

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

AUSTRALIAN PORK LIMITED v COMMISSIONER FOR ACT REVENUE (Administrative Review) [2018] ACAT 85

AT 67/2017

Catchwords: **ADMINISTRATIVE REVIEW** – Taxation Administration Act 1999, Part 3A – payroll tax – charitable organisation – beneficial organisation determination – organisations promoting trade, industry or commerce

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 9, 68
Payroll Tax Act 2011, ss 6, 10, 48
Taxation Administration Act 1999 ss 18A, 18B, 18C, 18D, 18E, 18F, 18G, 104, 107A, Sch 1 ss 1.1, 1.2
Explanatory Statement, Revenue (Charitable Organisations) Legislation Amendment Bill 2015

Cases cited: *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539
Bowman v Secular Society Ltd [1917] AC 406
BHP Billiton Iron Ore Pty Ltd v National Competition Council (2008) 236 CLR 145
Chamber of Commerce and Industry of Western Australia Inc v Commissioner of State Revenue (WA) [2012] WASAT 146
Comcare v Power [2015] FCA 1502
Comcare v Sahu-Khan [2007] FCA 15
Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531
Corporate Affairs Commission (SA) v Australian Central Credit Union (1985) 157 CLR 201
Crystal Palace Trustees v Minister for Town and Country Planning [1950] 2 All ER 857
FCT v Word Investments Ltd (2008) 236 CLR 204
Grain Growers Limited v Chief Commissioner of State Revenue [2015] NSWSC 925
Inland Revenue Commissioners v Yorkshire Agricultural Society [1928] 1 KB 611
Law Institute of Victoria v Commissioner of State Revenue [2015] VSC 604
Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355
Re Crown Forestry Rental Trust; Latimer v Commissioner of Inland Revenue [2004] 4 All ER 558

Repatriation Commission v Bendy [1989] FCA 217
Roman Catholic Archbishop of Melbourne v Lawlor (1934) 51
CLR 1
Stratton v Simpson (1970) 125 CLR 138
*Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner
of Taxation* (2005) 142 FCR 371

List of

Texts/Papers cited: ACT Legislative Assembly, *Hansard*, Mr Barr, Revenue
(Charitable Organisations) Legislation Amendment Bill 2015, 29
October 2015

Tribunal: Senior Member Professor T Foley

Date of Orders: 30 August 2018

Date of Reasons for Decision: 30 August 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) **AT 67/2017**

BETWEEN:

AUSTRALIAN PORK LIMITED
Applicant

AND:

COMMISSIONER FOR ACT REVENUE
Respondent

TRIBUNAL: Senior Member Professor T Foley

DATE: 30 August 2018

ORDER

The Tribunal orders that:

1. The decision under review is confirmed

.....
Senior Member Professor T Foley

REASONS FOR DECISION

1. Australian Pork Limited (the **applicant**) has sought review of a decision of the Commissioner for ACT Revenue (the **respondent**) made 23 October 2017 pursuant to section 104 of the *Taxation Administration Act 1999* (the **Tax Act**) to disallow the applicant's objection to its decision declining to make a 'Beneficial Organisation Determination' (a **BOD**) in the applicant's favour for payroll tax purposes.
2. Jurisdiction to review the respondent's decision is conferred on the Tribunal by section 107A, and Schedule 1 sections 1.1, 1.2(d) of the Tax Act which is an authorising law for the purposes of section 9 of the *ACT Civil and Administrative Tribunal Act 2008* (the **ACAT Act**). The review is an application for review by the ACT Civil and Administrative Tribunal pursuant to section 68 of the ACAT Act.
3. In the reasons below, a reference to 'ACAT' or 'tribunal' refers to the ACT Civil and Administrative Tribunal generally, whereas 'Tribunal' refers to the member who heard the application.

The hearing

4. The matter was heard on 26 and 27 March 2018. The Tribunal had before it the documents provide by the respondent on which its decision was based (the **T Documents**), the submissions and statements of facts and contentions of the parties. The applicant was represented by Mr P Walker SC and Ms K Katavic of counsel instructed by BAL Lawyers. The respondent was represented by Mr C Young of counsel instructed by the ACT Government Solicitor.
5. The applicant called evidence from its CEO Mr A Spencer, and both parties made submissions and responded to questions of the Tribunal.
6. At the conclusion of the hearing the Tribunal reserved its decision and indicated it would provide written reasons. These are those reasons.

Background

7. The applicant is a company limited by guarantee. It is an amalgamation of the Australian Pork Corporation, the Pig Research and Development Corporation and the Pork Council of Australia which occurred in 2000.
8. On 12 February 2016 the applicant sought a payroll tax exemption from the respondent based on the applicant's whole or predominant purpose being charitable. To obtain such exemption the applicant would need to be granted a BOD in its favour.
9. On 6 March 2017 the respondent refused the applicant's request for a BOD in its favour for the purpose of payroll tax exemption.
10. On 5 May 2017 the applicant lodged an objection to the respondent's decision.¹
11. On 23 October 2017 the respondent disallowed the applicant's objection being the reviewable decision now before the tribunal.²
12. On 15 November 2017 the applicants filed an application for review of a decision.³
13. A decision to refuse to grant a BOD is internally reviewable and may be externally reviewed by ACAT.

The relevant law

14. Section 6 of the Payroll Tax Act 2011 (**PT Act**) provides that payroll tax is imposed on all "taxable wages". "Exempt wages" are not taxable wages.⁴ Wages are exempt wages if they are paid or payable by a "charitable organisation".⁵
15. The application of the Tax Act to "charitable organisations" is dealt with in Part 3A.

¹ T Documents, pages 296-310

² T Documents, pages 315-331

³ T Documents, page 38

⁴ Section 10(2) of the PT Act

⁵ Section 48 of the PT Act

16. Section 18B of Part 3A provides the following meaning of charitable organisation:

18B Meaning of charitable organisation

For a tax law:

charitable organisation—

- (a) *means an organisation carried on for a religious, educational, benevolent or charitable purpose; but*
- (b) *does not include—*
 - (i) *an organisation carried on for securing pecuniary benefits to its members; or*
 - (ii) *an excluded organisation unless a beneficial organisation determination is in force for the excluded organisation.*

17. Section 18C(1) provides the following meaning of excluded organisation:

18C Meaning of excluded organisation—pt 3A

(1) *In this part:*

excluded organisation means—

- (a) *a political party; or*
- (b) *an industrial organisation; or*
- (c) *a professional organisation; or*
- (d) *an organisation that promotes trade, industry or commerce; or*
- (e) *a class of organisation prescribed by regulation.*

18. Relevantly, s18C(2) provides:

organisation that promotes trade, industry or commerce means an organisation that has as one of its purposes promoting, or advocating for, trade, industry or commerce, whether generally or for a particular kind of trade, industry or commerce.

19. Section 18D provides that the purpose or purposes of an organisation are determined in the following manner:

18D Determining the purpose of organisation

For this part, the purpose or purposes of an organisation are to be determined having regard to all the relevant circumstances including the organisation's stated objects (if any) and its activities.

20. Certain organisations that are excluded from the meaning of charitable organisation under Part 3A may seek a BOD that grants them such status. An

organisation that promotes trade, industry or commerce, is one of the categories of organisations that may apply to the commissioner for such a determination under Division 3A.2:

Division 3A.2 Beneficial organisation determinations

18E Beneficial organisation determinations—application

The following organisations may apply to the commissioner for a beneficial organisation determination:

- (a) a professional organisation mentioned in section 18C (1), definition of **excluded organisation**, paragraph (c);*
- (b) an organisation that promotes trade, industry or commerce mentioned in section 18C (1), definition of **excluded organisation**, paragraph (d);*
- (c) an organisation in a class of organisation prescribed by regulation under section 18C (1), definition of **excluded organisation**, paragraph (e), if the regulation prescribing the class of organisation states that this section applies to the class of organisation.*

18F Beneficial organisation determinations—decision

- (1) If the commissioner receives an application for a beneficial organisation determination from an organisation, the commissioner may make the determination if satisfied that—*
 - (a) the predominant purpose of the organisation is to advance religion, advance education, relieve poverty, or otherwise benefit the community; and*
 - (b) the objects and activities of the organisation that make the organisation an excluded organisation are not significant in relation to the purpose of the organisation considered as a whole; and*
 - (c) the purpose of the organisation is not, or is not intended to be, beneficial to a particular class of people (whether or not members of the organisation) rather than the community generally.*
- (2) A beneficial organisation determination is a notifiable instrument.*

18G Beneficial organisation determinations—effect

- (1) If the commissioner makes a beneficial organisation determination for an organisation, the determination takes effect on the day the organisation applied for the determination.*
- (2) A beneficial organisation determination for an organisation applies to the organisation in relation to any liability to pay—*

- (a) *duty for any of the following dutiable transactions registered with the registrar-general under the Land Titles Act 1925 while the determination is in effect:*
- (i) *an agreement for the transfer of dutiable property;*
 - (ii) *a grant of a Crown lease;*
 - (iii) *a grant of a declared land sublease;*
 - (iv) *a transaction prescribed by regulation for the Land Titles Act 1925, section 178B (1); and*
- (b) *duty for any other dutiable transaction entered into while the determination is in effect; and*
- (c) *payroll tax and rates for a financial year in which the determination is in effect.*
- (3) *The commissioner—*
- (a) *must reassess an organisation’s liability to duty, payroll tax or rates for the period beginning on the day the beneficial organisation determination takes effect; but*
 - (b) *must not make a reassessment more than 5 years after the determination is made.*
- (4) *In this section:*

dutiable transaction—see the Duties Act 1999, section 7 (2).

payroll tax—see the Payroll Tax Act 2011, dictionary.

rates—see the Rates Act 2004, dictionary

Admissions

21. In its reasons for decision⁶ the respondent accepted that the applicant met the requirements of section 18B(a) such that it was an organisation carried out for a charitable purpose. The applicant relied on that admission in its contentions⁷ and in its reply.⁸ However this admission was withdrawn by the respondent at the start of the hearing. The applicant subsequently made oral submissions that addressed the respondent’s altered position.

⁶ T documents, page 30

⁷ Applicant’s statement of facts and contentions filed 25 January 2018, paragraph 18(a)

⁸ Applicant’s reply filed 9 March 2018, paragraph 11

Issues

22. It is agreed that the issue for determination is whether the applicant satisfies the requirements of section 18F for a BOD.

The applicant's evidence

23. The applicant's CEO Andrew Spencer provided a written statement and gave oral evidence.⁹ He said the applicant company's strategic priorities seek to align with the Commonwealth Government's Rural Research and Development Priorities.¹⁰ Its first key strategic objective is to grow consumer appeal for pork products,¹¹ and its key performance indicator for that objective is to increase the percentage of households eating pork more than a given number of times per year.¹² Its second key strategic objective is to build markets, which extends to negotiating trade protocols where necessary to enter fresh markets such as China and Japan where Australian pork products are not currently sold, or not sold in quantity.¹³
24. Mr Spencer's evidence was that the applicant's R&D program also seeks to align directly with Commonwealth Government's priorities.¹⁴ He provided details of nine examples of a range of activities of the applicant in its Research & Innovation, Policy, and Marketing Divisions which progress this connection.¹⁵
25. Mr Spencer was cross-examined as to this range of activities detailed by way of example in his statement. He said all these activities were currently undertaken and had recently been refocused in its Strategic Plan 2015-2020 on 'demand creation', 'export market expansion' and 'production costs containment'.¹⁶ All of these activities were designed to make pork products more appealing to consumers and to increase the profitability of pig production. However, his evidence was that the applicant's activities were aimed more broadly than simply

⁹ Statement of Andrew Victor Spencer dated 25 January 2018, Exhibit A1. Exhibited with the statement as Exhibit AS1 were two volumes of documents paginated 1-1365. Additionally the applicant tendered in evidence as AS2 being a USB file containing eight pork industry videos which was viewed by the Tribunal

¹⁰ AS1 page 319

¹¹ AS1 page 1302

¹² AS1 page 1304

¹³ AS1 page 1307

¹⁴ AS1 page 1333

¹⁵ Statement of Andrew Victor Spencer dated 25 January 2018, Exhibit A1 paragraphs 33-102

¹⁶ AS1 pages 1290-1291

economic gain for pig producers. Consistent with this broader aim were its objectives to increase sustainability,¹⁷ and to maintain healthy farms through reducing biosecurity risks, such as antimicrobial resistance (AMR).¹⁸ As an example, the AMR strategic project is designed to prevent an added economic burden being placed on pork production by maintaining and protecting Australia's currently effective AMR status in pork.¹⁹

26. A further example Mr Spencer gave was the applicant's involvement in digital agriculture initiatives which are designed to enable agriculture to better leverage new technologies.²⁰ While this did help realise economic gains at the farm gate for producers, it had non-economic benefits more broadly. Further initiatives identified by Mr Spencer included the Pork Supply Chain Integrity Program which is designed to underpin disease management using 'PigPass' technology which is a digital tool to trace poor production practices back to individual farm source in order to rectify production faults.²¹ He also identified programs with wider community benefit including the development of education resources for schools closely linked to the Australian Schools Curriculum;²² the design of measures to contribute to environmental sustainability through the use of biogas;²³ the production of evidence of the pig industry's economic impact in terms of GDP; and the development and lifting public awareness of the consumer protective features trademark PorkMark.²⁴

The applicant's contentions as to purport of Mr Spencer's evidence

27. The applicant says Mr Spencer's evidence supports its contention that it is an organisation with strong community benefit. It is non-profit body membership of which is open to anybody who pays a pork levy. It is not a closed class or a limited class in the *Oppenheim* sense.²⁵ What the applicant says flows from this is that by promoting the pork industry generally many of the applicant's activities also

¹⁷ AS1 page 301

¹⁸ AS1 page 305

¹⁹ AS1 pages 367-369

²⁰ AS1 page 371

²¹ AS1 pages 415-416

²² AS1 pages 873-1214

²³ Statement of Andrew Victor Spencer dated 25 January 2018, Exhibit A1 paragraphs 74-75

²⁴ AS1 page 1276

²⁵ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297

serve broader community purposes directly by focusing on issues such as disease and animal welfare, (a well-known charitable purpose), and by providing money for education, through programs addressing staged levels of the Australian Schools Curriculum such as the Pigs in Schools program and the farm visit program,²⁶ in developing detailed assessment rubrics,²⁷ and in providing scholarships (again well-known charitable purposes).

28. The applicant says the core nature of these broader purposes is reinforced in its sources of Commonwealth funding. As detailed in Mr Spencer's statement,²⁸ the organisation receives funding from the Commonwealth pig slaughter levy of \$3.425 per carcass. The applicant receives \$3.25 of this which consists of \$2.25 per carcass for marketing activities and \$1.00 per carcass for research and development. The applicant says its funding agreement with the Commonwealth requires a substantial proportion of these funds to be spent on research development, marketing and advocacy.²⁹
29. 'Research development' is described in the preamble to the funding agreement as "the mechanism by which primary producers and the government co-invest in research and development for industry and community benefits" and this is fundamental in both funding and operational terms.³⁰
30. 'Market activities' are defined in the funding agreement in a broader sense than conventional marketing, and includes "strategic policy development or other activities for the benefit of the industry".³¹ The schedules to the agreement identify these as including activities such as "the commercialisation of research and development" and "the dissemination of information relation to research and development."³² Development is understood as the "awareness of the

²⁶ AS1 page 884 (Foundation-Year 2), page 940 (Junior Secondary Schools), page 996 (Primary Schools), page 1050 (Secondary Schools).

²⁷ AS1 page 1106-1117

²⁸ Statement of Andrew Victor Spencer dated 25 January 2018, Exhibit A1 paragraph 25

²⁹ AS1 page 67-112

³⁰ AS1 page 68

³¹ AS1 page 73

³² AS1 page 109

contribution that can be made by Research and Development in improving its efficiency and competitiveness”.³³

31. The applicant says that ‘Advocacy’ is the end result of all these activities, by attempting to advance particular positions or outcomes with Government Ministers. This advocacy is distinguishable from the activities of organisations such as “enterprise trade unions” like the Victorian Farmers Federation, and the kind of lobbying that it does. In a simple sense, there are no identified employees (amongst a staff of 37 or 38) with a dedicated advocacy function. The function is rather performed by Mr Spencer himself, or by the chairperson of the organisation, or by some other person.
32. The applicant contends the import of Mr Spencer’s evidence is that if the organisation’s objects are examined closely, objects such as “to provide leadership on the provision of Strategic Policy Development, Marketing and R&D services that advance the interests of the Australian Pig Industry” there is a clear resemblance to the requirements of the funding agreement.³⁴ The applicant contends that agreement strongly influences the nature of the way the organisation conducts many of its activities.
33. The applicant says the wide tenor of its activities is also captured in the examples provided in Mr Spencer’s statement and evidence.³⁵ The applicant expended \$10,242,000 in 2016-17 on research and development.³⁶ This expenditure supported activities such as bacterial research, water research, and digital technology development involving not just the pork industry but also multiple agricultural industries which the applicant says is indicative of the broader community purpose of the activities. For example, the pork supply chain program and the program of labelling for biosecurity purposes both have animal welfare purposes which provide a community benefit. The development of biosecurity devices such as ‘Physi-Trace’ and ‘PigPass’ provide the capacity to monitor the quality of animal products, providing benefits to the pork industry and other

³³ AS1 page 109 paragraph (i)

³⁴ AS1 pages 24-25

³⁵ Statement of Andrew Victor Spencer dated 25 January 2018, Exhibit A1 paragraphs 36-37

³⁶ Statement of Andrew Victor Spencer dated 25 January 2018, Exhibit A1 paragraph 39

agricultural industries that go well beyond simply trade promotion to benefit the community generally.

34. The applicant says Mr Spencer's evidence indicates an advertising budget of \$6 million (2016-2017) which while a large part of an overall \$20 million budget, only two staff members are involved in advertising. The purpose behind much of that advertising provided both a community benefit and a benefit for pork sales. The advertising budget is partly spent on fulfilling an educative function to increase community understanding of the characteristics of pork as a product (for example, specific advertising addresses a perceived belief that pork is too fatty). In instances such as this, advertising is designed to inform and educate the community of the true nature of pork products. While such advertising may lead to more pork sales it also fills this important educative function which the applicant says is relevant when considering the significance of the purposes of the organisation as a whole.
35. The applicant says Mr Spencer's evidence also shows there is considerable spending on targeted research which has a direct community benefit. There is an annual allocation of \$800,000 on animal welfare and \$600,000 on environmental research which is used for researching issues such as the removal of sow stalls in housing pigs and developing more effective means to manage aggressive sow behaviour to reduce animal mortality caused by sows rolling onto piglets. The applicant pointed to evidence of other such research initiatives including the manure management program³⁷ and the development and setting of industry-wide standards both of which have wider community benefit.³⁸
36. The applicant contends it is clear from this evidence that in determining the significance of the applicant's overall objects and activities there is evidence of substantial community benefit. The applicant says this is wholly consistent with the long held view that the promotion of agriculture has a charitable purpose.

³⁷ AS1 page 648-649

³⁸ AS1 page 600-641

The respondent's contention as to the purport of Mr Spencer's evidence

37. The respondent contends that the purpose of the applicant organisation discloses in both its documentary evidence and in Mr Spencer's evidence, is to advance and promote the Australian pork industry. The respondent says 'promote' means to advance and develop the Australian pork industry. The respondent says this is the applicant's only purpose, and when the issue of 'predominant purpose' in the *Stratton v Simpson*³⁹ sense is considered this is its predominant purpose.
38. The respondent accepts that Mr Spencer gave very balanced evidence and says he made two important points relevant to the outcome of this matter. Firstly, he described the applicant industry body as "a market failure body", in the sense that it does things that the industry cannot do for itself. In the respondent's view a body that performs functions that individual members could not (or would not) do for themselves very closely aligns with a body that is promoting an industry. Secondly, Mr Spencer said broadly speaking that the applicant does three things. It seeks to make sure that industry revenues are as high as possible; that industry costs are as low as possible; and it that the risks that industry participants are exposed to are minimised. On the respondent's view these three activities indicate that what the applicant does is for the purpose of promoting the pork industry and the interests of those in the pork industry.
39. The respondent highlighted a further aspect of the applicant's evidence with respect to the cost benefit analysis which is carried out for all of its projects. The respondent says individual projects are assessed against a balance of costs and benefits and are only pursued when they show a positive return to industry. The respondent says this suggests that promotion of the pork industry is the applicant's core purpose. The respondent also says all of the various key result areas and key performance indicators in the applicant's strategic plan are measures focused on the industry and the participants in the industry, not on the public or the wider community.
40. The respondent contends when these aspects of Mr Spencer's evidence are taken as a whole, together with the documentary evidence submitted by the applicant,

³⁹ *Stratton v Simpson* (1970) 125 CLR 138

it is plain that this is an industry body that is properly pursuing the advancement and development of its industry and in doing so, it is necessarily promoting the industry.

The applicant's contentions as to the interpretation of Part 3A of the Tax Act

A. The Explanatory Statement & Presentation Speech

41. The applicant's counsel submitted that a useful starting point in determining the regard to be had to the explanatory statement⁴⁰ is in its general introductory part under the heading 'Background':

Evolution in interpreting and applying this [charitable] law, as well as a number of recent court decisions outside the ACT, have broadened the definition of 'charitable organisation' away from the original policy intent and away from community expectations about benevolent activities, presenting a revenue risk.

42. Under the subsequent heading 'Legal Developments' two cases are cited in the explanatory statement. The first, *Aid/Watch Inc v Federal Commissioner of Taxation (Aid/Watch)* disapproved of the long-standing principle in *Bowman v Secular Society Ltd* [1917] AC 406 which had made the promotion of a political purpose forbidden in order to retain charitable status. The applicant rightly says this is not a prominent issue in relation to the present case. The second decision cited is *Chamber of Commerce and Industry of Western Australia Inc v Commissioner of State Revenue (WA)* [2012] WASAT 146 (*Chamber of Commerce and Industry*) which the explanatory statement says "extended charitable status to the Chamber of Commerce and Industry in Western Australia" which previously did not have such status. The conclusion the explanatory statement then draws is that "these developments have significantly affected the scope of what is considered to be charitable".
43. What the applicant contends the tribunal should draw from this is that the mischief identified in this document, is not the need to deal with organisations that promote agriculture, given such organisations are not those which have not recently acquired charitable status, but have long been accepted as charitable. In the applicant's oral submission, there has been no recent "legal developments

⁴⁰ Explanatory Statement, Revenue (Charitable Organisations) Legislation Amendment Bill 2015

whatsoever to question the idea of an industry that promotes agricultural purposes not being a charity”.

44. The applicant drew attention to the assertion on page 2 of the explanatory statement to the effect that

It is a broadly held view that only not-for-profit organisations that serve a wider community benefit should be provided this advantage [exemption from paying tax]. Organisations representing certain, narrow professional or political communities are not viewed by the general community as providing a community benefit.

45. The relevance of this statement in the applicant’s view is the reference firstly, to narrow professional or political communities, and secondly, to the endorsement given to organisations which provide wider community benefit. In the applicant’s contention the first statement is not intended to capture the applicant organisation given that organisations which promote agriculture have long been deemed charitable. Conversely, the second reference is an endorsement of providing wider community benefit that has long been accepted of organisations such as itself. The conclusion the applicant presses as to the regard to be had of the explanatory statement is that the mischief that the statute is designed to address is not *prima facie* agricultural organisations such as the applicant.
46. The applicant says it is simply not possible to identify any principle in these two decisions that suggests the change in charitable status being urged by the respondent is intended to apply to agricultural organisations enhancing the industry in the *Yorkshire Agriculture Society*⁴¹ sense. The applicant says if that is the approach that was to be taken, the legislation then being introduced would have the effect of overturning a long line of authority. If this was the intention this would need to be warranted by what was specifically decided in the *Chamber of Commerce and Industry* case.

B. The proper reading of the Chamber of Commerce and Industry case

47. Both parties contended that the tribunal should take particular note of the Chamber of Commerce and Industry case as the catalyst for the insertion of Part

⁴¹ *Inland Revenue Commissioners v Yorkshire Agricultural Society* [1928] 1 KB 611

3A provisions in the ACT Tax Act.

48. The applicant contends it is important to review the principles upon which the WA Tribunal proceeded, notably its acknowledgment that:⁴²

...[I]t has been recognised that the promotion of industry or commerce in general can be a public purpose of a charitable nature, so long as it is for the benefit of the public or a considerable section of the public.

49. The applicant says this proposition was not in dispute and that Justice Chaney cited a series of decided cases in which the proposition was established, relevantly referring to Yorkshire Agricultural Society saying “a society formed for the general improvement of agriculture [was] found to be charitable”.⁴³
50. The applicant contends that this is indicative that *Chamber of Commerce and Industry* was not seeking to remove the charitable status of such industry and commerce bodies, nor that the ACT legislation’s purpose was designed to deal with the sudden charitable status of agricultural societies as a recently identified mischief. The applicant also contends that the WA Tribunal was proceeding on the basis that it was not in dispute that “the fact that benefit may accrue to the members of an organisation does not necessarily mean that the organisation is not being carried on for a charitable purpose.”⁴⁴ Justice Chaney noted that the observation of Atkin LJ in *Yorkshire Agricultural Society* had been cited with approval in a series of subsequent cases. Relevantly, part of Atkin LJ’s observation reads at:⁴⁵

[I]f the benefit given to its members is only given to them with a view of giving encouragement and carrying on the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the society being established for charitable purposes only.

51. The applicant says this is likewise indicative that these longstanding principles and the approach to common law charities are not sought to be displaced by the *Chamber of Commerce and Industry* decision and this should be taken account of

⁴² *Chamber of Commerce and Industry* at [25]

⁴³ Cited at [26]

⁴⁴ Cited at [29]

⁴⁵ *Yorkshire Agricultural Society* at [631]

in the interpretation of the ACT statute.

52. The applicant further contends that the organisation that was seeking to establish charitable status in *Chamber of Commerce and Industry* has much broader objects than that of the applicant. Its objects, *inter alia* included:

*To provide for industry, trade and commerce the means of formulating and making known its common purposes and the means of action in regard to industrial, commercial, economic, fiscal, labour, social, educational, legal and technical matters.*⁴⁶

53. Consistent with these broader objectives, evidence given on behalf of the applicant in Chamber of Commerce and Industry was that it had very strong advocacy and policy activities and that “its core function and reason for being has and always will be the pursuit of free enterprise....[...] through its policy and advocacy teams.”⁴⁷ Given this, the organisation to which Justice Chaney extended charitable status is a much wider advocacy body than that suggested by the objects and activities of the applicant.
54. The conclusion that the applicant urged is that in granting the Chamber of Commerce and Industry of Western Australia (Inc) charitable status for the purposes of the *Payroll Tax Assessment Act 2002* (WA) the WA Tribunal was widening the scope of charitable purpose well beyond that usually ascribed to “the promotion of industry and commerce” within which scope the *Yorkshire Agricultural Society* exemption has long sat. The applicant contends that it is this significant widening which is the mischief to which the amended Part 3A was directed and not to organisations that had long sat well within charitable status. The applicant contends the ACT amendments are therefore not to be read in the overarching way in which the respondent contends. On the applicant’s submission, the statute is intended to address the widening the *Chamber of Commerce and Industry* decision produced and not the curtailing of pre-existing charitable status of agricultural organisations such as itself.

⁴⁶ *Chamber of Commerce and Industry* at [41]

⁴⁷ *Chamber of Commerce and Industry* at [50]

C. The consequential reading of Part 3A

55. The applicant provided submissions on the consequential reading of the following sections of Part 3A – sections 18B, 18C and 18F.

Section 18B

56. The applicant contends that given the respondent's withdrawal of its concession that the applicant meets the requirements of section 18B(a), the matter at issue is whether (given it is an excluded organisation) it meets the requirements for the issue of a BOD as provided for under 18B(b)(ii).

Section 18C

57. The applicant says the consequential reading of the balance of Part 3A is dependent on the correct use of the word 'promoting' as used in the section 18C definition section. That definition provides that "an organisation that promotes trade, industry or commerce means an organisation that has as one of its purposes promoting, or advocating for, trade, industry or commerce, whether generally or for a particular kind of trade, industry or commerce."
58. The applicant says 'promoting' more generally can be used in two distinct senses. When the word is construed in the sense of bodies that organise advertising campaigns, lead trade delegations, hold trade fairs, exhibit product etc. (such that almost their entire existence is related to the direct sense of 'promoting their trade') it is that kind of organisation to which the legislation is directed. When the word is construed in a more general sense of 'promoting activities' (such as agriculture) it is not directed at such organisations. The applicant organisation fits into the second which has long been traditionally regarded as charitable.

Section 18F

Paragraph 18F(1)(a)

59. The applicant contends that it meets paragraph 18F(1)(a) because its 'predominant purpose' is to benefit the community. The applicant says the statutory test provided here is not to be confused with the test for determining whether an organisation is charitable at common law. In the common law test an organisation's objects (or purposes) must be exclusively charitable, save that incidental or ancillary purposes will not rob it of that status if they are adjectival

to the charitable purposes. If there is a freestanding purpose that is minor but not charitable the status will be lost.⁴⁸

60. The applicant says the statutory test in paragraph (a) is different because the test directs attention to the ‘predominant’ purpose. The applicant says this means that, unlike a common law charity, an organisation’s non-charitable excluded purposes needs not be incidental or ancillary to its purpose in paragraph (a). That is to say it can have freestanding non-charitable purposes and still obtain a BOD provided those purposes are not ‘predominant’. The applicant therefore contends the statutory test is not as strict as the common law test for ‘charity’ and is a test the applicant satisfies.⁴⁹
61. Reiterating this point the applicant agrees that paragraph (a) restates Lord McNaughten’s four categories of charitable purposes from *Pemsel’s* case. In the applicant’s contention those four categories are, however, not the beginning and the end of the common law test. The common law requires that, excepting ancillary purposes, an organisation’s objects be exclusively charitable in order to qualify as a charity. Paragraph (a) does not make such a requirement.⁵⁰
62. The applicant takes this argument further in its reply saying the respondent’s submissions do not recognise the two senses in which words such as ‘main’, ‘predominant’, and ‘dominant’ are used both in respect of companies and charities at common law. These two senses were clearly identified by Windeyer J in *Stratton v Simpson* (1970) by reference to the term “the main object”.⁵¹ The two senses are equally apposite to words such as “predominant” and “dominant”.⁵²
63. The first sense of the words is that they denote the principal object or purpose of an institution that also has other lesser objects which are independent. The second

⁴⁸ Applicant’s statement of facts and contentions filed 25 January 2018, paragraph 29 citing *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1

⁴⁹ Applicant’s statement of facts and contentions filed 25 January 2018, paragraph 33

⁵⁰ Applicant’s reply filed 9 March 2018 paragraph 12

⁵¹ *Stratton v Simpson* (1970) 125 CLR 138 at [150]

⁵² Applicant’s reply filed 9 March 2018 paragraph 13

sense is that the words denote the dominant purpose of an institution having other permissible purposes which are all ancillary to that main purpose.⁵³

64. The common law has taken the view that there cannot be non-charitable objects which may be pursued independently of charitable objects if an organisation is to retain charitable status.⁵⁴ Therefore where the expression ‘main’, ‘predominant’ or ‘dominant’ has been used in charity cases, it has been used to discern and examine objects in the second sense outlined by Windeyer J in *Stratton v Simpson*. There is simply no reason for charity cases to examine the first sense in any detail as it excludes charitable status. However, the applicant says that does not mean that the words are used in this second sense in the statute where the test is different.⁵⁵
65. The applicant says by way of illustration that it was in this way the term “predominant purpose” was used by Gibbs J in *Stratton v Simpson*, when he was discussing the effect of section 37D of the *Conveyancing Act 1919-1954* (NSW) and section 1 of the *Charitable Trusts (Validation) Act 1954* (UK). These provisions, and others like them, were designed to save gifts for charitable purposes which would otherwise fail because of the inclusion of non-charitable purposes. It is in consideration of these statutory provisions that Gibbs J referred to the preservation of a class which while not exclusively charitable were ‘predominantly’ charitable in character.⁵⁶ That is to say these provisions allowed for the existence of independent non-charitable purposes provided the predominant purpose was charitable. The applicant says *this* (unusual use) is its use paragraph (a).
66. The applicant refers in distinction to the decision in *FCT v Word Investments Ltd*⁵⁷ (***Word Investments***) where the court said in relation to the interpretation of such words “in examining the objects, it is necessary to see whether its main or predominant or dominant objects *as distinct from its concomitant, incidental or*

⁵³ Applicant’s reply filed 9 March 2018 paragraph 14

⁵⁴ Citing *Roman Catholic Archbishop of Melbourne v Lamlor* (1934) 51 CLR 1

⁵⁵ Applicant’s reply filed 9 March 2018 paragraph 15

⁵⁶ Applicant’s reply filed 9 March 2018 paragraph 17 Gibbs J in *Stratton* at [165]

⁵⁷ (2008) 236 CLR 204

ancillary objects are charitable”.⁵⁸ When the emphasised phrase is considered the applicant says it is apparent that the court in *Word Investments* was using the words ‘main’ or ‘predominant’ or ‘dominant’ in the second sense posited by Windeyer J in *Stratton v Simpson*.⁵⁹ The applicant says *this is not* its use in paragraph (a).

67. The applicant thus contends that when section 18F is viewed as a whole it becomes apparent that the use of the term ‘predominant purpose’ in paragraph 18F(1)(a) is used in the first sense by Windeyer J in *Stratton* and not the second. That is to say, the section does allow for independent non-charitable purposes providing the organisation’s predominant purpose continues to satisfy one of the *Pemsel* categories. To that (considerable) extent the applicant says the paragraph departs from the common law approach to the determination of valid gifts to charities.⁶⁰
68. The applicant contends that if paragraph (a) applied the common law test fully (that is to say, Windeyer J’s second approach) and objects had to be charitable (accepting only those which were ancillary or concomitant to a charitable object) almost no excluded organisation as defined would be able to satisfy its requirements. The applicant gives the example of a professional organisation which as part of its definition has a purpose of benefitting its members. This would exclude it being a charity at common law.⁶¹ If paragraph (a) applied the common law test strictly most if not all BOD applications would fail at this first step.
69. The applicant says this becomes clearer when paragraph (a) is read in its context with paragraph (b), as it is clear from the requirement set in paragraph (b) that there is an anticipation an organisation may have some independent objects which are not charitable and yet satisfy that paragraph if they are not significant when considered as whole.⁶²

⁵⁸ *FCT v Word Investments Ltd* (2008) 236 CLR 204, [217 at [17], emphasis added

⁵⁹ Applicant’s reply filed 9 March 2018 paragraph 18

⁶⁰ Applicant’s reply filed 9 March 2018 paragraph 19

⁶¹ Applicant’s reply filed 9 March 2018 paragraph 20

⁶² Applicant’s reply filed 9 March 2018 paragraph 21

70. The applicant say the effect of this interpretation is that an organisation will satisfy the requirements of paragraph (a) if its purpose is “predominant” in the first sense posed by Windeyer J in *Stratton*. It will not be ruled out because amongst the objects of a charitable nature are independent objects of a non-charitable nature.⁶³

Paragraph 18F(1)(b)

71. The applicant directed the tribunal’s particular attention to the interpretation of the word “significant” in part of the paragraph (b) provision:

...the objects and activities of the organisation that make the organisation an excluded organisation are not significant in relation to the purpose of the organisation considered as a whole.

72. The applicant argues that any activity (such as ‘promotion activity’) that it might carry out has to be “significant” in the sense of to “a material degree, substantial or considerable”, or of “substantial import” or “of much consequence”. The applicant referred as a comparison to two cases used in the Comcare area of *Comcare v Sahu-Khan* [2007] FCA 15 (**Sahu-Khan**) and *Comcare v Power* [2015] FCA 1502 (**Power**) where these senses of the meaning were considered.
73. In *Sahu-Khan*, Justice Finn looked closely at the meaning of the word ‘material’ and examined a series of definitions with provisions such as “materially, substantially, considerably”.⁶⁴ Finn J cited Justice Davies’ remarks in *Repatriation Commission v Bendy*⁶⁵ comparing and preferring the ‘loose’ definitional sense of ‘material’ in the Macquarie Dictionary namely, “substantial import, of much consequence” to the perhaps narrower ‘legal sense’ of “pertinent” or “likely to influence”.
74. The applicant argues his Honour’s approach can be instructive as in the correct approach to give sensible meaning to the word ‘significant’ in paragraph (b). Firstly, ‘significant’ is capable like ‘material’ of bearing different meanings. Secondly, ‘significant’ could be taken to mean what Justice Davies regarded as the legal meaning of ‘material’, namely “likely to influence” or the ‘loose’

⁶³ Applicant’s reply filed 9 March 2018 paragraph 22

⁶⁴ At [15]

⁶⁵ [1989] FCA 217 at [325]

definitional sense dictionary meaning of “substantial import, of much consequence”. In *Power*, the word ‘significant’ was again interpreted as also meaning “empower more than a material degree”. The applicant’s point is that the analysis in *Sahu-Khan* and *Power* is indicative that the word ‘significant’ like ‘material’ can have at least two distinct meanings. The meaning the applicant urges for its paragraph (b) use is the looser or wider one of “substantial import” or “much consequence”, and not the narrower one of “likely to influence”.

75. The applicant contends that the respondent has mischaracterised the applicant’s objects and activities as all being directed to the promotion and advocacy of the Australian pork industry without regard to their substance and the outcomes derived or achieved from those objects and activities. The applicant says an object and activity may qualify as serving more than one purpose. It may on the one hand lead to greater industry viability and profitability but also benefit the community more generally, through education, awareness, enhanced practices, and research.⁶⁶
76. The applicant contends it is incorrect to characterise whether or not the ‘excluded purpose’ is significant by reference to expenditure alone. Such objects and activities may achieve multiple outcomes or meet multiple expectations. This dichotomy is not readily identified by reference to expenditure alone.⁶⁷ The applicant says its organisation meets the paragraph (b) requirement.

Paragraph 18F(1)(c)

77. The applicant submits that the promotion of agriculture has long been regarded as charitable because it benefits the community generally. The applicant says given this is not in dispute, the benefit to the community part of paragraph (c) is met. The issue is the whether the purpose of the organisation is, or is intended to be, beneficial to a particular class of people.⁶⁸
78. The applicant says it is noteworthy that unlike paragraph (a) which refers to ‘the predominant purpose’ (and therefore contemplates other purposes) and paragraph

⁶⁶ Applicant’s reply filed 9 March 2018 paragraphs 24-25

⁶⁷ Applicant’s reply filed 9 March 2018 paragraph 26

⁶⁸ Applicant’s reply filed 9 March 2018 paragraph 27

(b) which uses the plural “objects and activities”, paragraph (c) directs attention to “the purpose” of the organisation. The applicant contends that providing benefits to a class is not ‘the’ purpose of the applicant.⁶⁹

79. The applicant agrees that the provision that the purpose of the organisation not be beneficial to “a particular class of people (whether or not members of the organisation) rather than the community generally” shows a legislative intention to follow cases such as *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (*Oppenheim*). In *Oppenheim* it was accepted that a fairly confined class of a gift to people within a particular area was not to the public generally. Accordingly the word ‘class’ here, is to be interpreted such that if the benefit is just for the industry or just for a professional organisation, then the paragraph is not satisfied.
80. In terms of the ‘beneficial’ as used in paragraph (c) the applicant refers to the effect of indirect benefit to an organisation’s members as not being disqualifying of charitable status.
81. The applicant says it is instructive in terms of interpreting this paragraph to refer to certain of the cases from the law relating to charities which provide illustrations of where organisations have been held to benefit their members, and illustrations where that has not been regarded as the purpose of the organisation, even though members may obtain an incidental benefit.⁷⁰
82. In *Crystal Palace Trustees v Minister for Town and Country Planning* [1950] 2 All ER 857 the Minister had argued that the promotion of industry or commerce amounted to no more than the promotion of the interests of those engaged in the manufacture and sale of their particular products. Dankwerts J rejected this and found that it was for the benefit of the public. His Honour rejected the view that promotion should be read in such a narrow way. This decision has cited more recently with approval by Black J in *Grain Growers Limited v Chief Commissioner of State Revenue* [2015] NSWSC 925 (*Grain Growers*).⁷¹

⁶⁹ Applicant’s reply filed 9 March 2018 paragraph 28

⁷⁰ Applicant’s reply filed 9 March 2018 paragraph 29

⁷¹ Applicant’s reply filed 9 March 2018 paragraph 30

83. Black J in *Grain Growers* at [32] cited what the applicant says is a relevant passage from *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* (2005) 142 FCR favourably.⁷² In part that passage reads:

Once it is accepted that assistance to business and industry can provide a public benefit of the kind which the law recognises as charitable....I do not see how the fact that individual businesses may benefit can be a disqualifying factor. On the contrary, if business in general is assisted, it seems inevitable that some firms at least will become profitable, or more profitable, as a result of that assistance. There would be no point in the exercise if this were not the case. It would be an odd result if an institution established to benefit business could only qualify as a charity if the recipients of its benefits made losses or did no more than break even.

84. The applicant submits that the Tribunal should look at the applicant's activities overall to determine the singular question of what "the purpose of the organisation" is. Regarding anything which provides a marginal or incidental benefit to members arising from the promotion of trade as a disqualifying factor would mean that the promise held out to organisations that promote trade, industry or commerce in section 18E of an exemption would always be dashed by paragraph (c). The applicant submits that providing benefits to members in the relevant sense is not 'the' purpose of the applicant.⁷³

The respondent's contentions as to the interpretation of Part 3A of the Tax Act

A. The Explanatory Statement/ Presentation Speech

85. The respondent contends that the extrinsic material confirms an intention to significantly restrict the range of organisations entitled to concessional tax treatment from those the common law regards as charitable. The respondent refers in support of this contention to the statement in the explanatory statement beginning "Exemption from paying tax is a significant advantage, one that should only be provided in extraordinary circumstances."⁷⁴ The respondent says this reference to extraordinary circumstances confirms that the statute is both intentionally restrictive in its effect and intentionally widening in its reach.

⁷² Applicant's reply filed 9 March 2018 paragraph 31

⁷³ Applicant's reply filed 9 March 2018 paragraph 36

⁷⁴ At page 2, concluding paragraph

86. Further, there is an explicit reference under the heading “Excluded Organisations” to excluding certain types of organisations:⁷⁵

Excluded Organisations

To ensure revenue protection, this Bill would exclude the following types of organisation from obtaining charitable status:

- *political parties;*
- *industrial organisations (trade unions);*
- *professional organisations; and*
- *organisations that promote trade, industry or commerce.*

While Australian courts have not generally considered the charitable status of political parties and trade unions, they are included in these amendments to provide certainty for the future.

87. The respondent says it is this language of exclusion both reactive and proactive that makes good its claim that the legislative intention of the new Part 3A was to enact a restrictive approach to the granting of charitable status.
88. As to the presentation speech, the respondent says it too shows that there is a restrictive meaning or a restrictive approach that was intended and deliberate. The respondent says two particular passages of the Chief Minister’s speech are relevant. Firstly, the statement as to the legislation’s purpose:⁷⁶

Recently a number of decisions in the commonwealth and state courts have widened the common law meaning of “charity” under the fourth limb....These include chambers of commerce, commercial and industry peak bodies and professional organisations.

Secondly, the statement as to the policy effect of that extension:⁷⁷

The uncontrolled extension of charitable exemptions to professional and commercial lobby groups poses a serious revenue risk. To address this risk and to ensure a sustainable system for all other charities, this bill defines four categories of excluded organisation that cannot obtain tax exemptions regardless of the status as a charity under the common law.

89. The respondent says it is also relevant to review the Minister’s statement about the measures to be included to protect “more traditional charities” in the circumstances where “a professional, industry, trade or commerce organisation with strong charitable motives still loses its exemption.”⁷⁸ In the respondent’s

⁷⁵ At page 3, on the top half of the page

⁷⁶ At page 3811, at the bottom

⁷⁷ At page 3812, beginning at the second main paragraph

⁷⁸ Page 3812, at paragraph 6

submission these words again show that the intention of these provisions is designedly restrictive. The respondent says this makes clear a recognition that there is a class of bodies that are charities under the common law, but that it is a narrower subset of that class which is to be allowed access to tax exemptions under ACT law. The respondent contends that these provisions are more than an attempt to overturn the results in the Western Australia *Chamber of Commerce* case and (less relevantly) *Aid/Watch*. The respondent says the provisions enacted in response deliberately go beyond addressing the revenue mischief created by those cases.

90. The respondent contends that the intended effect is to change the common law position substantially and to narrow it substantially, such that otherwise charitable bodies as the applicant organisation are expressly excluded from being charitable organisations for the purposes of the legislation. When pressed to consider the type of organisation that would fit within this narrower and more limited restrictive regime, the respondent contends that even if there are now only very few, or perhaps no, organisations that can satisfy these provisions this is not a reason to construe the provisions other than in a way consistent with the stated legislative intent and the words of the legislation.

B. The proper reading of the *Chamber of Commerce and Industry* case

91. The respondent contends that the provisions introduced into Part 3A of the Tax Act are more than an attempt to overturn the result of the *Chamber of Commerce and Industry* decision or the result the *Aid/Watch* case. The respondent contends though these two cases are specifically referred to in the explanatory statement and the presentation speech, the provisions enacted in response in Part 3A go beyond their effect.

C. The consequent reading of Part 3A

92. The respondent says this is the first occasion in which the ‘charitable organisations’ provisions in Part 3A have been considered.⁷⁹ The respondent says the proper approach to their interpretation should follow three steps.

⁷⁹ Commissioner’s Written Submissions filed 2 March 2018 paragraph 27

Section 18B

93. The first step concerns the proper interpretation of section 18B.⁸⁰ Relevantly, the section begins with paragraph (a) which provides:

*For a tax law: charitable organisation -
(a) means an organisation carried on for a religious, educational, benevolent or charitable purpose,...*

94. The respondent says this clause is a definition in standard form using the word ‘means’ and referencing what the common law says a charitable purpose is using the accepted *Pemsel’s* categorisation.
95. The clause further says “but [...] does not include—” and sets out two exceptions. In this case the relevant exception is in subparagraph (ii) – “[but does not include] an excluded organisation...” The respondent cites a series of cases for authority that this kind of exclusion provision can be used for a number of reasons. One reason is to exclude an organisation that is plainly within the definition category but is excluded for some reason; another is to exclude an organisation because it is a doubtful case; or another might be to exclude it simply for the avoidance of any doubt as to whether it is covered by the definition or not. The respondent contends there are at least three reasons why some organisations are expressly so excluded.
96. The respondent contends the statutory form in subparagraph (ii) takes this one step further because it says “but [...] does not include an excluded organisation unless...” and then provides a condition. If that condition is present or satisfied, then the effect of the word “unless”, read with the earlier words “but does not include”, is actually to include an otherwise excluded organisation within the definition of a charitable organisation.
97. The respondent offers a number of cases that deal with and illustrate this “means but does not include” formulation. The first is *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 (*BHP*).⁸¹ In that case the definition of ‘service’ in section 44B of the *Trade Practices Act 1974* (Cth) had the same three-piece definitional structure. In that section, the term ‘service’

⁸⁰ Commissioner’s written submissions filed 2 March 2018 paragraph 32

⁸¹ Relevantly, paragraphs 31-33 on page 159

means a particular activity or use, but it *does not include* a particular set of uses *except or unless* a certain condition is met. Paragraph 32 of the decision is introductory but important:

The structure of the definition is to give a meaning to the term “service” and then to state what this meaning includes and what this meaning does not include. As a general proposition, the adoption of the definitional structure “means ‘and includes’” indicates an exhaustive explanation of the content of the term which is the subject of the definition and conveys the idea both of enlargement and exclusion. The enlargement comes from the “includes”, the exclusion comes from the “means”. In doing so, the definition also may make it plain that otherwise doubtful cases do fall within its scope.

98. Paragraph 33 of the decision then considers the effect of ‘includes’ in the formulation:

In the present case, the notion of exclusion which is the phrase “but does not include”, whether to remove otherwise uncertain cases or to remove cases that otherwise fall within the ordinary meaning of “service provided by means of a facility” is given an explicit form by the closing words of the definition.

99. In the respondent’s submission that sentence tells us that there were potentially two different reasons why certain activities or uses were seen as excluded. One reason is that they might otherwise be uncertain cases; the other is that they might be cases that certainly would otherwise fall within the ordinary meaning. But, the respondent submits, it was in *BHP* unnecessary to consider which of those reasons was applicable.
100. The respondent’s point is about what the court said in *BHP* about the effect of exclusion that the structure imposes. The court says that there can be a number of exclusionary reasons for ‘does not include’ but the effect of exclusion alone is a sufficient consideration, the reason for the exclusion does not need to be examined. Transposing this to the applicant’s case, whether the reason that the applicant might be excluded (unless a BOD in its favour reverses this) is for instance because it would in other circumstances fall into the ordinary meaning of a charitable organisation (under the developed common law) is immaterial. For the purposes of determining the application of Part 3A it is not necessary to interrogate other than the fact of the applicant organisation’s exclusion.

101. The second case the respondent cites takes this point about different kinds of exclusion categories further. In *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 (*Corporate Affairs Commission*) there is a reference to section 5(4) of the *Companies (South Australia) Code* which has somewhat of the same construction. It provides that a reference to the making of an offer to the public “shall, *unless* the contrary intention appears, be construed as *including* [a list of various things]...but [it] *shall not be taken to [include various other things]*”.⁸² The respondent says broadly speaking this is the same ‘inclusive group’ and an ‘unless’ exclusion format. The respondent says there was a similar issue in *Corporate Affairs Commission* as to whether the applicant was found to fall within the exclusions, what that meant by way of inference about whether or not the applicant would in other circumstances be within the ‘meaning’ phrase. This issue was considered in the joint judgment where their Honours said:⁸³

As King CJ pointed out in the Full Court of the Supreme Court however, undue attention by courts to implications based on such exceptions is liable to lead to constructions which distort the true meaning of the relevant general substantive provisions.

Their Honours concluded:⁸⁴

It would in our view be wrong to use the content of the exceptions contained in paragraphs (a)(d) to attribute to the substantive words of the subsection a wider scope than that which they bear as a matter of ordinary language.

102. In the respondent’s submission these cases provide authority for the proposition that there is no necessity to speculate as to the reason for exclusion from the substantive meaning. Whatever the reason for exclusion – exclusion for doubtful cases, or exclusion for cases that would otherwise be included save that the legislature specifically wants them excluded – is of no consequence.

103. The respondent uses this somewhat long line of argument to support a specific submission about the way section 18B should be applied. In short, it says only paragraph (b) needs to be investigated, not paragraph (a). If a BOD is made under the exception provision of paragraph (b)(ii) then nothing else needs to be

⁸² At [205-206], emphasis added

⁸³ At [211]

⁸⁴ At [211]

established. Whether the organisation might otherwise fit into the wording of paragraph (a) is of no consequence. It has (if it meets the conditions of entitlement to a BOD) been brought within the definition of charitable organisation simply because it satisfies the ‘unless’ condition.

Sections 18C-18E

104. The second step is to determine whether an ‘excluded organisation’ is entitled to apply for a BOD. Only a “professional organisation” and “an organisation that promotes trade, industry or commerce” may do so under section 18E. The respondent accepts that the applicant may apply for a determination.⁸⁵

Section 18F

105. The third step is to determine whether the Tribunal is satisfied of all of the matters set out in sections 18F(a)-(c). The respondent agrees that the test to be applied under these provisions is not the same as the common law test as to whether an organisation is charitable. In some respects, aspects of the test are the same, but in other respects, the test is different.⁸⁶

Paragraph 18F(1)(a)

106. The respondent says paragraph (a) in essence restates in statutory form the existing common law test for whether an organisation is charitable.⁸⁷ The phrase ‘predominant purpose’ is used in the *Stratton v Simpson* sense, as cited in *Word Investments* as “it is necessary to see whether its main or *predominant* or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable.”⁸⁸ The respondent says given the use of the word ‘predominant’ in such cases, it cannot be said that the legislature has evinced an intention to adopt some different test. The respondent cites *Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC 604 (*Law Institute of Victoria*) as an example of the rejection of a similar argument raised by a taxpayer about the use of the word ‘dominant’ in the Victorian payroll tax legislation.⁸⁹

⁸⁵ Commissioner’s written submissions filed 2 March 2018 paragraph 35

⁸⁶ Commissioner’s written submissions filed 2 March 2018 paragraph 36

⁸⁷ Commissioner’s written submissions filed 2 March 2018 paragraph 37(a)

⁸⁸ *Word Investments* at [17]

⁸⁹ Commissioner’s written submissions filed 2 March 2018 paragraph 37(b), citing *Law Institute of Victoria* at [88-101]

107. The respondent further submits that the four identified purposes in paragraph (a) – advancing religion, advancing education, relieving poverty and otherwise benefit the community – are the four commonly accepted “heads of charity”.⁹⁰
108. The contention the respondent urges as a consequence is that in applying paragraph (a), the tribunal should look to the same body of principle that informs the common law test, except to the extent that the body of principle is modified by paragraphs (b)-(c).⁹¹

Paragraph 18F(1)(b)

109. The respondent submits that paragraph (b) takes the objects and activities that underlie the purpose that made the organisation an ‘excluded organisation’ and requires them to be measured against the purpose of the organisation considered as a whole. Those objects and activities are required to be ‘not significant’. The respondent say this is not an assessment that is required by the common law test. It is an additional test and for that reason has an exclusionary effect.⁹² Under the common law test, a body that does nothing but promote an industry may be charitable but under the additional paragraph (b) test in section 18F, such a body may be excluded. In the respondent’s submission the applicant organisation does not satisfy this additional test.

Paragraph 18F(1)(c)

110. The respondent contends paragraph (c) expresses the legislature’s reformulation of the common law requirement as stated in *Oppenheim* that the benefit be for the community or a sufficient section of the community. The respondent says not only has the requirement been reformulated by the legislature, but it has been stated separately from the standard test in paragraph (a). In contrast to the common law charity test a benefit for a section of the community is not sufficient. The requirement has been reformulated by requiring the benefit to be for the

⁹⁰ Commissioner’s written submissions filed 2 March 2018 paragraph 37(c)

⁹¹ Commissioner’s written submissions filed 2 March 2018 paragraph 37(d)

⁹² Commissioner’s written submissions filed 2 March 2018 paragraph 37(e)

community generally.⁹³ The respondent says the benefit the applicant's purpose provides is to the pork industry, any benefit to the community is incidental.

111. The respondent contends the applicant organisation fails to meet each of the requirements for the grant of a BOD under section 18F. It is therefore not eligible for such a determination.

The Tribunal's consideration of the matter at issue

112. To determine whether the applicant organisation satisfies the tests set out in section 18F it is necessary to first examine each relevant section of Part 3 in the light of the parties' detailed submissions and contentions.

Section 18B

113. The withdrawal of the respondent's concession that the applicant fits within the definition of a charitable organisation in section 18B (save by way of the exception allowed as an excluded organisation) means that all of the requirements for a BOD application under 18E are at issue. The effect of a successful determination would, pursuant to 18G, be to give the applicant charitable status for the purpose of the Tax Act which, *inter alia*, would relieve it of the obligation to pay payroll tax (18G(2)(c)).
114. In spite of the respondent's lengthy submissions on the proper interpretation of section 18B, it is the tribunal's view that no further consideration of this section is therefore required.

Section 18C

115. It was accepted between the parties that the applicant is an excluded organisation given that it is "an organisation that promotes trade, industry or commerce". This is the Tribunal's view.

Section 18D

116. There was no dispute about the meaning of 18D. Both parties agreed that the purpose or purposes of an organisation are not the same as its objects and activities.

⁹³ Commissioner's written submissions filed 2 March 2018 paragraph 37(f)

Section 18E

117. Relevantly, only a ‘professional organisation’ and ‘an organisation that promotes trade, industry or commerce’ may apply for a BOD. In this case, there is no dispute that the applicant falls within the second class.

Section 18F

118. The Tribunal accepts the submission of the applicant that the interpretation of section 18F is guided by striving to give meaning to every word of the provision as per *Project Blue Sky v Australian Broadcasting Authority (1998)* 194 CLR 355 (*Blue Sky*). The section should be interpreted as a whole, not as three separate paragraphs (a), (b) and (c).

119. As to paragraph (a) the Tribunal must first be satisfied that the ‘predominant purpose’ is relevantly to ‘benefit the community’. Both counsel submitted the starting point for the interpretation of what is meant by predominant purpose are the set of principles set out in the dissenting judgment of Windeyer J in *Stratton v Simpson*. His Honour made a key distinction with respect to ‘main object’ of an organisation. He distinguished first between an organisation with a principal object which is charitable, and with one or several secondary objects which are not charitable but which can be pursued independently. The second class were organisations with a dominant charitable purpose and other objects which are ancillary to promoting that main object. It is accepted at common law that while the former is not a charitable organisation, the latter is.

120. But the applicant urges a departure from this agreed analysis and says ‘predominant’ in paragraph (a) is meant in a more general sense of ‘dominant’ rather than being the primary purpose with all other purposes being secondary or ancillary. The applicant’s submission signals a departure from the common law test. In the applicant’s view the section allows scope for additional purposes which can be significant and independent (and not just merely ancillary or incidental) providing the main or dominant purpose of the activities of the organisation are of benefit to the community. So the definition the applicant urges when interpreting paragraph (a) is not confined by the distinction made in Windeyer J’s judgment.

121. The applicant says as an aid to interpreting paragraph (a) it is important to see the difference in the statutory tests set in paragraphs (a) and (b). Paragraph (a) directs attention to the requirement that the Commissioner's satisfaction must be that the 'predominant purpose' is charitable. Paragraph (b) provides and allows that the objects and activities that make it an excluded organisation (and statutorily non-charitable), that is its secondary or other non-charitable purposes which are independent of rather than simply ancillary, not be "significant in relation to the purpose of the organisation considered as a whole." In the applicant's submission this means that an excluded purpose can be 'freestanding' provided it is not 'predominant' (paragraph (a)), nor 'substantial' in relation to the purpose of the organisation as a whole (paragraph (b)). The applicant characterised the outcome of this distinction in this fashion, "the statutory test is one of relativity not exclusivity."⁹⁴
122. In the respondent's view only a minor change is made to the common law test in paragraph (a). The respondent submits that given that *Stratton v Simpson* reaffirms that an institution "having also secondary objects or activities which, although of less importance, are capable of being pursued independently" is not charitable (that is, Windeyer's first sense), to interpret the words of the section otherwise would depart markedly from the common law's charitable institution sense of 'main object'. Such a departure as urged on behalf of the applicant has not been followed elsewhere, as for example its rejection in *Law Institute of Victoria*.
123. It is the respondent's contention that it was the legislature's intention to keep the common law principle largely intact. The respondent makes the valid point that if the interpretation being urged by the applicant is followed the legislature would be using a lower standard than the common law to give effect to what was designed to be legislation raising the bar for charitable exemptions. The respondent says the common law which does not allow for independent non-charitable objects should be followed otherwise the scope of exemption is moved beyond normal charitable exemptions. The respondent stood by this contention

⁹⁴ Applicant's statement of facts and contentions filed 25 January 2018, paragraph 33

even if this reading of paragraph (a) would mean that the section is to be construed in a way that makes a BOD virtually impossible to obtain.

124. The Tribunal rejects the applicant's assertion that paragraph (a) loosens the common law requirement and accepts the respondent's reading of the paragraph. The 'predominant purpose' of the applicant is on the evidence not charitable. Organisations with non-charitable secondary purposes which can be pursued independently such as the applicant do not satisfy the section.
125. As to paragraph (b), the Tribunal adopts the following interpretative aids. Firstly, it follows the line of authority cited in *Word Investments* and endorsed in *Aid/Watch* as to the distinction between 'objects' and 'activities' as regards effect on charitable status. 'Activities' are what an organisation does in pursuit of its objectives, that is to say "the purported effectuation of those objects in the activities, of the institution in question".⁹⁵
126. Secondly, it follows the reasoning of Davies J in *Sohukan*⁹⁶ and takes 'significant' in its Shorter Oxford Dictionary sense "of substantial import" or "of much consequence". The manner in which this 'significance' is to be tested is "in relation to the purpose of the organisation considered as a whole".
127. The applicant's view was that the inquiry in paragraph (b) was not directed at the predominant purpose identified in paragraph (a) (in its argument the organisation's "benefit of the public") but rather at those "secondary objects or activities which, although of less importance, are capable of being pursued independently". The applicant says the inquiry is to determine whether the objects and activities for these purposes (marketing, promoting, advocacy, R&D etc) are not so significant as to overbear its predominant charitable purpose.
128. The respondent conversely says 'purpose' here means the purpose identified in paragraph (a) as the predominant purpose. The respondent says in order to apply paragraph (b), the tribunal should recognise that there may be a whole range of objects and activities that go towards achieving that purpose and which may be

⁹⁵ *Word Investments* at [17] endorsed in *Aid/Watch* at [4]

⁹⁶ At [15]

of a non-charitable flavour. The tribunal needs to evaluate the significance of each of these against that purpose.

129. The respondent says applying this mode of analysis the purpose of this organisation is, as stated in both in its documentary evidence and in Mr Spencer's evidence, to advance and promote the Australian pork industry. The respondent says paragraph (b) is to be applied in this way to the predominant purpose not as the applicant contends to any independent secondary purposes. The respondent says this is because paragraph (b) adds a new level of review of the predominant purpose by examining whether the objects and activities that underline that purpose and which make it an excluded organisation (because of their trade promotion flavour) are or are not 'significant'. This is not an assessment that is required by the common law.
130. The Tribunal accepts that the purpose against which the organisation's activities and objects are evaluated in paragraph (b) is the predominant purpose from paragraph (a) which has been found to be the promotion of the pork industry. When the evidence of these objects and activities are examined, particularly in the context of the allocation of expenditure under the applicant's funding agreement with the Commonwealth, they are to a significant degree directed to promoting and advocating for the Australian pork industry in the Oxford English Dictionary sense of "advancing the interests of" or "furthering the growth, development and progress of".
131. As to paragraph (c) the Tribunal accepts it is a reformulation of the *Oppenheim* test and requires the benefit from an organisation's activities be for the community generally, not just a section of it as the common law test allowed. The effect is that the purpose cannot be to be beneficial to a particular class of people whether or not they are members of the organisation. The purport of the 'rather than' phrase is that the benefit must be for the community generally.
132. The Tribunal also accepts the mode of analysis described as the *Latimer* test that distinguish between means, ends and consequences to the effect that ⁹⁷

⁹⁷ *Re Crown Forestry Rental Trust; Latimer v Commissioner of Inland Revenue* [2004] 4 All ER 558 at [36]

The distinction is between ends, means and consequences. The ends must be exclusively charitable, but if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost.

133. The applicant contends the clearly discernible purpose of the organisation is the promotion of agriculture which has long been regarded as charitable. When its objects and its activities are examined (notably its activities in animal welfare, environmental sustainability, anti-microbial resistance research, and its educational and nutritional programs) they are all beneficial to the community generally and not just to pork producers. There is no doubt that increasing sustainability, maintaining healthy farms through reducing biosecurity risks, undertaking bacterial research and water research, and developing digital technology are.
134. The respondent says that everything the applicant does is directed to the 'ends' of the industry. Yes, virtually all its activities while benefiting members of the industry also provides a broader community benefit. In the respondent's contention, 'purpose' here means the same predominant purpose from paragraph (a) and that purpose is advancing and developing the pork industry. The respondent says the 'ends' of that purpose is the industry benefit.
135. The Tribunal finds paragraph (c) is concerned with benefit and where that benefit flows. The applicant says the benefit flows to the public generally, and the benefit that flows to pork producers is marginal or incidental. The respondent says the reverse, the benefit flows to pork producers, and the benefit to the public generally is consequential. Mr Spencer's evidence clearly shows substantial benefit flowing to the community from its research development endeavours, its education programs and many of its broader marketing activities. But the predominant purpose of the organisation remains the promotion of the pork industry. The benefit flowing from this purpose principally flows to the class of people who are pork producers. The benefit flowing to the community generally is secondary.
136. The Tribunal finds that the applicant organisation does not satisfy the requirements in section 18F for the issue of a BOD.

Decision

137. The explanatory statement and the presentation speech evince an overreaction to the *Aid/Watch* and *Chamber of Commerce and Industry* cases. Nonetheless, it is clear from the Minister’s ‘colourful language’ (in the respondent’s own counsel’s description) that this is a deliberate overreaction. The newly drafted Part 3A introduced by the *Revenue (Charitable Organisations) Legalisation Amendment Bill 2015* is consistent with this overreach. Institutions long regarded as being for charitable purposes are to be excluded from a raft of taxation exemptions. The applicant as one such organisation would at common law fit well within section 18B(a) save that as an organisation “that promotes trade, industry or commerce” it is explicitly excluded. Its only way back into the charitable class is to be determined a ‘beneficial’ organisation. It cannot meet the requirements for this.
138. The process for satisfying the requirements for a BOD is convoluted and restrictive. Section 18F(1)(a)-(c) which set these requirements needs to be read as a whole. Paragraph (a) is essentially a refinement of the *Pemsel* test, but paragraphs (b) and (c) add further or separate requirements. Paragraph (b) adds a requirement to consider the ‘significance’ of the objects and activities which support the purpose. Paragraph (c) separates out the requirement of benefit and alters it from the common law in requiring a consideration as to whether the purpose is intended to benefit a particular class of people rather than the community generally. Taken together these requirements create a test which sits above the common law test. It is a test the applicant organisation does not satisfy. It is difficult to imagine an organisation that could. The respondent’s counsel could not suggest one.
139. The Tribunal confirms the decision under review to disallow the applicant’s objection to the respondent refusal of its request for a BOD in its favour for the purpose of payroll tax exemption.

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Senior Member Professor T Foley

HEARING DETAILS

FILE NUMBER:	AT 67/2017
PARTIES, APPLICANT:	Australian Pork Limited
PARTIES, RESPONDENT:	Commissioner for ACT Revenue
COUNSEL APPEARING, APPLICANT	Mr P Walker SC, Ms K Katavic
COUNSEL APPEARING, RESPONDENT	Mr C Young
SOLICITORS FOR APPLICANT	BAL Lawyers
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
TRIBUNAL MEMBERS:	Senior Member Professor T Foley
DATES OF HEARING:	26 March 2018 27 March 2018