



## Charity Law Association of Australia and New Zealand

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### Is philanthropy charitable?

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#### Introduction

- 1 I will be commenting on how I think an Australian Court would interpret the word “philanthropic”, including whether the term is interchangeable with “charitable”.
- 2 So, is a trust for a philanthropic purpose charitable? Is an association established for philanthropic purposes charitable?
- 3 I will **not** be looking at issues that may affect the interpretation, such as:
  - (a) the particular context in which the term is used, or
  - (b) the effect of State legislation that saves mixed trusts for both charitable and non-charitable purposes (eg, a trust for “charitable or philanthropic purposes” will typically be construed as a trust for charitable purposes only), or
  - (c) the potential to rectify the use of the word under, for example, section 31 of the Victorian Wills Act<sup>1</sup> on the basis it does not reflect the instructions of a testator.
- 4 Dictionaries describe philanthropy as a love of humanity, private initiatives for the public good, love of mankind, happiness of mankind etc.
- 5 A number of cases are relevant, all considering mixed purposes expressed in a gift, eg, a gift for charitable or philanthropic purposes.

#### *In re Macduff* (UK Court of Appeal - 1896)<sup>2</sup>

- 6 Lindley LJ, of *Carbolic Smoke Ball Company* fame, said<sup>3</sup>:

“...what is the meaning of the word ‘philanthropic’? ... I cannot put any definite meaning on the word. All I can say is that a philanthropic purpose must be a purpose which indicates goodwill to mankind in general. **Can anything be looser than that?**

‘What philanthropic purpose is not charitable? My answer is, you are dealing with 2 words of so vague a meaning that it is extremely difficult to say, but we can suggest purposes that might be philanthropic and not charitable – purpose indicating goodwill to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptance of the word – that is to say,

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<sup>1</sup> Section 31 of the *Wills Act 1997* (Vic) permits the court to rectify a will to carry out the intentions of a testator if the wording does not give effect to the testator’s instructions.

<sup>2</sup> [1896] 2 Ch 451.

<sup>3</sup> At page 464

the wide, loose sense of indicating goodwill towards mankind or a great portion of them; but I do not think they would be charitable... I **do not know with anything like certainty what is meant by philanthropic**". (emphasis added)

7 Lopes LJ said<sup>4</sup>:

"I think I could suggest many objects which would come within the word 'philanthropic,' and to which the trustees would be entitled to apply the money, which are not charitable.

....

I come, therefore, to the conclusion that the words used in this will are too wide and too indefinite to support the gift."

8 Finally, Rigby LJ said<sup>5</sup>:

"No Court has defined [the word philanthropic]; and if we now try to define it, I confess myself unable to do so – at any rate, in a sense which would show that the definition meant the same thing as charitable.

***Attorney-General for NSW v Adams (High Court of Australia - 1908)***<sup>6</sup>

9 This also was a mixed purpose case (ie, a testamentary gift for "charitable, benevolent or philanthropic institutions"). It was found to be too vague to be valid, relying in part on Macduff's case.

"The words "benevolent" and "philanthropic" have been under the consideration of the Courts in several cases, and **it must now be taken as settled that bequests for these purposes, if the natural meaning of the words is not qualified by the context, are not charitable in the legal sense**" (O'Connor J at page 122)(emphasis added)

**US Approach**

10 The US courts have generally taken a different approach and a number of cases have treated "philanthropic" as having the same meaning as "charitable", particularly when used, even disjunctively, with the word "charitable".

***Thorp v Lund (Supreme Judicial Court of Massachusetts - 1917)***<sup>7</sup>

11 The court concluded that the word "philanthropic" "is almost if not quite synonymous with the word charity, at least as it was used at the time of the enactment of the [Statute of Elizabeth]"<sup>8</sup>.

It stated that to the extent the view of the court was inconsistent with Macduff's case, it was not inclined to follow Macduff's case<sup>9</sup>.

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<sup>4</sup> At 469

<sup>5</sup> At 470

<sup>6</sup> (1908) 7 CLR 100

<sup>7</sup> (1917) 227 Mass 474

<sup>8</sup> At 480

<sup>9</sup> At 481



***Wilson v Flowers* (Supreme Court of New Jersey - 1971)<sup>10</sup>**

- 12 The court said that the word “philanthropic” would seem, in its liberal sense, to include all acts of friendliness to mankind, whether conducive to improvement of society or merely to enrichment and enjoyment.
- 13 It noted that in English cases, the result has been that the trust has been non-charitable “because it would permit the Trustee to perform acts of mere friendliness and generosity, having no connection with the need of the recipients of the benefits”.
- 14 The court stated<sup>11</sup> that:
- “While ‘philanthropic’ may be technically broader than ‘charitable’, we think that it has come to mean the same thing in modern usage. However, even if it has not, it is ambiguous enough to be construed as such.** Most words are susceptible of more than one meaning, for as Justice Holmes has remarked ‘A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.’ (emphasis added)
- 15 In *Wilson v Flowers*, there was also evidence as to the probable intention of the testator, including evidence from the drafter of the will that he, the drafter, thought “philanthropic” meant the same things as “charitable”.
- 16 The drafter also gave evidence that the testator had told him that he wanted his entire residuary estate to be left to charities so as to be exempt from State and Federal Estate Taxes.

**Conclusion**

- 17 While an Australian court may have some sympathy to the US approach, the position in Australia seems “settled” by the High Court in *Adams Case*. I believe an Australian Court would still reject a proposition that philanthropy was charitable.
- 18 Accordingly, I suggest that if the word “philanthropic” is used when drafting a document, its meaning should be expressly limited to philanthropic purposes that are charitable. For example, by referring to philanthropic purposes “to the extent they are charitable”.
- 19 This approach should sidestep having to consider the matters referred to in paragraph 3 above, namely the particular context in which the term is used, the legislative savings legislation for trusts for mixed purposes, and issues of rectification.

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<sup>10</sup> (1971) 58 NJ 250

<sup>11</sup> At 263