

THE LAW OF CONTRACTS, TRUSTS AND CORPORATIONS AS CRITERIA
OF TAX LIABILITY

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The Constitution

My principal concern is with federal taxation. So it is best to begin with what in *Commissioner of Taxation v Futuris Corporation Ltd*¹ Kirby J called the "constitutional moorings" which inform the meaning of the legislation. The legislative power, conferred by s 51(ii) of the Constitution, is to make laws with respect to "Taxation; but so as not to discriminate between States as parts of States".

It is here that there immediately is apparent the importance of criteria selected for the operation of the law imposing "taxation". This is so, notwithstanding the proposition, expressed by Aickin J in *General Practitioners Society v The Commonwealth*², that "the tax power is not limited to older or well known taxes but extends to any form of tax which ingenuity may devise".

¹ (2008) 237 CLR 146 at [78]; [2008] HCA 32.

² (1980) 145 CLR 532 at 569; [1980] HCA 30.

The essential role played by legislative criteria appears from three steps in the reasoning of Gibbs CJ, Wilson, Deane, Dawson JJ in *MacCormick v Federal Commissioner of Taxation*³. The first step states the major premise:

"[W]here, as is ordinarily the case under the Commonwealth Constitution, the validity of the law depends upon its characterization as a law with respect to a particular subject matter by reference to the criteria which the law itself fixes for its operation, the law cannot be so characterized if, in effect, it goes on to provide that it will have that operation regardless of whether those criteria are, in truth, satisfied."

The second step fixes upon the distinction between a tax and an "arbitrary exaction":

"For an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by reference to the criteria by which liability to pay the tax is imposed."

The third step deals with the manner of application of those criteria:

"Not only must it be possible to point to the criteria themselves, but it must be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner. In *Giris Pty. Ltd. v. Federal Commissioner of Taxation*⁴, Kitto J. pointed out that the expression "incontestable tax" in the sense in which it is used in *Hankin* and *Brown* "refers to a tax provided for by a law which, while making the taxpayer's liability depend upon specified criteria,

³ (1984) 158 CLR 622 at 640-641; [1984] HCA 20.

⁴ (1969) 119 CLR 365, at pp 378-379; [1969] HCA 5.

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purports to deny him all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case." The purported tax is thereby converted to an impost which is made payable regardless of whether the circumstances of the case satisfy the criteria relied upon for characterization of the impost as a tax and for characterization of the law which imposes it as a law with respect to taxation. Such an incontestable impost is not a tax in the constitutional sense and a law imposing such an impost is not a law with respect to taxation within s.51(ii). It is in this sense that an incontestable tax is invalid."

This third step has caused difficulty where the operation of the law turns upon the exercise of a discretion conferred by that law upon the Commissioner. However, it is settled that whatever the width of the discretion its exercise is judicially examinable to determine whether the Commissioner has exceeded the limits which may be discerned from the legislation⁵.

The constitutional imperatives were succinctly expressed in the joint reasons of the whole Court in a transfer pricing case, *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation*⁶, where their Honours said:

"First, for an impost to satisfy the description of taxation in s 51(ii) of the Constitution it must be possible to distinguish it from an arbitrary exaction. Secondly, it must be possible to point to the criteria by which the Parliament imposes liability to pay the tax; but this does not deny that the incidence of a tax

⁵ *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678; [1985] HCA 36.

⁶ (2008) 237 CLR 198; [2008] HCA 33. See also *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [79]-[82] per Kirby J.

may be made dependent upon the formation of an opinion by the Commissioner. Thirdly, the application of the criteria of liability must not involve the imposition of liability in an arbitrary or capricious manner; that is to say, the law must not purport to deny to the taxpayer "all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case".

These constitutional imperatives may be seen to encourage the engagement by the legislation of criteria which have an appearance of clarity and stability because they are taken from the general law. So it is that many leading cases expounding concepts and institutions of the general law are revenue cases.

Form and Substance

Allied to this attraction to the general law, has been a canon of statutory construction which at one stage almost assumed the higher status of a constitutional imperative. Regard was to be had solely to the "legal form" of a transaction, rather than to "substance", "end result" or "economic equivalence". This restriction was associated with *IRC v Duke of Westminster*⁷ and thereafter with *Europa Oil* litigation⁸. This twice reached the Privy Council from New Zealand and was heard by Boards including Sir Frank Kitto (*Europa No. 1*) and Sir Garfield Barwick (*Europa No.2*). Back in the High Court, Barwick CJ described the reasoning as "still

⁷ [1936] AC 1 at 19-20, 24-25, 29-30.

⁸ *IRC v Europa Oil (NZ) Ltd* [1971] AC 760; *Europa Oil (NZ) Ltd v IRC* (1976) 1 WLR 464.

basic in this area of the law"⁹. As is well known this approach contributed to the demise of s 260 of the Income Tax Assessment Act 1936 (Cth) ("the Act"), and its replacement by Pt IVA, which in turn has yielded results unsatisfactory to the Commissioner. As Lehane J observed in *Richard Walter Pty Ltd v Federal Commissioner of Taxation*¹⁰, many tax schemes are designed to have an otherwise inexplicable legal effect precisely because of the fiscal objectives being pursued.

This chain of events in Australia may be contrasted to what followed in the United Kingdom. Beginning in *WR Ramsay v IRC*¹¹ with the speech of Lord Wilberforce (who had dissented in *Europa No.2*, and had stressed the distinctions drawn by Dixon J¹² "between a practical and business point of view" and "the juristic classification of ... legal rights") there was judicial development of a "fiscal nullity" doctrine.

In Australia, the constitutional considerations outlined above have encouraged the adoption of legislative criteria apparently drawn from the general law; this is apt to emphasise the importance of legal form taken by transactions.

⁹ *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314 at 321; [1977] HCA 9.

¹⁰ (1996) 67 FCR 243 at 267-268.

¹¹ [1981] 2 WLR 449 at 456; see, further *Furniss v Dawson* [1984] AC 474, *MacNiven v Westmorland Investments Ltd* [2003] 1 AC 311.

¹² *Hallstrom Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 at 648; [1946] HCA 34.

Assignments

The importance of legal form in applying the general criterion in s 25 of the Act, that the taxpayer have "derived" assessable income, had been emphasised in two cases where liability turned upon the effectiveness of purported assignments.

*Norman v Federal Commissioner of Taxation*¹³, concerned the voluntary assignments, by deed executed in 1956, of future interest on a loan repayable at will and of future dividends on company shares; were these assignments effective at general law, so that dividends and interest paid in the 1958 year of income were to be regarded as assessable income derived by the assignee, the wife of the assignor? The Commissioner successfully contended that both sums were assessable income derived by the husband. But this was the result of detailed analysis by the High Court of the law of assignments and of the effectiveness at law and in equity of the 1956 deed. Given the favourable result for the Revenue, there was no occasion to consider the application of s 260.

The taxpayer succeeded in the second assignments case, *Shepherd v Federal Commissioner of Taxation*¹⁴. By deed poll executed in 1957 the taxpayer had assigned all his right title and interest "in and to an amount equal to" 90% of the income which might accrue over a three year period

¹³ (1963) 109 CLR 9; [1963] HCA 21.

¹⁴ (1965) 113 CLR 385; [1965] HCA 70.

from royalties payable to the taxpayer under an agreement licensing a patent held by the taxpayer. Much turned upon the terms of the deed poll. It was held that 90% of the royalties which accrued in the 1958 year of income was not assessable income derived by the taxpayer, even, as Kitto J noted¹⁵, allowing for the presence in the Act of s 19. The tree, but not its fruit had existed in 1957, and the taxpayer then had effectively disposed of 90% of that tree.

The Parliament, however, took the view that with respect to assignments for a period of seven years and made after 22 October 1964, the assignor who retained the income producing asset should be taxed as if the assignments had not been made¹⁶. The result was the insertion by the 1964 Act¹⁷ of Div 6A into Pt III of the Act.

In both *Norman* and *Shepherd* the statutory term "derived" was applied by regard to general law concepts, those dealing with the tricky subject of assignments of choses in action. It may be thought that the constitutional imperatives discussed above are more readily met in the safe house of criteria supplied there by the principles of law and equity, than by the indefinite operation of criteria expressed in terms of substance, effect

¹⁵ (1965) 113 CLR at 393.

¹⁶ Hansard, House of Representatives, 22 October 1964, at 2217.

¹⁷ *Income Tax and Social Services Contribution Assessment Act (No 3) 1964 (Cth)*, s 27.

and economic equivalence. But as *Norman* and *Shepherd* indicate, those general law principles themselves may be in an unsettled state.

More recently, in *Bluebottle UK Limited v Deputy Commissioner of Taxation*¹⁸ the focus was upon s 255 of the Act. This applied to persons having receipt, control or disposal of money belonging to a non-resident who derived income from a source in Australia. Two non-resident companies held shares in a listed public company. Any right they enjoyed to receive a dividend was subject to those provisions of company law the effect of which was that the directors might fix a record date to limit those entitled to participate in a dividend to members registered on that date. This stipulation could not be severed from the debt or other legal chose in action which was the subject of purported assignments (here, for value). The assignments created rights between the parties to it, but as between the assignors and the company, the company had control of the dividend moneys belonging to the assignors, the two non-resident companies. This conjunction between company law and the law of assignments crossed the threshold for the operation of s 255, as the Commissioner contended was the case.

General Considerations

With such cases in mind, it hardly needs to be added that, what is required of tax lawyers (including the Commissioner's officers) is a well-

¹⁸ (2007) 232 CLR 598; [2007] HCA 54.

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grounded working knowledge of the general law as it applies from time to time, beyond any over specialised experience in tax law in its most specific sense. This is one lesson reinforced by some of the recent cases which will be considered below.

There are several further points to be made. First, the application in revenue law of criteria drawn from the general law may breed confusion;¹⁹ this is not the least because of the ambiguity of the term "general law". Secondly, the transfer of meaning from the general law to the revenue law may yield revenue outcomes at odds with the apparent policy of the taxation provision in question. Thirdly, in particular, the taxation provision may be enacted at a time when the general law was in a state of development; some time later the legislation may remain but the general law may now operate differently as a criterion of revenue liability. Finally, there then may be a legislative response which not only seeks to reinstate the desired revenue outcome, but, in doing so, goes further and distorts the general law.

These themes appear across a range of taxation provisions and judicial decisions, to examples of which I now turn.

¹⁹ Cf *Gartside v IRC* [1968] AC 553 at 617 per Lord Wilberforce.

What is a "trust"?

The judge made law respecting trusts may be modified from time to time by State statute and this may not be repeated across the country. Is reference in a federal revenue law to a "trust" to be read as "picking up" trust law in its condition before the intervention of State statute? The problem is neatly illustrated by s 8 of the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW). This declared to be charitable purposes for "the general law relating to charitable trusts" the principal purposes of a fund established by James Hardie Industries NV²⁰. Did this bind the Commissioner in applying the revenue statutes he administered?

Beneficial Ownership

It might have been thought when the 1964 Act inserted the loss carry forward provision in s 80A that it was clear enough what was involved in a requirement that at both ends of the temporal spectrum shares were "beneficially owned" by the same persons. But the slippery nature of "beneficial ownership" had been made apparent just two weeks before the passage of the 1964 Act through the House of Representatives. In *Commissioner of Stamp Duties (Q) v Livingston*²¹ Viscount Radcliffe had said it was mistaken to assume "that for all purposes and at every moment

²⁰ I am indebted to Professor J.G. Stumbles for this reference.

²¹ [1965] AC 696 at 712.

of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable". This statement assumed great significance with the increasing use of what are described as unit trusts and discretionary trusts and for the revenue issues to which this development gave rise²².

What was the effect, for the phrase "beneficially owned" in s 80A, of the supervening appointment of a liquidator to the holding company in question? What was the significance of the 19th century view that upon liquidation, while the legal estate remained in the company, as if it were a trustee, "the beneficial interest clearly is taken out of the company"²³.

The submission by the Revenue, in *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In Liq)*²⁴ was that the chain of continuity required by s 80A had been lost; this was because:

"'[B]eneficially owned' meant the ability of Linter Group to use its shares in Linter Textiles for its own benefit, by selling them and applying the proceeds as it thought fit; the liquidator of Linter Group had had the power to cause the transmission of the ownership of the shares of Linter Group in Linter Textiles, but "beneficial ownership" by Linter Group had been lost because the liquidator was bound to apply proceeds of sale in accordance with the statutory formula of distribution between creditors."

²² See, for example, *CPT Australian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at 112-114 [29]-[32]; [2005] HCA 53.

²³ See *Re Oriental Inland Steam Co; Ex parte Scinde Railway Co* (1874) LR 9 Ch App 557.

²⁴ (2005) 220 CLR 592 at 612 [51]; [2005] HCA 20.

However, the decision of the High Court was that the change in control of the affairs of the company had no impact upon its beneficial ownership of its assets. The majority of the Court held:

"By analogy with the general law, the circumscribing or suspension by reason of the appointment of the liquidator of the exercise by the usual organs of the company of the incidents of ownership of the assets of the company does not mean that the company itself has ceased to own beneficially its assets within the meaning of s 80A(1). Power to deal with an asset and matters of ownership or title are not interchangeable concepts."

Executory contracts

The GST legislation provides striking instances of the interaction between the law of executory contracts and the fiscal objectives of that system when it selects as a sufficient criterion of liability one of the characteristics of that contract.

It may come as a surprise to those who book and pay for Qantas and Jetstar flights that what they have purchased is not an unconditional promise to carry passengers and baggage on a particular flight; rather there is a promise to use best endeavours to carry passengers and baggage, having regard to the exigencies of the business operations of the airline. This is sufficient to constitute a contract²⁵; it also is a "taxable supply" for which consideration, being the airfare, was received. This was the holding,

²⁵ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 64-65, 91-92, 116-117, 120, 137-138; [1984] HCA 64.

by majority, in *Federal Commissioner of Taxation v Qantas Airways Ltd*²⁶. Some passengers did not take the flights and did not receive a refund. But, nevertheless, there had been "taxable supplies" for which the airline was required to remit GST on the fares.

Given the structure of the GST legislation, it was no answer by the airlines that, on the proper construction of the contract, there was to be distilled, as its "essence and sole purpose", actual carriage by air, and without this, there was no "taxable supply". Critical to the interpretation by the Court of the statute (in particular s 29-5(1)) were the propositions²⁷:

"The GST is attributable to the tax period in which there is received 'any' of the consideration, being the fares paid, or, before that receipt, the invoice is issued.

...

GST is not payable more than once by reason that the consideration is received in connection with an executory contract which involves more than one supply. Thus, GST on the consideration received is not payable in each of the tax periods in which a series of events occur in performance of an executory contract; the GST is payable once, in the tax period of the first payment or invoice."

The proposition that a legal construct (in *Qantas* an executory contract) which has several characteristics each of which might involve

²⁶ (2012) 86 ALJR 1243 at 1249 [33]; [2012] HCA 41.

²⁷ (2012) 86 ALJR 1243 at 1244 [4], [5].

"consideration" for a "taxable supply", enables the taxpayer to fix upon one or more of them to demonstrate the absence of criteria for a "taxable supply", had earlier been rejected in *Reliance Carpet Co Pty Ltd v Federal Commissioner of Taxation*²⁸. It was sufficient for the Commissioner that at least one of those characteristics supplied a criterion to attract the tax. Thus, one of the characteristics of a deposit under a land contract was that upon payment it operated as security for the performance of the obligation of the purchaser to complete and was liable to forfeiture on that failure. This was sufficient for the Commissioner's case²⁹. It was no answer for the taxpayer that (a) the deposit also was "in the nature of damages" because if the contract was later terminated by the vendor (as was the case here) the forfeited deposit would be brought into account where (as was not the relevant case) the vendor sought and recovered damages, and (b) those damages would not attract GST³⁰.

Trustee Income

Perhaps the most difficult interaction between revenue law and the general law has been in the provisions in Pt III, Div 6 of the Act respecting trust income. At bottom is a point made by Professor Parsons³¹:

²⁸ (2008) 236 CLR 342; [2008] HCA 22.

²⁹ (2008) 236 CLR 342 at 352 [28].

³⁰ (2008) 236 CLR 342 at 350 [24].

³¹ "Income Taxation in Australia" (1985) ¶1.30.

"Lawyers argue about what the word [income] means in a particular context. Trust law has a meaning for the word. Income tax law has another ... The income tax law meaning or meanings owe a good deal to trust law. But income tax law is fundamentally statute law ...".

Another significant consideration is the absence of a distinct legal personality for the trust. Throughout Div 6 beginning with s 95, the expression "the income of a trust estate", is not defined, and "trust" is awkwardly defined as meaning:

- "(a) an entity in the capacity of trustee (including an entity that manages a trust if there is no trustee); or
- (b) as the case requires a trust or trust estate".

The term "trustee" includes an executor, administrator, guardian, committee, receiver or liquidator and "every person ... acting in any fiduciary capacity". Thus, it was held in *Harmer v Federal Commissioner of Taxation*³² to be sufficient to attract Div 6 that moneys paid into court were held not for any beneficiary but for statutory purposes.

The central provisions in s 97, shortly put, includes certain "income" in the assessable income of certain "beneficiaries". A critical expression in s 97 is "any beneficiary is presently entitled to a share of the income of the trust estate". There is no further statutory explication of the terms "beneficiary" or "presently entitled", or "a share of the income".

³² (1991) 173 CLR 264; [1991] HCA 51.

It was held in the joint reasons of the Court in *Commissioner of Taxation v Bamford*³³ that the phrase "income of the trust estate" was to be understood as income according to the general law of trusts, and that the expression "share of the net income of the trust estate" identified the proportion of the distributable income of the trust estate as ascertained by the trustee according to appropriate accounting principles and the trust instrument. The Court emphasised that the treatment of receipts and outgoings by a trustee under the general law allowed for special provisions in the trust instrument (as was the position in the instant case); these could not be expected necessarily to correspond with the treatment of receipts and outgoings under the general provisions of the Act³⁴.

In *Bamford* the Commissioner had proceeded, unsuccessfully, on the footing that although the trustee had treated a certain receipt as income available for distribution, s 97 had no application because the phrase "the income of the trust estate" identified income according to ordinary concepts³⁵; the Commissioner then assessed the trustee at the special rate under s 99A. What is perhaps significant is that in argument both sides in *Bamford* accepted that on either construction of the legislation in question

³³ (2010) 240 CLR 481; [2010] HCA 10.

³⁴ See the terms of cl 4, and cl 7 of the deed of 9 February 1995: (2010) 240 CLR 481 at 482-483.

³⁵ Not including what (such as capital gains) might be called "statutory income": (2010) 240 CLR 481 at 499 [10]; see now s 95AAB of the Act and subdiv 115-C of the *Income Tax Assessment Act 1997* (Cth).

examples readily could be given of consequent apparent unfairness in its administration³⁶.

Temporal Issues

A particular temporal issue may arise from legislative adoption as a taxation criterion of an institution or principle of the general law. The general law develops with decisions at various stages in the court hierarchy. Does the revenue statute "pick up" the general law in its (perhaps inconclusive) state at the time of enactment of the statute, or does it speak continuously to the present state of the case law?

These issues were at the forefront of the submissions in *Aid/Watch Incorporated v Commissioner of Taxation*³⁷. A body having the endorsement of the Commissioner as a "charitable institution" was exempt from liability to income tax under the 1997 Act, and to the GST and fringe benefits tax. The expression "charitable institution" was not defined. The term "charitable" had both a popular meaning associated with benevolence and the relief of the needy, but since at least *Pemsel's Case*³⁸ it has been treated as used in its technical sense when appearing in taxation legislation.

³⁶ (2010) 241 CLR 539; [2010] HCA 42.

³⁷ (2010) 241 CLR 539; [2010] HCA 42.

³⁸ *Commissioner for Special Purposes of Income Tax v Pemsel* [1871] AC 531.

But in what temporal sense was the technical meaning to be given to the term "charitable"? The answer in the joint reasons in *Aid/Watch*³⁹ was:

"Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time."

Their Honours added the further, and important point⁴⁰:

"Further, where, as here, the general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute."

Charitable Purposes

These considerations were determinative of the outcome in *Aid/Watch*. The Commissioner submitted that because *Aid/Watch* sought to generate public debate and to bring about changes in government policy and activity relating to the provision of foreign aid there applied to *Aid/Watch* the "political disqualification principle", associated with what

³⁹ (2010) 241 CLR 539 at 549 [23].

⁴⁰ (2010) 241 CLR 539 at 549 [23]. See, further, Dal Pont "Conceptualising 'charity' parameters—the prism of public benefit" (2013) 7 *Journal of Equity* 1 at 13-16.

had been said respectively by Lord Parker and Lord Wright in *Bowman v Secular Society Ltd*⁴¹ and *National Anti-Vivisection Society v IRC*⁴². The taxpayer successfully submitted that such a principle should not be accepted in Australian law, particularly since the Constitution, as interpreted in 1997 by *Lange v Australian Broadcasting Corporation*⁴³, recognised the public benefit in dissemination and receipt of information, opinions and arguments concerning government and political matters. The Constitution thus cut across what in 1938 had appeared to Dixon J to be the proposition that no "coherent system of law can ... admit that objects which are inconsistent with its own provisions are for the public welfare".⁴⁴

The Parliament, in the absence of referral of State powers pursuant to s 51(xxxvii) of the Constitution, lacks a general power to legislate with respect to trust law beyond its engagement by other federal laws, such as revenue law. The response by the Parliament to *Aid/Watch*⁴⁵ has been to define "charity" and "charitable purpose" so as to provide "clarity and certainty", but "for the purposes of all Commonwealth law": Preamble to the *Charities Act 2013* ("the 2013 Act").

⁴¹ [1917] AC 406 at 442.

⁴² [1948] AC 31 at 52.

⁴³ (1997) 189 CLR 520 at 557-559.

⁴⁴ *Royal North Shore Hospital of Sydney v AG (NSW)* (1938) 60 CLR 396 at 426; [1938] HCA 39.

⁴⁵ Previous consideration of the federal statutory privileges and concessions available to charitable trusts, associations and institutions is discussed in Dal Pont "Conceptualising 'charity' parameters—the prism of public benefit" (2013) 7 *Journal of Equity* 1 at 6-10.

The definition of "charitable purpose" in s 12(1) of the 2013 Act includes in par (l) the purpose of promoting or opposing change to any matter established by law, practice or policy in the Commonwealth, a State, a Territory or another country, being with respect to one or more of the purposes in pars (a)-(k) of the sub-section. The result in *Aid/Watch* appears undisturbed.

A charitable purpose which fell within the fourth residual head of charitable purpose in *Pemsel*, as at the day before the commencement of the new legislation (on 1 January 2014), will be treated as falling within s 12(1), even if it otherwise would not do so⁴⁶.

But what of purposes which fail to qualify at general law? One such religious purpose is that of the closed and contemplative order considered in *Gilmour v Coats*⁴⁷. However, such a purpose will be exempted from the public benefit requirement in the definition of "charity" in s 5 of the 2013 Act⁴⁸.

An apparent paradox thus is presented by the new federal legislation. A trust for a purpose may fail at general law because the purpose is not charitable, and a gift over or a resulting trust may come into operation; yet

⁴⁶ *Charities (Consequential Amendment and Transitional Provisions) Act* 2013, Sched 2, Item 7.

⁴⁷ [1949] AC 426.

⁴⁸ See s 10(2) of the 2013 Act and the *Extension of Charitable Purposes Act* 2004 (Cth).

for the purposes of federal law, in particular revenue law, the trust may be recognised as effective and attract favourable treatment under the taxation system⁴⁹,

It is one thing for the Parliament to require of superannuation funds that they meet certain criteria to obtain particular revenue outcomes⁵⁰. This may be done without the federal law being at odds with the general law of trusts, alterations to which is for State legislatures. It is another to treat as valid for federal law purposes a trust which fails at general law.

Conclusion

The interrelation and interaction between the Constitution, the common law and statute may trigger varied and complex issues. The general law respecting contracts, companies and trusts may be thought to present clear and stable criteria for the operation of revenue laws. But experience suggests the degree of clarity and stability offered by the general law for the administration of the revenue law may be overrated. This is not to urge increased legislative resort to criteria of substance over legal form, with the attendant temptation to impose arbitrary imposts. But it is to urge legislative vigilance in measuring the policy ends sought by

⁴⁹ Different considerations may apply to a charitable institution, such as Word Investments Limited, whose assets are not held upon trust: *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204; [2008 HCA 55].

⁵⁰ See *A-G (Cth) v Breckler* (1999) 197 CLR 83 at [9]-[19].; [1999] HCA 28.

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proposed measures against the selection of particular legal criteria to achieve them.