CHARITY LAW FROM A PUBLIC LAW PERSPECTIVE: THE AID/WATCH CASE REVISITED

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Introduction

In this article, I examine the reasoning in the High Court of Australia's decision of *Aid/Watch Incorporated v Commissioner of Taxation* (*Aid/Watch*).[1] Since the *Aid/Watch* decision was handed down, there have been a number of analyses of the case from a private law perspective. A review of the existing literature indicates that there is, however, very little public law scholarship on the *Aid/Watch* case.[2] In my wider research, I am interested in the role of charity law in representative democracies and how the legal definition of charity has played a role in shaping public law principles and concepts. In this article, I aim to illustrate how a private law topic such as charity law can be enriched by public law perspectives at both a conceptual and doctrinal level. At a more general level, I hope to demonstrate the complexity of the interplay between distinctions of government and charity, law and politics, and public and private realms - a complexity which is very much a part of a modern representative democracy such as Australia.

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1 [2010] HCA 42, (2010) 241 CLR 539. The High Court is the highest court in the Australian judicial system.

2 For public law research regarding the *Aid/Watch* case, see G Williams, 'The Australian Constitution and the Aid/Watch Case' (2011) 3 Cosmopolitan Civil Societies: An Interdisciplinary Journal 1; M Turnour and E Turnour, 'Archimedes, Aid/Watch, Constitutional Levers and Where We Now Stand' in M Harding, A O'Connell and M Stewart (eds), *Not-for-Profit Law* (Cambridge University Press 2014) 61.

I begin by reflecting briefly on the conceptual links between charity law and public law in order to provide the reader with a broad understanding of key concepts such as 'the public sphere' and 'public discourse', which I rely on in the doctrinal analysis to follow. In the next section of the article, I provide some context for the *Aid/Watch* decision by describing briefly the relevance of the term 'public benefit' in charity law. I then provide a brief summary of the case law on the implied freedom of political communication under the Australian Constitution, before examining the different approaches taken by the Justices of the High Court in order to decide whether the purposes of Aid/Watch are charitable. The case interests me because of the way in which different judicial conceptions of the public sphere and public discourse affects both our jurisprudence on representative democracy in Australia and the scope of charity law. I conclude with some reflections on the future of the charitable nature of public debate in the Australian constitutional context given subsequent statutory developments in charity law in Australia.

A brief reflection on some conceptual links between charity law, public law and politics

One of the fascinating aspects of charitable trusts is how charitable 'uses' or trusts formed at the intersection of emerging public and private realms of power in England. These legal mechanisms provided a means of regulating private giving in ways that were recognised in emerging public spheres of society as having a 'public' benefit. These early 'uses' therefore represent an example of the ways in which early modern society began to develop a concept of the 'public' in legally recognised ways that are separate from more recognisably political forms of 'public power'. Arguably, we view the phenomenon of 'charity' as distinguishable from 'politics' in the modern era thanks to these public and private realms that emerged, first in Britain and then in France, as 'politics' shifted to thinking about sovereign power and its relationship to a commonwealth of 'the people'. This kind of socio-legal development was only possible of course once 'the people' began engaging in debate about their own essentially privatised but publicly relevant spheres.[3] This in turn required a 'civil society' of individuals free to contract, associate and speak within those spheres. Jürgen Habermas describes this concept of the public sphere in 'The Social-Structural Transformation of the Public Sphere' as being 'made up of private people gathered together as a public and articulating the needs of society with the state'.[4] As Habermas writes, the 'bourgeois public

3 See J Habermas, *The Structural Transformation of the Public Sphere* (MIT Press 1992).

4 J Habermas, 'The Social-Structural Transformation of the Public Sphere' in *The Structural Transformation of the Public Sphere* (MIT Press 1989) 176.

sphere evolved in the tension-charged field between state and society. But it did so in such a way that it remained itself a part of the private realm'.[5]

Through law, the charitable sector exists in the public sphere, but outside of the realm of government, for the purpose of producing public benefits. Charity is valued by the state through incentives such as tax concessions, while at the same time any political power or authority vested in what might otherwise be conceived as a public function is kept in check constitutionally by means of its categorisation as a largely private concern. In this way, charity law might be conceived as having emerged at the intersection between public and private law as a means of the administrative state regulating and rewarding private interests functioning in the public realm. What makes charity law so fascinating from a public law perspective is the range of private interests that the law recognises as performing a public function.

In my analysis of the *Aid/Watch* case below, we will see how contemporary Australian constitutional law is providing an avenue through which the courts answer the question of whether there are political purposes that are a fundamental aspect of the system of government prescribed by the Commonwealth Constitution but which are not charitable. In doing so, the Australian High Court grapples with the public functions or benefits of charitable purposes and causes us to think carefully about the lines being drawn in contemporary charity law between public and private realms of power, and the role of law in creating those lines.

The concept of the public benefit and the *Aid/Watch* case

Since 2013 in Australia, 'charity' and 'charitable purpose' are defined in the Charities Act 2013 (Cth) (Charities Act).[6] The Charities Act applies only for the

5 J Habermas, 'The Public Sphere' (1973) in C Mukerji and M Schudson (eds), *Rethinking Public Culture: Contemporary Perspectives in Cultural Studies* (University of California Press 1991) 141. Habermas has also described the public sphere as: 'the sphere of private persons assembled to form a public' and 'first of all a domain of our social life in which such a thing as public opinion can be formed': J Habermas, 'The Public Sphere' in J Habermas, *On Society and Politics* (Beacon Press 1989) 231.

6 These are: (a) the purpose of advancing health; (b) the purpose of advancing education; (c) the purpose of advancing social or public welfare; (d) the purpose of advancing religion; (e) the purpose of advancing culture; (f) the purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia; (g) the purpose of promoting or protecting human rights; (h) the purpose of advancing the security or safety of Australia or the Australian public; (i) the purpose of preventing or relieving the suffering of animals; (j) the purpose of advancing the natural environment; and, (k) any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j): Charities Act 2013 (Cth), s 12.

purposes of Commonwealth law. For the purposes of this article, it is important to understand the traditional common law view of 'charity' and 'charitable purpose' in Australia, not only because the Charities Act utilises 'familiar concepts from the common law'[7] but also because the *Aid/Watch* decision was decided before the Charities Act was introduced.

The law of charity and definitions of charitable purpose were originally developed through the law on trusts.[8] Charitable trusts are first and foremost trusts for purposes, not persons;[9] but a focus on the 'beneficiaries' has assisted courts in distinguishing charitable trusts from private trusts by ensuring that the 'beneficiaries' of a charitable trust do not have a personal or private relationship to the donor.[10] If a personal element does form an essential part of the gift, the trust will not be considered charitable.[11] Hence, regardless of the size of the group, 'the quality which distinguishes [the beneficiary] from other members of the community … must be a quality which does not depend on their relationship to a particular individual'.[12] A less strict standard applies to the relief of poverty.[13]
In Australian charity law, as it existed at the time of *Aid/Watch*, once the public nature of the charity has been established, the purpose of a trust was presumed to be charitable if it benefited that public by: (i) relieving poverty; (ii) advancing education; or (iii) advancing religion.[14] These are what have long been referred to as the first three heads of charity drawn by Lord Macnaghten from the Statute of

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7 ibid preamble.

8 See GE Dal Pont, '"Charity" - What's Trusts Got to Do With It?' (Conference paper presented at the Charity Law Association Annual Conference in Brisbane, Australia, 27-28 August 2015).

9 Thus, charitable trusts form an exception to the general rule that trusts expressed for a purpose, and which lack an individual beneficiary or beneficiaries to enforce the trust, are invalid. See GE Dal Pont, *Law of Charity* (LexisNexis Butterworths 2010) 360.

10 See generally ibid ch 3.

11 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 per Lord Simonds; cf *Dingle v Turner* [1972] AC 601.

12 *Oppenheim* (n 11) 306 per Lord Simonds.

13 See Dal Pont, *Law of Charity* (n 9) 176-178.

14 This remains true of charity law as it applies in the Australian States and Territories. However, under the Charities Act 2013 (Cth), a presumption of (a) publicness and (b) beneficial character will be made in relation to several articulated purpose types, extending beyond the traditional three heads. Note that in the United Kingdom, the common law presumption of public benefit has been abolished: Charities Act 2011 (UK), s 4(2). The 2011 Act consolidated the bulk of the Charities Act 2006, outstanding provisions of the Charities Act 1993, and various other enactments.

Elizabeth[15] in the case of *Commissioners for Special Purposes of Income Tax v Pemsel*.[16] A fourth head of charity was also identified, namely trusts for other purposes beneficial to the community, not falling under any of the preceding heads.[17] This fourth head includes the purposes either specifically mentioned in the preamble to the Statute of Elizabeth or held to be within the spirit of that preamble. However, under the fourth head, there is no presumption of public benefit.[18] In the case of *Aid/Watch,* the Australian High Court applied the *Pemsel* test in its consideration of whether the purpose of advocating changes to law and policy is charitable, either because it benefits the public by relieving poverty or advancing education, or because generating public debate is otherwise beneficial to the community.

Background to the *Aid/Watch* case

The case of *Aid/Watch* involved an incorporated association that worked in different ways to promote the effectiveness of Australian and overseas aid in developing countries. On 2 October 2006, the Australian Commissioner of Taxation revoked the association's endorsement as a 'charitable institution' and thus invalidated any claim it had to charitable status for the purposes of federal revenue laws. A review of the merits of that decision was undertaken by the Administrative Appeals Tribunal.[19] The Tribunal set aside the Commissioner's decision and determined that the association was a 'charitable institution' for the purposes of the relevant legislation. That decision was then appealed by the Commissioner in the Full Federal Court on a question of law regarding the meaning of 'charitable institution'. The Full Federal Court held that, because the immediate and prevailing aim of Aid/Watch was 'to influence government', this

15 Statute of Charitable Uses 1601 (43 Eliz I c 4) preamble. Although the Statute does not expressly define 'charitable uses or trusts', its preamble includes a long list of uses that were, in 1601, regarded as 'good, godly and charitable'. See Dal Pont, *Law of Charity* (n 9) 84.

16 [1891] AC 531.

17 ibid 583. See also J Chia, 'The History and Future of the Definition of Charity in Australia' in Harding, O'Connell and Stewart (n 2) 179.

18 See *Incorporated Council of Law Reporting of the State of Queensland v Federal Commissioner of Taxation* (1971) 125 CLR 659, 669 per Barwick CJ; *Re Income Tax Acts (No 1)* [1930] VLR 211, 222-223.

19 *Re Aid/Watch Inc and Federal Commissioner of Taxation* [2008] AATA 652; (2008) 71 ATR 386.

invalidated any claim to charitable status.[20] Aid/Watch appealed to the High Court.[21]

Protecting debate: Representative democracy and the freedom of political speech in Australia

The Australian Constitution provides for representative democracy. Chapter I of the Australian Constitution establishes a bicameral Parliament, whose members are to be 'directly chosen by the people' under sections 7 and 24.[22] These sections are to be read together with section 128, which makes 'the people' of the Commonwealth responsible for constitutional change in Australia.[23] The majority of the High Court first described the important role of political communication for the functioning of representative democracy in Australia in the case of *Nationwide News Pty Ltd v Wills*.[24] In that case, Deane and Toohey JJ held:[25]

> The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. … The ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire information about the background, qualifications and policies of the candidates for election and about the countless number of other circumstances and considerations, both factual and theoretical, which are relevant to a consideration of what is in the interests of the nation as a whole or of particular localities, communities or individuals within it. Moreover, the doctrine of representative government which the Constitution incorporates is not concerned merely with electoral processes … The doctrine presupposes an ability of represented and representatives

20 *Federal Commissioner of Taxation v Aid/Watch Inc* (2009) 178 FCR 423, 430.

21 *Aid/Watch* (n 1).

22 Sections 7 and 24 of the Constitution require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively.

23 Section 128 of the Constitution provides a mechanism for altering the Constitution. This requires passage of a Bill by an absolute majority of both Houses of Parliament, and both by a majority of the people as a whole and the majority of the people in a majority of the States at a referendum.

24 (1992) 177 CLR 1.

25 ibid 72. See also *Coleman v Power* (2004) 220 CLR 1, 125-126 per Heydon J; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143-144 per Brennan J.

> to communicate information, needs, views, explanations and advice. It also presupposes an ability of the people of the Commonwealth as a whole to communicate, among themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf.

The questions to be asked in determining whether an impugned law exceeds that limit were settled in *Lange v Australian Broadcasting Corporation*.[26] In that case it was held that:[27]

> [f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively.

More recently, French CJ has recognised that freedom of speech is a common law freedom that 'embraces communication concerning government and political matters'.[28]

The reasoning in the case law on the implied freedom of political communication in Australia is premised on the idea that democracy works most effectively and legitimately if citizens are engaged in the democratic process, sharing their views and increasing the range of opinions in the public sphere.[29] In general, the High Court has been reluctant to determine that laws infringe on that freedom, but it has done so in some cases.

For example, in the case of *Coleman v Power*,[30] the High Court was divided on the question as to whether legislation that prohibited threatening, abusive or insulting words infringed the implied freedom of communication. Three of the judges in the majority held that its operation was limited to situations where the words were 'either intended to provoke unlawful physical retaliation, or were reasonably likely to do so'.[31] The fourth judge in the majority held that the relevant provision did

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26 (1997) 189 CLR 520.

27 ibid 559. For more recent judicial comment, see the judgment of the current Chief Justice of the High Court (with whom Heydon J agreed) in *Monis v The Queen* (2013) 249 CLR 92, 105.

28 *Monis* (n 27) 105, 128. His Honour restated this view in *Tajjour v NSW* [2014] HCA 35.

29 See C Pateman, *Participation and Democratic Theory* (Cambridge University Press 1970).

30 n 25.

31 ibid 74 per Gummow and Hayne JJ (Kirby J agreeing at 87).

not apply in the circumstances because, while the end to be achieved by the legislation was legitimate, the means by which it was to be achieved were not.[32] All four judges in the majority therefore read down the legislation for slightly different reasons so that it did not apply to the communication in question. The minority held that the legislation was valid and applicable, with Heydon J stating that the 'exercise of the freedom must involve at least the possibility that it will "throw light on government or political matters"'.[33]

The case law makes it clear that in Australia freedom of speech is not an absolute individual right. This was emphasised by Brennan J in *Cunliffe v Commonwealth*:[34]

> The Constitution precludes by implication from its terms … the operation of other laws to prejudice the system of representative democracy mandated by the Constitution. The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.

Since the decision in *Aid/Watch* was handed down, a number of cases on the implied freedom of political communication have been decided. In *Unions NSW v NSW*,[35] the High Court ruled that certain sections of the Election and Disclosures Amendment Act 2012 (NSW) were invalid. In *Tajjour v NSW*,[36] a majority held that the offence of consorting in the Crimes Act 1900 (NSW) did not contravene the implied freedom of political communication.[37]

Most recently, the High Court upheld the validity of certain provisions of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) in *McCloy v NSW*.[38] Those sections imposed caps on political donations, prohibited property developers from making such donations, and restricted indirect campaign

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32 ibid per McHugh J.

33 ibid 125-126 per Heydon J (citations omitted).

34 (1994) 182 CLR 272, 327.

35 [2013] 252 CLR 530.

36 *Tajjour* (n 28). *Tajjour* is the latest in a series of cases challenging the validity of 'anti-gang legislation' in Australia: see e.g. *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v NSW* (2011) 243 CLR 181; *Kuczborski v Queensland* (2014) 254 CLR 51.

37 Gageler J held the relevant provision was invalid to the extent that it applied to associations 'for a purpose of engaging in communication or governmental or political matter', but that the section is severable and therefore to 'be read down'. French CJ handed down a dissenting judgment.

38 [2015] HCA 34.

contributions. The Court held that the provisions augment the system of representative government that is protected by the implied freedom of political communication.

In the case of *Tajjour*, the Court was asked explicitly to answer the question of whether there is an implied freedom of association in the Constitution, independent of the implied freedom of communication on governmental and political matters. Each judge answered in the negative.[39] In *Tajjour,* the Chief Justice restated the two limbs of the *Lange* test as follows:[40]

> i. Does the impugned law effectively burden the freedom of political communication either in its terms, operation or effect?
>
> ii. If the provision effectively burdens the freedom, is the provision reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government?

The second limb has been broken down into two parts: first, whether the law serves a legitimate end; and second, the 'proportionality question' of whether the law is reasonably appropriate and adapted to serve its legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government.[41] Although these developments in the case law do not have any significant effect on the analysis of the *Aid/Watch* decision below, they are relevant to ongoing debates with respect to the public benefit test in Australian charity law as it applies to political advocacy and political activities of charities.

Having provided this very brief overview of the law on the implied freedom of political communication in the Australian Constitution, the next section considers its relevance to charity law.

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39 *Tajjour* (n 28) [27] per French CJ.

40 ibid [32]-[33] per French CJ (citations omitted).

41 It is beyond the scope of this article to discuss the different ways in which the proportionality test has been applied by the High Court in recent cases; but it should be noted that the way in which the second limb of the *Lange* test is to be applied is still evolving.

The *Aid/Watch* case and Australia's representative democracy

In this section of the article, I argue that what is being adjudicated in the *Aid/Watch* case is not whether the proposed outcome of a particular law reform is of public benefit. What is being adjudicated is whether advocating for changes to law and policy is in and of itself a public benefit, because the advocacy is related to the relief of poverty or because it is educational or because the generation of public debate is in and of itself a public benefit. Both the majority judgment and the two separate dissenting judgments will be analysed, taking into account the impact of the High Court case law on the constitutional nature of Australia's representative democracy and the role of political speech in that democracy at the time of the *Aid/Watch* decision.

Throughout the analysis, I aim to demonstrate how the reasoning of the majority in *Aid/Watch,* and to some extent that of Heydon J, changed the way in which the question of public benefit is addressed. The judgment of Kiefel J, on the other hand, overturned the doctrine against political purposes but did not disturb the traditional view of the public benefit test.

Her Honour's judgment was therefore similar to the reasoning of courts in other jurisdictions where the political purposes doctrine has been overturned. In the New Zealand case of *Re Greenpeace of New Zealand Incorporated*,[42] for example, a majority of the Supreme Court of New Zealand held that the 'political purpose' exclusion should no longer be applied. The Court held that the inquiry is simply whether a purpose is of public benefit within the sense the law recognises as charitable. Thus, the majority in *Re Greenpeace* held that a 'conclusion that a purpose is "political" or "advocacy" obscures proper focus on whether a purpose is charitable within the sense used by law'.[43] The reasoning is as follows:[44]

> Just as the law of charities recognised the public benefit of philanthropy in easing the burden on parishes of alleviating poverty, keeping utilities in repair, and educating the poor in post-Reformation Elizabethan England, the circumstances of the modern outsourced and perhaps contracting state may throw up new need for philanthropy which is properly to be treated as charitable …
>
> Just as promotion of the abolition of slavery has been regarded as charitable, today advocacy for such ends as human rights or protection of the environment and promotion of amenities that make communities

42 [2014] NZSC 105, [2015] 1 NZLR 169.

43 ibid [69].

44 ibid [70]-[71].

> pleasant may have come to be regarded as charitable purposes in themselves, depending on the nature of the advocacy, even if not ancillary to more tangible charity.

Thus, the law in New Zealand accepts that 'an object which entails advocacy for change in the law is 'simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the statute of Elizabeth I'.[45] In this respect, the majority in *Re Greenpeace* follows the views expressed by Kiefel J in *Aid/Watch* that charitable and political purposes are not mutually exclusive[46] and that the question is ultimately one of proof.

The majority's judgment in Aid/Watch

In the case of *Aid/Watch*, a majority of five High Court judges (French CJ, Gummow, Hayne, Crennan and Bell JJ)[47] held that 'the generation by lawful means of public debate … concerning the efficiency of foreign aid directed to the relief of poverty, is itself a purpose beneficial to the community within the fourth head of *Pemsel*'.[48] The majority did not determine whether the fourth head encompasses the encouragement of public debate respecting activities of government that lie beyond the first three heads (or the balance of the fourth head) identified in *Pemsel*. This was because the debate being generated by Aid/Watch, concerned as it was with the relief of poverty, was considered within the spirit of charitable purposes. The majority did decide that in Australia 'there is no general doctrine which excludes from charitable purposes "political objects"'.[49] Further, the majority held that any lawful generation of debate concerned with proposed

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45 ibid [72] citing LA Sheridan, 'Charitable Causes, Political Causes and Involvement' (1980) 2 The Philanthropist 5, 16.

46 *Re Greenpeace* (n 42) [74].

47 Of the majority, only French CJ and Bell J remain on the High Court. In terms of the minority Heydon J has retired but Kiefel J remains on the Court together with French CJ and Bell J.

48 *Aid/Watch* (n 1) 557. See also the preamble to the Statute of Charitable Uses (n 15); *Pemsel* (n 16).

49 *Aid/Watch* (n 1).

changes in the law, at least regarding matters falling under the four heads of charity, is of public benefit and ought to be considered charitable for that reason.[50]

For the majority of judges in *Aid/Watch*, the starting point for the construction of the term 'charitable institution' in the relevant legislation was the scope and purpose of the legislation itself, considered together with the case law in decisions such as *Commissioners for Special Purposes of Income Tax v Pemsel*,[51] *Chesterman v Federal Commissioner of Taxation*[52] and *National Anti-Vivisection Society v Inland Revenue Commissioners*.[53] The majority stated that use of the term 'charitable' in the phrase 'charitable institution' in the relevant legislation was to be understood by reference to its meaning in the general law as it has been developed in Australia from time to time.[54] Thus the matter in dispute was understood to focus on the content of the general law respecting charitable purposes and, in particular, the significance to be attached to the line of authority beginning with *Bowman v Secular Society Ltd*.[55] In that case, Lord Parker of Waddington observed:[56]

> The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage or the observation of the Sabbath are purely political objectives. Equity has always refused to recognise such objects as charitable … A trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, 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.

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50 Thus echoing the First Amendment jurisprudence of the US Supreme Court exemplified in the observation of Hughes CJ in *Stromberg v California* 238 US 359 (1931), 369: 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system' cited in R Post, 'Understanding the First Amendment' (2012) 87 Washington Law Review 549, 555.

51 n 16.

52 (1923) 32 CLR 362.

53 [1948] AC 31.

54 *Aid/Watch* (n 1) 550.

55 [1917] AC 406. See also M Chesterman, *Charities Trusts and Social Welfare* (Weidenfeld & Nicolson 1979) 182.

56 *Bowman* (n 55) 442.

The reasoning in the above passage can be seen as a good reflection of early twentieth century liberal, representative democracy and the modern administrative state. Concepts such as free speech are honoured but the public function of deciding if laws are of public benefit has become, by definition, a matter of public policy to be decided by the ultimate representative of the people, their government, and not the courts.[57]

After reviewing the law in the United Kingdom, Canada, New Zealand and the United States of America, the majority's response to the line of English authority that stems from *Bowman* was that 'the remarks of Lord Parker in *Bowman* were not directed to the Australian system of government established and maintained by the Constitution itself'.[58] If Lord Parker's remarks were taken as a comment on the justiciability of public policy by Australian courts, this would have been a remarkable observation.[59] However, the separation of powers doctrine was not the focus of the majority judgment. The majority's gaze was directed instead to quite a different doctrine underpinning representative government in Australia, that of the implied freedom of communication on governmental or political matters:[60]

> The provisions of the Constitution mandate a system of representative and responsible government[61] with a universal adult franchise,[62] and s 128 establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of government of the executive, and between electors themselves, on matters of government and politics is 'an indispensable incident' of that

57 Lord Parker's views need not necessarily be interpreted as an application of the separation of powers doctrine. It is also arguable that Lord Parker was merely following a particular convention regarding appropriate degrees of judicial activism. Another view, put forward by Matthew Harding, is that Lord Parker is stating that courts are 'institutionally incapable of making findings of fact as to the public benefit of law reform'. With respect to this and the first interpretation, see M Harding, *Charity Law and the Liberal State* (Cambridge University Press 2014) 181-183.

58 *Aid/Watch* (n 1) 554.

59 See for example *R v Davison* (1954) 90 CLR 353, 380 per Kitto J; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; or the comments on Ministerial discretion in *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 per Gaudron, Gummow and Hayne JJ and 460, per McHugh J.

60 The footnotes have been retained in this quote so that readers can appreciate the extent to which the majority relies on the implied freedom of political communication cases in this passage.

61 *Lange* (n 26) 557-559.

62 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174-175, 186-188.

> constitutional system.[63] While personal rights of action are not by these means bestowed upon individuals[64] in the manner of the *Bivens*[65] action known in the United States, the Constitution informs the development of the common law. [66] Any burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of that system. [67]

Condensed into this short passage is over 20 years of jurisprudence on the implied freedom of political communication in the Australian Constitution. The reasoning of the majority in *Aid/Watch* was that Australia's constitutional system of law was built with agitation for legislative and political changes in mind, and that 'it is the operation of these constitutional processes which contributes to the public welfare'.[68] Accordingly, the majority found 'none of the "stultification" of which Tyssen wrote in 1888',[69] because a 'court administering a charitable trust [established to secure a change in the law] is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes'.[70]

By finding that Australia's constitutional system of law is built with agitation in mind, the majority has changed the focus of what is being adjudicated in assessing public benefit. The implicit reasoning of the majority was that the High Court's role as the guardian of the Constitution was to declare limits on such common law doctrines that affect Australia's constitutional system of representation. The majority was therefore concerned not with the public benefit of the particular law

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63 *Lange* (n 26) 559-560.

64 *Kruger v Commonwealth* (1997) 190 CLR 1, 46-47, 93, 125-126, 146-148.

65 *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388 (1971).

66 *Lange* (n 26) 562-566; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 220; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

67 *Coleman* (n 25), 50, 77-78, 82.

68 *Aid/Watch* (n 1) 556.

69 Tyssen argued that the 'law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. The court must proceed on the principle that the law is right as it is': *Tyssen on Charitable Bequests* (1st ed, 1898) 176 quoted with approval by Lord Simonds in *National Anti-Vivisection* (n 53). See also *Re Shaw* [1957] 1 All ER 745. In overturning Tyssen's reasoning, the majority also rejects the reasoning of Dixon J in *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396, 426.

70 *Aid/Watch* (n 1) 556.

or policy reform but with protecting public debate with respect to such reform. The majority therefore accepted the submissions of Aid/Watch that 'the generation by lawful means of public debate … 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*'.[71] The majority judgment in *Aid/Watch* thus forms part of the line of authority by the High Court regarding the extent of the implied freedom of political communication, which it holds as central to Australia's constitutional representative democracy.

In consequence, the judgment broadens the scope of the public benefit test to include political purposes that are indispensable incidents of our constitutional system and which fall within the four heads of charity. As stated above, the majority did not decide whether the fourth head encompassed the encouragement of public debate respecting activities of government which lie beyond the first three heads (or the balance of the fourth head) identified in *Pemsel*. However, there is potential to broaden significantly the public benefit test of the fourth head of charity to include agitation and activism for, or against, all political purposes that advance Australia's constitutional system of representative democracy. The majority in *Aid/Watch* thereby establishes a public benefit test with respect to charitable trusts suited to Australian circumstances.

What is less clear is whether the majority has in fact completely disqualified the need for a doctrine against political purposes in charity law in Australia. In this respect, it is important to note that the majority holds that the purposes and activities of Aid/Watch 'do not fall within any area of disqualification for reasons of contrariety between the established system of government and the general public welfare'.[72] This appears to be a reference to the reasoning of Dixon J in *Royal North Shore Hospital*,[73] to which the majority expressly refer to in the conclusion of its judgment when it notes that:[74]

> 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*.[75] 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.

71 ibid 557.

72 ibid 556.

73 n 69.

74 *Aid/Watch* (n 1) 557.

75 *Royal North Shore* (n 69) 426.

It is, however, difficult to grasp exactly what the majority wishes to take from Dixon J's comments. What the majority appears to be saying here is that in finding the advocacy of Aid/Watch is for the public benefit, it is relevant that the advocacy was not aimed at changing government policy but rather debating it.
The *Royal North Shore Hospital* case was decided in 1938. At that time, Dixon J was of the view that:[76]

> when the main purpose of a trust is agitation for legislative or political changes, it is difficult for the law to find the necessary tendency to the public welfare, notwithstanding that the subject of the change may be religion, poor relief, or education. When the subject matter is none of these and the case must fall under the fourth class, viz., that of undefined purposes for the public good, the difficulty becomes even greater. …[W]here 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 neither the good intentions nor the public purposes of such a body can suffice to support the trust as charitable.

Given that the majority in *Aid/Watch* finds that the purposes and activities of Aid/Watch are for the public benefit because they involve communication respecting matters of government and politics, it is difficult to imagine what 'particular ends and means' the majority have in mind when they refer to Dixon J's discussion of the general welfare.[77] For example, Dixon J was of the view that when persons 'have combined as a political party or otherwise for the purpose of influencing or taking part in the government of the country' the associations that are formed as a result are not to be considered 'charitable institutions'.[78] Are these the kinds of means and ends that mark the limits of an Australian public benefit test in charity law?[79] It is arguable that political parties, which aim to win control of the executive and legislative arms of government in order to implement their own policies, employ different means and ends to civil society associations that

76 ibid.

77 ibid.

78 ibid.

79 What we do know is that since the decision in *Aid/Watch* was handed down, the High Court has held that no association claiming charitable status will be able to rely on an implied constitutional freedom of political association or freedom to associate to support an argument that such associations support the general welfare in a charitable sense. See *Tajjour* (n 28) per Hayne J (with whom Crennan, Kiefel and Bell JJ agreed, [134]); [136] per Gageler J; [242]-[245] per Keane J. French CJ does not decide the issue: [46].

advocate policy and law reform in the public domain without seeking to win government office as their predominant purpose.[80]

Given these difficulties in assessing contrariety between the established system of government and the general public welfare, it is arguable that a restated political purposes doctrine may have produced clearer results than broadening the public benefit test. We know that the majority found that 'the remarks of Lord Parker in *Bowman* were not directed to the Australian system of government established and maintained by the Constitution itself'.[81] In making this finding, the majority held that the doctrine effectively burdens the implied freedom of political communication.

However, in deciding how the implied freedom of communication on governmental or political matters informs the common law of Australia, the majority did not apply the second limb of the *Lange* test to consider whether the doctrine might be restated so that it is reasonably appropriate and adapted to serve a legitimate end, in this case or more generally, in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by section 128 of the Constitution. Instead, once the majority found that the political purposes doctrine effectively burdens the implied freedom of political communication, it turned to a consideration of the public benefit test to find that 'the generation by lawful means of public debate … 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*'.[82] The reasoning then becomes somewhat circular because the majority then qualifies the kind of political communication that would fall within the four heads of charity by reference to the reasoning of Dixon J in *Royal North Shore Hospital*, which itself follows the line of authority stemming from *Bowman*.

Had the majority approach aligned the political purposes doctrine more closely with the two limbs of the *Lange* test, it could have provided Australia with a new common law doctrine consistent with Australia's system of representative and responsible government that had stronger links to the line of authority that shapes our understanding of that system. As it is, the majority approach produces a

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80 It is easier to see why an entity, even one that operates on a not-for-profit basis, that is established to lobby government discreetly, 'behind the scenes' or in the 'corridors of power' would not satisfy the public benefit test because the communication in that case is of a private, and possibly even confidential, nature, which does not generate debate.

81 *Aid/Watch* (n 1) 554.

82 ibid 557.

public benefit test, the content of which is informed by the freedom of communication on governmental or political matters, but somehow differentiated from the traditional approach of Kiefel J and the New Zealand Supreme Court, which accepts that an object which entails advocacy for change in the law is 'simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the statute of Elizabeth I'.[83]

The majority in *Aid/Watch* found that the purpose of agitating for law reform was for the public benefit within the fourth head in *Pemsel* because the Australian constitutional system of law was built with agitation for legislative and political changes in mind. Instead, a new, constitutionally informed political purposes doctrine might have acknowledged that a doctrine against political purposes still applies, but only in certain cases. Those cases would include where the doctrine is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government. Arguably, the doctrine as put forward by Tyssen or Lord Parker would not apply to the agitation for legislative and political changes in Australia because those reasons do not serve a legitimate end in the contemporary Australian context. In this way, the majority could have established a refined doctrine of political purposes directed to the Australian constitutional system of government and thereby offered a means by which public benefit could be found in the generation of public debate, but not in other political purposes.

This raises the further question of associations that are constituted to advocate changes to the law in a way that is lawful but that intrudes on individual rights of privacy or aims to injure human dignity as a means of gaining public attention and generating debate. For example, how free should an organisation be to use public debate to advocate laws that some might find offensive? Is it charitable to advocate for a change to local planning laws in order to prevent the construction of a mosque? In facts similar to those in *Monis,*[84] could an entity be considered charitable at law if its predominant purpose was that of advocating against Australia's military involvement in Syria by sending out offensive letters to the relatives of Australians who might be killed whilst on active service there? What are the limits of claiming charitable status under Australian revenue laws on the basis of the public benefit that such 'public debate' generates?[85]

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83 *Greenpeace* (n 42) [72] citing Sheridan (n 45) 16.

84 n 27.

85 Defamation and libel laws and anti-vilification laws also provide limits. See for example, *Catch the Fire Ministries Inc v Islamic Council of Victoria* [2006] VSCA 284, in which the statutory prohibition on inciting of hatred of another based on their religious beliefs was

The case law on the implied freedom of political communication suggests that the approach taken by the majority in *Aid/Watch* possibly would be to consider the contents of all public debate as protected communication under the implied freedom. Unless a new doctrine against political purposes is developed along the lines suggested above, it is open to argument that such debate is for the public benefit. It is also not clear how Dixon J's observations in *Royal North Shore Hospital* would prove fruitful here.

To date, the High Court has not been prepared to recognise any competing constitutional rights or freedoms that must be balanced against freedom of speech, such as the right of human dignity or the right to privacy. Thus, in *Monis,* French CJ held:[86]

> reasonable persons would accept that unreasonable, strident, hurtful and highly offensive communications fall within the range of what occurs in what is sometimes euphemistically termed 'robust' debate. That does not logically preclude the conclusion that a communication within that range is also one which is likely or calculated to induce significant anger, outrage, resentment, hatred or disgust. There may be deeply and widely held community attitudes on important questions which have a government or political dimension and which may lead reasonable members of the community to react intensely to a strident challenge to such attitudes.

Although *Monis* is a case about the content of political communication, the reasoning suggests that as long as the High Court views the generation by lawful means of public debate about a particular law reform as falling within one of the four heads of charity, then the content of that debate or how it is driven or communicated need not be particularly charitable in the lay sense of the word. The case law in this area indicates that the High Court is keen to ensure that Australians are free to participate in the formation of public opinion as long as it is lawful and that it will take public debate as it finds it. Also in *Monis*, Hayne J reasoned:[87]

> Great care must be taken in this matter lest condemnation of the particular views said to have been advanced by the appellants, or the manner of their expression, distort the debate by obscuring the centrality and importance of the freedom of political communication, including political communications that are intended to and do cause very great offence.

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upheld and found to be constitutionally valid. See also *Sunol v Collier (No 2)* [2012] NSWCA 44.

86 n 27 131-132.

87 ibid 136-137 per Hayne J.

At least in so far as political communication is concerned, it would appear that the High Court stands in the way of the state acting to ensure that the 'altruistic pursuit of charitable purposes is preserved as a viable mode of social interaction'.[88] If public discourse is 'precisely the site of political contention about the nature of collective identity',[89] then Australian identity can certainly not be regarded as civil. This brings us to the dissenting judgment of Heydon J in *Aid/Watch*, who finds that concepts of civility *are* important to the legal definition of charity.

The judgment of Justice Heydon

Heydon J, in his dissenting judgment, approached the appeal by first considering whether the purposes of Aid/Watch fell within one of the four heads of charity. His Honour held that they did not.[90] Having found the purposes were not charitable, his Honour found it unnecessary to consider whether the purposes were political so as to disqualify Aid/Watch from being considered a 'charitable institution'. Although His Honour left undisturbed the doctrine of political purposes in charity law, it would be untrue to say that Heydon J did not consider, or was not prepared to consider, whether other forms of public debate or political communication fell within the fourth head of *Pemsel*, and, therefore, whether the political purposes doctrine infringed on that speech.

As discussed above, the majority considered the generation of lawful debate about changes to the law to be charitable because of the essential place of public debate within Australia's constitutional system of representative government. Heydon J's approach was to judge the benefit of the actual debate being generated, rather than to adjudicate on the merits of the *freedom* to have that debate. Like Lord Parker in Bowman, his Honour accepted that Aid/Watch had the freedom to put forth its views in public. However, for Heydon J, the issue was decided by nature of the debate.

In his judgment, Heydon J considered whether the objectives and activities of Aid/Watch fell within one or all of the following three heads identified in *Pemsel*: the purpose of relieving poverty; the purpose of advancing education; and other purposes beneficial to the community. His Honour held that the purposes of Aid/Watch did not fall within the first head of charity by relieving poverty because Aid/Watch neither provided funds, goods or services to the poor, nor did it raise funds to be distributed to the poor by others. Heydon J thus defined 'relief of poverty' so as not to include the advocacy of systemic law and policy reforms that

88 Harding (n 57) 203.

89 Post (n 50) 553.

90 *Aid/Watch* (n 1) 557-564.

are believed by the particular organisation in question to be necessary for the relief of poverty.[91]

In terms of the second head, that of advancing education, Heydon J found that education was not a main or even a substantial purpose and that Aid/Watch's activities 'did not involve any systematic method or procedure for the inculcation of knowledge, the cultivation of mental or physical powers or the development of character'.[92] Having regard to the evidence before the Court, His Honour noted that Aid/Watch 'described itself as an "activist group"'.[93] Heydon J disagreed with the submission that Aid/Watch's 'major publications' constituted research that improved 'the sum of communicable knowledge'[94] (in the words of Wilberforce J in *In re Hopkins' Will Trusts*).[95] His Honour held that the function of Aid/Watch was polemical, and that its activities were not 'educational' in the sense of being instructive or providing any systematic accumulation of knowledge.[96] His Honour held that the aim of Aid/Watch was rather to '*influence public opinion* by making the results of its research available, with the further goals of *influencing public opinion* and ultimately government agencies and government itself'.[97]

His Honour's finding as to how education is advanced is not necessarily a particularly controversial view but one that leads to the conclusion that organisations that undertake research aimed at advocating specific, systemic reforms by *influencing public opinion* may not be considered to be 'advancing education'. Heydon J views the use of knowledge in this way as activism, not education.

For similar reasons, Heydon J found that the purposes of Aid/Watch did not fall within the fourth head of charity. His Honour held that Aid/Watch was not seeking to 'generate debate' on how poverty is best relieved. His Honour held that Aid/Watch:[98]

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91 ibid 560. Compare this to the statutory definition of recognised charitable purposes Charities Act 2011 (UK), s 3(1) which includes 'the prevention or relief of poverty'.

92 ibid citing *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645, 661.

93 ibid 560-561.

94 ibid 563.

95 [1965] Ch 669, 680.

96 *Aid/Watch* (n 1) 563.

97 ibid 559.

98 ibid 561.

> advanced points of view, but it was not generating debate in the sense of stimulating others to contribute competing points of view so that some higher synthesis or more acute understanding of issues might emerge.

Heydon J's reasoning in the above passage is very similar to his reasoning with respect to the advancement of education. His Honour stated further:[99]

> Those who ran the appellant did not see themselves as philosophers merely talking about the world, or encouraging others to talk about the world: they saw their task as being to change the world.

For Heydon J, the purpose of public debate takes place in a public sphere where rational minds debate and advance values such as truth and reason.[100] This is the kind of debate that his Honour believes is of public benefit and deserving of charitable status. Heydon J thereby appears to commit a conceptual error by collapsing the conception of public debate into the concept of advancing education. By treating the two concepts as co-extensive, his Honour did not judge 'public debate' on its own terms and thereby failed to properly address the phenomenon on which he was ruling.

While it is difficult to distinguish Heydon J's conception of public debate from his view of advancing education, it is clear that his Honour distinguishes 'activism' from both. His Honour held that the 'appellant wanted its views to be implemented, not debated … [i]t wanted obedience, not conversation'.[101] Accordingly, his Honour found that Aid/Watch was neither concerned with generating rational debate nor presenting arguments for their own sake, but rather wished to achieve a very particular set of law reform outcomes.[102]

For Heydon J, it was beside the point whether advocating for a change in the law constituted a political act, as his Honour was satisfied that seeking to change the law in a single-minded 'activist' manner is not of public benefit. His Honour found that only a particular kind of public debate or mere debate (pre-action) - namely communication that advances education by increasing the sum of knowledge or by speaking to some kind of philosophical, objective Truth - is for the public benefit. The consequence of this was that his Honour did not need to address the question of whether the doctrine of political purposes applied and, if

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99 ibid.

100 I am drawing here on Robert Post's analysis of P Horwitz, 'The First Amendment's Epistemological Problem' (2012) 87 Washington Law Review 451 in Post (n 50) 554-555.

101 Emphasis added.

102 *Aid/Watch* (n 1) 562.

so, whether the doctrine impinged on the implied constitutional freedom of political communication. His Honour can therefore also be said to have followed, to some extent, the reasoning of Dixon J in *Royal North Shore Hospital* in so far as his reasoning with respect to the campaigning and activism of Aid/Watch is analogous to Dixon J's observations about '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'.[103]

Implicit in Heydon J's approach, and his Honour's focus on the 'single-mindedness' of the advocacy, was the view that activism seeks to achieve the introduction of a particular law or policy and thus a particular political reality. In contrast, true public debate does not have a particular end in mind but aims to generate informed choices through rational and reasoned communication of different points of view that citizens can draw on as they approach the ballot box. Thus, for Heydon J, the issue was not first and foremost about the political role of activism in Australian democracy, but rather about the role played by different kinds of public debate in that democracy.

Heydon J's views on the different role and status of discourse in the public sphere were also evident in his reasoning in the case law on the implied freedom of political communication. His Honour has applied similar reasoning concerning rational and irrational discourse in his view of what counts as protected political communication. In the case of *Coleman v Power*, his Honour interpreted political communication narrowly, holding that some communications, such as insults, are not protected because they do not advance political debate. Heydon J held in that case that:[104]

> Insulting words, considered as a class, are generally so unreasonable, so irrational, so much an abuse of the occasion on which they are employed, and so reckless, that they do not assist the electors to an 'informed' or 'true' choice.

We can see in his Honour's judgment in *Coleman* the same kind of reasoning being applied to threatening, abusive or insulting speech that Heydon J applied to activist discourse. In *Coleman,* Heydon J found that the legitimate ends described were 'compatible with the maintenance' of the system of government prescribed by the Commonwealth Constitution, and that the provision under scrutiny 'leaves a very wide field for the discussion of government and political matters by non-insulting words, and it leaves a wide field for the use of insulting words (in

103 n 69 426.

104 n 25 126. Emphasis added.

private, or to persons other than those insulted or persons associated with them)'.[105] Thus, his Honour found that the burden placed by law on political communication in that case was reasonably appropriate and adapted to serve its legitimate ends.

In the passage below, we see how his Honour distinguished such unprotected communication from 'false, unreasoned and emotional' communication:[106]

> The goals of [the law in question] are directed to 'the preservation of an ordered and democratic society' and 'the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society'. Insulting words are inconsistent with that society and those claims because they are inconsistent with civilised standards. A legislative attempt to increase the standards of civilisation to which citizens must conform in public is legitimate. In promoting civilised standards, [the law] not only improves the quality of communication on government and political matters by those who might otherwise descend to insults, but it also increases the chance that those who might otherwise have been insulted, and those who might otherwise have heard the insults, will respond to the communications they have heard in a like manner and thereby enhance the quantity and quality of debate. It is correct that the constitutional implication protects not only true, rational and detached communications, but also false, unreasoned and emotional ones. But there is no reason to assume that it automatically protects insulting words by characterising the goal of proscribing them as an illegitimate one.

It is clear from this passage in *Coleman*, in which his Honour was applying the second limb of the *Lange* test, that his Honour accepted that 'false, unreasoned and emotional communication' is protected by the constitutional implication. However, in the charity law context, his Honour was not prepared to accept that communication of that kind is for the public benefit in the *Aid/Watch* case. In that case, Heydon J found that although Aid/Watch was free to engage in activism, the activism of Aid/Watch was of no public benefit for the purposes of charity law.

His Honour is not alone is believing that certain forms of debate do more harm than good, particularly when those in a position of power are able to use the outer limits of objectivity to discredit others with opinions outside the existing orthodoxy or majoritarian view. Heydon J did not argue that activism should not be protected as a form of political communication. Rather, his Honour's point was

105 ibid 123 (citations omitted).

106 ibid 122 (citations omitted).

rather to distinguish public debate deserving of charitable status from the lobbying of private interests in the public sphere on government and political matters and from debate which his Honour regards as false, unreasoned and emotional. However, it is worth noting Kirby J's observations with respect to Heydon J's judgment in *Coleman v Power*:[107]

> His Honour's chronicle appears more like a description of an intellectual salon where civility always (or usually) prevails. It is not, with respect, an accurate description of the Australian governmental and political system in action …
>
> From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas … By protecting from legislative burdens governmental and political communications in Australia, the Constitution addresses the nation's representative government as it is practised. It does not protect only the whispered civilities of intellectual discourse.

Kirby J's views in *Coleman* follow the majority approach in *Aid/Watch*. For the majority, agitating for law reform is by its very nature beneficial, regardless of its content,[108] and the judgment of the worthiness of communication should occur in the course of political debate, not outside it. As long as the debate is concerned with agitation for legislative and political change in mind, it is of public benefit in the sense required by charity law. The majority understood the benefit in terms of democratic legitimation through the free formation of public opinion.[109]

Heydon J, on the other hand, set very high standards for the Australian polity and the public discourse in which it engages. His Honour defined the benefits of public debate as epistemic in nature, to be understood as an advancement of knowledge. His Honour expected a public that engages in rational, non-partisan debate concerning matters of public benefit, and saw no reason to subsidise other

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107 n 25 91. See further K Ricketts, 'The Collected Insults of Former PM Paul Keating' (14 November 2013) available at: http://www.abc.net.au/news/2013-11-12/the-collected-insults-of-paul-keating/5071412; and S Black, 'Great Australian Political Insults - a Crikey list' (11 July 2007) available at http://www.crikey.com.au/2007/07/11/great-australian-political-insults-a-crikey-list

108 As Robert Post points out: 'Government routinely regulates commercial speech based upon its content; we know that commercial speech enjoys no First Amendment protection if it is false or misleading. Government also routinely regulates the speech of professionals like doctors based upon its content. Bad advice risks sanctions for medical malpractice': Post (n 50) 552.

109 I am drawing here on Robert Post's analysis of Horwitz (n 100) in ibid 554-555.

forms of public discourse by private interests that form part of the constitutional relations between the state and its citizens. There is some merit in such an approach when one considers the differences in class, wealth, status, identities and large-scale private interests (such as mass media and lobbyists) that have turned the content of the public sphere in Australia into privileged private interests. However, these kinds of interests make the impassioned and sometimes irrational activities of groups such as Aid/Watch more necessary, not less. The majority of the High Court appears to have accepted this and saw a public benefit in hearing all sides of a debate, at least concerning the four heads of charity.

Justice Kiefel

In her dissenting judgment, Kiefel J held that 'there is no reason, in principle, that the political nature of an organisation's main purpose should mean its outright disqualification from charitable status'[110] and confirmed that '[n]o-one would suggest that charitable and political purposes are mutually exclusive'.[111]

Thus, her Honour held that the political nature of an organisation's *main* purpose would not mean its outright disqualification from charitable status, but the main purpose must be for the public benefit. Her Honour observed that in order to adjudicate on that question, regard must be had to the natural and probable consequences of an entity's activities, as well as to its main or predominant purposes (rather than those which are ancillary or incidental).

Kiefel J found that the purposes of Aid/Watch, including its advocacy, did not fall under any of the four heads of charity identified in *Pemsel*.[112] Her Honour's reasons focused on the fourth head, because she found that the main purpose of Aid/Watch is 'its political purpose, which is to say, the assertion of its views'.[113] Having considered the purposes and activities of Aid/Watch, Kiefel J found that the assertion of the association's views, without more, could not be assumed to be for the public benefit because there was no evidence that the reforms Aid/Watch was seeking would provide a benefit to the public 'determined by reference to the natural and probable consequences of its activities, as well as its stated purposes'.[114] For example, if it could have been proven that the views put forward advance education, 'disseminate knowledge or information, upon legitimate topics'

110 *Aid/Watch* (n 1) 565.

111 ibid 564.

112 *Pemsel* (n 16) 583.

113 *Aid/Watch* (n 1) 568.

114 ibid 565.

or 'some other evident benefit to society', a public benefit would have been demonstrated.[115]

Unlike Lord Parker in *Bowman*, her Honour was prepared to judge the merits of the particular public policy or law being advocated by requiring proof that the policies or reforms benefit the public by reference to the four heads of charity. She held:[116]

> It should not be assumed that the courts will be unable to discern a public benefit in trusts concerned with agitation for reform, at least where they encourage public debate or education, by way of disseminating knowledge or information, upon legitimate topics.

Her Honour held that on the facts before the Court in *Aid/Watch* 'the appellant's main purposes [we]re to agitate for change in the programmes and policies of the Government or its agencies, by putting forward the views of its members'.[117] Her Honour concluded that the 'pursuit of a freedom to communicate views' did not in and of itself qualify as being for the public benefit. In this way, Kiefel J's judgment, like that of Heydon J, subordinates values of 'democratic legitimation' - the benefits derived from the mere fact of entering into public discourse about the delivery of foreign aid - to the requirements of 'epistemological concerns' regarding the outcome of the proposed changes.[118] Kiefel J upheld the reasoning of the Full Federal Court that it was not possible to determine that the purposes were for the public benefit because 'the Court was in no position to determine that the promotion of one view, rather than the other, was for the public benefit'.[119] Her Honour found that 'whilst 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'.[120] Accordingly, Kiefel J held that it could only be *assumed* that the views of Aid/Watch concerning the delivery of aid have been, or would be, effective; and that the views of Aid/Watch as published on its website were part of a campaign to persuade others of its views, not to educate the public. Her Honour concluded that Aid/Watch's 'pursuit of a freedom to communicate its views d[id] not qualify as being for the public benefit'[121] because no public benefit was proven to result from the expression of those views.

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115 ibid.

116 ibid 565-566.

117 ibid 565.

118 See discussion in Post (n 50) 553-557.

119 *Aid/Watch* (n 1) 568.

120 ibid 567.

121 ibid 568-569.

In short, Kiefel J was of the view that the Court did have the means of judging whether a proposed change in the law would be for the public benefit and could require Aid/Watch to prove that the particular reforms for which they advocated would advance a charitable purpose. Therefore, in contrast to Heydon J, Kiefel J was concerned less with how the views are being communicated and more with issues of proof and objectivity. Her Honour thereby set a very high threshold for those wishing to claim charitable status if their main or predominant purpose was to advocate for changes to law or policy.

Conclusion

Since the decision in *Aid/Watch*, the Australian Parliament has introduced the Charities Act to define 'charity' and 'charitable purpose'. In doing so, the Australian legislature has endorsed the High Court's decision in *Aid/Watch* and included in the definition of charitable purpose the 'purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country', as long as the promotion or opposition to change is in furtherance or in aid of one or more of the purposes defined as charitable in the Act.[122]

In that sense, it would seem the debate over the application the political purposes doctrine has been laid to rest in Australia, at least at the Commonwealth level. Courts now have the jurisdiction to adjudicate whether a proposed change in the law will or will not be for the public benefit, but not beyond a consideration of the concepts of public benefit enumerated in one or more of the purposes defined as charitable in the Act. By defining charitable purposes in this way, the Act attempts to answer the question left open by the majority of the High Court in *Aid/Watch* as to whether the fourth head of charitable purposes in *Pemsel* encompasses the encouragement of public debate beyond the first three heads and the balance of the fourth head, being for purposes beneficial to the community.[123]

Parliament has also sought to distinguish 'charitable purposes' from 'party-political purposes' in the Charities Act by explicitly excluding from the definition of 'charity' the purpose of promoting or opposing a political party or a candidate for political office. The Charities Act notes that promoting or opposing a political party or a candidate for political office does not apply to the purpose of distributing information, or advancing debate, about the *policies* of political parties or candidates for political office (such as by assessing, critiquing, comparing or

122 See n 6.

123 *Aid/Watch* (n 1) 557.

ranking those policies), and arguably, the information or debate must relate to those matters listed in (a) to (g) of the definition of 'charitable purpose'.[124]

However, while the Act tries to address the question of public benefit raised by political purposes, it may in fact be infringing on the implied freedom of political communication by re-introducing a 'statutory doctrine' against political purposes. On the one hand, the definition upholds the idea that the promotion of, or opposition to, political parties and candidates is to be classified as the pursuit of a private benefit rather than a public one. The definition also sits comfortably with the idea that the charitable sector and its purposes should remain distinguishable from sovereign power, including the political parties and individuals who seek to exercise that power. It is arguable, however, following the majority reasoning in *Aid/Watch,* that an institution established to promote or oppose a political party or a candidate for political office, might be considered for the public benefit on the grounds that campaigning is 'an indispensable incident' of Australia's constitutional system and that by excluding political parties and political campaigning from the definition of charitable purpose, the Charities Act burdens the constitutionally implied freedom of communication respecting matters of government and politics. The question then would be whether it is a reasonably appropriate and adapted end that is in a manner compatible with the maintenance of that system of government, which raises the question of public benefit and the purposes of charity.

In conclusion, the breadth of the implied freedom of political communication under the Constitution is not yet clear. Nor is it yet clear whether other formulations of the political purposes doctrine that encompass, for example, political campaigning or promoting the spread of a general political doctrine, such as socialism, would also be considered to place an unacceptable burden on the constitutional system of government of the Commonwealth. The *Aid/Watch* case demonstrates that the interplay between distinctions of government and charity, law and politics and public and private realms is complex; but also that it is very much a part of a modern, functioning, representative democracy such as Australia. In short, the intersection of public and private law can be a very interesting place for a charity lawyer to stand.

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124 The Charities Act also explicitly excludes from the definition of 'charity' the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy, including the rule of law, the constitutional system of government of the Commonwealth, and the safety of the general public and national security and notes further that activities are not contrary to public policy merely because they are contrary to government policy.