

**NAVIGATING THE POLITICS OF CHARITY:
REFLECTIONS ON *AID/WATCH INC v FEDERAL
COMMISSIONER OF TAXATION***

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[This article analyses the decision of the High Court in Aid/Watch Inc v Federal Commissioner of Taxation, in which a majority of the Court ruled that an organisation was not necessarily excluded from charitable status because it had a main or dominant political purpose. The article reflects upon the benefits of the decision, especially its infusion of public law principles into charity law, before discussing the uncertainties generated by the decision. It is argued that, ultimately, the decision exposes a hole in the heart of charity law — the absence of a coherent conception of charity. The article concludes with suggestions as to what a coherent conception of charity might look like, and how it might help solve perennial puzzles in charity law.]

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I INTRODUCTION

On 1 December 2010, a majority of the High Court held in *Aid/Watch Inc v Federal Commissioner of Taxation* (*‘Aid/Watch’*)¹ that an organisation was not necessarily excluded from charitable status (or its resulting tax concessions) because it had a main or dominant political purpose. This decision has two obvious effects: advocacy organisations are now eligible for charitable status, including for tax purposes; and charities can engage more openly and actively in advocacy. The *Aid/Watch* decision has therefore, and rightly, been celebrated by the charitable sector.² The decision should also be celebrated for another reason: its infusion of public law principles into charity law.

Yet the decision seems to raise more questions than it answers, and ultimately, it exposes the hole in the heart of charity law — the absence of a coherent and contemporary conception of the purpose and role of charity. This article concludes by examining some of the puzzles of the legal concept of charity, and by suggesting how a coherent conception, and the infusion of public law principles, might assist in the development of charity law post-*Aid/Watch*.

The article begins by explaining the legal context, focusing on the political purposes doctrine that *Aid/Watch* rejected and the debate concerning that doctrine. It then analyses the different decisions in the *Aid/Watch* litigation, before providing three different reflections on *Aid/Watch*: celebration, deflation, and speculation on the future evolution of charity law.

II THE LEGAL CONTEXT

A *The Significance and Meaning of Charity*

Whether an organisation is a ‘charity’ at law (that is, has charitable status) is principally important for two reasons.³ First, ‘charitable’ trusts are valid while other trusts for purposes are generally not,⁴ and there are other privileges that

¹ (2010) 241 CLR 539.

² Pro Bono Australia, *Aid/Watch Decision a Win for Charities’ Freedom of Speech* (2 December 2010) Pro Bono News <<http://www.probonoaustralia.com.au/news/2010/12/aidwatch-decision-win-charities%E2%80%99-freedom-speech>>.

³ There are other benefits: see generally G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 156–7 [7.18]–[7.20].

⁴ However, savings legislation empowers courts to ‘sever’ charitable purposes from non-charitable purposes, therefore preserving to some extent purpose trusts that would otherwise have failed: see *ibid* 331–9 [13.32]–[13.47].

facilitate the validity of charitable trusts.⁵ Second, and practically more important today, charitable status grants access to a range of tax concessions, such as exemptions from income tax; concessions in relation to goods and services tax ('GST'); and rebates in respect of fringe benefits tax ('FBT').⁶ The organisation must, however, be 'endorsed' by the Australian Taxation Office ('ATO').⁷ Income tax deductions for donors and exemptions from FBT are also relevant to charities, but in general these charities must be 'public benevolent institutions' or otherwise specified in the legislation.⁸

'Charity' has a technical meaning in the common law, developed over centuries of case law. Importantly, this common law meaning has long been held to govern references to 'charity' in taxation legislation,⁹ despite the inherent tension between the policies of trusts law and taxation law.¹⁰ The common law meaning of 'charity' has long been criticised as unduly complex and anachronistic,¹¹ and in 2001 the ad hoc Inquiry into the Definition of Charities and Related Organisations ('Sheppard Inquiry') proposed replacing it with an expanded statutory definition.¹² While this proposal was not ultimately adopted in Australia,¹³ it proved influential overseas, with the various jurisdictions of the United Kingdom

⁵ See generally *ibid* 129–33 [6.1]–[6.7].

⁶ See generally Productivity Commission, 'Contribution of the Not-for-Profit Sector' (Research Report, January 2010) app E <<http://www.pc.gov.au/projects/study/not-for-profit/report>>.

⁷ *Income Tax Assessment Act 1997* (Cth) ss 50-5, 50-52, sub-div 50-B; *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 176-1, 176-5; *Fringe Benefits Tax Assessment Act 1986* (Cth) pt XA.

⁸ *Income Tax Assessment Act 1997* (Cth) s 30-45; *Fringe Benefits Tax Assessment Act 1986* (Cth) s 57A. See Ann O'Connell, 'The Tax Position of Charities in Australia — Why Does It Have to Be So Complicated?' (2008) 37 *Australian Tax Review* 17.

⁹ *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531; *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317. The latter case followed the former in holding that the common law meaning of charity governed the term 'charitable institution' in Australian income tax legislation, despite an argument that the compound phrase 'charitable institution' indicated a narrower meaning.

¹⁰ This has led to several suggestions that the definition in tax law ought to be 'decoupled' from that in the common law: see, eg, Geoffrey Cross, 'Some Recent Developments in the Law of Charity' (1956) 72 *Law Quarterly Review* 187, 204; Nigel P Gravells, 'Public Purpose Trusts' (1977) 40 *Modern Law Review* 397; Susan Bright, 'Charity and Trusts for the Public Benefit — Time for a Re-Think?' [1989] *Conveyancer and Property Lawyer* 28; John D Colombo and Mark A Hall, *The Charitable Tax Exemption* (Westview Press, 1995) 39; G E Dal Pont, 'Why Define "Charity"? Is the Search for Meaning Worth the Effort?' (2002) 8(1) *Third Sector Review* 5. See generally Nuzhat Malik, 'Defining "Charity" and "Charitable Purposes" in the United Kingdom' (2008) 11 *International Journal of Not-for-Profit Law* 36 <http://www.icnl.org/knowledge/ijnl/vol11iss1/special_2.htm>.

¹¹ See generally Joyce Chia et al, 'Defining Charity: A Literature Review' (Not-for-Profit Project, Melbourne Law School, 20 February 2011) <<http://tax.law.unimelb.edu.au/go/research-and-resources/current-research-projects/index.cfm>>.

¹² See especially Ian Sheppard, Robert Fitzgerald and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) ('*Sheppard Report*').

¹³ Instead, the government passed legislation clarifying the charitable status of three particular groups: *Extension of Charitable Purpose Act 2004* (Cth). This followed opposition to an exposure draft Bill which purported to entrench the political purposes doctrine into statute: see Charities Bill (Exposure Draft) 2003 (Cth); Board of Taxation, *Consultation on the Definition of a Charity: A Report to the Treasurer* (2003).

(‘UK’) as well as Ireland eventually adopting similar statutory definitions.¹⁴ The Australian government has recently revived the proposal for a statutory definition of ‘charity’.¹⁵

In order to qualify as a charity under the common law definition, an organisation must fall within one of four ‘heads’ of charity, commonly known as the ‘*Pemsel* heads’ after the case where the classification was first adopted.¹⁶ These are: the relief of the poor, aged or impotent; the advancement of education; the advancement of religion; and the fourth ‘head’, a residual category, of ‘other purposes beneficial to the community’. To determine which ‘head’ a charity might fall into, courts typically examine the objects and powers of the organisation in its rules or constitution (and, if necessary, its activities)¹⁷ as a whole in order to ‘characterise’ its purposes.

If an organisation falls into the first three heads, it is traditionally presumed to be ‘of public benefit’ (that is, it is beneficial and it benefits a sufficient section of the public).¹⁸ However, if the organisation potentially falls into the fourth ‘head’, public benefit must be proved and, further, its purpose must be either listed or analogous to one of the 10 specific purposes in the preamble to the *Statute of Charitable Uses 1601*, 43 Eliz 1, c 4 (‘*Statute of Charitable Uses*’).¹⁹

B *The Political Purposes Doctrine*

These basic rules are supplemented by rules refining the parameters of charity, such as the rule that a purpose that is illegal or against public policy cannot be charitable.²⁰ Most relevantly, one of these rules traditionally disqualified from charitable status any organisation with a main or dominant political purpose (the ‘political purposes doctrine’). The doctrine originated in Lord Parker’s statement in *Bowman v Secular Society Ltd* (‘*Bowman*’) in 1917:

¹⁴ *Charities and Trustee Investment (Scotland) Act 2005* (Scot) asp 10, s 7; *Charities Act 2006* (UK) c 50, s 2; *Charities Act (Northern Ireland) 2008* (NI) c 12, s 2; *Charities Act 2009* (Ireland) s 3.

¹⁵ The Treasury (Cth), *Final Report: Scoping Study for a National Not-for-Profit Regulator* (2011).

¹⁶ *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531. The classification appears to have been adopted from counsel’s suggestion in *Morice v Bishop of Durham* [1804] 9 Ves 399; 32 ER 656. See Gareth Jones, *History of the Law of Charity 1532–1827* (Cambridge University Press, 1969) 124.

¹⁷ The activities of an organisation are relevant in three main circumstances: where there are no rules or constitution; where the rules or constitution do not clearly indicate the organisation’s main objects; or where there is doubt whether the objects reflect the true purposes of the organisation (Dal Pont, *Law of Charity*, above n 3, 322–3 [13.19]).

¹⁸ The Ontario Law Reform Commission (‘OLRC’) suggested that the test of public benefit comprises three elements, including whether there was sufficient practical utility in the organisation’s purposes: OLRC, *Report on the Law of Charities* (1996) vol 1, 166.

¹⁹ These purposes were: the relief of the aged, poor and impotent; the maintenance of sick and maimed soldiers and mariners; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the maintenance of schools and colleges; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; the supportation, aid and help for young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid and ease of any poor inhabitants concerning payment of fifteens, setting out soldiers, and other taxes.

²⁰ Dal Pont, *Law of Charity*, above n 3, 72–5 [3.46]–[3.52].

a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one 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.²¹

The doctrine was fully established in *National Anti-Vivisection Society v Inland Revenue Commissioners* ('*National Anti-Vivisection Society*'),²² which held that the purpose of changing the law — in this case, abolishing the practice of vivisection — was a political purpose that disqualified the organisation from charitable status. The scope of the doctrine was expanded in the later case of *McGovern v Attorney-General*, which defined political purposes broadly to include: furthering the interests of a particular political party; procuring changes in the laws of a country; and procuring a reversal of government policy or governmental decisions in a country.²³ Case law even supports the extension of the doctrine to the purpose of supporting the maintenance of the present law,²⁴ although this aspect of the doctrine is more controversial.²⁵

In Australia, judges have accepted that the doctrine applies, albeit somewhat reluctantly.²⁶ In 1938, the High Court held in *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* ('*Royal North Shore*')²⁷ that it was not a political object to provide a prize for the best essay promoting the extension of technical education in state schools. The Court unanimously held that applying the doctrine to these facts would stretch the meaning of 'political' too far²⁸ — it would lead to the 'absurd conclusion'²⁹ that 'political activity' extended to anything that might be associated with political activity³⁰ or that might affect or concern the state.³¹

However, Latham CJ and Dixon J arguably supported a narrow version of the doctrine, albeit on differing bases.³² Latham CJ suggested it was not 'difficult to suggest reasons of public policy which would prevent recognition ... of a trust for the promotion of a particular political object as such, or for the maintenance and advocacy ... of the principles of a political party', because such trusts 'might

²¹ [1917] AC 406, 442.

²² [1948] AC 31.

²³ [1982] 1 Ch 321, 340 (Slade J).

²⁴ *Re Hopkinson; Lloyds Bank Ltd v Baker* [1949] 1 All ER 346, 350 (Vaisey J).

²⁵ See, eg, *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, 608 (Santow J). The ATO, however, adopted this proposition in its previous Ruling: ATO, *Income Tax and Fringe Benefits Tax: Charities*, TR 2005/21, 21 December 2005, 29 [107]–[108]. This Ruling has now been replaced with a new Ruling that reflects the decision in *Aid/Watch*: ATO, *Income Tax and Fringe Benefits Tax: Charities*, TR 2011/4, 12 October 2011, 16–17 [70]–[73].

²⁶ See, eg, *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600; *A-G (NSW) v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128 (27 November 2002).

²⁷ (1938) 60 CLR 396.

²⁸ *Ibid* 412–13 (Latham CJ), 419 (Rich J), 420 (Starke J), 426–7 (Dixon J).

²⁹ *Ibid* 419 (Rich J).

³⁰ *Ibid* 412 (Latham CJ).

³¹ *Ibid* 419 (Rich J).

³² See the discussion in *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, 607–8 (Santow J).

become a public danger'.³³ This remark suggests Latham CJ supported only a narrow conception of 'political purpose', and viewed the doctrine as an aspect of the public policy rule.

More widely cited is Dixon J's approach which treated the doctrine as part of the 'public benefit' test:

A coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare. Thus, 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 ...³⁴

Dixon J's remarks also suggest a relatively narrow scope for the doctrine. He referred expressly to funding a political party,³⁵ 'influencing or taking part in the government of the country'³⁶ and 'establish[ing] a means of affecting or interfering with government administration'³⁷ as disqualifying political activity, and distinguished these activities from merely 'seeking to mould opinion ... [by] propagat[ing] general views for the purpose of producing a widespread opinion coinciding with [one's] own.'³⁸

Recent Australian cases similarly evidence a critical approach to the doctrine. In three recent cases, the judges avoided applying the doctrine to the facts: *Public Trustee v Attorney-General (NSW)* ('*Public Trustee*'),³⁹ concerning a body promoting the interests of Aborigines and Torres Strait Islanders; *Attorney-General (NSW) v The NSW Henry George Foundation Ltd* ('*Henry George*'),⁴⁰ concerning a trust promoting the views of a 19th century economist; and *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* ('*Victorian Women Lawyers' Association*'),⁴¹ concerning a professional women lawyers' association.

In all of these cases, the judges expressed sympathy with criticisms of the doctrine, with Santow J in particular seeking to narrow its scope. For example, his Honour suggested that charitable status could extend to organisations with the object of introducing new law 'consistent with the way the law is tending',⁴² and rejected its application to trusts whose main object was to maintain the status quo.⁴³ Although Young CJ in Eq declined to follow Santow J's approach in the *Henry George* case, his Honour criticised the supposed rationale for the doctrine and the case law distinguishing between trusts for 'educational' purposes and

³³ *Royal North Shore* (1938) 60 CLR 396, 412.

³⁴ *Ibid* 426.

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ *Ibid* 427.

³⁸ *Ibid*.

³⁹ (1997) 42 NSWLR 600.

⁴⁰ [2002] NSWSC 1128 (27 November 2002).

⁴¹ (2008) 170 FCR 318.

⁴² *Public Trustee* (1997) 42 NSWLR 600, 608.

⁴³ *Ibid* 607–8. This view was developed in Justice G F K Santow, 'Charity in Its Political Voice — A Tinkling Cymbal or a Sounding Brass?' (1999) 18 *Australian Bar Review* 225.

trusts promoting ‘propaganda’.⁴⁴ Similarly, French J observed in *Victorian Women Lawyers’ Association* that the doctrine was ‘not well defined and is more difficult of application today having regard to the change in social conditions since [*Bowman*] and the involvement of legislatures in areas unthought of at that time’⁴⁵ — as indeed Latham CJ had recognised even in 1938.⁴⁶

C The Treatment of Advocacy Overseas

The reception of the political purposes doctrine has been mixed even within those countries sharing the English tradition of ‘charity law’. In England itself (and Wales), the effect of the doctrine has been partly mitigated by the inclusion of inherently ‘political’ purposes (such as the promotion of human rights) in the statutory list of charitable purposes,⁴⁷ and by less restrictive guidance by the Charity Commission of England and Wales.⁴⁸

Similarly, Ireland’s charity legislation includes in its definition of charitable purposes inherently ‘political’ purposes.⁴⁹ The Act also expressly disqualifies political parties, bodies promoting political parties or candidates, and bodies promoting a political cause ‘unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body’.⁵⁰

In Canada, the courts have tended to apply the doctrine strictly,⁵¹ and the doctrine has also been entrenched in its taxation legislation through a definition that was intended to clarify that ancillary and incidental political activity was acceptable.⁵² However, the Charities Directorate has issued guidance⁵³ which

⁴⁴ [2002] NSWSC 1128 (27 November 2002) [50]–[54], [61]–[64].

⁴⁵ (2008) 170 FCR 318, 348 [128].

⁴⁶ *Royal North Shore* (1938) 60 CLR 396, 412.

⁴⁷ *Charities Act 2006* (UK) c 50, s 2(2)(h). Equivalent provisions are found in *Charities and Trustee Investment (Scotland) Act 2005* (Scot) asp 10, ss 7(2)(j)–(l); *Charities Act (Northern Ireland) 2008* (NI) c 12, s 2(2)(h).

⁴⁸ Charity Commission, *Speaking Out: Guidance on Campaigning and Political Activity by Charities* (2008). Cf, eg, the criticisms in Francis Gladstone, *Charity, Law and Social Justice* (Bedford Square Press, 1982) 110–14.

⁴⁹ *Charities Act 2009* (Ireland) ss 3(11)(e)–(f).

⁵⁰ *Ibid* s 2 (definition of ‘excluded body’). However, while the doctrine appears to have been received into Irish law, it has never been litigated: Law Society of Ireland Law Reform Committee, *Charity Law: The Case for Reform* (2002) 79–80.

⁵¹ Paul Michell, ‘The Political Purposes Doctrine in Canadian Charities Law’ (1995) 12(4) *Philanthropist* 3, 13.

⁵² *Income Tax Act*, RSC 1985 (5th Supp), c 1, ss 149(6.1)–(6.2). This deems charitable organisations and foundations to include those devoting part of their resources to political activities, where such activities are ‘ancillary and incidental’ to the charitable purposes and do not include direct or indirect support of, or opposition to, any political party or candidate for public office. These provisions were introduced in 1986 as beneficial legislation, intended to recognise the appropriateness of ancillary political expenditure: Terrance S Carter and Theresa L M Man, ‘Charities Speaking Out: The Evolution of Advocacy and Political Activities by Charities in Canada’ (Paper presented at Nonprofit Speech in the 21st Century: Time for a Change?, New York University School of Law National Centre on Philanthropy and the Law, 29 October 2010) <<http://www.carters.ca/pub/article/charity/2010/tsc1029.pdf>>. The legislation also excludes expenditure on political activities from the disbursement quotas imposed on Canadian charities, but these quotas have recently been reformed: Donald Bourgeois, ‘Eliminating the Disbursement Quota: Gold or Fool’s Gold?’ (2010) 23(2) *Philanthropist* 184.

appears to take a more liberal approach. For example, ‘political activity’ is confined to explicit communications either relating to contacts with or pressure on officials, or explicit communications to the public of an organisation’s stance on an issue.⁵⁴ The guidance also excludes from the definition of ‘political activity’ public awareness campaigns about the charity’s work or related issues and direct representations to political representatives or public officials, as long as they are non-partisan, connected and subordinate to the charitable purposes of the organisation.⁵⁵ Finally, the Charities Directorate’s guidance is that a charity can safely spend 10 per cent of its income on political activity, with slightly higher limits for smaller charities.⁵⁶

The United States (‘US’) has been the most liberal in its common law treatment of advocacy, as its courts have ultimately not adopted the doctrine.⁵⁷ Instead, advocacy is permissible as long as the ‘means proposed are peaceful, in accordance with law and public policy’.⁵⁸ Indeed, the US courts have tended to take a much more positive view of advocacy, most famously expressed in *Taylor v Hoag*:

To hold that an endeavour to procure, by proper means a change in a law is in effect to attempt to violate that law would discourage improvement in legislation and tend to compel us to continue indefinitely to live under laws designed for an entirely different state of society. Such view is opposed to every principle of our government, based on the theory that it is a government ‘of the people, by the people and for the people[.]’ ...⁵⁹

However, US taxation legislation is not as liberal, with § 501(c)(3) of the *Internal Revenue Code* entrenching two prominent restrictions.⁶⁰ The first restriction disqualifies organisations from tax exempt status under that provision if a ‘substantial part’ of their activities involves propaganda or influencing legislation (the ‘lobbying’ restriction).⁶¹ However, organisations can elect to be

⁵³ Canada Revenue Agency, *Policy Statement — Political Activities* (2 September 2003) <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>>.

⁵⁴ *Ibid* [6.2].

⁵⁵ The activities must also be well-reasoned, cannot be primarily emotive and cannot contain information that the charity knows or ought to know is false, inaccurate or misleading: *ibid* [7.1]–[7.3].

⁵⁶ *Ibid* [9].

⁵⁷ The case law is discussed in L A Sheridan, ‘The Political Muddle — A Charitable View?’ (1977) 19 *Malaya Law Review* 42.

⁵⁸ Note, ‘Charitable Trusts for Political Purposes’ (1951) 37 *Virginia Law Review* 988, 989.

⁵⁹ 116 A 826, 828 (Frazer J for Frazer, Walling, Simpson, Kephart and Sadler JJ) (Pa, 1922).

⁶⁰ The US law is quite complex. See generally Bruce R Hopkins, *Charity, Advocacy, and the Law: How Nonprofit Organizations Can Use Charitable Dollars to Affect Public Policy — Lawfully* (John Wiley & Sons, 1992).

⁶¹ For discussion of this restriction, see, eg, Elias Clark, ‘The Limitation on Political Activities: A Discordant Note in the Law of Charities’ (1960) 46 *Virginia Law Review* 439; Ronald S Borod, ‘Lobbying for the Public Interest — Federal Tax Policy and Administration’ (1967) 42 *New York University Law Review* 1087; Note, ‘The Revenue Code and a Charity’s Politics’ (1964) 73 *Yale Law Journal* 661; Mortimer M Caplin and Richard E Timbie, ‘Legislative Activities of Public Charities’ (1975) 39(4) *Law and Contemporary Problems* 183; Note, ‘The Tax Code’s Differential Treatment of Lobbying under Section 501(c)(3): A Proposed First Amendment Analysis’ (1980) 66 *Virginia Law Review* 1513; Laura B Chisolm, ‘Exempt Organization Advocacy: Matching the Rules to the Rationales’ (1988) 63 *Indiana Law Journal* 201; Richard L

assessed against an alternative ‘quantitative’ test that sets out a permissible level of expenditure on lobbying activities depending on the income of the organisation (the ‘safe harbour’ provisions).⁶² The ‘electioneering’ restriction prohibits participating or intervening in political campaigns.⁶³ Finally, under § 4945 of the *Internal Revenue Code* private foundations are penalised through excise taxes if they engage in any ‘lobbying’ activities.

Outside of the common law world, non-governmental organisations are not generally subject to any sector-specific restrictions. This is true even of one of the constituent parts of the United Kingdom, Scotland. Scotland, with its distinctive legal system that mixes civil and common law features, has its own tradition of charity law which takes a more liberal approach to political activities. As the Scottish regulator advises:

The Scottish charity test ... does not prevent charities from campaigning or lobbying to change the law or the policy of public bodies where this is in furtherance of their charitable purposes. Nor would it prevent such campaigning being a charity’s main activity.⁶⁴

Perhaps the starkest contrast is with the Council of Europe, which has specifically recommended that non-governmental organisations⁶⁵ should enjoy ‘the right to freedom of expression’, and in particular:

- the right ‘to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law’;⁶⁶ and
- the right ‘to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation’ (subject to legislation on the funding of elections and political parties).⁶⁷

The recommendation of the Council of Europe also includes guidance that

NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or gov-

Haight, ‘Lobbying for the Public Good: Limitations on Legislative Activities by Section 501(c)(3) Organizations’ (1988) 23 *Gonzaga Law Review* 77.

⁶² IRC § 501(h) (2006). The legislative history of these restrictions is described extensively in several works, including Oliver A Houck, ‘On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the *Internal Revenue Code* and Related Laws’ (2003) 69 *Brooklyn Law Review* 1, 8–37.

⁶³ For discussion of this restriction, see, eg, Laura Brown Chisolm, ‘Politics and Charity: A Proposal for Peaceful Coexistence’ (1990) 58 *George Washington Law Review* 308; Johnny Rex Buckles, ‘Not Even a Peep? The Regulation of Political Campaign Activity by Charities through Federal Tax Law’ (2007) 75 *University of Cincinnati Law Review* 1071.

⁶⁴ Office of the Scottish Charity Regulator, *Meeting the Charity Test: Guidance for Applicants and for Existing Charities* (2010) [5.3]. The legislation does, however, disqualify political parties and organisations with a purpose of advancing a political party: *Charities and Trustee Investment (Scotland) Act 2005* (Scot) asp 10, s 7(4)(c).

⁶⁵ ‘Non-governmental organisations’ is defined to exclude political parties: Committee of Ministers, Council of Europe, *Recommendation on the Legal Status of Non-Governmental Organisations in Europe*, Recommendation CM/Rec(2007)14 (10 October 2007) [1].

⁶⁶ *Ibid* [12].

⁶⁷ *Ibid* [13].

ernmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits.⁶⁸

Therefore, the European position is that tax benefits should exist alongside charitable advocacy and even promotion of a political candidate or party.

III THE CASE AGAINST THE POLITICAL PURPOSES DOCTRINE

The political purposes doctrine has long been criticised, both in Australia and overseas.⁶⁹ Drawing from this literature, the ‘case against’ the doctrine can be summarised in terms of a pyramid of arguments, consisting of four primary levels, with the most narrowly based legalistic arguments perhaps most prominent at the top, but ultimately supported by broader normative arguments.

A *A Specious Doctrine*

At the top level is the argument that the doctrine rests on shaky legal ground (the ‘speciousness’ argument). Most frequently, it is noted that Lord Parker misread the authorities,⁷⁰ and that the doctrine emerges only in the 20th century, contradicting earlier cases that clearly accepted ‘political’ organisations as charities.⁷¹

At a slightly broader level, critics contest the supposed rationales for the doctrine.⁷² Three rationales can be discerned from the authorities:

- the court is ‘not capable of determining public benefit’ (the *Bowman* rationale);⁷³
- the law must be understood as being ‘right as it stands’, otherwise it would be either ‘stultified’⁷⁴ or made incoherent;⁷⁵ and
- judges should not decide political questions, and should leave them to the legislature.⁷⁶

The *Bowman* rationale can be interpreted literally as suggesting that judges are incapable of determining public benefit, or alternatively as reflecting the

⁶⁸ Ibid [57].

⁶⁹ For a comprehensive review, see Chia et al, above n 11.

⁷⁰ The authorities were based on the public policy doctrine. This criticism was accepted in *National Anti-Vivisection Society* [1948] AC 31, 54 (Lord Porter), 63 (Lord Simonds).

⁷¹ Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson, 1979) 181–3.

⁷² See generally Adam Parachin, ‘Distinguishing Charity and Politics: The Judicial Thinking behind the Doctrine of Political Purposes’ (2008) 45 *Alberta Law Review* 871, 880–97.

⁷³ *Bowman* [1917] AC 406, 442 (Lord Parker).

⁷⁴ *National Anti-Vivisection Society* [1948] AC 31, 50 (Lord Wright). This passage cites Amherst D Tyssen, *The Law of Charitable Bequests: With an Account of the Mortmain and Charitable Uses Act, 1888* (William Clowes and Sons, 1888) 177.

⁷⁵ *Royal North Shore* (1938) 60 CLR 396, 426 (Dixon J).

⁷⁶ *National Anti-Vivisection Society* [1948] AC 31, 50 (Lord Wright), 62 (Lord Simonds). See also *McGovern v A-G* [1982] 1 Ch 321, 337 (Slade J).

constitutional claim that judges should not decide political questions.⁷⁷ The literal interpretation is easily dismissed because judges are required to determine public benefit all the time in charity law.⁷⁸ More generally, judges often call for changes to the law, and there are ‘few people better qualified’ to assess the value of such changes.⁷⁹

The second argument can also be similarly dismissed as, at best, hopelessly old-fashioned. It rests on a mythical view of the ‘eternal correctness’ of the law that has long been exploded; wrongly assumes that legislation or case law has decisively settled the ‘issue’ in favour of one side or another; and is hard to reconcile with practices of governance that assume an ongoing need for law reform.⁸⁰

Finally, the ‘constitutional’ rationale reflects a very circumscribed and anachronistic view of the constitutional role of judges which, in any event, does not apply in Australia. This highly deferential view permeated English public law in the first half of the 20th century, and was clearly reflected in the limited scope of judicial review.⁸¹ It chimes still with judges committed to the law as a ‘neutral’ discipline removed from the ‘political’ fray, as reflected by the reaction of some judges to proposals for bills of rights in Australia.⁸² Yet the contemporary judicial landscape is one in which judges are frequently required to resolve politicised issues, and the *Australian Constitution* itself makes the High Court the ultimate arbiter on matters such as the federal division of power, the constitutionality of legislation, and the legality of government action — all matters of the highest political importance.

B Competing Rights and Values

At the next level of the pyramid are arguments about the conflict between the doctrine and competing legal rights and values. While the most obvious competing legal right is that of freedom of expression, other rights and values include freedom of association, freedom of religion,⁸³ equality of treatment,⁸⁴ the right and value of political participation,⁸⁵ and the need for certainty in the law.⁸⁶

⁷⁷ See Abraham Drassinower, ‘The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis’ in Jim Phillips, Bruce Chapman, and David Stevens (eds), *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen’s University Press, 2001) 288, 293–4.

⁷⁸ L A Sheridan, ‘Charity versus Politics’ (1973) 2 *Anglo-American Law Review* 47; Kate Tokeley, ‘A New Definition for Charity?’ (1991) 21 *Victoria University of Wellington Law Review* 41, 51; Santow, above n 43, 229; Advisory Group on Campaigning and the Voluntary Sector, *Report* (2007) 11–14 [0.5.4]–[0.6.6] <<http://www.ncvo-vol.org.uk/regulation-legislation>>.

⁷⁹ L A Sheridan, ‘Charitable Causes, Political Causes and Involvement’ (1980) 2(4) *Philanthropist* 5, 12.

⁸⁰ See, eg, *ibid* 12; Parachin, above n 72, 880.

⁸¹ Lord Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed, 2007) ch 4.

⁸² See, eg, Phillip Coorey, ‘Rights Bill May Corrupt Judiciary, Says Ex-Judge’, *The Sydney Morning Herald* (Sydney), 25 May 2009, 9; Michael Pelly, ‘Chief Justice Opposed to Bill of Rights’, *The Australian* (Sydney), 29 May 2009, 29.

⁸³ In the US context, see, eg, Wilfred R Caron and Deidre Dessingue, ‘IRC § 501(c)(3): Practical and Constitutional Implications of “Political” Activity Restrictions’ (1985) 2 *Journal of Law and*

In jurisdictions where these rights are expressly guaranteed, the argument is often whether restrictions on advocacy violate such guarantees.⁸⁷ The US and Canadian courts have, however, rejected these arguments in relation to freedom of expression, on the basis that such restrictions do not restrain speech but rather withhold tax subsidies from such speech.⁸⁸

A broader, and better, argument is that the doctrine sits uneasily, at best, with these legal and political principles and values. It is this argument that succeeded before the High Court in *Aid/Watch*, as is discussed later. However, outside the US, the focus of the literature has been the conflict between the doctrine and the need for certainty, a principle that is so deeply embedded in our understanding of law that it has taken on a non-political flavour.

This argument is both simple and virtually incontestable. A qualitative test allowing ‘ancillary’ or ‘incidental’ political activity creates an intolerable degree of uncertainty when the consequences imperil the very existence and financial viability of the organisation. This uncertainty is also compounded by ignorance of the permissible scope of political activity.⁸⁹ The result is a ‘chilling effect’ which deters organisations from engaging in any political activity or from

Politics 169; Edward McGlynn Gaffney Jr, ‘On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics’ (1990) 40 *DePaul Law Review* 1; Erik J Ablin, ‘The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns’ (1999) 13 *Notre Dame Journal of Law, Ethics & Public Policy* 541, 567–9; Eric R Swibel, ‘Churches and Campaign Intervention: Why the Tax Man Is Right and How Congress Can Improve His Reputation’ (2008) 57 *Emory Law Journal* 1605.

⁸⁴ It has been argued in the US that restrictions on advocacy could violate the equal protection clause of the *US Constitution*, because businesses are not similarly restricted: see Edward W Wachtel, ‘David Meets Goliath in the Legislative Arena: A Losing Battle for an Equal Charitable Voice?’ (1972) 9 *San Diego Law Review* 944; Gregory E Robinson, ‘Charitable Lobbying Restraints and Tax Exempt Organizations: Old Problems, New Directions?’ [1984] *Utah Law Review* 337. This can also be justified on public policy grounds of equality and improving the legislative process: see Alvin J Geske, ‘Direct Lobbying Activities of Public Charities’ (1973) 26 *Tax Lawyer* 305.

⁸⁵ For example, there is a right to participate directly in the conduct of public affairs: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 25(a). It has also been argued in the US that restrictions on advocacy could infringe the right to petition (an implied right): Wachtel, above n 84, 955.

⁸⁶ In the US, it has been argued that the political purposes doctrine may infringe the doctrine prohibiting impermissible ‘vagueness’: see Borod, above n 61, 1106; Caplin and Timbie, above n 61, 202–3.

⁸⁷ George Cooper, ‘The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining the Public Policy Objectives’ (1968) 68 *Columbia Law Review* 801, 830–41; John Michael Clear, ‘Political Speech of Charitable Organizations under the *Internal Revenue Code*’ (1974) 41 *University of Chicago Law Review* 352; Caplin and Timbie, above n 61, 201–6; Note, ‘The *Tax Code*’s Differential Treatment’, above n 61; Kay Guinane, ‘Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations’ (2007) 6 *First Amendment Law Review* 142, 156–8; Benjamin Vaughn, ‘The High Cost of Free Exercise: All Saints, the Service, and Section 501(c)(3)’ (2008) 61 *Tax Lawyer* 981.

⁸⁸ *Cammarano v United States*, 358 US 498, 512–13 (Harlan J for Warren CJ, Black, Frankfurter, Clark, Harlan, Brennan, Whittaker and Stewart JJ), 515 (Douglas J) (1959); *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504, 558 (Stone JA, Linden and McDonald JJA agreeing); *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202, 220–1 (Strayer JA, Isaac CJ and Robertson JA agreeing).

⁸⁹ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Charity Law and Voluntary Organisations* (1976) 45 [103] (*‘Goodman Report’*).

applying for charitable status,⁹⁰ and which also distorts the preferences of donors and the structures of organisations.⁹¹

The mainstream approach is to argue for a more generous, clear and principled distinction between charity and politics.⁹² For example, advocacy could be distinguished from politics as the former seeks to achieve public interest rather than private advantage,⁹³ or because advocacy determines a 'basic human good' while politics is a process.⁹⁴ Alternatively, distinctions could be made relating to the degree of consensus about the good of the political object⁹⁵ or the partisan features of the activity.⁹⁶ An alternative is to provide for 'quantitative' safe harbour tests, as used in the US and Canada,⁹⁷ or to create new forms of advocacy organisations eligible for fewer tax concessions and subject to more stringent reporting requirements.⁹⁸

C The Political Process

The third level of the argument is that political speech by charities enriches the political process by encouraging political debate,⁹⁹ facilitating citizen participation and engagement, and promoting political pluralism.¹⁰⁰ Public benefit in this

⁹⁰ Myron Walker and Tim Rothermel, 'Political Activity and Tax Exempt Organizations before and after the *Tax Reform Act of 1969*' (1970) 38 *George Washington Law Review* 1114, 1126; Advisory Group on Campaigning and the Voluntary Sector, above n 78, 20 [0.9.7].

⁹¹ Alison Dunn, 'Charity Law as a Political Option for the Poor' (1999) 50 *Northern Ireland Legal Quarterly* 298, 300; Advisory Group on Campaigning and the Voluntary Sector, above n 78, 19–20 [0.9.4]–[0.9.6].

⁹² Most commentators agree that there is an 'unacceptable political realm', even if they reject the current dividing line or the proposed justifications for it: Dunn, 'Charity Law as a Political Option for the Poor', above n 91, 307; Parachin, above n 72, 872–3.

⁹³ Borod, above n 61, 1115. Borod argues for administrative reform along the lines of the original formulation in the US legislation, focusing on the desire to prevent individuals associated with the organisation from turning charity to personal advantage. The 'private interest theory' is also discussed by Buckles, 'Not Even a Peep?', above n 63, 1085–9.

⁹⁴ OLRC, above n 18, 152–4. The Commission expressed the view that the distinction was largely 'formal', a distinction between what is being done and why it is being done, and therefore had to be evaluated in an open-textured way.

⁹⁵ J Stevens and D J Feldman, 'Broadcasting Advertisements by Bodies with Political Objects, Judicial Review, and the Influence of Charities Law' [1997] *Public Law* 615, 617.

⁹⁶ Guinane, above n 87, 167–8. This suggested that genuine advocacy involved three features: (i) a nexus to legislative issues; (ii) no references to an election, candidate, campaign or party; and (iii) no position taken on the qualifications and fitness of a candidate.

⁹⁷ See Note, 'The *Revenue Code* and a Charity's Politics', above n 61, 674–5, especially at 674 n 57; Walker and Rothermel, above n 90, 1135; Ablin, above n 83, 585–6; Richard Bridge, 'The Law of Advocacy by Charitable Organizations: The Case for Change' (2002) 21 *Estates, Trusts & Pensions Journal* 92, 105–6, 116–17.

⁹⁸ Cooper, above n 87, 846–50; Kernaghan Webb, *Cinderella's Slippers? The Role of Charitable Tax Status in Financing Canadian Interest Groups* (SFU-UBC Centre for the Study of Government and Business, 2000) 117–19.

⁹⁹ Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008) 85 [8.18].

¹⁰⁰ Lynn Lu, 'Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations That "Advocate a Particular Position or Viewpoint"' (2004) 29 *New York University Review of Law and Social Change* 377, 382; Jonathan Garton, *The Regulation of Organised Civil Society* (Hart Publishing, 2009) 71–5.

view resides in the generation of public debate itself, rather than in the particular cause,¹⁰¹ so both sides of a public debate could be deemed charitable.¹⁰²

This argument directly addresses two rationales expressed in the US literature for the restrictions on advocacy: a fear that political speech by charities will only encourage political paralysis and polarisation and promote propaganda;¹⁰³ and the argument that the tax subsidies enjoyed by charities would unfairly skew the balance of political speech.¹⁰⁴ The first rationale is grounded in a restrictive view of the appropriate sphere of political debate. The second rationale fails to recognise that the distribution of political speech is already unequal and will always be ‘imperfect’,¹⁰⁵ and that if anything charitable advocacy will mitigate those inequalities, by representing under-represented interests¹⁰⁶ and improving the quality of decision-making through charities’ expertise and connection with the voiceless.¹⁰⁷ These benefits are enhanced by the independence of charities from the government.

D *The Function of Charity*

At the base of the pyramid of arguments against the political purposes doctrine is the argument that the distinction between ‘charity’ and ‘politics’ misconceives the true role of charity. Instead, advocacy and engagement with politics are better conceptualised as an essential, and perhaps the most effective,¹⁰⁸ method of achieving charitable purposes.¹⁰⁹ The distinction is also anachronistic, because the expansion of government and legislative activity has enlarged the sphere of

¹⁰¹ Nicola Silke, “‘Please Sir, May I Have Some More?’ Allowing New Zealand Charities a Political Voice” (2002) 8 *Canterbury Law Review* 345, 364; Parachin, above n 72, 884.

¹⁰² *Goodman Report*, above n 89, 31 [73]; Tokeley, above n 78, 51; Stevens and Feldman, above n 95, 622.

¹⁰³ J Craig Jenkins, ‘Nonprofit Organizations and Political Advocacy’ in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2nd ed, 2006) 307, 307.

¹⁰⁴ See, eg, *ibid*; Donald B Tobin, ‘Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy’ (2007) 95 *Georgetown Law Journal* 1313, 1317–18. This rationale has been especially influential in US case law: see *Slee v Commissioner of Internal Revenue*, 42 F 2d 184 (2nd Cir, 1930); *Cammarano v United States*, 358 US 498 (1959).

¹⁰⁵ Perri 6 and Anita Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Dartmouth Publishing, 1995) 202–3; Jenkins, above n 103, 326.

¹⁰⁶ Clark, above n 61, 456–8; Caplin and Timbie, above n 61, 198–9; Chisolm, ‘Exempt Organization Advocacy’, above n 61, 272–4; Jenkins, above n 103, 326.

¹⁰⁷ Wachtel, above n 84, 958; Bridge, above n 97, 109–10; Advisory Group on Campaigning and the Voluntary Sector, above n 78, 9–10 [0.4.1], 16–17 [0.7.3].

¹⁰⁸ See, eg, Clark, above n 61, 452, who argues that the restrictions target those whose message is ‘aimed at the one agency, government in all its forms, which can effect the most immediate solution to society’s problems’.

¹⁰⁹ See, eg, Caplin and Timbie, above n 61, 196–8; Gladstone, above n 48, ch 7; Bright, above n 10, 34; Dunn, ‘Charity Law as a Political Option for the Poor’, above n 91; Laurie Rektor, ‘Advocacy — The Sound of Citizens’ Voices’ (Position Paper, Advocacy Working Group, Voluntary Sector Initiative, September 2002); Betsy A Harvie, ‘Regulation of Advocacy in the Voluntary Sector: Current Challenges and Some Responses’ (Report, Voluntary Sector Initiative, January 2002) 4–5; Silke, above n 101; Advisory Group on Campaigning and the Voluntary Sector, above n 78, 9–10 [0.4.1]–[0.4.3]; Senate Standing Committee on Economics, above n 99, 84 [8.16].

‘politics’ dramatically,¹¹⁰ and because of trends such as devolution in service delivery, decreasing policy development by governments, and increasing consultation.¹¹¹

This argument addresses the justifications occasionally offered in support of the political purposes doctrine that rely upon an intuitive distinction between charity and politics. These justifications include that the ‘true nature’ of charity is not political,¹¹² that advocacy will divert resources away from charity,¹¹³ that donors need to be protected from the ‘misuse’ of their donations, and that too close an association with politics would undermine the ‘brand’ of charity.¹¹⁴ These suggested justifications, however, do not withstand scrutiny.

First, the idea that charity is not political presupposes a restrictive concept of charity that would exclude, for example, campaigns against slavery or most environmental campaigns, both of which have been recognised as charitable at law.¹¹⁵ Second, the idea of diversion similarly depends upon a pre-existing distinction between advocacy and charity, and fails to recognise that sometimes the most effective way of addressing a social problem is a change in legislation or policy. Third, the argument that donors need to be protected from misuse of donations or that the charity ‘brand’ will be tainted is not sustained by any evidence that donors do not want their donations to be spent on advocacy — indeed, there is some evidence to the contrary.¹¹⁶ Aid/Watch itself found that it received similar amounts for its separate charitable and advocacy funds.¹¹⁷ The

¹¹⁰ Clark, above n 61, 454; Borod, above n 61, 1116; Clear, above n 87, 366; Advisory Group on Campaigning and the Voluntary Sector, above n 78, 9–10 [0.4.1].

¹¹¹ Harvie, above n 109, 7–9.

¹¹² A more extreme version is posited as an ‘antithetical agency hypothesis’ by Buckles, ‘Not Even a Peep’, above n 63, 1092–5. This hypothesis suggests that each sector seeks to serve the community entirely separately from each other, so should have no voice in the other sector. Buckles argues that the ‘complementary agency hypothesis’, where state and charity work side by side, better describes the current legal relationship.

¹¹³ See, eg, Ann M Murphy, ‘Campaign Signs and the Collection Plate — Never the Twain Shall Meet?’ (2003) 1 *Pittsburgh Tax Review* 35, 81; Tobin, above n 104, 1319. This argument is discussed, but not supported, by Parachin, above n 72, 887. Similar arguments have been considered and rejected in relation to churches: see, eg, Steffen N Johnson, ‘Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations’ (2001) 42 *Boston College Law Review* 875, 885–7.

¹¹⁴ This suggestion finds favour in Frances R Hill, ‘Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits’ (1997) 41 *New York Law School Law Review* 881; Murphy, above n 113, 81; Lloyd Hitoshi Mayer, ‘Grasping Smoke: Enforcing the Ban on Political Activity by Charities’ (2007) 6 *First Amendment Law Review* 1, 6. There is empirical evidence of the potency of this belief in health charities in the UK: Alison Dunn, ‘Hippocratic Oath or Gordian Knot? The Politicisation of Health Care Trustees and Their Role in Campaigning’ (2007) 18 *King’s Law Journal* 481, 496–7.

¹¹⁵ In *Re Ingram* [1951] VLR 424, it was held that a trust established for the preservation of flora and fauna was for a ‘purpose beneficial to the community’. Campaigns against slavery have been recognised by the Canada Revenue Agency as having the purpose of ‘preserving human life and health’ and therefore being ‘beneficial to the community’: Canada Revenue Agency, *Upholding Human Rights and Charitable Registration* (15 May 2010) [6.4] <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hmn-rghts-eng.html>>.

¹¹⁶ See Harvie, above n 109, 6. This cites a survey showing strong support by Canadians for a range of advocacy activities by charities.

¹¹⁷ Aid/Watch, *Annual Report 2009* (2010) 6.

argument is also paternalistic, assuming that the ‘law needs to protect public charities from themselves.’¹¹⁸

A more radical approach is to argue that the distinction between charity and politics itself is artificial, as charitable purposes naturally involve questions about the distribution of political power and issues of law and policy.¹¹⁹ This reflects a broader conception of ‘politics’. Chesterman, for example, argues that charity is ‘political’ in the sense that it empowers people to influence or control the conduct of the beneficiaries, and that asserting a role for charity implicitly supports the continuation of an unequal social structure.¹²⁰ Drassinower, on the other hand, posits a distinction between changes *in* a society and changes *of* a society, which distinguishes charity and politics through the level of fundamental political agreement underpinning them.¹²¹

IV AID/WATCH IN THE COURTS

A *The Factual Context*

The *Aid/Watch* decision is a landmark in this broader debate about the relationship between charity and politics. The facts of the case are simple enough. *Aid/Watch* is an activist member-based association concerned with improving Australia’s foreign aid and trade policies.¹²² The purposes listed in its constitution focus on ensuring that such policies accord with environmental principles and empower local communities, especially women and indigenous people.¹²³ Its activities include monitoring aid and trade policies; producing research reports on Australia’s policies and practices; campaigning for changes to those policies and practices; and participating in conferences, international networks and public awareness campaigns.¹²⁴

In some senses, *Aid/Watch* was a perfect test case. On the one hand, it concerned what might be thought of as the quintessence of modern charity, humanitarian overseas aid. As the poverty of developing nations becomes both more acute and visible in a globalised world, humanitarian overseas aid has become the most visible face of the ‘core’ of charity, the relief of poverty. The ‘charitable’ nature of humanitarian overseas aid is enhanced by its association with the

¹¹⁸ Samuel D Brunson, ‘Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition’ (2011) 8 *Pittsburgh Tax Review* 125, 142. See also Eleanor Burt, ‘Charities and Political Activity: Time to Re-Think the Rules’ (1998) 69 *Political Quarterly* 23, 28.

¹¹⁹ This is explored in detail by Drassinower, above n 77. See also Borod, above n 61, 1104–5; Dunn, ‘Charity Law as a Political Option for the Poor’, above n 91.

¹²⁰ Chesterman, above n 71, 354–8.

¹²¹ Drassinower, above n 77, 299.

¹²² It was incorporated as an association on 26 May 1993 under the *Associations Incorporation Act 1984* (NSW): *Aid/Watch* (2010) 241 CLR 539, 544 [1] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹²³ Its constitution is available at *Aid/Watch*, *About Aid/Watch* <<http://aidwatch.org.au/about-aidwatch>>.

¹²⁴ See *Aid/Watch*, *Annual Report 2009*, above n 117.

most powerful charity brands, such as World Vision and the Red Cross, and by the reliance of the sector on public donations.¹²⁵

However, foreign aid also reflects the ‘mixed’ nature of the sector, with the extensive involvement of government and the increasing influence of the private sector in this field. Government funding, known as ‘official development assistance’, will amount to \$4.3 billion in 2011–12,¹²⁶ while international aid organisations raise annually around \$1 billion.¹²⁷ International development organisations are often financially reliant upon overseas development aid funding, and their activities are tightly regulated by AusAID and the peak body, the Australian Council for International Development.¹²⁸ As well, there has been a trend towards mixing market principles with traditional aid practices, marked by the rise of microfinance and projects driven by corporate self-interest.¹²⁹

Foreign aid has also been discursively transformed into ‘international development’, with its accompanying emphasis on local capacity-building and empowerment and the consequences of exploitative corporate practices.¹³⁰ This is fostered by a broader shift from talking of ‘charity’ to talking of ‘global justice’, and from focusing on states to focusing on human rights — a paradigm shift that Aid/Watch clearly represents. Indeed, somewhat ironically, Aid/Watch proclaims as its first value: ‘We believe in solidarity not charity’.¹³¹

B *The Facts and Issues*

Aid/Watch was endorsed by the ATO as a ‘charitable institution’ for the purposes of income tax with effect from 14 July 2000, and for the purposes of FBT and GST effective from 1 July 2005.¹³² However, on 2 October 2006, the Commissioner of Taxation revoked these endorsements.¹³³

The ATO’s objections were twofold. First, it argued that Aid/Watch’s purpose was to monitor the aid program, not deliver aid. Second, the ATO objected to three ‘political’ activities: urging the public to write to the government to put pressure on the Burmese regime; delivering an ironic birthday cake to the World Bank; and raising concerns about the developmental impacts of the *Australia–US Free Trade Agreement*.¹³⁴ Aid/Watch’s objection was disallowed on 6 March

¹²⁵ See Australian Council for International Development, *Total Funds Raised by Australian NGOs* <<http://www.acfid.asn.au/resources/facts-and-figures/total-funds-raised-aust-ngos>>.

¹²⁶ AusAID, *About Australia’s Aid Program* (20 May 2011) <<http://www.aid.gov.au/makediff/default.cfm>>.

¹²⁷ Australian Council for International Development, above n 125.

¹²⁸ AusAID, *Accreditation for Non-Government Organisations* (18 March 2011) <<http://www.aid.gov.au/ngos/accreditation.cfm>>.

¹²⁹ Joel Negin, ‘Reviving Dead Aid: Making International Development Assistance Work’ (Analysis, Lowy Institute for International Policy, August 2010) 15–16.

¹³⁰ *Ibid* 5.

¹³¹ Aid/Watch, *About Aid/Watch*, above n 123.

¹³² *Aid/Watch Inc v Federal Commissioner of Taxation* [2008] AATA 652 (28 July 2008) [10] (Downes J).

¹³³ *Ibid* [11].

¹³⁴ Aid/Watch, ‘ATO Decision Has Implications for All Charities’ (Backgrounder, 30 May 2007) <<http://aidwatch.org.au/sites/aidwatch.org.au/files/ATO+backgrounder+30th+May+2007.pdf>>;

2007, and two days later Aid/Watch sought review of the decision by the Administrative Appeals Tribunal ('AAT').¹³⁵

The case raised two principal legal issues: first, whether Aid/Watch's activities could properly be characterised as falling within either the first or second *Pemsel* head (poverty or education) rather than the fourth head; and second, whether Aid/Watch was disqualified by reason of the political purposes doctrine.

C The AAT Decision

On 28 July 2008, the President of the AAT, Downes J, found for Aid/Watch on both issues.¹³⁶ Aid/Watch was found to fall within both the first and second *Pemsel* heads and, to the extent it did not fall within either, it fell within the fourth head.¹³⁷ Aid/Watch was also found to be emphasising particular priorities in an existing government policy rather than challenging government policy, and so did not fall afoul of the political purposes doctrine.¹³⁸

Downes J held that Aid/Watch's purposes included relieving poverty, notwithstanding that this was not articulated in its constitution, because the object of relieving poverty was 'so fundamental to aid' that it need not be expressly stated.¹³⁹ Promoting the effectiveness of aid advanced the relief of poverty, even though it did not directly relieve poverty.¹⁴⁰ Aid/Watch was found to advance education because of the scholarship of its publications.¹⁴¹ The public benefit of its reports was also compared favourably to the public benefit of researching Shakespearean manuscripts (which had previously been found charitable).¹⁴² Finally, it would 'not be surprising' if the organisation also satisfied the fourth *Pemsel* category,¹⁴³ in which case foreign aid could be seen as analogous to delivering public infrastructure, a purpose implied by the preamble of the *Statute of Charitable Uses*.¹⁴⁴

Downes J further characterised Aid/Watch as encouraging the government's policy of providing overseas aid and protecting the environment, although it was proposing 'different priorities'¹⁴⁵ for that policy as to the 'nature and extent and means of delivery'¹⁴⁶ of aid. This was so even though some of Aid/Watch's activities 'might be thought to be at the edges of appropriate conduct' and

Aid/Watch, 'Background on the Aid/Watch Charitable Tax Status Case' (Backgrounder, 1 October 2009) <http://aidwatch.org.au/sites/aidwatch.org.au/files/AIDWATCH_CourtCaseBackground.pdf>.

¹³⁵ *Aid/Watch Inc v Federal Commissioner of Taxation* [2008] AATA 652 (28 July 2008) [11] (Downes J). The review was sought pursuant to ss 426–60, 14ZL and 14ZZ of the *Taxation Administration Act 1953* (Cth).

¹³⁶ *Aid/Watch Inc v Federal Commissioner of Taxation* [2008] AATA 652 (28 July 2008).

¹³⁷ *Ibid* [41].

¹³⁸ *Ibid* [6], [47].

¹³⁹ *Ibid* [23].

¹⁴⁰ *Ibid* [5].

¹⁴¹ *Ibid* [32], [39].

¹⁴² *Ibid* [40].

¹⁴³ *Ibid* [41].

¹⁴⁴ *Ibid* [42].

¹⁴⁵ *Ibid* [6].

¹⁴⁶ *Ibid* [47].

‘somewhat aggressive’.¹⁴⁷ However, Downes J did appear to suggest that extreme conduct (not evinced here) could result in the organisation losing its charitable quality.¹⁴⁸

Significantly, Downes J also doubted whether ‘robust attempts to influence government policy’¹⁴⁹ should continue to be excluded from charitable status, in the light of contemporary governance practices such as the entrenchment of consultation practices, freedom of information and other administrative law reforms.¹⁵⁰ His Honour also agreed with criticisms of the rationale of the political purposes doctrine,¹⁵¹ and suggested it applied only to charities under the fourth *Pemsel* head.¹⁵²

D Aid/Watch in the Full Federal Court

The AAT’s decision, however, was reversed on appeal to the Full Federal Court on 23 September 2009.¹⁵³ The unanimous Court largely agreed with the AAT on the issue of characterisation. Like the AAT, the Full Court held that promoting the efficiency of aid delivery would (albeit indirectly)¹⁵⁴ aid the relief of poverty,¹⁵⁵ and extended this to Aid/Watch’s environmental objectives, since unsustainable aid ‘may destroy ecosystems upon which communities rely in order to prosper.’¹⁵⁶ Although it was not strictly necessary, the Court also found that Aid/Watch was ‘educational’, agreeing with the AAT that the publication of substantial research reports satisfied the element of education,¹⁵⁷ and rejecting the submission that ‘education’ had to involve structured training or teaching.¹⁵⁸

However, the Full Court held that Aid/Watch was disqualified from charitable status by the political purposes doctrine.¹⁵⁹ In its view, Aid/Watch’s objectives could only be achieved by campaigning to alter government policy, and its primary goal was to influence the government.¹⁶⁰ Its attempt to persuade the government necessarily involved criticism of, and an attempt to change, government activity and policy, and thus Aid/Watch’s main purpose and activity were political.¹⁶¹ The Court did, however, reject the AAT’s apparent suggestion

¹⁴⁷ Ibid [35].

¹⁴⁸ Ibid.

¹⁴⁹ Ibid [21].

¹⁵⁰ Ibid [18]–[21].

¹⁵¹ Ibid [45].

¹⁵² Ibid [44].

¹⁵³ *Federal Commissioner of Taxation v Aid/Watch Inc* (2009) 178 FCR 423.

¹⁵⁴ Ibid 427 [19] (Kenny, Stone and Perram JJ).

¹⁵⁵ Ibid 427 [18].

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 429 [27]–[28].

¹⁵⁸ Ibid 428 [24].

¹⁵⁹ Ibid 427–8 [20].

¹⁶⁰ Ibid 430 [36].

¹⁶¹ Ibid 430–1 [37].

that ‘undue emphasis’ on political means could disqualify an organisation from charitable status.¹⁶²

The Court then considered whether charitable and political purposes were in this case mutually exclusive, acknowledging Santow J’s point in *Public Trustee* that an object of changing government policy may not be in such contradiction with government policy as to become ‘automatically “political”’.¹⁶³ The Court agreed that, on one level, it could be said that Aid/Watch’s objectives did not conflict with the government’s objective to deliver aid efficiently with due regard to environmental concerns. However, Aid/Watch’s aim was to ensure that aid should conform to its view of the best way to achieve this objective, disregarding other factors that a government would have to consider.¹⁶⁴

The Court not only accepted that it was bound by the political purposes doctrine,¹⁶⁵ but also accepted both the literal and the constitutional rationales for the doctrine. The Court observed that judges could not judge public benefit in ‘all circumstances’; that they were not ‘equipped to consider all the factors that have resulted in decisions as to what foreign aid is to be provided and how it is to be delivered’; and that they were ‘not entitled to enter into such debates.’¹⁶⁶ Ultimately, the Court held that it could not judge public benefit because the issue was, in the end, one for government.¹⁶⁷

E Aid/Watch in the High Court

The High Court heard argument on 15 and 16 June 2010.¹⁶⁸ At the hearing, the primary argument of counsel for Aid/Watch was that both the AAT and the Full Court had found that Aid/Watch fell within the first two *Pensel* heads, and therefore that it benefited from the presumption of public benefit which had not been rebutted.¹⁶⁹ Counsel’s main contention was that, as Downes J had suggested, the political purposes doctrine applied only to the fourth head of charity.¹⁷⁰ This was despite Aid/Watch’s written submission which suggested more broadly that ‘public benefit’ could reside in the existence of public debate itself.¹⁷¹

¹⁶² Ibid 431 [39]–[40].

¹⁶³ Ibid 431 [38], quoting *Public Trustee* (1997) 42 NSWLR 600, 620.

¹⁶⁴ *Federal Commissioner of Taxation v Aid/Watch Inc* (2009) 178 FCR 423, 431–2 [41] (Kenny, Stone and Perram JJ).

¹⁶⁵ Ibid 432 [43]–[45].

¹⁶⁶ Ibid 432 [45].

¹⁶⁷ Ibid 433 [47].

¹⁶⁸ Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 154 (15 June 2010); Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 155 (16 June 2010).

¹⁶⁹ Interestingly, Heydon J queried this reliance on the presumption, observing that there was ‘very fragile support in authority’ for it: Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 154 (15 June 2010) 2601.

¹⁷⁰ Ibid 216–24, 1102–7 (D L Williams SC).

¹⁷¹ Ibid 187–90 (French CJ).

Instead, Aid/Watch focused on the ‘speciousness’ of the doctrine, arguing that the doctrine rested on ‘foundations of sand’¹⁷² and suggesting that the House of Lords in *National Anti-Vivisection Society* had relied on the wrong edition of a textbook.¹⁷³ Counsel only briefly contested the doctrine’s rationales, but after careful probing, submitted that there was public benefit from public debate at least in relation to any of the first three heads of charity.¹⁷⁴

Counsel for the Commissioner of Taxation similarly focused on the issue of characterisation, submitting that either a dominant political means or a dominant political purpose would disqualify an organisation from charitable status.¹⁷⁵ This applied to all four *Pemsel* heads, and it was not possible simply to combine the desirability of public debate with one of the first three *Pemsel* heads. Counsel also argued that the purpose of relieving poverty was ‘totally missing and, indeed, is antithetical to what is being advocated in some areas where there is a conflict between the environment and poverty and one has to benefit one or benefit the other.’¹⁷⁶

The interesting point is that both sides chose not to focus on what the judges clearly saw as the crucial issue — namely, the political purposes doctrine. Counsel for Aid/Watch failed to articulate a vision of advocacy as generally for the public benefit, or to supply any cogent limits to that broad principle. Only at the very end of his address did he briefly put forward the ‘functional’ argument that political activity was ‘an inherent and necessary part’ of the activities of charities.¹⁷⁷

In contrast, the judges sought to focus on broad principle, especially the normative tension between the doctrine’s proscription of political speech by charities and the *Constitution*’s valorisation of political communication. This was best put by Hayne J:

a defining characteristic of the society in which this doctrine has defined its application is that of representative and responsible government underpinned by free political exchange and an understanding of what is meant by the term ‘political’ when used, it seems, as a term of disapprobation in contradiction to the approving term ‘charitable’, requires some adjustment.¹⁷⁸

Counsel for the Commissioner initially sought to rely on the US and Canadian cases distinguishing between restraints on free speech and the withholding of a tax benefit,¹⁷⁹ and then on a distinction between ‘promoting public discussion

¹⁷² As suggested by French CJ in *ibid* 124.

¹⁷³ *Ibid* 97–106 (D L Williams SC).

¹⁷⁴ *Ibid* 1085–94 (Crennan J and D L Williams SC).

¹⁷⁵ *Ibid* 2327–54, 2492–7 (D M J Bennett QC).

¹⁷⁶ Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 155 (16 June 2010) 3923–5 (D M J Bennett QC).

¹⁷⁷ Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 154 (15 June 2010) 1900–1 (D L Williams SC).

¹⁷⁸ *Ibid* 3086–92.

¹⁷⁹ *Ibid* 2968–3005, 3221–70 (D M J Bennett QC), citing especially *Regan v Taxation with Representation of Washington*, 461 US 540 (1983), *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504 and *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202.

and pushing one side in a debate',¹⁸⁰ evoking the distinction between education and propaganda in charity law.¹⁸¹ Counsel also contended that there was 'no particular benefit to poor people or to the advancement of education in talking about poverty or education'¹⁸² — a view Hayne J swiftly condemned as anachronistic.¹⁸³ Counsel then resorted to the constitutional rationale of the doctrine, arguing that 'it [was] outside the realm of the courts to make political judgments',¹⁸⁴ although Gummow J was quick to point to the 'political' role of the High Court envisaged by the *Constitution*, as discussed above.¹⁸⁵

The judges were, however, concerned about the implications of repealing the doctrine. As French CJ concisely put it:

Ultimately the question ... is if one dispenses with a political purposes exception or disqualification what are the boundaries of community benefit, or public benefit?¹⁸⁶

The judges suggested several 'hard cases', such as political parties, societies dedicated to decriminalisation of drug trafficking, and organisations dedicated to the repeal of anti-discrimination law. However, counsel for Aid/Watch refused to be drawn on this issue, insisting that ultimately the public benefit of 'fourth head' charities had to be decided in each case on the evidence.¹⁸⁷

The judges also clearly rejected the suggestion, initially made by Gummow J,¹⁸⁸ that the definition of charity in tax legislation should be decoupled from the common law definition¹⁸⁹ — a position later affirmed in the majority judgment.¹⁹⁰

F *The High Court Decision*

On 1 December 2010, a majority of five judges overturned the Full Federal Court's decision, with Heydon J and Kiefel J writing separate dissents.¹⁹¹ The key passage in the majority judgment amounted to three short paragraphs. First, the majority characterised Aid/Watch's activities as falling within the fourth

¹⁸⁰ Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 154 (15 June 2010) 3032–3 (D M J Bennett QC).

¹⁸¹ *Ibid* 3035–40.

¹⁸² *Ibid* 3072–4.

¹⁸³ *Ibid* 3076–9.

¹⁸⁴ Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 155 (16 June 2010) 3682–3 (D M J Bennett QC).

¹⁸⁵ *Ibid* 3690–3.

¹⁸⁶ Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 154 (15 June 2010) 1141–4.

¹⁸⁷ *Ibid* 1219–386 (French CJ, Gummow, Heydon and Kiefel JJ and D L Williams SC).

¹⁸⁸ *Ibid* 290–4.

¹⁸⁹ Gummow J initially suggested that the meaning of the legislative term should be governed by the meaning understood by the legislators of the time, and not expanded by subsequent common law decisions: *ibid* 306–12. In fact, the phrase 'charitable institution' appeared in the *Income Tax Assessment Act 1915* (Cth) s 11, two years before the political purposes doctrine was developed in *Bowman* [1917] AC 406.

¹⁹⁰ *Aid/Watch* (2010) 241 CLR 539, 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁹¹ *Ibid*.

Pemsel head, on the basis that ‘the generation by lawful means of public debate ... concerning the efficiency of foreign aid’ was itself beneficial to the community.¹⁹² Second, it held that public debate concerning government activities within the first three heads (or the balance of the fourth head) fell within the fourth head.¹⁹³ The Court, however, expressly left open the question of whether the fourth head

encompasses 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* and, if so, the range of those activities.¹⁹⁴

The majority therefore accepted the line suggested by counsel for Aid/Watch. Third, the majority ruled that the ‘political purposes’ doctrine did not apply in Australia, although in a particular case the ends and means involved could result in a finding that there was insufficient public benefit.¹⁹⁵

The rationale of the majority for rejecting the political purposes doctrine was set out in an earlier passage of its judgment¹⁹⁶ discussing Dixon J’s dictum in *Royal North Shore* concerning the coherence of the law.¹⁹⁷ The majority rejected this argument because the doctrine itself was in tension with the *Constitution*. The *Constitution* was based on representative and responsible government, included a universal adult franchise, and provided for constitutional change through popular referenda, and thus assumed as an ‘indispensable incident’ communication between the executive, legislature and electors on matters of government and politics.¹⁹⁸ The system itself therefore required ‘agitation’ for legislative and political change, and assumed that this would contribute to the public welfare.¹⁹⁹ This conclusion was, perhaps, reinforced by the discussion of the shaky legal foundations of the doctrine, the liberalising effect of the guidance on political purposes issued by the Charity Commission of England and Wales, and the different position taken in the US.²⁰⁰

The dissenting judgments took rather different paths. Heydon J’s judgment might be characterised as a ‘traditionalist’ approach, evincing a fairly narrow view of ‘public debate’, ‘poverty’ and ‘education’. Heydon J was clearly influenced by the distinction between ‘emotional and rhetorical’ propaganda and reasoned ‘debate’ when he contested the characterisation of Aid/Watch as ‘seeking to generate debate’:

The appellant 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. The

¹⁹² Ibid 557 [47] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁹³ Ibid 557 [48].

¹⁹⁴ Ibid.

¹⁹⁵ Ibid 557 [47]–[49].

¹⁹⁶ Ibid 555 [42].

¹⁹⁷ *Royal North Shore* (1938) 60 CLR 396, 426.

¹⁹⁸ *Aid/Watch* (2010) 241 CLR 539, 556 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁹⁹ Ibid 556 [45].

²⁰⁰ Ibid 550–4 [27]–[38].

appellant was not playing the role of a teacher in charge of a skilfully conducted seminar, or someone deftly presiding over a meeting. The appellant's activities were designed to ensure that the appellant's points of view about aid prevailed by ensuring that government did some things and did not do others. ... 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. ... The appellant's views were not put in a manner inviting a response, but in a manner seeking compliance. 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.²⁰¹

The distinction Heydon J is invoking is a distinction often made in charity law between 'reasoned' discourse and 'polemical' discourse. Yet the effect of this distinction, it appears, is that there is more public benefit in an organisation that 'merely talk[s]' about the world or 'presides' over a seminar than in an organisation that seeks to 'change the world'. In this view, there is more value in an organisation that subscribes to no position than an organisation that stands for something and seeks to convince others of it.

Heydon J also found that Aid/Watch did not relieve poverty as it did not distribute aid and the objective of relieving poverty was 'diffused by' and 'actually contradicted by' other objectives, such as the removal of extractive industries which may generate wealth.²⁰² Further, the organisation was not educational, because this was only one of its objectives and its reports were 'polemical'.²⁰³ Having decided Aid/Watch was not charitable, Heydon J decided to leave open the further issue of the political purposes doctrine.²⁰⁴

While Heydon J objected to the fact that Aid/Watch did not function as a debating society, Kiefel J's primary objection was that it functioned too much like one. Her Honour held that there was insufficient public benefit in Aid/Watch merely asserting its views.²⁰⁵ It did not promote the relief of poverty 'in any practical way',²⁰⁶ and it could only do so if its views about the greater effectiveness of aid were in fact true, which could not be established.²⁰⁷ She also characterised its reports as campaigning rather than educational.²⁰⁸ Finally, the Full Federal Court's decision that it could not determine public benefit was 'plainly correct'.²⁰⁹

Kiefel J's reasoning is difficult to support, as charity law requires organisations to prove neither their efficacy nor the truth of their views. The reasoning also assumes that expressions of political views do not effect political or social change, gravely undervaluing the role of advocacy and public debate.

²⁰¹ Ibid 561–2 [58].

²⁰² Ibid 563 [61].

²⁰³ Ibid 563 [62].

²⁰⁴ Ibid 564 [63].

²⁰⁵ Ibid 565 [69].

²⁰⁶ Ibid 567 [80].

²⁰⁷ Ibid 567–8 [82].

²⁰⁸ Ibid 568 [84].

²⁰⁹ Ibid 568 [85].

Nevertheless, Kiefel J's dissent came closest to articulating a more progressive role for charity by referring directly to the 'functional' argument about the interrelationship between charity and politics:

It could scarcely be denied, these days, that it may be necessary for organisations, whose purposes are directed to the relief of poverty or the advancement of education, to agitate for change in the policies of government or in legislation in order to best advance their charitable purposes.²¹⁰

Kiefel J also rejected two of the rationales for the doctrine. Judges could and did judge public benefit, although there may well be 'practical difficulties' in doing so.²¹¹ Further, it was not essential to assume the correctness of existing law, because one could consistently maintain the law while recognising the 'importance and value of public discussion, education and debate about aspects of the law and changes which might be made to it.'²¹²

V REFLECTION 1: CELEBRATION

The reaction of charities to the *Aid/Watch* decision was generally, and rightly, one of celebration.²¹³ The judgment was a clear and strong rejection of the political purposes doctrine. It removes a doctrinal anomaly and the muddle it engendered.

Most importantly, it paves the way for organisations to primarily and wholly engage in advocacy, at least within fields of activity already recognised as charitable. While this is the clearest legal consequence of the decision, its practical implications in the long term are less clear. One intriguing possibility is that, by encouraging smaller advocacy organisations, it may restructure parts of the not-for-profit sector. This is more than a matter of mere form. An organisation devoted to advocacy may be more effective in relation to some issues where, for example, the government is the principal actor or legislative change is necessary. An advocacy organisation may also better suit (as in the case of *Aid/Watch*) a volunteer member-based organisation. Larger charitable organisations may decide to set up separate advocacy organisations in order to take a more independent approach to advocacy.

The second principal effect of the decision is to remove the 'chilling' uncertainty caused by the doctrine which had deterred charities from engaging in advocacy.²¹⁴ This consequence is less dramatic since organisations could already engage in ancillary or incidental advocacy, but is likely to be more practically significant in the short term than the structural implications.

²¹⁰ Ibid 564 [68].

²¹¹ Ibid 566 [73].

²¹² Ibid 565 [71].

²¹³ See, eg, Amnesty International Australia, *Aid/Watch High Court Decision* (27 January 2011) <<http://www.amnesty.org.au/about/comments/24633>>.

²¹⁴ The first empirical study has recently been conducted as to this effect in Australia: Esther Abram, 'Freedom to Speak, Capacity to Act: Charity Law Reform Project — Removing the Barriers to Advocacy' (Report, Changemakers Australia, March 2011).

The most profound symbolic consequence is that advocacy has been accepted as a legitimate charitable activity. This will no doubt shape the charity sector's self-conception and its future engagement with government.

A Freedom of Expression

A less obvious cause for celebration is that the decision directly addresses the normative tension between the political purposes doctrine and the principle of freedom of expression, although this is less prominent in the majority judgment than might have been expected after the oral hearing. The irony, of course, is that Australia's protection of freedom of expression is limited in contrast with that of the US and Canada,²¹⁵ yet those countries consider similar restrictions on advocacy compatible with freedom of expression, although principally in relation to restrictions in tax legislation.

There are three key limitations to the implied freedom of political communication in Australia. First, its rationale is that the *Constitution* provides for a system of representative government²¹⁶ and freedom of communication is an 'indispensable incident' of that system.²¹⁷ The doctrine is therefore founded upon a very narrow version of the 'democratic' rationale for democracy, namely that '[d]emocratic decision making requires discussion and debate as well as voting, and a significant limit upon its deliberative process will significantly limit its democratic character.'²¹⁸

Second, that rationale results in the freedom protecting only discussion about 'political or government matters' which is necessary to enable free and informed electoral choices,²¹⁹ although this has been relatively generously interpreted, including for example discussion of the conduct of statutory authorities and public utilities and, to some extent, discussion of matters at the local, state or territory level.²²⁰ Throughout the world, political or government matters form the

²¹⁵ See generally Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2005).

²¹⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

²¹⁷ *Ibid* 559.

²¹⁸ Peter Jones, 'Freedom of Speech' in Edward Craig (ed), *Routledge Encyclopedia of Philosophy* (Routledge, 1998) vol 3, 762, 763. This definition is narrower than that employed by Meagher in his analysis of the underlying rationale: Dan Meagher, 'What Is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438. For a discussion of the other rationales for freedom of speech, see generally Barendt, above n 215, ch I.

²¹⁹ *Lange* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²²⁰ *Ibid* 561, 571–2. See also *Hogan v Hinch* (2011) 243 CLR 506, 543 [48] (French CJ); *Coleman v Power* (2004) 220 CLR 1, 45 [80], 49 [90] (McHugh J). The majority in *Hogan v Hinch* declined to discuss the submission in relation to the scope of the implied political freedom outside of the federal context: (2011) 243 CLR 506, 556 [99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). Communications concerning the exercise of judicial power, however, are not ordinarily within the *Lange* freedom, except to the extent that they concern the acts or omissions of the legislature or government: *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 361 [65]–[66] (McHugh J). This was reaffirmed recently in *Hogan v Hinch* (2011) 243 CLR 506, 554–5 [92]–[93] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

very core of the freedom, and typically warrant greater scrutiny or justification.²²¹

Third, the freedom does not confer personal rights on individuals, but rather precludes the legislature or executive from curtailing the freedom.²²² However, the freedom will invalidate laws only if: (i) the law effectively burdens freedom of communication about government or political matters in its terms, operation or effect; and (ii) the laws are not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.²²³ The rules of the common law must also be developed by reference to the same considerations.²²⁴

What is most striking is that this peculiarly confined freedom protects exactly the kind of activity that is proscribed by the political purposes doctrine. The political purposes doctrine proscribes exactly the kind of discussion and debate designed to inform voting choices — criticism of existing laws and government policy by those often best placed to observe and understand the effects of such laws and policy, especially in relation to typically under-represented segments of the community. Indeed, the doctrine directly targets information because it is ‘governmental’ or ‘political’, rather than incidentally restricting political communication, and is therefore harder to justify as compatible with the implied freedom.²²⁵ As Hayne J perceptively observed, the heart of the problem is that the implied freedom assumes the fundamental ‘public benefit’ of democratic debate, whereas the political purposes doctrine implicitly views political speech with ‘disapprobation’.²²⁶

Further, the implied freedom requires restrictions on political speech to be ‘reasonably appropriate and adapted to serve a legitimate end’ in a manner compatible with representative democracy. As discussed above, there is no principled justification for targeting the free speech of charities. Nor are the consequences, both existential and financial, ‘reasonably appropriate and adapted’ to any suggested justification. Rather, as argued above, the restrictions serve to diminish rather than enhance representative democracy. The political purposes doctrine is also a common law rule which should be developed in light

²²¹ See generally Barendt, above n 215, ch V.

²²² *Lange* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²²³ *Ibid* 561–2, reformulated in *Coleman v Power* (2004) 220 CLR 1, 50 [93] (McHugh J), 77–8 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J). See also *Hogan v Hinch* (2011) 243 CLR 506.

²²⁴ *Lange* (1997) 189 CLR 520, 568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²²⁵ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 169 (Deane and Toohey JJ). This was also emphasised in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 (Gleeson CJ) and *Hogan v Hinch* (2011) 243 CLR 506, 555–6 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

²²⁶ Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 154 (15 June 2010) 3086–92.

of the freedom,²²⁷ much as the High Court has diverged from English defamation law to protect this implied freedom.²²⁸

The political purposes doctrine, in effect, upends the hierarchy of values implicit in Australian public law and in the international jurisprudence on freedom of expression. As the majority rightly perceived, the argument that the political purposes doctrine maintains the ‘coherence’ of the law simply fails to recognise the deeper normative incoherence between a constitutional arrangement that depends upon freedom of political communication and a common law doctrine that targets precisely that form of communication.

This can be seen very clearly in the case of *Aid/Watch*, because the organisation acted as a ‘watchdog’ to influence the ‘free and informed’ choice of electors. Indeed, the European Court of Human Rights has recently equated the role of watchdogs with that of the privileged position of the press:

The Court has repeatedly recognised civil society’s important contribution to the discussion of public affairs ... The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social ‘watchdog’. In these circumstances, the Court is satisfied that its activities warrant similar *Convention* protection to that afforded to the press.²²⁹

Superficially, the *Aid/Watch* case rests on Australia’s particular constitutional framework. This helps legitimise Australia’s departure from common law doctrine, but may limit the decision’s utility in other jurisdictions.²³⁰ Yet the framework of representative democracy is applicable to most other comparable jurisdictions and, since most comparable jurisdictions expressly guarantee a broader notion of freedom of expression, the reasoning in *Aid/Watch* ought to be even more persuasive in those jurisdictions. This was recognised by Heath J in the recent New Zealand decision *Re Greenpeace of New Zealand Inc*, who had ‘no real concerns that the political system in Australia ought to bring about a different conclusion’, referring inter alia to the existence of the guarantees of freedom of thought, conscience and religion, and freedom of expression in the *New Zealand Bill of Rights Act 1990* (NZ).²³¹ However, Heath J held ‘with a degree of reluctance’ that the Court was bound by an earlier New Zealand Court

²²⁷ *Aid/Watch* (2010) 241 CLR 539, 556 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²²⁸ See *Lange* (1997) 189 CLR 520, 568–71 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²²⁹ *Társaság a Szabadságjogokért v Hungary* (2011) 53 EHRR 130, 136 [27] (citations omitted).

²³⁰ See, eg, *Re Draco Foundation (NZ) Charitable Trust* (Unreported, High Court of New Zealand, Ronald Young J, 15 February 2011), especially at [60].

²³¹ (Unreported, High Court of New Zealand, Heath J, 6 May 2011) [59]. Heath J also referred to the use of mixed member proportional voting systems and the use of select committees to enable policy to be properly debated as other key features of the New Zealand system.

of Appeal decision affirming *Bowman*.²³² Greenpeace has indicated it will appeal this decision to the Court of Appeal.²³³

There is, however, one obvious parallel between the constitutional doctrine and the political purposes doctrine — the idea of the appropriate ‘means’ of political communication. In *Coleman v Power*, a majority held that insults could constitute ‘political communication’. Gummow and Hayne JJ noted, for example, that insults and ‘invective have been employed in political communication at least since the time of Demosthenes.’²³⁴ Callinan J, however, thought that insults were not ‘capable of throwing light on government or political matters’,²³⁵ and were thus unprotected.²³⁶ While Heydon J seemed to accept that some political communication was insulting, he considered that ‘[t]o address insulting words to persons in a public place is conduct sufficiently alien to the virtues of free and informed debate on which the constitutional freedom rests that it falls outside of it.’²³⁷ As Arcioni has argued, Callinan J and Heydon J’s approach ‘painted a picture of the system of government as they believe it should exist, or as they believe it would most effectively operate’, rather than measuring the freedom against political reality.²³⁸

In *Aid/Watch*, Heydon J similarly disparaged Aid/Watch’s methods of political communication as failing to generate ‘debate ... so that some higher synthesis or more acute understanding of issues might emerge.’²³⁹ This echoes Callinan J’s criticisms in *Coleman v Power* that the insult in that case generated ‘heat’ rather than ‘light’²⁴⁰ — once again idealising public debate as a sphere of reason.²⁴¹ Nevertheless, the majority in *Aid/Watch*²⁴² clearly rejected Heydon J’s narrow construction of public debate as ‘civilised political discourse’²⁴³ — a welcome conclusion that recognises the practice and variety of political speech, especially in the contemporary media landscape.

²³² *Ibid*, agreeing with *Re Draco Foundation (NZ) Charitable Trust* (Unreported, High Court of New Zealand, Ronald Young J, 15 February 2011) that the Court was bound by *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (Court of Appeal).

²³³ Greenpeace New Zealand, *Greenpeace Will Appeal High Court Decision on Charitable Status* (10 May 2011) <<http://www.greenpeace.org/new-zealand/en/news/Greenpeace-will-appeal-High-Court-decision-on-charitable-status>>.

²³⁴ (2004) 220 CLR 1, 78 [197] (Gummow and Hayne JJ). See also at 45–6 [81] (McHugh J), 91 [238]–[239] (Kirby J).

²³⁵ *Ibid* 109 [291].

²³⁶ *Ibid* 113–14 [299].

²³⁷ *Ibid* 126 [332].

²³⁸ Elisa Arcioni, ‘Developments in Free Speech Law in Australia: *Coleman* and *Mulholland*’ (2005) 33 *Federal Law Review* 333, 352.

²³⁹ *Aid/Watch* (2010) 241 CLR 539, 561 [58].

²⁴⁰ *Coleman v Power* (2004) 220 CLR 1, 113–14 [299].

²⁴¹ See Arcioni, above n 238, 340.

²⁴² (2010) 241 CLR 539, 556 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²⁴³ This phrase comes from Arcioni, above n 238, 340.

B Public Law

Another cause of celebration is that the *Aid/Watch* decision infuses principles of public law into charity law. To some extent, this may have been the product of the happy circumstance that the solicitors for Aid/Watch were not traditional charity lawyers, but rather public lawyers.²⁴⁴

This infusion of public law principles in charity law is welcome, as charity law involves both private and public aspects. Charity is inspired by private persons and takes the form of private organisation, but its motive is to benefit the public, it acts in the public sphere, it affects the public, and more often than not it is supported by the public by way of donations of time and money, and to a lesser extent by tax concessions. Yet, because of its historical development through the private law field of trusts law, the ‘public’ implications of charity law have too often been obscured or under-theorised.

While all laws tend to be captive to the historical norms that shape their evolution, in the case of charity law this is exacerbated by two other factors. First, the role of charity has undergone significant historical shifts. For example, while religion was synonymous with charity in medieval times, post-Reformation charity was both secularised and turned into a primitive form of welfare provision. In Australia, unlike in the UK, early charitable institutions were often funded by the state. In the 20th century, the massive growth of the government and the welfare state radically reshaped the role of charity. The role of charity has also been reconfigured by the emergence of fields such as social justice and environmental protection.²⁴⁵ Centuries of case law have therefore embedded quite different contextual understandings of charity into legal doctrine.

Second, charity law developed in the courts of equity, which in the 19th century became famously inaccessible. The establishment in England and Wales of a Charity Commission partly offset the decline in litigation, but has also inhibited the development of case law. The cost and uncertainty of litigation continues to deter charities from litigating and clarifying the law.²⁴⁶

The private law context of charity law and the mismatch between a slowly developing law and a rapidly changing social role and context have combined to produce a law of charity that fails to give due recognition to the ‘public’ aspects of charity law. Indeed, although the key to the definition of charity is ‘public’ benefit and the key to the political purpose doctrine is the term ‘political’, there is a striking dearth of discussion as to the meaning of either of these terms, or

²⁴⁴ The solicitors for Aid/Watch were part of the Social Justice Practice at Maurice Blackburn, which specialises in public interest litigation.

²⁴⁵ See generally W K Jordan, *Philanthropy in England 1480–1660: A Study of the Changing Pattern of English Social Aspirations* (George Allen & Unwin, 1959); Jones, *History of the Law of Charity*, above n 16; Chesterman, above n 71; Jeremy Kendall and Martin Knapp, *The Voluntary Sector in the United Kingdom* (Manchester University Press, 1996); Mark Lyons, *Third Sector: The Contribution of Nonprofit and Cooperative Enterprise in Australia* (Allen & Unwin, 2001).

²⁴⁶ See, eg, James Goodman, ‘Inside the *Aid/Watch* Case: Translating Across Political and Legal Activism’ (2011) 3(3s) *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 46, 60, which discusses the high financial stakes for Aid/Watch in its application for leave to appeal to the High Court.

even recognition of their multi-layered nature. Worse, decisions and discussion often proceed on unarticulated and sometimes unfounded assumptions concerning the nature and role of charity. By infusing public law principles into its decision in *Aid/Watch*, the High Court points to a way of solving many of the doctrinal puzzles in charity law — by drawing in more clearly articulated, and more contemporary, theories of the public and political arena and the role of charity in them. Some of the possible implications of this approach are sketched in the conclusion of this article.

VI REFLECTION 2: DEFLATION

There were many reasons, then, to welcome the *Aid/Watch* decision. Yet, the further one reflects upon the decision, the more unanswered questions one confronts. For one thing, the decision creates uncertainty. On the issue of characterisation, the three judicial decisions differed considerably. The AAT found that *Aid/Watch* relieved poverty and advanced education, and otherwise fell into the fourth head; the Full Federal Court agreed but characterised its primary purpose as political.

In contrast, the majority of the High Court characterised *Aid/Watch* as falling within the fourth *Pemsel* head, as generating public debate ‘concerning the efficiency of foreign aid directed to the relief of poverty’.²⁴⁷ The majority did not, however, explain why it had rejected the earlier judicial characterisations of *Aid/Watch*’s purposes, and failed to discuss the characterisation issue in any detail. Heydon J, on the other hand, strongly rejected the argument that *Aid/Watch* either relieved poverty or advanced education, based on a narrow construction of ‘poverty’ as a lack of material prosperity (so that environmental objectives were possibly opposed to the relief of poverty) and on a narrow construction of education.²⁴⁸ Kiefel J similarly rejected the characterisation of *Aid/Watch* as educational and considered its connection to the relief of poverty too remote.²⁴⁹

The decision also fails to provide guidance in key respects. One concern is whether the decision applies to ‘political activities’ other than generating public debate, such as private lobbying of government officials or political campaigning — especially when read in light of the majority’s comment that the ‘particular ends and means’ used may disqualify an organisation from charitable status.²⁵⁰ It is unclear, therefore, whether *Aid/Watch* changes the legal position in relation to organisations such as GetUp! or political parties.

Another question, left expressly open, is the charitable status of entities engaging in public debate involving governmental activities in a field that has not already been identified as charitable (that is, within the first three *Pemsel* heads or the ‘balance of the fourth head’). For example, would an association formed to

²⁴⁷ *Aid/Watch* (2010) 241 CLR 539, 557 [47] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²⁴⁸ *Ibid* 562–4 [60]–[62].

²⁴⁹ *Ibid* 567–8 [80]–[86].

²⁵⁰ *Ibid* 557 [49] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

oppose government policy on Australian–Chinese relations be charitable? It is probable that the High Court’s intention was merely to restrict its ruling to the facts of the case (by following the conservative lead of counsel for Aid/Watch). However, the High Court could also be signalling that this kind of public debate may not be charitable.

One interpretation might be that this is because the purpose of such a charity would not be within the spirit and intendment of the preamble to the *Statute of Charitable Uses*. However, it is difficult to infer this because the majority failed to refer at all to the preamble, despite classifying Aid/Watch as falling within the fourth head. It may be simply that the requirement was satisfied because Aid/Watch was generating debate concerning a recognised *Pemsel* head, but it is not entirely clear. Further, there are authorities suggesting that the general purposes of government may be charitable.²⁵¹ If this authority is accepted, the *Statute of Charitable Uses* requirement would be superfluous.

The real difficulty, however, in determining the extent of the ruling in *Aid/Watch* lies in the fact that the High Court judgment does not clearly indicate whether the ‘public benefit’ lies primarily in the generation of public debate itself, in the charitable purpose which is being publicly debated, or in some combination of the two.

In one view, the public benefit largely arises out of the charitable purpose itself, and public debate is in a sense ancillary to this public benefit. Such a view may justify restricting the application of *Aid/Watch* to public debate concerning identified charitable purposes. A much broader view is that the public benefit resides in the public debate itself, inhering in the value of political speech in a democratic and pluralistic society. As noted earlier, this view would relieve courts from adjudicating on the merits of any particular viewpoint.

The trouble with the first view is that the High Court did not characterise public debate as a *means* of achieving the purpose of relieving poverty, but rather considered that the generation of lawful debate was in itself a purpose beneficial to the community. Further, that view does not sit easily with High Court’s discussion of the implied freedom of political communication. Yet the majority judgment also falls well short of describing political speech as inherently of public benefit; instead it emphasises that the implied freedom arises as a necessary incident of a constitutional system that provides for elections and referenda,²⁵² and restricts the ratio to topics already recognised as charitable.²⁵³

The compromise reached by the High Court may well mean that while there is general value in political speech, the context of that speech is also important in determining the ‘public benefit’ of that public debate. This may well be the route by which the judges grapple with the thorny questions of how, absent a political purposes doctrine, charity law might deal with (for example) racist societies and

²⁵¹ See Matthew Harding, ‘Distinguishing Government from Charity in Australian Law’ (2009) 31 *Sydney Law Review* 559.

²⁵² *Aid/Watch* (2010) 241 CLR 539, 555–6 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²⁵³ *Ibid* 557 [48].

organisations devoted to the repeal of anti-discrimination legislation — examples raised in the oral hearing,²⁵⁴ but not addressed in the judgment.

Ultimately, these various uncertainties stem from the absence of a clear rationale in the majority judgment. While the judges pointed to the constitutional assumption of the public benefit of political debate, its connection with the majority's conclusions was curiously oblique. Perhaps this reflects a reluctance to engage more fully with the controversial doctrine of the implied freedom of political communication because, despite referring to the implied freedom repeatedly during the hearing, the judgment fails to draw upon the relevant jurisprudence.

The absence of a clear rationale can also be partly attributed to the conservative line adopted by Aid/Watch in the hearing. In shying away from the more ambitious claim about the public benefit of public debate, and the 'functional' argument based on the intimate relationship between charity and politics, counsel missed an opportunity to set out a more compelling or broader rationale.

Indeed, although the High Court decision is a fitting successor to the liberalising charity law decisions in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)*²⁵⁵ in 2006 and *Federal Commissioner of Taxation v Word Investments Ltd*²⁵⁶ in 2008, it also represents a missed opportunity. The majority did not address the supposed rationales justifying the political purposes doctrine, nor did it reject the false dichotomy of charity and politics. More importantly, the Court failed to articulate a clear vision of the role of politics in charity, a vision in which it is an important and sometimes essential part of the mission of charities to criticise and influence legislation and government policy; in which charities' participation in public debate enriches public discourse and government decision-making; and in which charities, as well as governments, have a primary role of driving and fostering social change.

Importantly, such a vision fits well with other principles of public law. It invokes public law norms of participation and consultation, and builds upon ideals of deliberative decision-making and public engagement in decision-making. Further, charities promote the key public law norms of accountability and transparency by acting as a watchdog of government and of business. Ultimately, such a vision is grounded upon contemporary theories and conceptions of democracy and lawmaking that better reflect the complexity of modern governance.

VII REFLECTION 3: THE HOLE IN THE HEART

These reflections on the *Aid/Watch* case ultimately support Parachin's conclusion that there is a hole in the heart of charity law — namely the absence of a conception of 'charity' itself.²⁵⁷ The different decisions in *Aid/Watch* reflect, at

²⁵⁴ Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCA Trans 154 (15 June 2010) 1219–20 (Gummow J), 1386 (French CJ).

²⁵⁵ (2006) 228 CLR 168. This case considered the relationship between charity and government.

²⁵⁶ (2008) 236 CLR 204. This case considered the relationship between charity and business activity.

²⁵⁷ Parachin, above n 72, 899.

heart, different views about the appropriate role and nature of charity. Implicitly, the majority of the High Court endorsed a progressive view of charity which recognised the legitimacy of charitable advocacy and, further, the legitimacy of the form of advocacy undertaken by Aid/Watch.

In contrast, Heydon J endorsed a narrow traditional conception, in which poverty is relieved by direct distribution of aid and short-term increases of material prosperity, and education takes the rarefied form of debating societies. Although Kiefel J formally embraced a more progressive role for charity, she struggled with the idea that charities could achieve public benefit merely by ‘talking’ about issues.

Similarly, while the Full Federal Court broadly construed the environmental and social justice policies of Aid/Watch as ‘relieving poverty’, and considered the publication of research reports a legitimate form of ‘education’, the judges struggled with the idea of ‘campaigning’ charities. Perhaps the AAT came closest to articulating a modern vision of charity, most clearly in a passage where Downes J, after referring to extensive changes in administrative practice and law promoting public engagement and consultation, said:

Rules established a century ago relating to what is charitable need to be revisited in this light. If seeking to influence government to deliver more effective aid may improve the quality of the aid, may that not be charitable? If it is government policy to furnish aid to less developed countries, why would seeking to increase or redirect the aid not be charitable because the purpose is political? Why would similar considerations not apply to protection of the environment? If there was a time when robust attempts to influence government policy could not themselves be charitable, is that still the position?²⁵⁸

These underlying disagreements about the real nature of ‘charity’ have bedevilled charity law. Several puzzles can be identified in this debate. First, when does a charity stop being a private organisation for the public benefit because it is too closely intertwined with government or business (the ‘demarcation’ debate)? Second, to what extent should purposes that are not popularly regarded as charitable (for example, the purposes of an opera company or a private school) be considered ‘charitable’ in law (the ‘popular versus legal’ definition debate)? Third, when is an organisation promoting its own private interests rather than the public interest (the ‘public benefit’ debate)? Fourth, to what extent is ‘charity’ a progressive or conservative vision (the ‘ideological’ debate)? The final question, which underlies the other debates, is what, exactly, is the ‘good’ in charity?

Some insights into these puzzles are sketched here, although it is beyond the scope of this article to address them comprehensively. The aim is to probe what these puzzles reveal about our deeply held conceptions of charity, and to suggest what, exactly, is the ‘good’ in charity.

²⁵⁸ *Aid/Watch Inc v Federal Commissioner of Taxation* [2008] AATA 652 (28 July 2008) [21].

A The 'Demarcation' Debate

As already discussed, there have been remarkable historical shifts in the relationships between the three 'sectors' of public life (government, business and the not-for-profit sector). As charities have become more reliant on government funding and commercial partnerships, these entanglements reshape the nature of the charitable sector and confound traditional expectations of charities.

These anxieties suggest an 'ideal-type' charity, namely an organisation established and run by private individuals for the community out of pure altruism. In part, therefore, what distinguishes the charitable sector is that the driving force of action is this element of voluntarism or altruism, as the Sheppard Inquiry identified.²⁵⁹ In contrast, the driving force of an 'ideal-type' government is the obligation to serve the public welfare, and that of an 'ideal-type' business is self-interest in the form of profit. Part of the reason we value and support the charitable sector, therefore, is consensus on the moral value of selflessness and other-regarding behaviour, and (perhaps) our recognition that this moral impulse is weak in humans and requires encouragement. At least one element of the concept of charity, therefore, resides in the distinctive value of its *form*. This resonates with the literature identifying the 'process benefits' of charities, such as political pluralism, superior efficiency, promotion of individual freedom, and autonomy from government.²⁶⁰

The demarcation debate also reveals that the ways we think about charity are historically, socially and politically determined. Hospitals were originally charitable because they were considered institutions for the poor;²⁶¹ but in a context where private hospitals compete with not-for-profit hospitals, the tax-exempt status of hospitals has come under fire.²⁶² Similarly, newspapers, once highly profitable, are now increasingly becoming not-for-profit as their attached advertising businesses have dwindled.²⁶³ A classic marker of when government or not-for-profit provision is necessary is when such goods will not be provided

²⁵⁹ *Sheppard Report*, above n 12, 123–5. See also Rob Atkinson, 'Altruism in Nonprofit Organizations' (1990) 31 *Boston College Law Review* 501; OLRC, above n 18, 149; John F Coverdale, 'The Normative Justification for Tax Exemption: Elements from Catholic Social Thought' (2010) 40 *Seton Hall Law Review* 889, 898–9.

²⁶⁰ See, eg, Rob Atkinson, 'Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Synthesis' in Paul Bator, Frits Hondius and Penina Kessler Lieber (eds), *The Tax Treatment of NGOs: Legal, Fiscal and Ethical Standards for Promoting NGOs and Their Activities* (Kluwer Law International, 2004) 253, 259; David E Pozen, 'Remapping the Charitable Deduction' (2006) 39 *Connecticut Law Review* 531, 564–5.

²⁶¹ Chesterman, above n 71, 52.

²⁶² See, eg, John D Colombo, 'The Role of Tax Exemption in a Competitive Health Care Market' (2006) 31 *Journal of Health Politics, Policy and Law* 623.

²⁶³ Steve Coll, 'Nonprofit Newspapers', *The New Yorker* (online), 28 January 2009 <<http://www.newyorker.com/online/blogs/stevecoll/2009/01/nonprofit-newsp.html>>; Thomas Ferraro, 'US Bill Seeks to Rescue Faltering Newspapers', *Reuters* (online), 24 March 2009 <<http://www.reuters.com/article/2009/03/24/us-usa-congress-newspapers-idUSTRES2N67F20090324>>.

by the market, and this aspect has been very influential in the economic tradition of not-for-profit theory in the US.²⁶⁴

What this suggests is that there are four dominant mechanisms (government, business, the not-for-profit sector and the household sector) which produce all 'goods' (in the broadest sense). What we think of as 'naturally' falling within each domain depends upon economic, technological, social and political conditions. What is inherently 'charitable', therefore, resides less in the type of good than in the form of provision. This helps explain puzzles such as when economic development activities can be considered 'charitable'. While classically economic goods seem to fall within the natural domain of the market, they may well be 'charitable' under some circumstances, such as the provision of banking services or utilities in a community otherwise without.²⁶⁵

Yet economic theory tends to assume that the market is the most effective mechanism of provision, all else being equal, and both government and not-for-profit provision merely 'compensate' for market deficiencies.²⁶⁶ This is not historically accurate and also tends to assume as 'normal' what are in reality rather special conditions for the effective operation of a competitive market.²⁶⁷ An alternative, 'mixed systems', approach posits instead that while each sector has a natural 'domain', they also operate to supplement each other, providing compensatory and competitive mechanisms for producing 'goods'. This approach displaces the primacy of the market paradigm, and instead 'mixed systems' are seen as necessary to provide optimal outcomes for all. One example in which a 'mixed systems' perspective is relevant is in the vexed question of whether tax concessions distort the even playing field of capitalism.²⁶⁸

²⁶⁴ For an overview, see Richard Steinberg, 'Economic Theories of Nonprofit Organisations' in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2nd ed, 2006) 117.

²⁶⁵ An analogy can be made with *Federal Commissioner of Taxation v Wentworth District Capital Ltd* (2011) 191 FCR 151. This case concerned a tax exemption for a non-profit banking service in a rural town, which qualified as an 'association established for community service purposes' under the *Income Tax Assessment Act 1997* (Cth), rather than under the charitable tax exemption.

²⁶⁶ This is most famously articulated in the 'three failures' theory: see generally Burton A Weisbrod, 'Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy' in Edmund S Phelps (ed), *Altruism, Morality, and Economic Theory* (Russell Sage Foundation, 1975) 171; Burton A Weisbrod, *The Voluntary Nonprofit Sector: An Economic Analysis* (Lexington Books, 1977); Henry B Hansmann, 'The Role of Nonprofit Enterprise' (1980) 89 *Yale Law Journal* 835; Lester M Salamon, 'Of Market Failure, Voluntary Failure, and Third-Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State' (1987) 16(1-2) *Nonprofit and Voluntary Sector Quarterly* 29.

²⁶⁷ For alternative perspectives on the economic nature of community goods, see Roger A Lohmann, 'And Lettuce Is Nonanimal: Toward a Positive Economics of Voluntary Action' (1989) 18 *Nonprofit and Voluntary Sector Quarterly* 367; Johnny Rex Buckles, 'The Community Income Theory of the Charitable Contributions Deduction' (2005) 80 *Indiana Law Journal* 947.

²⁶⁸ A 'multiple pathways' model is similarly suggested in Lateral Economics, 'The Case for Retaining the FBT Concession for Not for Profit Hospitals/Aged Care and Public Benevolent Institutions (Charities)' (Report, April 2010) 42-3.

B The 'Popular versus Legal' Debate

Another puzzle is the disjuncture between the relief of poverty and other legally charitable objects. Early proposals to redefine the definition of charity focused on restricting the meaning to the relief of poverty or disadvantage,²⁶⁹ and others have proposed a 'moral hierarchy' of charity in determining access to tax benefits.²⁷⁰ In large part, this disjuncture reflects the historical origins of charity, which arose primarily in the context of relief of poverty. Even the advancement of education historically reflected a concern with poverty.²⁷¹

This disjuncture has been best explained by the Ontario Law Reform Commission ('OLRC') in its final report on charities.²⁷² The OLRC argued that the 'real' nature of charity is comprised of two key elements: (i) doing good (ii) for others.²⁷³ In defining 'good', the OLRC referred to a conception of ultimate human goods, such as knowledge and play, that has been set out in the work of the philosopher John Finnis.²⁷⁴ This treats matters such as spirituality, art, knowledge and the like as ends rather than means.

In the OLRC's view, the distinction between the 'popular' and 'legal' definition of charity reflects a distinction between the degree of deprivation and the means of flourishing.²⁷⁵ This interpretation suggests a distinction between, on the one hand, redressing disadvantage, and on the other, enriching individuals and communities in largely non-economic dimensions of human experience and life. However, the 'legal' concept of charity is united by the fact that both aspects are aimed at the full flourishing of individuals and the communities to which they belong.

This analysis sheds light on some of the puzzles of charity law. For example, the 'popular' understanding of charity as concerned with poverty can be readily generalised into a broader concern with redressing disadvantage. This helps explain the case of *Public Trustee*²⁷⁶ and the case of *Victorian Women Lawyers' Association*,²⁷⁷ both of which recognised as charitable bodies that were, at heart, addressing societal disadvantages. It is that concern which would distinguish such bodies from, for example, a white supremacist group.²⁷⁸

²⁶⁹ United Kingdom, Royal Commission on the Income Tax, *Report*, Cmd 615 (1920) 68 [307] ('*Colwyn Committee Report*'); United Kingdom, Royal Commission on the Taxation of Profits and Income, *Final Report*, Cmd 9474 (1955) 56–7 [170]–[172] ('*Radcliffe Report*').

²⁷⁰ *Goodman Report*, above n 89, 143–4 (minority report); Trevor C W Farrow, 'The Limits of Charity: Redefining the Boundaries of Charitable Trust Law' (1994) 13 *Estates and Trusts Journal* 306; Michael Gousmett, 'A Legislative Definition of "Charitable Purpose"' [2003] *New Zealand Law Journal* 78.

²⁷¹ Jordan, above n 245, 281.

²⁷² OLRC, above n 18.

²⁷³ *Ibid* 145–6.

²⁷⁴ *Ibid* 147–8. Finnis's ultimate goods include: life, knowledge, play, aesthetic experience, friendship, religion, and practical reasonableness (the basic good of being able to bring one's own intelligence to bear effectively on one's life).

²⁷⁵ *Ibid* 149.

²⁷⁶ (1997) 42 NSWLR 600.

²⁷⁷ (2008) 170 FCR 318.

²⁷⁸ OLRC, above n 18, 218.

Further, the OLRC's analysis sheds light on the traditional distinction between sport and charity. It is accepted doctrine that, in certain conditions, sporting activity can be charitable, especially where it is designed to address disadvantage. Yet sporting activity per se is not charitable, being of private interest only.²⁷⁹ If we accept the OLRC's analysis, however, sport can also be theorised as promoting the ultimate good of 'play' alongside its incidental by-products, such as promoting community life and health.

C *The 'Public Benefit' Debate*

The OLRC's two-part definition also helps elucidate the public benefit debate. In defining 'others', the OLRC employed a concept of 'obligational distance', in which the good was performed for the benefit of those to whom no real obligation is owed (unlike for example a family or friend).²⁸⁰ This definition imports therefore the crucial element of altruism as part of the 'good' of charity.

This element also makes sense of the puzzle in charity law about what constitutes the 'public' for the purposes of analysing public benefit. The more remote the beneficiary is from any obligational relationship, the more clearly 'public' the organisation is. Indicia used in the case law such as geographical criteria, the openness of the group, and the size of the group act as proxies for this element of obligational distance.²⁸¹ The 'public' requirement, therefore, is intimately linked to the moral value of other-regarding behaviour.

D *The Ideological Debate*

The debate over the definition of charity is in large part an ideological debate. Chesterman's critique of charity law²⁸² reflected perhaps the high noon of progressive belief in the welfare state. The 19th century, in contrast, conceived of charity law in a moralistic, individualistic fashion that would be considered regressive today.²⁸³ This ideological debate underlies Aid/Watch's claim that it 'believe[s] in solidarity not charity'.²⁸⁴

Charity can play both sides of the political fence. The UK Labour Government spent considerable political energy on reforming charities and championing their voice; the succeeding coalition government has championed charities as the heart of the 'Big Society'.²⁸⁵ To some extent, this reflects the contemporary consensus that neither government nor the market is necessarily a 'first-best' option, as well as shifting practices which encourage integration between the three sectors. To some extent, it also reflects a political enthusiasm on both sides of the fence to slim down government, empower citizens and generate a sense of community

²⁷⁹ Dal Pont, *Law of Charity*, above n 3, 281–2 [12.2]–[12.3].

²⁸⁰ OLRC, above n 18, 150.

²⁸¹ Dal Pont, *Law of Charity*, above n 3, 48–59 [3.3]–[3.19].

²⁸² Chesterman, above n 71.

²⁸³ *Ibid* ch 4.

²⁸⁴ Aid/Watch, *About Aid/Watch*, above n 123.

²⁸⁵ Pete Alcock, 'Building the Big Society: A New Policy Environment for the Third Sector in England' (2010) 1 *Voluntary Sector Review* 379.

and self-empowerment, in part to counter widespread cynicism and political apathy. The values that can be ascribed to charity are many and various, and come close to representing a modern political consensus — for example, deliberative democracy, political participation and engagement, devolved decision-making, individual empowerment and autonomy, social capital, civil society, and the downsizing of government. What is also good about charity, then, is that it represents the ‘liberal’ sphere in a liberal democracy — ‘society’ as opposed to ‘the state’ or even ‘its citizens’, a mode of human interaction that is foundational to, yet distinct from, a polity.

VIII CONCLUSION

When we think about what is ‘good’ about charity, several threads of thought can be distinguished. First, one facet of ‘charity’ relates to valuable dimensions of human experience and life which are not easily quantified or assimilated into the public sphere or the market. Second, another facet reflects a concern with deprivation and disadvantage. Third, ‘charity’ also reflects the moral value of other-regarding and altruistic behaviour. This is more important than the type of good produced, although charity frequently provides under-served goods which itself is a valuable benefit. Finally, the value of ‘charity’ can also be interpreted as grounded in its promotion of liberal attributes, which are foundational to a healthy and vibrant society and democracy.

These threads provide us with some guideposts on the way to locating the ‘good’ (or, more likely, multiple goods) of charity, and sketch out some broad contours to the concept of charity. Broad as these contours are, these threads help us to think through some of the puzzles of charity law, and identify the policy which charitable privileges and tax concessions aim to promote.

It also helps us put the ‘hard cases’ posed by the judges in *Aid/Watch* in context. Arguably, examples such as racist societies are not ‘hard’ because they conflict with our ideas of charity, but rather because they conflict with core political norms, such as fundamental principles of equality and non-discrimination, as Drassinower suggests.²⁸⁶ These cases could be accommodated by pre-existing doctrine, such as the rules relating to illegality, public policy, or public benefit. An alternative approach would recognise the privileges of charity as being founded on the key role charity plays in sustaining our liberal democracy and society. Such an approach would logically require basic coherence between core political norms and charitable objects, while preserving a great deal of latitude for organisations to define other goods and means of achieving charitable objects.

²⁸⁶ There will, of course, always be disputes about which norms are ‘core’ political norms, and the application of such norms to a particular context. To some extent, this can be addressed in a legal context by assessing the strength of particular legal norms. This is done in various contexts such as interpreting statutes in light of principles of human rights, or assessing whether a norm has become a norm of customary international law. For example, see the discussion by Lord Steyn of ‘the legal right of equality with the correlative right of non-discrimination on the grounds of race’ in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1, 46 [46].

Finally, our conception of 'charity' can be refined through cross-fertilisation with public law theory, as suggested above. Importantly, crucial distinctions can be made within the categories of 'politics' and 'public', which are neither self-explanatory nor indivisible. For example, it is possible to distinguish at the core of the 'political' the concept of 'party political'. Party politics is most visibly manifested not only in political parties but also, in a Westminster system, in Parliament and the executive. There may well be a useful distinction between these institutions and the manifold institutions of 'government', which now extends to the most petty of bureaucracies.

Further, more thinking can be done about the overlapping 'public' nature of charities and government in the context of devolved service delivery. Much discussion has occurred, for example, in the analogous realm of the scope of the *Human Rights Act 1998* (UK) c 42, in the context of the key phrase 'functions of a public nature', along with the more traditional sphere of judicial review.²⁸⁷

There is also much to be said for more careful distinctions between the 'private' and 'public' aspects of charity, so that (for example) respect for the 'private' origins and institutional form of charity should encourage courts to respect organisations' private definitions of the public good and their means for achieving it. Some of the 'public' aspects of charity, such as the potential to harm the public and the potential for fraud or misconduct, are more appropriately addressed by targeted regulation.

Another aspect of public law that may enrich charity law is the use of human rights norms to mark out appropriate limits to freedom of expression. For example, qualifications to the freedom of expression such as respect for the rights or reputations of others, and countervailing provisions such as the obligation to prohibit 'advocacy of national, racial or religious hatred',²⁸⁸ provide insights into why we object to conferring charitable status on racist or discriminatory societies — namely, because of the requirements of other fundamental liberal principles. Such an analysis accords with Drassinower's analysis of the levels of fundamental political agreement and the conditions of 'legality', discussed above.

Finally, there is much to be learnt from recent debate in public law about the institutional and constitutional competence of judges, since the political purposes doctrine is ultimately grounded on a claim that is familiar to public lawyers — the need for judicial restraint. Scholars have sought to identify the factors that affect both the institutional and constitutional competence of judges to make decisions. For example, Kavanagh has theorised that a decision-maker should be granted substantial deference only when the judge recognises 'institutional shortcomings', such as a deficit of institutional competence, expertise or institutional or democratic legitimacy, or where there are prudential reasons to

²⁸⁷ See, eg, Stephanie Palmer, 'Public Functions and Private Services: A Gap in Human Rights Protection' (2008) 6 *International Journal of Constitutional Law* 585; Colin D Campbell, 'The Nature of Power as Public in English Judicial Review' (2009) 68 *Cambridge Law Journal* 90.

²⁸⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 20(2).

defer.²⁸⁹ King has elaborated a ‘contextual institutional approach’, which is grounded on a concept of the inter-institutional comity of, and collaboration between, branches of government, and identifies at least four general principles of restraint or deference, to be applied in context and when relevant: polycentricity, expertise, flexibility and democratic legitimacy.²⁹⁰

These approaches use principles to structure judicial decision-making that require careful identification of the particular features of a decision that demand deference, in contrast to the crude ‘all-or-nothing’ political purposes doctrine. Applying these principles makes some sense of the concern about ‘party political purposes’. Determining the ‘public benefit’ of party politics is likely to pose institutional problems in determining ‘benefit’ and, importantly, is more likely to implicate democratic legitimacy. Yet, rather than a black-and-white rule, the principles of restraint need to be applied after a careful consideration of all the facts and the particular context — what Santow J was doubtless referring to when he suggested that not all causes were ‘automatically “political”’.²⁹¹

IX POSTSCRIPT

Since this article was prepared for publication, the Australian government has announced an ambitious agenda for reform of not-for-profits, including a statutory definition of charity to be introduced in 2013 to be administered by a new Commonwealth regulator for charities and not-for-profits, the Australian Charities and Not-for-Profits Commission.²⁹² The Australian government issued a consultation paper on the statutory definition in late 2011²⁹³ and intends to issue an exposure draft of the statutory definition in early 2012.

²⁸⁹ Aileen Kavanagh, ‘Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication’ in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008) 184.

²⁹⁰ Jeff A King, ‘Institutional Approaches to Judicial Restraint’ (2008) 28 *Oxford Journal of Legal Studies* 409, 435.

²⁹¹ *Public Trustee* (1997) 42 NSWLR 600, 620.

²⁹² Commonwealth of Australia, ‘Not-for-Profit (NFP) Sector Reforms’ (Fact Sheet, 28 July 2011) <http://www.futuretax.gov.au/content/Content.aspx?doc=FactSheets/reform_for_nfp_sector.htm>; The Treasury (Cth), *Not-for-Profit Reform* <http://treasury.gov.au/content/not_for_profit.asp?ContentID=2188&titl=Not-for-profit%20Reform>; Commonwealth of Australia, *Australian Charities and Not-for-Profits Commission Implementation Taskforce* <<http://acnctaskforce.treasury.gov.au>>.

²⁹³ Commonwealth of Australia, ‘A Definition of Charity’ (Consultation Paper, October 2011) <http://www.treasury.gov.au/documents/2161/PDF/definition_v6.pdf>.