

Is Equity Fit For Purpose? Saving Mixed Purposes Trusts in Australia

Emerita Professor Pauline Ridge



Australian
National
University

“the court washes its hands of the administration and holds the entire bequest invalid. The whole gift fails for uncertainty. There is, it is said, no general trust for charity binding the whole fund. The court will not disregard the invalid part of the bequest and administer the valid. Such is the rule of the court. Whether it is a wise or sensible rule it is not here material to consider.”

Chichester Diocesan Fund and Board of Finance v Simpson [1944] AC 341 (HL) (Lord Wright) 356.



An Act relating to Charitable Uses and Trusts.

[26th October, 1914.]

BE it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say) :—

1. This Act may be cited as the *Charitable Trusts Act* 1914.

Short title.

2. (1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

Inclusion of
non-charitable
purposes not to
invalidate trust.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.

(3) This Act shall not apply to any trust declared before or to the will of any testator dying before the commencement of this Act.

Could Equity in the ACT and NT respond to the saving legislation in all other jurisdictions in the Australian federal system by adopting the legislative approach and saving mixed purposes trusts?



Analogical Reasoning & Legal History

Why does Equity refuse to salvage the settlor's lawful charitable purposes?

Why was Victoria in 1914 the first jurisdiction to challenge Equity's approach?

Why are there saving provisions in the Australian States but not in the ACT or NT?



An obvious solution?

Legislative inaction re charity law reform;

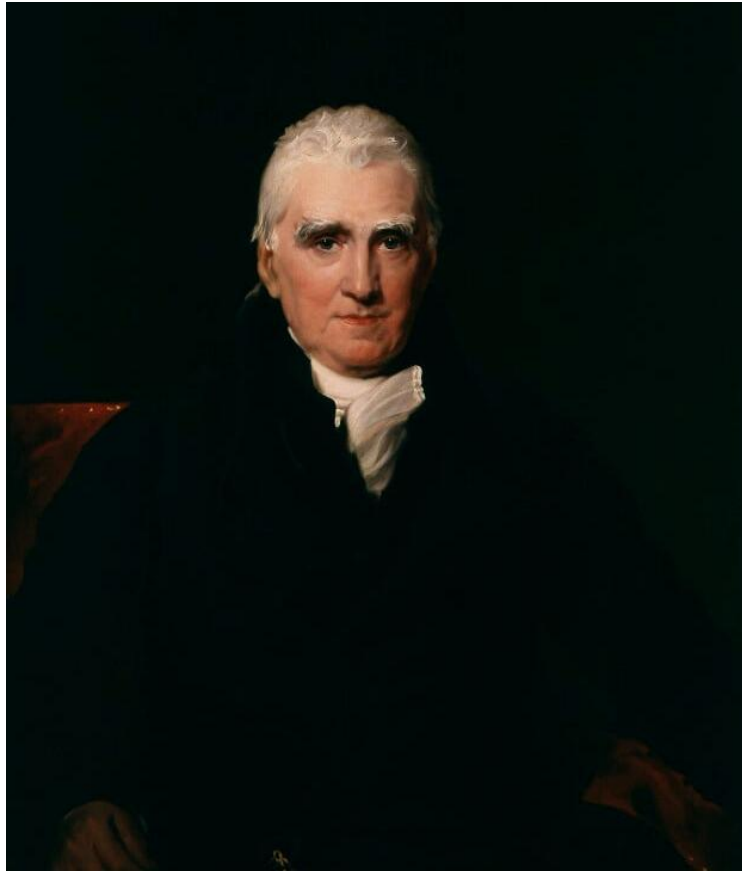
Technical and non-intuitive legal definition of “charity”;

Ubiquity of State saving provisions;

Potential for a *Re Diplock* scenario;

Consequences of invalidity extend beyond the ACT & NT: see Electoral Commission NSW, ‘Summary of Facts Relevant to the Decision of the New South Wales Electoral Commission: Liberal Party of Australia (NSW Division) Claim for Public Funding’, 23 March 2016.





“As it is a maxim, that the execution of a trust shall be under the controul of the Court, it must be of such a nature, that it can be under that controul; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust...”

Morice v Bishop of Durham (1805) 10 Ves Jun 522, 539-540; 32 ER 947, 954 (Lord Eldon LC).

“such objects of
benevolence and
liberality as [the trustee]
in his own discretion
shall most approve”

Morice v Bishop of Durham

Bishop Shute Barrington
(1734-1826)

by Thomas Lawrence (1769-1830)
Image credit: Merton College,
University of Oxford, licensed under
CC BY-NC



“At least under the word ‘benevolence’ the bequest must avail to some extent; ... there being two objects, half ought to be given to one; and half to the other.”

Morice (1805) 10 Ves Jun 522, 526; 32 ER 947, 949 (counsel for the Attorney-General, citing *Attorney-General v Doyley* (1735) 4 Vin 485, 2 Eq Cas Ab 194, 22 ER 1670).



“The question is, what authority would this Court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute.”

James v Allen (1817) 3 Mer 17, 19; 36 ER 7, 8 (Sir William Grant MR).



“[T]hat would be to make a will for him differing from what he has made. His intention was of the most extensive and generous nature, and it would do violence to his language to cut it down in the way suggested.”

Attorney-General for NSW v Adams (1908) 7 CLR 100, 127 (Isaacs J).



“to such charities hospitals
philanthropical institutions or objects
free libraries or mechanics’ institutes
churches or any other objects of a like
or similar nature in the State of Victoria
as they shall in their absolute discretion
deem fit...”

Will of Forrest [1913] VR 425



Charles Lamond Forrest

Image courtesy Parliament
of Victoria





“Coming to his last act I can only say he has set an example to those just as well able as he to think of their neighbours. Throughout all time the name of Charles Lamond Forrest will be known as a benefactor of the State and it will be the duty of his trustees of whom I have the honour to be one, the others being Mr. McWhae, M.L.C., and Captain McLeod, of Colac, to carry out as nearly as we possibly can the wishes of our late friend. The heart of many a widow and many an orphan will rejoice in the thought that the late Charles Lamond Forrest was enabled with his wealth to do something for his country.”

Victoria, *Parliamentary Debates*, Legislative Assembly, 3 September 1912, 1104 (Mr Johnstone).

“[The Court] cannot sever the bad from the good, and retain the latter only...”

Will of Forrest [1913] VR 425, 433 (Madden CJ).



“The remedy is I think simple. Let the Legislature in effect declare that a discretion in trustees to apply to purposes ‘charitable,’ as well as ‘non-charitable’ shall be construed as a discretion to apply to such only of those purposes as are ‘charitable’.”

Victoria, *Parliamentary Debates*, Legislative Assembly, 15 July 1914, 404 (Mr Mackinnon AG quoting letter from Mr Weigall KC).



VICTORIA.



ANNO QUINTO

GEORGII QUINTI REGIS.

No. 2544.

An Act relating to Charitable Uses and Trusts.

[26th October, 1914.]

BE it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say) :—

1. This Act may be cited as the *Charitable Trusts Act 1914*. Short title.

2. (1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

Inclusion of non-charitable purposes not to invalidate trust.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.

(3) This Act shall not apply to any trust declared before or to the will of any testator dying before the commencement of this Act.

MELBOURNE:

By Authority: ALBERT J. MULLETT, Government Printer.

An Act relating to Charitable Uses and Trusts.

[26th October, 1914.]

BE it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say) :—

1. This Act may be cited as the *Charitable Trusts Act* 1914.

Short title.

2. (1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

Inclusion of
non-charitable
purposes not to
invalidate trust.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.

(3) This Act shall not apply to any trust declared before or to the will of any testator dying before the commencement of this Act.

Charitable Trusts Act 1914 (Vic) s 2

(1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.

(3) This Act shall not apply to any trust declared before or to the will of any testator dying before the commencement of this Act.

Charities Act 1978 (Vic) s7M

(1) A trust is not to be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which that trust directs or allows the trust funds or any part of the trust funds to be applied.

(2) A trust referred to in subsection (1) is to be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part of the trust funds to or for the non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.

(3) This section does not apply to a trust declared before, or to the will of any testator dying before, 26 October 1914.



“Having regard to the number of cases in which, owing to the incompetence of the draughtsmen, the multiplicity of decisions and the extraordinarily fine distinctions between the authorities, the intention of charitably-minded testators has been disappointed, and the heavy cost of litigation which falls upon their estates, I venture to express the view that the Legislature might well take the matter into its consideration.”

Re Price (1935) 35 SR (NSW) 444, 458 (Long Innes CJ in Eq).



Why no saving provisions in the Territories?

Trustee Ordinance 1957 (ACT).





Mr. PRENDERGAST.—[The mixed purposes rule] has been the state of the law for years and years.

Mr. MACKINNON.— But we did not realize it. It is only when these things occur that you discover what a mistaken shape of law we have been living under.

Parliamentary Debates, Legislative Assembly, 15 July 1914, 409-10 (second reading of the Charitable Trusts Bill 1914).