must be considered whether that benefit is charitable in the Elizabethan sense. Out of certain of the instances given in the preamble to the Act of 1601 a broad concept emerges of the kind of object of public utility which will satisfy the quality of charity. Any notion that that concept is of an eleemosynary nature is seen to be untenable by some of those very instances themselves, eg the repair of bridges, havens, causeways, seabanks and highways and the setting out of soldiers. Further, these instances seem to regard the provision of some of the indispensables of a settled community as charitable."

176 It seems to me to be beyond question that health care, a term which compendiously covers all of the purposes and activities of the appellant, can only be regarded as an "indispensable of a settled community".

The respondent's case

177 The respondent nevertheless advances these propositions: a government department, (here the Commonwealth Department of Health and Ageing), is not a charitable body when it acts to implement government policy. When a body, such as the appellant here, acts so much under the control or influence of a government department that it can be seen to be acting to implement government policy, rather than in the independent performance of its own objects, then it too may not be regarded as a charitable body. The history of the divisional system and the control asserted over all divisions of general practice, including the appellant, by the Commonwealth, shows that the appellant was acting so much under the control and influence of government in discharging its obligations under its OBF agreement, and otherwise, during the tax year ending 30 June 2002, that it is an implementer of government policy rather than an independent body pursuing its own objects: accordingly it was not a charitable body entitled to exemption from pay-roll tax.

(179) See *In re Macduff* [1896] 2 Ch 451; *Attorney-General v National Provincial and Union Bank* [1924] AC 262; *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447 and *In re Strakosch (Deceased)* [1948] Ch 37.

(180) (1925) 37 CLR 317 at 320.

(181) (1971) 125 CLR 659 at 669.

178 I would reject the respondent's arguments. Section 10(1)(bb) says nothing about government, government control, or the implementation of government policies. It is not difficult to conceive, as I have foreshadowed, of many charitable bodies, the activities of which further government ends. The classic example is a body which does good works for the relief of poverty. A major aim of all well-intentioned governments is the elimination or reduction of poverty. In argument, the respondent accepted that to be so but submitted that the facts have shown more, that the Commonwealth controlled the activities of the appellant. The submission went so far as to contend that the appellant was the puppet of the Commonwealth. The argument continued that the appellant was not a charitable body because, by reason of the Commonwealth's "control", it did not bear the hallmark of all charities: subjection to control by the Supreme Court at the suit of the Attorney-General for the State of Victoria.

179 I disagree. There is no real possibility of a conflict between the appellant, the Commonwealth and the Attorney-General, leading to an application to any court by the Attorney-General, either personally or in a relator action. This is so because the appellant's objects are all truly charitable. They are also objects which either further or even implement government policy, and none of the appellant properly advised, the Commonwealth or the Attorney-General for Victoria, would have any interest in anything other than the proper pursuit of those objects. Both the Commonwealth and the Attorney-General would also have exactly the same interest in the proper application of the funds, however derived, of and by the appellant, to the charitable objects for which the appellant was established. The Attorney-General would not in any event be precluded from applying to the court if concerned about any misapplication or, if the Attorney wished, to ensure the proper application, of the appellant's funds however derived.

180 Three cases upon which the respondent sought to rely are readily distinguishable even if everything that was said and held in them should be accepted (something which is unnecessary to decide here but about which there may be some doubt in view of the passages from *Bathurst City Council* that I have cited). First, in each of *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (182), *Mines Rescue Board (NSW) v Commissioner of Taxation* (183) and *Ambulance Service (NSW) v Federal Commissioner of Taxation* (184), the appellant sought to be classified as a "public benevolent institution" within the meaning of the *Fringe Benefits Tax Assessment Act 1986* (Cth), not as a charitable body within the meaning of the general law. Secondly, unlike the appellant here, the relevant body in each was established by statute and owed its whole existence to that statute. In

(182) (1990) 27 FCR 279.
(183) (2000) 101 FCR 91.
(184) (2003) 130 FCR 477.

Metropolitan Fire Brigades Board, it was expressly held that the Board was an emanation of government (185). In *Mines Rescue Board*, the Board was held to represent the State (186), and in *Ambulance Service*, it was held that when proper regard was had to the constitution, funding and functions of the Service, it was sufficiently governmental in character as to fall outside the meaning of the statutory phrase "public benevolent institution" (187). On no view does the appellant answer any of the descriptions applied to the appellants in those cases. Each was obliged by statute or regulation to expend money under the ultimate supervision of the Minister to whom it was answerable. Accordingly, in those cases it was not difficult to conclude that the government could be said to have effectively assumed responsibility for what the appellants there did.

181 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. It is a matter entirely for it whether it seeks government funds or subsidisation.

182 The respondent sought to rely on a principle that clear words are required before an obligation on the part of the Crown, or a servant or agent of the Crown will be treated as a trust according to ordinary principles, even if the obligation could be described as a fiduciary obligation: absent the clearest of words, the obligation will be characterised as a government or political obligation. *Kinloch v Secretary of State for India* (188), *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (189) and *Bathurst City Council* (190) were relied upon in an attempt to make good that proposition. The submission continued that, by analogy with the reasoning underlying the exclusion of trusts for political purposes from the category of charities, a court could not adjudge whether the implementation of a particular government policy or particular work of government is for the benefit of the community or a section thereof. *Roman Catholic Archbishop of Melbourne v Lawlor* (191) and *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (192) were cited in support of the argument.

183 Both the analogy and the reliance are inapt. In *Roman Catholic Archbishop of Melbourne*, Dixon J was referring to truly political objects, that is to say, controversial subjects although they may have had, for example, a religious connection, such as to secularise

(185) (1990) 27 FCR 279 at 280.
(186) (2000) 101 FCR 91 at 101 [43].
(187) (2003) 130 FCR 477 at 493 [48].
(188) (1882) 7 App Cas 619.
(189) (1993) 178 CLR 145.
(190) (1998) 195 CLR 566 at 591.
(191) (1934) 51 CLR 1 at 33 per Dixon J.
(192) (1938) 60 CLR 396 at 426 per Dixon J.

education. Activities of that kind cannot be charitable because "the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift" (193). His Honour's observations there, and in *Royal North Shore Hospital*, have nothing to say about a case in which, as here, the objects can be seen to be undeniably charitable. No occasion arises for any assessment of any coincident governmental or political policy.

184 That the Commonwealth, by the Department, controls the appellant and its activities is a misconception. The respondent seeks to make much of cl 2.3 of the agreement between the appellant and the Commonwealth requiring the former to comply with requirements "regarding identified Outcomes for Outcomes-Based Funding as specified …". Charitable bodies, within the course of their activities, no doubt enter into many contracts under which obligations are imposed upon them, or they assume them. The fact that those obligations are, by contract, enforceable against them, by no means has the consequence that in respect of those particular obligations, they are under the control of another contracting party or parties. It is a matter for the charitable body in question, as here, to decide whether it wishes to enter into a particular contract.

185 I would therefore reject the respondent's contention that the primary judge and the majority of the Court of Appeal were correct in concluding that, under the OBF agreement, or otherwise, the appellant acted to further the purposes of government "rather than to implement its own [charitable] purposes". The fact that the purposes of government are coincident with the undoubtedly charitable purposes of the appellant does not mean that the appellant cannot qualify for exemption under the Act. The appellant does not lose the status to which it may be entitled because it does not have, or seek to implement, any purposes different from those of the government in relation to health care. If the respondent's contention and the holdings in the courts below were correct, the result would be that whenever the government had a purpose, which if it were pursued by any non-government body would be charitable, and it funded some other body which happened to have the same purposes, and no others, that other body could never be regarded as a charitable body. As I have already said, many of governments' policies, particularly in modern times, are directed to what would undoubtedly be charitable purposes if they were undertaken by non-government bodies.

186 It follows that the appeal should be allowed with costs. I would join in the orders proposed in the joint judgment.

1. *Appeal allowed.*
2. *The respondent to pay the costs of the appellant in this Court.*

(193) (1934) 51 CLR 1 at 33.

3. Set aside the orders of the Court of Appeal, Supreme Court of Victoria, made on 1 July 2005 and, in their place, order:

(a) Appeal allowed.

(b) Set aside the orders of the Supreme Court of Victoria made on 15 August 2003.

(c) The appellant's appeal from the decision of the Victorian Civil and Administrative Tribunal made on 22 November 2002 be allowed.

(d) The notice of determination issued by the respondent dated 16 July 2002 to disallow the appellant's notice of objection dated 29 January 2002 be set aside.

(e) The appellant's notice of objection dated 29 January 2002 against the respondent's decision dated 14 December 2001 be allowed.

(f) The respondent pay the costs of the proceedings in the Court of Appeal of the Supreme Court of Victoria and in the Supreme Court of Victoria.

Solicitor for the appellant, *Health Legal*.

Solicitor for the respondent, *Solicitor to the Commissioner of State Revenue*.

Solicitors for the amicus curiae, *Clayton Utz*.

CL