CHARITY LAW, ADVOCACY AND THE AID/WATCH DECISION: COMPATIBILITY OF CHARITABLE PURPOSES AND POLITICAL OBJECTS — THE VIEW FROM AUSTRALIA

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Introduction

In 1952 the Nathan report stated that:

> Some of the most valuable activities of voluntary societies consist, however, in the fact that they may be able to stand aside from and criticize State action or inaction, in the interests of the inarticulate man in the street.[2]

Some 60 years later it remained the case that if a voluntary society wanted to gain or retain charitable status then, contrary to the Nathan report, the one thing it could not do was set itself up with the purpose of criticizing State action or inaction. This legal position was adopted by the authorities in Australia with the Australian Taxation Office (ATO) noting in Taxation Ruling TR2005/21:

> 102. An institution or fund is not charitable if its purpose is advocating a political party or cause, attempting to change the law or government policy, or propagating or promoting a particular point of view.[3]

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2 See, Committee on the Law and Practice Relating to Charitable Trusts, *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (1952, Cmd 8710) 12, [53], (the Nathan Report).

So, why, if it is such a valuable activity, have governments steadfastly refused to allow charities to have as their purpose the freedom to advocate in this way and how has this situation been affected by the recent High Court of Australia[4] decision in *Aid/Watch v Commissioner of Taxation*?[5]

This article proposes to address such questions. Beginning with some background history, it explains that, initially, the current constraints did not apply. Then it looks at the nature of these constraints: how does the law define what constitutes the type of political activity that a charity must not undertake? What is the rationale for prohibition? How has the judiciary contributed to the development of the law in this area in recent years? This will lead into a consideration of the *Aid/Watch case* and the implications arising from the recent final decision. The article concludes by reflecting on what has changed and why the view on this contentious matter now looks different from Australia.

Background

Constraints on the freedom of charities to campaign for change are of fairly recent origin. There is no historical record of their hands being tied in this way. In England during the Victorian era, many important initiatives resulting in policy changes by government were led by charities. The protests against the conditions suffered by children employed in factories or as chimney sweeps were led by charities such as Dr Barnardo's and the National Society for the Prevention of Cruelty to Children (NSPCC). The Infant Life Protection Society, founded in 1870, was both a service provider and an advocacy organization. It provided such support as was then available for the protection of newborn babies in workhouses and it campaigned for the introduction of the *Infant Life Protection Act 1872*. The Charity Organisation Society, established in 1869, was again a good example of reflective philanthropy at work. It mixed provision for the poor with research into the causes of poverty. Leadership for such an approach was provided by the 'chocolate philanthropists' from the Quaker families of Fry, Cadbury[6] and Rowntree. Their construction of model villages, enabling whole communities to be self-sufficient and mutually supportive, offered a new challenging interpretation of philanthropy. This approach, of charities being actively engaged with the causes of poverty, contrasted sharply with State provision of alms and the workhouse.

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3 Australian Taxation Office, *Income Tax and Fringe Benefits Tax:Charities* (TR2005/21, 21 December 2005), [102].

4 The High Court is the highest court in the Australian judicial system..

5 *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 85 ALJR 154 (*Aid/Watch case*).

6 In 1900, the Bournville Village Trust was established to manage the village. The trust focused on providing schools, hospitals, museums, public baths and reading rooms.

Then as now, however, it was not necessary to be poor to be socially disadvantaged and this was reflected in the activities of charities. They were to the fore in the rallies against the slave trade; they lobbied to halt the practice of 'baby-farming'; and they campaigned in support of the suffragette movement. In the US, for example, the judiciary in the landmark case of *Jackson v Phillips*[7] in 1867 delivered an important verdict when Justice Gray ruled that the emancipation of slaves was very definitely a charitable purpose and the trust established to further that cause was a valid charitable trust because, although its purpose was to end slavery, this was to be achieved not by changing the law, but by changing public sentiment through education. That decision has often been cited as authority for the proposition that charities may campaign against certain laws provided their goal is to educate the public to do voluntarily that which they may otherwise be statutorily required to do. By way of contrast, in the earlier case of *De Bonneville*,[8] when the court found a trust to promote the doctrine of papal supremacy to be void, it did so on grounds of public policy. No reference was made to the possibility of the trust being non-charitable because it had a purpose that could be construed as 'political'. At that time it would seem that authority for such grounds was not available to the courts.

A century later the temperance cases indicated the beginning of a change in judicial approach, but it was a confused change. In the US, the court in the *Farewell case*[9] in 1892 had no difficulty in finding a trust established to promote temperance through the introduction of legislation to be charitable, even praiseworthy. While in England, the court in the *Temperance Council of Christian Churches case*[10] in 1926 held the same cause to be not charitable, an approach followed by the courts in New Zealand[11] and Tasmania.[12] In these cases the grounds for finding the trusts to be non-charitable are stated as being because their purpose is 'political'. It is likely that the temperance cases in the early 20th century were influenced by the 1917 judgment of Lord Parker in *Bowman v Secular Society Ltd*,[13] in which he grounded his finding that a society, with objects that included the abolition of religious texts and the

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7 96 Mass (14 Allen) 539 (1867), a decision which perhaps provided authority for the similar English Court of Appeal decision in *Re Hood* [1931] 1 Ch 240.

8 *De Themmines v De Bonneville* [1828] 5 Russel 288.

9 *Farewell v Farewell* (1892) 22 OR 573.

10 *Inland Revenue Commissioners v Temperance Council of Christian Churches of England and Wales* (1926) 136 LT 27. Where the purpose of promoting temperance was to be given effect by means of circulating propaganda, rather than by seeking to introduce legislation as in *Re Hood* [1931] 1 Ch 240 (CA), this could be charitable.

11 *Knowles v Stamp Duties Commissioner* [1945] NZLR 522

12 *Re Cripps* [1941] Tas SR 19.

13 [1917] AC 406.

disestablishment of the Church, could not be charitable because these were 'purely political objects. Equity has always refused to recognize such objects as charitable. .... [A] trust for the attainment of political objects has always been held invalid, not because it is illegal, ... but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift'.[14] This ruling, which made a direct link between political objects and equitable principles, became a milestone in the development in this area of law. Before that case there is no mention in any judgment of the term 'political' in reference to charitable trusts. Thereafter, from the temperance cases to the present day, the term is in common use and for a full century a body of English law grew up around judicial interpretation of 'political objects'. By the 1950s, in some common law jurisdictions, it had been firmly established that in practice charitable purposes and political purposes were mutually exclusive.[15]

The Constraints on Charity Involvement in Public Advocacy/Political Campaigning

The rule is that voluntary organizations seeking to acquire or retain charitable status, and all the attendant financial benefits, must avoid having political purposes. A legal distinction is drawn between bodies with a primary political purpose and bodies that engage in political activities: the former are not charitable; the latter will be charitable if the activities are ancillary, but subordinate to and in furtherance of its non-political purposes and are within its powers. This rule varies to some degree between the common law jurisdictions.[16]

Political purposes

No definitive statement has yet been given by a court or regulator as to what constitutes 'political purposes'. The nearest to a definition is the list of purposes identified by Slade J in the seminal case of *McGovern v Attorney General*,[17] also

14 Ibid, 442

15 See e.g.: in England, *Re Scowcroft* [1898] 2 Ch 638; *Re Jones* (1929) 45 TLR 259; and *Anglo-Swedish Society v Commissioners of Inland Revenue* (1931) 47 TLR 295; in Scotland, *Trustees for the Roll of Voluntary Workers v Commissioners of Inland Revenue* 1942 SC 47; in Canada, *Re Loney Estate* (1953) 9 WWR (NS) 366; in New Zealand, *Re Wilkinson* [1941] NZLR 1065.

16 See: in Australia, *Re Inman* [1965] VR 238; and in Canada, *Re Public Trustee and Toronto Humane Society* (1987) 40 DLR (4th) 111. Also see generally, Kerry O'Halloran, Myles McGregor-Lowndes and Karla W Simon, *Charity Law and Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, 2008).

17 [1982] 1 Ch 321.

known as the Amnesty International case. During the course of his judgment Slade J made a finding as to matters that could be construed as political purposes and which would debar an organisation from charitable status. These were:

(i) to further the interests of a particular political party,

(ii) to procure changes in the laws of this country,

(iii) to bring about changes in the laws of a foreign country,

(iv) to bring about a reversal of government policy or of particular decisions of governmental authorities in this country,

(v) to bring about a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

The subsequent decision in *Re Koeppler's Will Trusts*[18] added a sixth matter:

[(vi)] to oppose a particular change in the law or a change in a particular law.

As pointed out by Dal Pont, it may have been extended further, in New Zealand at least, by the ruling in the *Molloy case*[19] that 'advocating or promoting the maintenance of the *present* law is equally a political purpose because the court has no means of judging whether a change in the law would *not* be beneficial to the community'.[20] Central to each of these seven categories is the concept of 'campaigning'. Basically, it is clear that an organisation cannot be a charity, nor can it remain one, if its principal or sole purpose is to campaign to support or oppose a particular political party or its doctrines[21] or to further policies such as the promotion of peace,[22] international understanding[23] or the removal of injustice.[24] As the ATO

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18 *Re Koeppler 's Will Trusts* (1984) Ch 243, where an organisation that staged conferences with the purpose of promoting increased co-operation between European states was found to be charitable.

19 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688.

20 See GE Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) 290.

21 See *Re Jones* [1929] 45 TLR 259. In Australia see e.g., *Bacon v Pianta* [1966] ALR 1044 where a gift to the Communist Party for its sole use was found to be non-charitable on political grounds.

22 *Re Southwood v AG* [2000] EWCA (Civ) 204.

23 *Anglo-Swedish Society v IRC* (1931) 47 TLR 295. In the US, such a trust would be charitable.

24 *McGovern v Attorney General* [1982] Ch 321, 354 (Slade J).

warns in Taxation Ruling TR2005/21, it is possible that activities directed at political change may demonstrate an effective abandonment of indubitably charitable objects:

> Clear examples would include supporting a political party, seeking to persuade members of the public to vote for or against particular candidates or parties in an election for public office, participating in party political demonstrations, and distributing material designed to underpin a party political campaign.[25]

Nor can a charity engage in political activity in order to organise public opinion in support of or to seek to change matters of law or government policy,[26] or to resist any proposed change.[27]

Permissible political activity

Outside the broad prohibition as stated by Slade J, however, much is possible. Where a charity has a purpose or purposes that are not political, then it may engage in political activity, provided that it does so in ways that are ancillary and incidental to that purpose. This has allowed a degree of flexibility. As ruled by the Australian Taxation Office:

> 103. However, if the purpose of an institution or fund is charitable, the presence of political or lobbying programs and activities will not detract from this status, provided they are merely incidental to the charitable purpose….[28]

This allows charities to engage in many forms of political activity including: advocacy and campaigning to change law or policy;[29] educating the public in forms of government and in political matters;[30] conducting research and disseminating information; affiliating with other bodies for campaigning purposes; seeking to influence elections and elected representatives. The ATO website gives 41 examples

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25 Australian Taxation Office, *Income Tax and Fringe Benefits Tax:Charities* (TR2005/21, 21 December 2005), [28].

26 Ibid, [111], which states that 'a purpose of seeking changes to government policy or particular decisions of governmental authorities is also not charitable'.

27 *Re Hopkinson* [1949] 1 All ER 346.

28 Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Charities* (TR2005/21, 21 December 2005), [103].

29 *The Commonwealth Magistrates Association* [1975] Ch Com Rep 20–21, [63]–[64].

30 *Re The Trustees of the Arthur McDougall Fund* [1956] 3 All ER 867.

of ways in which political activity, lobbying and advocacy can occur without a charity's status being jeopardized.[31] The overriding caveat, however, is that any such political activity must be clearly linked to, be subordinate to and actually further the charity's purpose as stated in its constitution.

A more difficult question arises when a charity has several stated purposes and one of these is political. The law here is somewhat uncertain but on balance it would seem that it comes down to matters of scale: if the political purpose is of a dominant nature — such as promoting a change in the law through direct action, as opposed to the use of an even-handed educational approach — then it is likely to be caught by the prohibition. For example, organisations promoting anti-abortion campaigns through the use of emotive and biased leaflets are often found to be non-charitable. The information being distributed must be educational, not just propaganda. It is possible that the ATO's position as stated in Taxation Ruling TR2005/21, is stretching accepted case law a little:

> 113. An institution or fund which aims to propagate or promote a particular point of view or endeavours to convince the public of the correctness of such a view is not charitable.[32]

This 2005 ruling extends the political constraint to include the promotion of 'a particular point of view' which seems too all-embracing. For example, it is not wholly clear how this can be squared with the decision in *Public Trustee v Attorney-General for New South Wales*[33] where the pursuit of legal changes 'consistent with the way the law is tending' was found to be charitable. Santow J noted there that, in the *Amnesty case*, Slade J had identified extreme action, aimed at reversing government legislation or policy, as amounting to 'political activity'.[34] By implication, a lesser degree of action such as seeking to change legislation or policy by educating the public would not necessarily fall within Slade J's prohibited activity list.

The rationale for the rule

The accepted rationale for denying charitable status to bodies engaging in political activity rests on several related arguments. These all essentially stem from the view

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31 Australian Taxation Office, *Charities – political, lobbying and advocacy activities*, (20 December 2005) <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/62779.htm>.

32 Australian Taxation Office, *Income Tax and Fringe Benefits Tax:Charities* (TR2005/21, 21 December 2005), [113].

33 (1997) 42 NSWLR 600.

34 See also GFK Santo, 'Charity in its Political Voice – a Tinkling Cymbal or a Sounding Brass?' (1999) 18 *Australian Bar Review* 225.

that such activity subverts the established democratic political process. Because a charity has not submitted to the electoral system it is not publicly accountable. Because it is not usually internally organised in a democratic fashion it is seldom in a position to proclaim that other systems are unfair. It is therefore suggested that a charity has no mandate to represent issues before the 'body politic'. It is also suggested that the social value of a charity lies in the latter's independence which would be compromised if it became politicised. A corollary to this is that the legitimacy conferred on a charity by virtue of its formal recognition as such would, in the eyes of the general public, be extended to the cause it chose to espouse, with corresponding disadvantages for causes not championed by charities. Allied to this is the argument that it would be illogical for the State to defray the liability of an organisation to contribute towards the 'public purse', thereby imposing a duty on others to make good the tax loss, only to find that by doing so it was subsidising the capacity of the organisation to undermine State policies. Again, by granting public monies to charities, the State is channeling taxpayers' funds on a preferential basis, but it has no way of knowing which campaigns the taxpayers wish to support and which they do not.[35] Moreover, as illustrated by the anti-vivisection cases,[36] over time a cause may gain or lose public support, thereby rendering uncertain the public benefit component which is so crucial to charitable status. The judicial dilemma when faced with policy issues arising from action or inaction by government or Parliament remains as stated by Simons LJ, 'it is not for the court to judge and the court has no means of judging'.[37]

Essentially, it would seem that courts take the view that matters of law and policy are for Parliament or government to determine: any organization with a purpose of changing or supporting existing law or policy cannot be a charity as there is no way of establishing whether such activity would in fact be compatible with the public benefit test. This approach is open to question. It is not immediately obvious why a court should not be able to test the boundaries of law and policy. Arguably, the whole point of the common law is that the judiciary can and does interpret the law in accordance with contemporary social conditions. By doing so for four centuries they have allowed charity law to develop through established case law precedents without intervention from Parliament or government. As for the judicial capacity to gauge whether or not a change in existing law or policy would be compatible with the

35 See further: Perri 6, *Restricting the Freedom of Speech of Charities: Do the Rationales Stand Up*, (Demos, 1994); Perri 6 and Anita Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Dartmouth, 1995).

36 See *National Anti-Vivisection Society v IRC* [1948] AC 31, as applied in *Re Jenkin's Will Trusts* [1966] Ch 249.

37 *National Anti-Vivisection Society v IRC* [1948] AC 31, 62.

public benefit,[38] there have been quite a number of public inquiries set up by governments and headed by various prominent members of the judiciary to advise on proposed legislative change. Moreover, both Santow J in Australia,[39] and Marshall J in Canada,[40] have recently called upon the government to initiate changes in charity law. So the argument that the courts are not in a position to make a judgment on the benefit to the public of a proposed change in law or policy seems spurious.

Some basic problems with the rule

The rule against a charity having a purpose that is 'political' runs into difficulties with the presumption in *Pemsel* that purposes falling within the first three heads of charity — the relief of poverty, the advancement of education and the advancement of religion — satisfy the public benefit test and therefore automatically qualify for charitable status. There is no such presumption in relation to those that fall under the fourth head — trusts for other purposes beneficial to the community — and evidence must be provided showing that they do so before they can qualify as charities. Over the past century or so this has led to a situation whereby many organizations that have qualified as charities under the first three heads have developed some degree of political activity and have retained charitable status, whereas very many other organizations, engaged in some degree of political activity and seeking charitable status under the fourth head, have been denied the opportunity to acquire that status. Consequently, an organization with intentions to pursue political activity will endeavour to fit itself into one of the first three heads, most usually under education. If its purpose or purposes are educational (or religious or for the relief of poverty) then it makes no difference to a claim for charitable status that its purpose is also capable of being political. The crunch issue is precisely what degree of political activity will take an organization out of charitable status or prevent it from acquiring such status in the first place.

Another serious problem lies in the fact that those organizations established on a campaigning basis before the rule took effect, such as the 1839 Anti-Slavery Society (now known as Anti-Slavery International), and which were then registered as charities, continue to have charitable status. Although such charities were never de-registered in spite of their campaigning, their modern day counterparts are routinely refused registration (because of their campaigning basis).

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38 Note that in *Incorporated Council for Law Reporting in England and Wales v Attorney General* [1972] Ch 73, the court had no such difficulty when it ruled that a trust in relation to the development of the law was established for the public benefit.

39 *Public Trustee v Attorney-General for New South Wales* (1997) 42 NSWLR 600.

40 *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* (2007) 287 DLR (4th) 4.

Then there is the problem that arises when it is maintained that a charity's political activity is merely ancillary to its non-political purpose. The difficulty here is that in practice the scale and the nature of the political activity undertaken may in fact be such as to constitute an independent purpose in its own right. This often occurs when a charity finds itself caught up in a campaign to promote social change and gradually commits ever more resources and activities to that end. A heavy onus rests on such an organization to show that its 'political object' is subordinate to its charitable purpose and its 'political activities' are so integrated and proportionate in relation to that purpose that there is no danger of their becoming detached, and constituting a separate force capable of subverting the charitable purpose. Charities may engage in limited campaigning for political change only as an incidental means to achieving a genuine charitable end.[41]

Applying the rule

Some English decisions, in particular the *Anti-Vivisection* and the *Amnesty International* cases, have played a crucial role in shaping the political constraint rule throughout the common law world.

The anti-vivisection saga began in 1890 with the Irish case of *Armstrong v Reeves*,[42] when the court upheld the charitable status of a gift to the Society for the Abolition of Vivisection. The court found that the aims of the society were compatible with the public benefit. As the judge then explained: 'A society for the purpose of inducing the legislature by legitimate means, by bringing public opinion to bear, to make certain alterations in the law was acting in the public interest'. This was subsequently endorsed in 1895 by Chitty J in *Re Foveaux*.[43] But when the House of Lords came to consider much the same issues in 1948 in *National Anti-vivisection Society v Inland Revenue Commissioners*[44] it arrived at a very different conclusion, reversing the previous finding that the anti-vivisection objects of a society were charitable. In refuting this assertion the House of Lords held that vivisection offered long-term benefits to humanity which outweighed the incidental suffering caused to

41 See e.g., *Webb v O'Doherty* [1991] TLR 68, when Hoffmann J granted an injunction restraining the officers of a students' union, which was an educational charity, from making payments to a national campaign to 'Stop War in the Gulf', stating, at 68: 'There is ... a clear distinction between the discussion of political matters, or the acquisition of information which may have a political content, and a campaign on a political issue. There is no doubt that campaigning, in the sense of seeking to influence public opinion on political matters, is not a charitable activity.'

42 (1890) 25 LR Ir 325, 339 (Chatterton VC).

43 [1895] 2 Ch. 501.

44 [1948] AC 31, 50, where Wright LJ quoted *Tyssen on Charitable Bequests*: 'the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed'.

animals. Subsequently, the rationale linking charity and politics, as first expressed in 1907 by Lord Parker in the *Bowman case*, was reiterated in 1966 by Buckley J in *Re Jenkin's Will Trusts*.[45] As he explained:

> ...the prohibiting of any forms of cruelty inherent in vivisection, however admirable that may be from an ethical point of view, is not a charitable activity in the contemplation of the law because the court cannot weigh the benefits to the community which result from using animals for vivisection and research against the benefits which would result to the community from preventing such practices.[46]

This view still prevails: the courts hold that they have no way of knowing whether or not an organisation's political activity may ultimately meet the public benefit test and therefore cannot rule that at present the organization satisfies this basic requirement for charitable status.

In 1982 there came the *Amnesty International case*.[47] The ruling then made by Slade J was approved and followed in Canada, Ireland and other countries.[48] Although the courts in Australia have not expressly approved this ruling, it has served generally to underpin the traditional common law approach to political activity by charities.

Post-*Amnesty International* development of the rule

The *Amnesty* decision established a clear precedent for the common law jurisdictions, though it was treated in a more relaxed fashion in the US. In the UK there was increasing concern and protests from the sector regarding widespread uncertainty as to what if any advocacy was now compatible with charitable status. The Charity Commission, while standing firm on the rule that charities cannot be established for political purposes nor have political objects,[49] acknowledged that

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45 [1966] Ch 249

46 Ibid, 255.

47 *McGovern v Attorney General* [1982] Ch 321, which ruled that trusts for the purpose of seeking to alter the laws or policies of the UK or another country were political, so the trust whose object was to secure the release of prisoners of conscience by lawful persuasion to change government policy or decisions was not charitable.

48 For Ireland, see *Colgan v Independent Radio and Television Commission, Ireland and the Attorney General* [1999] 1 ILRM 22, 24–5 (O'Sullivan J). For Canada, see *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* (1999) 169 DLR (14th) 34, 130 (Iacobucci J).

49 *Re Bushnell* [1975] 1 WLR 1596, where the dominant or essential objects (the teaching of 'socialised medicine') were found to be political and therefore the fund was held not charitable.

charities must be free to continue their traditional role of contributing to social reform. Following the decision in *Attorney-General v Ross*,[50] which recognised that an organisation may encourage political awareness in furtherance of a charitable educational purpose, the Commission issued a series of guidance leaflets in 1986, 1997,[51] 1999[52] and 2008.[53] A charity may engage in political activity if:[54]

- There is a reasonable expectation that the activity concerned will further the stated charitable purpose of the charity (and so benefit its beneficiaries), to an extent justified by the resources devoted to the activity;
- The activity is not in support of a political party;
- The activity is within the powers which the trustees have to achieve those purposes;
- The activity is consistent with these guidelines; and
- The views expressed are based on a well-founded and reasoned case and are expressed in a responsible way.

The Commissioners went on to introduce some change to the constraints on political activity by accepting, as charitable, trusts for the promotion of good race relations, for endeavouring to eliminate discrimination on the grounds of race and for encouraging equality between persons of different racial groups. This approach was reinforced by the ruling in *Re Koeppler's Will Trusts*,[55] where an organisation that staged conferences with the purpose of promoting increased co-operation between European states was found to be charitable. In that case the judiciary focused on evidence which supported the claim that the Trust was educational and was convinced by the involvement of academic experts and the fact that discussions and

50 [1986] 1 WLR 252.

51 Charity Commission, *Political Activities and Campaigning by Local Community Charities*, (CC9a, 1997).

52 Charity Commission, *Political Activities and Campaigning by Charities*, (CC9, 1999). In 2004, the Commission also published on its website *Commentary on the Descriptions of Charitable Purposes in the Draft Charities Bill*; see now *Commentary on the Descriptions of Charitable Purposes in the Charities Act 2006* (August 2009) <http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_essentials/public_benefit/corcom1.aspx#1>.

53 Charity Commission, *Speaking out: Guidance on Campaigning and Political Activity by Charities*, (CC9, March 2008); http://www.charity-commission.gov.uk/Publications/cc9.aspx

54 Ibid; see in particular D5, E1, F1.

55 [1986] Ch 423.

debates were held on a seminar basis and presented in a manner that allowed for a balanced and informed understanding of political issues. The political dimension was held to constitute 'no more than genuine attempts in an objective manner to ascertain and disseminate the truth'.[56]

In 2000 however, there was a setback in the move towards a more liberal approach when in the *Southwood case*[57] the Court of Appeal talked about the danger of charities usurping the role of government. This case concerned a trust for advancing the education of the public on the subject of militarism and disarmament and related fields. It was held to be not charitable on the traditional ground that the court could not determine whether or not the trust's object of securing peace by demilitarisation promoted the public benefit. This decision contrasted sharply with the earlier ruling in *Re Koeppler's Will Trusts*.[58] The *Southwood* decision rested on evidence that, unlike in *Koeppler*, the Trust was not acting impartially in its dissemination of information: it was seeking to promote disarmament by activities and information that supported only its own views.

Again, in 2003, the Charity Commission relied on several grounds to find that the Wolf Trust[59] was not charitable, including that the Trust did not wholly satisfy the public benefit test, as its primary purpose was to promote the reintroduction of the wolf into Scotland as an end in itself, but there was no way of being certain that this was for the benefit of the public.[60] But also it could not be charitable as it was designed to influence the opinion of the public and the decisions of the relevant government authorities, which is incompatible with charitable status.[61]

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56 Ibid, 437.

57 *Southwood v Attorney-General* [2000] EWCA (Civ) 204.

58 [1986] Ch 423.

59 See Charity Commission, *Decision of the Charity Commissioners for England and Wales made on 30 January 2003: Application for registration of The Wolf Trust (formerly known as 'Wild Bite')* <http://www.charity-commission.gov.uk/library/start/wolftrustdecision.pdf>.

60 Ibid, [8]. The Commissioners cited *Southwood v Attorney General* [2000] EWCA (Civ) 204, and *Incorporated Council of Law Reporting v Attorney General* [1972] Ch 73, in saying (at [3]) that 'for the purpose of considering public benefit, it is necessary to look at the nature and scope of the activities which the trustees intend to promote under the banner of conserving wolves'.

61 Ibid. At [7.3] the Commissioners cited *McGovern v AG* [1982] Ch 321 and *Re Shaw* [1957] 1 WLR 729 to support the view that a purpose to promote a change in the law or bring about a change in government policy, or designed to promote a propagandist or particular point of view, is a political purpose and as such cannot be charitable, primarily because the Court is unable to judge whether such a change is for the benefit of the public.

Pre-Aid/Watch Australian Case Law

In recent years, the advocacy role of charities in Australia has been compromised by a hardening of the ATO's view that charitable status and lobbying for change in law and government policy are incompatible activities. Those community organizations, and there are quite a few, whose main activity is advocacy attract statutory tax deductible status for the purposes of donations, but are denied charitable status. The ATO has been firming up on the need for organizations to choose between these two categories: to be a charity an organization must forgo advocacy on political matters.

In a line of cases from *Royal North Shore* in 1938 to the *Aid/Watch* controversy over 2008 to 2010, the ATO and state revenue authorities have defended their view that the presence of a political dimension is necessarily fatal to charitable status.[62] Of these cases, the three with most relevance are the decisions in *Royal North Shore Hospital of Sydney v Attorney-General (NSW),*[63] *Australian Conservation Foundation v Commissioner of State Revenue*[64] and *Victorian Women Lawyers' Association v Federal Commissioner of Taxation*.[65]

In the *Royal North Shore case*,[66] it was held that encouraging the teaching of technical education in State schools was a valid charitable object and that a bequest for that purpose was not void as a trust for the attainment of a political object. The case is notable for the views of Dixon J who, acknowledging that 'the case law dealing with the distinction between charitable purposes and political objects is in an unsatisfactory condition', stated that 'a coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare';[67] that is, that such objects would necessarily fail the public benefit test and destroy any entitlement to charitable status. He added:

> Again, where funds are devoted to the use of an association of persons who have combined as a political party or otherwise for the purpose of influencing or taking part in the government of the country, it is evident that

62 Other significant cases not discussed here include: *Public Trustee v Attorney-General* (1997) 42 NSWLR 600; *National Council of Women of Tasmania v Federal Commissioner of Taxation* (1998) 38 ATR 1174); and *Aid/Watch Incorporated v Commissioner of Taxation* [2009] FCAFC 128. Also see *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688; *Attorney-General for NSW v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128.

63 (1938) 60 CLR 396.

64 [2002] VCAT 1491 (Victorian Civil and Administrative Tribunal, 18 October 2002).

65 (2008) 170 FCR 318.

66 (1938) 60 CLR 396.

67 Ibid, 426.

> neither the good intentions nor the public purposes of such a body can suffice to support the trust as charitable.[68]

The *Australian Conservation Foundation case*[69] is notable for present purposes, because of the strong views expressed by Justice Gibson in relation to matters that should be construed as 'political'. He argued quite forcefully that times have changed and the political constraint rule must now be viewed in the light of changed circumstances. Unlike previous centuries when challenges to government policy could have serious political implications, in a present day context much of our society's concerns are already the subject of legislation. Our modern democratic societies encourage responsible civic participation and provide for the freedom of expression which includes the right to comment on government policy. As he quite rightly pointed out 'a charity involved in the relief of poverty may not be worth its salt if it did not actively lobby government to conduct its affairs in a way which assisted the charity' and 'it cannot be said that a charity ceases to be a charity if its activities are predominantly said in some unspecified sense to be "political"'.[70] Gibson J distinguished that case from the old English cases partly on the grounds that in this instance the difficulty of judges being involved with political issues did not arise as the political issues had already been decided by Parliament. The purposes of the Foundation were congruent with existing legislation and with the terms of reference of several government departments. Finding that any objective or strategy of the Foundation that might be called 'political' could only be regarded as ancillary or incidental and that it was not the case that all its activities were directed to political means or ends, he upheld the appeal and restored the Foundation's charitable status. In his concluding remarks, Gibson J commented, 'It is now plain, if it was not before, that there is no law that says a charity can be proscribed merely because you can attach the epithet political to some of its activities: for a variety of reasons many charities nowadays will not be able to avoid conduct that may be said to be political'.[71]

In the *Victorian Women Lawyers case*,[72] the Association had in its Constitution a long list of objects including to work towards the reform of the law. And among its stated purposes were: to achieve justice and equality for all women; to further understanding of and support for the legal rights of all women; and to identify, highlight and eradicate discrimination against women in law and in the legal system. The Commissioner objected to these 'law reform' objects and purposes. The court, however, found that the principal purpose of the Association 'was to remove barriers

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68 Ibid.

69 [2002] VCAT 1491.

70 Ibid, [15], [16].

71 Ibid, [26].

72 (2008) 170 FCR 318.

and increase opportunities for participation by and advancement of women in the legal profession in Victoria'[73] and that any other 'social or professional' activities or 'political advocacy' were incidental or ancillary to its main charitable purpose.

The *Aid/Watch* Case

In the *Aid/Watch case*,[74] the purpose of the organisation was to promote the effectiveness of overseas aid, both by ensuring that it was delivered as intended and by ensuring that its delivery was environmentally effective. After 12 years of unchallenged charitable status, the Commissioner revoked that status on the grounds that Aid/Watch was an institution which did not itself distribute aid and thus was not charitable, and that it achieved its objects through campaigning which amounted to a political purpose. It explained that charitable purpose is determined having regard not only to the objects of an institution, but also to its activities. The three activities deemed by the ATO to be political were: urging the Government to put pressure on the Burmese regime; delivering an ironic 60th anniversary birthday cake to the World Bank; and raising concerns about the developmental impacts of the US–Australia Free Trade Agreement. In the view of the ATO, these activities were not charitable nor could they be construed as incidental to and in furtherance of Aid/Watch's object of researching, campaigning about and monitoring the impact of Australia's overseas aid programs on the environment. The nature of the activities indicated that Aid/Watch had a separate and political purpose. Therefore the ATO ruled that Aid/Watch did not have a sole purpose that was charitable.

On appeal, the Administrative Appeals Tribunal set aside the decision of the Commissioner and made certain findings.[75] Firstly, it found that Aid/Watch is a charitable institution, the objects and activities of which are charitable, under the heading 'relief of poverty' and to a degree also under 'education'. Secondly, it found that Aid/Watch does not have the object of promoting a political party or seeking changes in the law. And thirdly, it found that Aid/Watch is involved in campaigning, but only to the extent of seeking to influence government. These findings were appealed to the Full Federal Court[76] which set aside the decision of the AAT and affirmed the decision of the Commissioner. It determined that Aid/Watch had purposes which were not charitable because the relief of poverty and education were not its primary purpose. Its activities were directed towards purposes which would

73 (2008) 170 FCR 318, [147].

74 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 85 ALJR 154 (High Court of Australia); *Federal Commissioner of Taxation v Aid/Watch Incorporated* (2009) 178 FCR 423 (Federal Court of Australia, Full Court); *Re Aid/Watch Inc and Commissioner of Taxation* (2008) 71 ATR 386 (Administrative Appeals Tribunal).

75 *Re Aid/Watch Inc and Commissioner of Taxation* (2008) 71 ATR 386.

76 *Federal Commissioner of Taxation v Aid/Watch Incorporated* (2009) 178 FCR 423.

fall within poverty relief, unless disqualified by being political. However, its political purposes were in fact its main purpose rather than being merely ancillary to a charitable purpose. The Full Court concluded:

> Aid/Watch's attempt to persuade the government (however indirectly) to its point of view necessarily involves criticism of, and an attempt to bring about change in, government activity and, in some cases, government policy. There can be little doubt that this is political activity and that behind this activity is a political purpose. Moreover the activity is Aid/Watch's main activity and the political purpose is its main purpose. Recognising Aid/Watch's ultimate concern to relieve poverty does [not] diminish its political purpose.[77]

Because the immediate and prevailing aim of Aid/Watch was 'to influence government' this, as a matter of the law of charitable trusts, 'invalidated' any claim to charitable status for the purposes of the federal revenue laws. Therefore Aid/Watch was disqualified from being a charitable institution. Aid/Watch then applied to the High Court for leave to appeal against the decision of the Full Federal Court.[78]

The High Court Appeal Hearing

The majority verdict of the Court: allowing the appeal[79]

(a) Tax Exempt Status

To acquire and retain tax exempt status under the relevant legislation[80] and to enjoy tax concessions,[81] Aid/Watch had to be a 'charitable institution'. However, the term 'charitable institution' is not defined in statute and it was this that had given rise to the present litigation: the classification of Aid/Watch's purposes as 'political' and therefore non-charitable was the central issue.

Employing the principles of statutory construction, the Court made the finding that statute law in Australia could exclude the operation of the common law to the extent

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77 Ibid, [37].

78 Application filed on 20th October 2009.

79 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 85 ALJR 154 (by French CJ, Gummow, Hayne, Crennan and Bell JJ; Heydon and Kiefel JJ dissenting).

80 The *Income Tax Assessment Act 1997* (Cth), s 50–5 and *Fringe Benefits Tax Assessment Act 1986* (Cth), s 65J(1)(baa).

81 *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 176–1.

that the two were in conflict.[82] The common law and the ruling given by Wright LJ in *National Anti-Vivisection Society v Inland Revenue Commissioners*[83] must be seen in the light of social circumstances that prevailed at that time.[84] Since then, considerable social change had occurred in Australia and a body of legislation had intruded into matters previously governed by the common law. In particular, Lord Wright's finding that the Society was devoted to the pursuit of 'political' purposes and therefore was not a body 'established for charitable purposes only', as relied upon by the Commissioner in the present case, was not consistent with the approach employed in relevant Australian statute law.[85]

The Court said the use of the term 'charitable' in the phrase 'charitable institution' as employed in the *Fringe Benefits Tax Assessment Act 1986*, the *Income Tax Assessment Act 1997*, and *A New Tax System (Goods and Services Tax) Act 1999*, had to be understood by reference to its source in the general law as it is developed in Australia from time to time.[86] In other jurisdictions, such as the US, the revenue law is expressed in terms which limit the exempt status of charitable institutions. This was not the case in Australia.

(b) Charitable purposes which are 'political'

Identifying this as the main area of dispute, the Court reviewed the development of the law in other common law countries. It was noted that in the recent English case of *Hanchett-Stamford v Attorney-General*,[87] Lewison J held that the *Charities Act 2006* did not change 'the fundamental principle that if one of the objects or purposes of an organisation is to change the law, it cannot be charitable' although the combination of the incidental and ancillary rule together with the public benefit principle[88] did allow for some degree of flexibility.

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82 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 85 ALJR 154, [20].

83 [1948] AC 31

84 (2010) 85 ALJR 154, [21]–[22].

85 See legislation cited above, nn 78, 79. Gleeson CJ, Gaudron and Gummow JJ then remarked (at [22], citing *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 59–60), that the interrelation and interaction between the common law and statute may trigger varied and complex questions.

86 (2010) 85 ALJR 154, [24].

87 [2009] Ch 173, 181–2.

88 *Charities Act 2006*, s 4; citing also, Charity Commission for England and Wales, *Speaking Out – Guidance on Campaigning and Political Activity by Charities*, CC9 (2008), D1; Philip Pettit, *Equity and the Law of Trusts* (Oxford University Press, 11th ed, 2009) 278–9.

Turning to consider the present standing of the *Bowman* ruling in Australia, the Court noted the observation made by Young CJ, in *Attorney General (NSW) v The NSW Henry George Foundation*,[89] that *McGovern* and the recent English cases stemming from *Bowman* had 'not been wholeheartedly accepted in Australia'. Referring to the *Royal North Shore* case, the Court found that:

> the foundation of the 'coherent system of law' of which Dixon J spoke in *Royal North Shore Hospital* is supplied by the *Constitution*. …. The system of law which applies in Australia thus postulates for its operation the very 'agitation' for legislative and political changes of which Dixon J spoke....[90]

In 1992, the High Court had held in two landmark cases that the *Australian Constitution* impliedly provided for freedom of political communication.[91] This implication came from various sections of the *Constitution* establishing Australia's system of representative democracy. These cases resulted in declaring invalid: legislation which proscribed the use of words calculated to bring into disrepute the Industrial Relations Commission;[92] and legislation which prohibited the broadcasting of political advertising during an election period.[93] Both statute and common law can be ruled invalid.

Dismissing as irrelevant the Commissioner's submission that the main or predominant or dominant objects of Aid/Watch itself were too remote from the relief of poverty or advancement of education to attract the first or second heads in *Pemsel*, the Court explained:

> This is because the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in *Pemsel*.[94]

Moreover, 'in Australia there is no general doctrine which excludes from charitable purposes "political objects" and [which] has the scope indicated in England by *McGovern v Attorney-General*'.[95] Finally:

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89 *Attorney-General (NSW) v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128.

90 (2010) 85 ALJR 154, [44]–[45].

91 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; and *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106.

92 The *Industrial Relations Act 1988* (Cth).

93 The *Broadcasting Act 1942* (Cth).

94 (2010) 85 ALJR 154, [47].

95 Ibid, [48].

> It may be that some purposes which otherwise appear to fall within one or more of the four heads in *Pemsel* nonetheless do not contribute to the public welfare in the sense to which Dixon J referred in *Royal North Shore Hospital*. But that will be by reason of the particular ends and means involved, not disqualification of the purpose by application of a broadly expressed 'political objects' doctrine.[96]

By a majority of 5:2 the High Court ordered that the appeal be allowed.

The minority verdict of the Court

The lengthy dissenting judgments of Heydon and Kiefel JJ, while numerically constituting an insignificant minority, are of more than passing academic interest.

For Heydon J the issues could be grouped under two questions: whether the purposes of Aid/Watch fell within one of the four classes of charitable purposes; and, if so, whether there was anything in those purposes which disqualified Aid/Watch from being a 'charitable institution' because there was something 'political' about them. While no claim was made that Aid/Watch advanced religion, it contended that it fell within one or all of the other three classes of charitable purposes.

Heydon J began by exhaustively examining Aid/Watch's objectives and activities. Beginning with Clause 2 of the Aid/Watch Constitution, he noted that, as its 'main objectives', Aid/Watch stated that it 'monitors, researches, campaigns and undertakes activities on the environmental impact of Australian and multinational aid and investment programs, projects and policies' and by these means it would 'seek to ensure' 12 specific ends. He fully stated the 12, each of which had a distinct political flavour. Heydon J then reviewed the findings of previous hearings in relation to the way in which the appellant conducted its activities, concluding that the appellant's role was 'campaigning' and its goal was to influence government. He observed that Aid/Watch describes itself as a group that 'campaigns on Australian involvement in overseas aid and trade projects, programs and policies', that it was an 'activist group' and an 'activist and solidarity organisation', that its 'activist' and '[p]rotest oriented' nature was one of its '[s]trengths' and that it claimed to employ a 'multi-level strategy to effect change'.[97]

Heydon J then turned to examining Aid/Watch's aims and objectives in respect of each of the three relevant *Pemsel* heads. Beginning with the fourth head, Heydon J suggested that the most fully developed way in which the appellant had put its case was to say that it 'seeks to generate debate about how poverty is best relieved' by

96 Ibid, [49].

97 Ibid, [57].

Australia's provision of foreign aid. He firmly renounced such a claim saying that Aid/Watch was not interested in pursuing an educational approach: 'It did not want dialogue, nor even too long a monologue. The appellant wanted its views to be implemented, not debated. It wanted obedience, not conversation.'[98] The appellant was not concerned with generating debate or presenting arguments for their own sake that would be 'inconsistent with its concern for results, to be achieved with whatever amount of rancour and asperity was needed'.[99]

Heydon J briskly dismissed any claim that Aid/Watch had poverty relief as its main purpose: 'The appellant did not have the goal of relieving poverty. It provided no funds, goods or services to the poor. It did not raise funds to be distributed to the poor by others.'[100] Acknowledging that it was an objective, he added that it was one 'diluted and diffused by many other objectives, and actually contradicted by some'.[101]

Heydon J could see little merit in Aid/Watch's claim that it had the advancement of education as a primary purpose. Given that it was evident in only the eleventh of the objectives stated in the appellant's constitution, education was not a main or even a substantial purpose: 'the function of the appellant is not educative, but polemical … its stand may be virtuous, it may even be right, but it is not educational'.[102] Commenting that influencing public opinion could not by itself be construed as educational, he quoted the observation of Hammond J in another context, that the conduct of the appellant represents 'an attempt to persuade people into a particular frame of mind. There is no instruction directed; nor is there to be any systematic accumulation of knowledge'.[103]

Heydon J concluded, referring to his initial two questions, that 'the first question in this appeal must be answered in the negative. The second therefore does not arise'.[104]

For Kiefel J the question was whether the appellant, Aid/Watch, was a charitable institution within the meaning of the Acts of 1986, 1997 and 1999. While what is

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98 Ibid, [58].

99 Ibid, [59].

100 Ibid, [60.

101 Ibid, [61]

102 Ibid, [62].

103 Ibid, quoting *Re Collier (Deceased)* [1998] 1 NZLR 81, 93.

104 Ibid, [63].

regarded as charitable may develop or change, according to the needs of society,[105] she noted that all conceptions of charitable purposes must nonetheless provide for the public benefit. Further, whether an organisation has charitable purposes must be determined by reference to the natural and probable consequences of its activities, as well as its stated purposes,[106] and of the latter it is the main or predominant purposes, not the ancillary or incidental, to which attention must be given.[107]

In her view, the main purposes of Aid/Watch were to agitate for change in the programmes and policies of the government or its agencies. Conceding that, 'a charitable institution may have charitable and political purposes, provided that the political purpose is not the main or predominant purpose of the organization'[108] she saw no reason, in principle, why 'the political nature of an organisation's main purpose should mean its outright disqualification from charitable status'.[109] For Kiefel J the problem in this case was ascertaining the necessary public benefit quotient where the activities largely involved the assertion of Aid/Watch's views because 'a mere connection between those activities and the charitable purposes of others, to render aid, will not suffice as a public benefit'.[110] It remained necessary for Aid/Watch to show that actual benefits resulted directly from its pursuit of change, rather than via the role of a third party. Interestingly, she offered the comment that 'it should not be assumed that the courts will be unable to discern a public benefit in trusts concerned with agitation for reform'.[111]

Kiefel J took the view that an assessment of Aid/Watch's charitable status must be made under the fourth *Pemsel* head 'because the appellant's main purposes do not qualify under the first two'.[112] She dismissed the claim that the purposes of Aid/Watch could include the relief of poverty as was suggested by the Tribunal's

105 Ibid, [66], citing Jean Warburton, *Tudor on Charities*, (Sweet & Maxwell, 9th ed, 2003), 4, [1–005].

106 Ibid, [67], citing *The Baptist Union of Ireland (Northern) Corporation Ltd v The Commissioners of Inland Revenue* [1945] NI 99, 106; *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, [38].

107 Ibid, citing *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, [17].

108 Ibid, [68].

109 Ibid, [69].

110 Ibid. At [70] Kiefel J cited Slade J in *McGovern v Attorney-General* [1982] Ch 321, 336–7, where he extracted two reasons, from *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, for the rejection of trusts for political purposes as charitable.

111 Ibid, [73].

112 Ibid, [76].

view that '[a]id itself is at the heart of charity'.[113] Although 'the purposes and activities of the appellant may have a connection with aid they can neither be seen to promote nor to advance it in any practical way'.[114] Also, while the stated objectives did include some references to education, essentially Aid/Watch sought to 'persuade others of its views, not to educate them'.[115]

Under the fourth head, the presumption of public benefit did not apply and any likely benefit to the public must be demonstrated in its stated purposes and activities. As Kiefel J saw it, two main threads ran through Aid/Watch's stated objectives: 'The first is to ensure local community involvement in the planning and implementation of aid projects. The second is to ensure that aid is delivered in an environmentally effective manner'.[116] As the objectives were not explicit she considered it necessary to examine how the appellant operates, in order to ascertain what was really involved, which, she outlined briefly as:

> the appellant begins with monitoring and then moves to research. The research is used to campaign, and to influence practices relating to the delivery of aid. Essentially, therefore, the appellant is concerned to effect changes in the practices of aid agencies.[117]

She acknowledged that the effectiveness of one charitable organisation may be promoted by another, by the provision of support and services, for example, but considered that Aid/Watch's activities were not of that kind. Although it may well consider that the changes which it seeks, from time to time, would render aid more effective, that would depend upon the correctness of Aid/Watch's views. It cannot be assumed, 'without more, that its views will necessarily promote the delivery of aid …. Its motives are not sufficient to establish public benefit'.[118]

Returning to the initial premise that it was to the main or predominant purposes of Aid/Watch that attention must be given, Kiefel J pointed out that the Full Court of the Federal Court had held that the main purpose was its political purpose, which is to say, the assertion of its views. That Court had taken the well-established approach 'that it was not possible to determine that the appellant's purposes were for the

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113 Ibid, [80], quoting the AAT decision *Re Aid/Watch Inc and Federal Commissioner of Taxation* (2008) 71 ATR 386, [37].

114 Ibid.

115 Ibid, [84].

116 Ibid, [77].

117 Ibid, [79].

118 Ibid, [82].

public benefit, since the Court was in no position to determine that the promotion of one view, rather than the other, was for the public benefit'.[119]

Kiefel J concluded by endorsing this view: the submission that Aid/Watch's purposes were for the public benefit, as it thereby generates public debate, was unacceptable; 'pursuit of a freedom to communicate its views does not qualify as being for the public benefit'.[120]

Conclusion

The pronouncement that 'in Australia there is no general doctrine which excludes from charitable purposes "political objects"'[121] constitutes a firm and clear break in Australian jurisprudence from the lead taken by England and in many other common law jurisdictions. The finding that 'the generation by lawful means of public debate' concerning a change in government law or policy 'directed to the relief of poverty', is itself 'a purpose beneficial to the community within the fourth head in *Pemsel*'[122] marks a step change in the established common law approach. Essentially, in Australia a charity may now engage in campaigning in relation to relief of poverty, advancement of religion or education as its primary purpose, without fear of losing its charitable status, provided it can show that in so doing it is also satisfying the public benefit test.

Arguably, this was change in a direction indicated by the provisions of a statutory authority or the principles of a supervening authority, in this case the *Australian Constitution*, which may indicate the way forward for the UK, Ireland and other jurisdictions. Leaving aside the question as to whether or not existing taxation statutes may, like the cited Australian provisions, impact upon the common law interpretation of 'charity', there is a case to be made that the provisions of the *Human Rights Act 1998*, as echoed in the human rights extensions to the *Pemsel* charitable purposes in section 2(2)(h) of the *Charities Act 2006*,[123] do have an effect similar to that of the *Australian Constitution*. Some bring with them an inescapable political dimension. These new statutorily stated purposes include: the prevention of poverty; the advancement of human rights, conflict resolution or reconciliation, and the promotion of multiculturalism etc.; the advancement of civil society; and

119 Ibid, [85], citing the Full Federal Court in *Federal Commissioner of Taxation v Aid/Watch Inc* (2009) 178 FCR 423, [47] referring to *Southwood v Attorney-General* [2000] TLR 541,

120 Ibid, [86].

121 Ibid, [48].

122 Ibid, [47].

123 For Ireland, see the *European Convention on Human Rights Act 2003* and s 3(11)(e) and (f) of the *Charities Act 2009*.

promoting the welfare of specific socially disadvantaged groups. While certain purposes — such as the prevention of poverty — are themselves clearly political, others invite charities to engage to a substantial degree in political activity: that is, as in Australia, they legitimate political engagement by charities. For the future, charities in the UK jurisdictions will really have no option but to engage in political activity if they are to advance many of these new charitable purposes. In short, as in Australia, it would seem that the legislators have simply bypassed the judicial political constraint rule, which may now become redundant, at least in respect of the stated purposes.

The approach taken by the dissenting judges in Aid/Watch in relation to proving public benefit is also of more than passing interest to the UK and other jurisdictions. The minority's dismissal of any claim that Aid/Watch could be construed as having charitable purposes that might fit under either the poverty or education head, falls within accepted case law parameters. For both, however, there was an issue as to how Aid/Watch could demonstrate that its political purpose satisfied the public benefit test. The Kiefel J standpoint, that campaigning in itself was insufficient to do so, though in keeping with orthodox judicial dicta, has been negated by the majority verdict. However, her approach and that adopted generally by this court, of examining Aid/Watch's activities to test their congruency with its stated purposes, is one that will now acquire greater legitimacy as a result of this decision. Provided that campaigning is not contrary to public policy and is demonstrably for the public benefit — though that threshold may at times be difficult to ascertain — then it will now be compatible with charitable status, at least in Australia.

The political constraint rule has constituted a considerable weighting in favour of government in its relationship with charity. It represents an archaic use of the law to suppress matters clearly in the public interest and has contributed considerably to a general muting of dissent in the nonprofit sector.

For the future, it is to be hoped that other common law jurisdictions will follow the example set by the Aid/Watch decision and view this antiquated rule in the fresh perspective offered by the human rights and other statutory provisions that now provide the legal framework for responsible civic engagement in a modern democracy.