HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

AID/WATCH INCORPORATED APPELLANT

AND

COMMISSIONER OF TAXATION RESPONDENT

Aid/Watch Incorporated v Commissioner of Taxation [2010] HCA 42
1 December 2010
S82/2010

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1, 2 and 3 of the order of the Full Court of the Federal Court of Australia made on 23 September 2009, and in their place order that the appeal to that Court be dismissed.*

On appeal from the Federal Court of Australia

Representation

D L Williams SC with S Kaur-Bains and R L Seiden for the appellant (instructed by Maurice Blackburn Lawyers)

D M J Bennett QC with M N Allars and D F C Thomas for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Aid/Watch Incorporated v Commissioner of Taxation

Taxation – Charitable institution – Appellant had object of promoting greater efficiency and effectiveness of foreign aid – Whether appellant "charitable institution" for purposes of Commonwealth tax exemptions and concessions – Whether meaning of "charitable institution" in revenue laws governed by law of charitable trusts – Whether meaning of "charitable institution" interpreted as at time of enactment – Whether appellant's main, predominant or dominant objects charitable – Whether for relief of poverty – Whether for advancement of education – Whether otherwise for purpose within spirit and intendment of preamble to Statute of Elizabeth 1601 (43 Eliz I c 4).

Trusts – Charitable trusts – Political objects doctrine – Whether, and to what extent, doctrine recognised by common law of Australia.

Words and phrases – "charitable institution", "political objects", "political purposes".

A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 176-1.
Fringe Benefits Tax Assessment Act 1986 (Cth), s 65J(1)(baa).
Income Tax Assessment Act 1997 (Cth), s 50-5.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN AND BELL JJ. The appellant ("Aid/Watch") was incorporated on 26 May 1993 pursuant to the *Associations Incorporation Act* 1984 (NSW). From 14 July 2000 it was endorsed as a "charitable institution" and thus an entity exempt from income tax liability under the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act"). From 1 July 2005 Aid/Watch also was endorsed as a "charitable institution" for the purposes of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) ("the FBT Act") and the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act"). These endorsements were revoked by the respondent ("the Commissioner") with effect from 2 October 2006. Thereafter Aid/Watch lodged an objection to the revocations which was disallowed by the Commissioner on 6 March 2007.

2 On 28 July 2008 the Administrative Appeals Tribunal (Downes J) ("the AAT") set aside the decision of the Commissioner and determined that Aid/Watch was a "charitable institution" within the meaning of the relevant legislation[1].

3 Upon appeal by the Commissioner, the Full Court of the Federal Court (Kenny, Stone and Perram JJ) set aside the decision of the AAT and affirmed the objection decision of the Commissioner of 6 March 2007[2]. Aid/Watch now appeals to this Court. For the reasons which follow the appeal should be allowed and the decision of Downes J restored.

The Full Court reasons

4 The Full Court referred[3] to the statement in *Federal Commissioner of Taxation v Word Investments Ltd*[4]:

> "[I]t is necessary to examine the objects, and the purported effectuation of those objects in the activities, of the institution in question. In examining the objects, it is necessary to see whether its main or predominant or

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

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

3 (2009) 178 FCR 423 at 429 [29].

4 (2008) 236 CLR 204 at 217 [17]; [2008] HCA 55. See also *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375 at 442, 450; [1952] HCA 48.

> dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable[5]."

5 The Full Court emphasised that it was common ground between the parties that Aid/Watch is an organisation concerned with promoting the effectiveness of Australian and multinational aid provided in foreign countries by means which include investment programs, projects and policies[6]. Their Honours referred to the evidence and said of the activities of Aid/Watch[7]:

> "It researches 'generally in partnership with people that are recipients of the aid and non-government organisations'; it brings the issues it identifies to light by publicly releasing the reports that are the result of its research; and it campaigns for changes to the ways in which aid is delivered through media releases and public events designed to influence relevant agencies to alter the way aid programs are administered."

6 The Full Court remarked that while the activities of Aid/Watch might be described as educational, this was "a long way from being the dominant activity"[8]. Their Honours also said[9]:

> "This concern [of Aid/Watch] with the effectiveness of aid delivery is clearly aimed at the relief of poverty. Its premise is that if too little aid is delivered, if aid is delivered to the wrong areas, or if aid is of a particularly low quality it will be ineffective, or at least less efficient, at achieving its goal: namely, the relief of poverty. By promoting the effectiveness of foreign aid, Aid/Watch clearly seeks to promote more efficient use of resources directed to the relief of poverty. Indeed, it may be said that the focus on ensuring that aid is environmentally sustainable is also directed towards the relief of poverty. Where aid is delivered in an

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5 *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436 at 447, 448, 450, 452; [1943] HCA 34.

6 (2009) 178 FCR 423 at 424 [1].

7 (2009) 178 FCR 423 at 427 [17].

8 (2009) 178 FCR 423 at 433 [46].

9 (2009) 178 FCR 423 at 427 [18].

unsustainable way it may destroy ecosystems upon which communities rely in order to prosper."

7 However, the Full Court concluded[10]:

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

8 Because the immediate and prevailing aim of Aid/Watch was "to influence government" this, as a matter of the law of charitable trusts, "invalidated" any claim to charitable status for the purposes of the federal revenue laws[11].

9 In this Court, Aid/Watch challenges these conclusions.

Tax exempt status

10 In order to acquire and retain tax exempt status under the relevant provisions of the 1997 Act (s 50-5) and the FBT Act (s 65J(1)(baa)), and to enjoy tax concessions under the GST Act (s 176-1), it is necessary that Aid/Watch answer the description of a "charitable institution". Section 50-5 of the 1997 Act appears in Pt 2-15, Div 50 and is headed "Charity, education, science and religion". Item 1.1 of s 50-5 identifies as an "Exempt entity" a "charitable institution" that also meets the special conditions set out in s 50-50 (dealing with presence in Australia) and s 50-52 (requiring an endorsement by the Commissioner, as an entity exempt from income tax, pursuant to s 50-105). Charitable institutions are also required to be endorsed by the Commissioner under the FBT Act (ss 65J(1A), 123E) and the GST Act (s 176-1).

11 The term "charitable institution" is not defined. It is this circumstance which gives rise to the issues in this litigation. These issues concern the

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10 (2009) 178 FCR 423 at 430-431 [37].

11 (2009) 178 FCR 423 at 430 [34].

classification of the purposes of Aid/Watch as "political" and therefore as non-charitable in character.

Charity and revenue legislation

12 There is a long history of revenue legislation containing provisions respecting charitable institutions. The first British income tax statute, the *Income Tax Act* 1799[12], stated:

> "That no corporation, fraternity, or society of persons established for charitable purposes only, shall be chargeable under this Act, in respect of the income of such corporation, fraternity, or society."

Provisions respecting charitable institutions have not always been designed to favour the revenue position of such bodies. For example, the *Succession Duty Act* 1853 (UK)[13] imposed succession duty at rates beginning at one percent in respect of dispositions or devolutions in favour of close relatives and rising to ten percent in respect of dispositions or devolutions in favour of strangers (s 10). This highest rate of ten percent also was imposed upon dispositions in favour of "a trust for any charitable or public purposes" (s 16).

13 The issue of statutory construction in *Commissioners for Special Purposes of Income Tax v Pemsel*[14] concerned the provision in the *Income Tax Act* 1842 (UK)[15] providing an allowance in respect of rents and profits of land "vested in trustees for charitable purposes, so far as the same are applied to charitable purposes"[16]. The majority of the House of Lords held that notwithstanding the application of the statute throughout the United Kingdom, and in particular in Scotland, the expression "trust for charitable purposes" and other expressions in the statute containing the word "charitable" were to be construed not according to some popular understanding of charity, which was seen as requiring the relief of

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12 39 Geo III c 13, s 5.

13 16 & 17 Vict c 51.

14 [1891] AC 531.

15 5 & 6 Vict c 35, s 61.

16 The lengthy legislative provision is set out in full in the speech of Lord Halsbury LC: [1891] AC 531 at 540-541.

poverty, but with the technical meaning given by the English law of trusts. Under that law, as Barwick CJ later put it[17], not every purpose beneficial to the community is a charitable purpose; the purpose must be "within the equity of the preamble to the Statute of Elizabeth[18]". The equity of the preamble may operate upon additional matters and circumstances which lie beyond its actual terms[19].

14 It is against this background that in the early years of the Commonwealth the Parliament enacted the *Land Tax Assessment Act* 1910 (Cth), the *Estate Duty Assessment Act* 1914 (Cth) ("the Estate Duty Act") and the *Income Tax Assessment Act* 1915 (Cth). Each statute contained a provision for favourable treatment for "charitable" institutions[20].

15 In *Chesterman v Federal Commissioner of Taxation*[21] the Privy Council took as a starting point the decision in *Pemsel* and held that the expression "charitable purposes" in s 8(5) of the Estate Duty Act was used in its technical sense and did not bear any different and popular meaning. Their Lordships concluded that a gift of a fund to provide prizes for competitions in physical, moral and literary excellence, without regard to the pecuniary means of the competitors, was for charitable purposes within the meaning of the legislation. They said[22]:

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17 *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 667; [1971] HCA 44. See also at 671 per Windeyer J.

18 1601 (43 Eliz I c 4).

19 See *Nelson v Nelson* (1995) 184 CLR 538 at 552-554; [1995] HCA 25.

20 Sections 13(e), 8(5) and 11(d) respectively.

21 (1925) 37 CLR 317; [1926] AC 128. See also *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 at 245-246; [1987] HCA 30; *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 220-221; [1996] HCA 47; *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 261 [24]-[25]; [2005] HCA 28.

22 (1925) 37 CLR 317 at 319; [1926] AC 128 at 130-131. See also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585-586 [45]-[46], 589 [57]; [1998] HCA 59.

> "The [taxpayers] contend that the word 'charitable' in the Act bears its technical legal meaning as in the Statute of Elizabeth. The [Commissioner] contends that it bears its popular meaning, which involves the idea of assisting poverty or destitution and which may perhaps be expressed by the word eleemosynary."

It was this latter submission that was rejected. The result was to deny the limitation which the submissions by the Commissioner had sought to impose upon the favourable treatment given to taxpayers by s 8(5) of the Estate Duty Act.

16 The legislative response to the decision in *Chesterman*[23] was the amendment of s 8(5) of the Estate Duty Act[24]. This, however, was not to vindicate the Commissioner's construction but to assist taxpayers by the addition of favourable treatment for any entity which was a "public benevolent institution in Australia". As Starke J emphasised in *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation*[25], that expression had no technical legal sense and thus was to be understood in accordance with common usage. The exempt entities for which provision now is made by ss 50-5 and 50-10 of the 1997 Act include "religious", "scientific" and "public educational" institutions, and bodies "established for community service purposes (except political or lobbying purposes)".

17 In the present litigation, by way of contrast to the stance taken in the unsuccessful submissions in *Chesterman*, the Commissioner relies upon what is said to be the technical meaning of "charitable" to narrow the area of exemption from the revenue law.

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23 See *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224 at 231; [1931] HCA 20.

24 *Estate Duty Assessment Act* 1928 (Cth), s 5(b).

25 (1931) 45 CLR 224 at 231-232. See, further, Chesterman, "Foundations of Charity Law in the New Welfare State", (1999) 62 *Modern Law Review* 333 at 340-342.

Statutory construction

18 The speech of Lord Macnaghten in *Pemsel*[26] is the source of the modern classification of charitable trusts in four principal divisions, namely, trusts for the relief of poverty, for the advancement of education, for the advancement of religion and for other purposes beneficial to the community. But even in 1891, the case law which gave the term "charitable" its technical meaning had developed considerably since the time of the British income tax statute of 1799. The case law may be expected to continue to do so as the cases respond to changed circumstances. As Lord Wilberforce put it, the law of charity is a moving subject which has evolved to accommodate new social needs as old ones become obsolete or satisfied[27].

19 There thus is engaged in the consideration of the revenue legislation upon which this appeal turns an important principle of statutory construction.

20 A law of the Commonwealth may exclude or confirm the operation of the common law of Australia upon a subject or, as in the present case, employ as an integer for its operation a term with a content given by the common law as established from time to time. The phrase "charitable institution" employed in s 50-5 of the 1997 Act does not give to that provision the character which was fatal to the validity of s 12 of the *Native Title Act* 1993 (Cth). Section 12, by giving "the force of a law of the Commonwealth" to "the common law of Australia in respect of native title", unsuccessfully attempted to engage s 109 of the Constitution to make that common law immune from affection by State laws[28]. No such issue arises respecting s 50-5.

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26 [1891] AC 531 at 583. The degree to which Lord Macnaghten drew upon the argument of Sir Samuel Romilly in *Morice v Bishop of Durham* (1805) 10 Ves Jun 522 at 532 [32 ER 947 at 951] has been a matter of some debate: *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 667.

27 *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 154. See also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 582 [34].

28 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 487-488; [1995] HCA 47; see also *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [102]; [2003] HCA 2; and

(Footnote continues on next page)

21 However, in *National Anti-Vivisection Society v Inland Revenue Commissioners*[29] Lord Wright advanced, in support of the conclusion that the Society was devoted to the pursuit of "political" purposes and therefore was not a body "established for charitable purposes only" within the meaning of the *Income Tax Act* 1918 (UK), the proposition that this result would prevent the Society "from claiming the benefit of being immune from income tax, which would amount to receiving a subsidy from the state to that extent". The effect of the submissions for the Commissioner in the present case was that the case law respecting the exclusion of "political" purposes from charitable purposes should be applied and developed consistently with the remarks of Lord Wright.

22 That would not be a proper approach to the construction of the 1997 Act, the FBT Act or the GST Act. In *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[30], Gleeson CJ, Gaudron and Gummow JJ remarked that the interrelation and interaction between the common law and statute may trigger varied and complex questions. They went on to consider instances where statute might provide an analogy for the purpose of developing the common law, and distinguished this from the process of statutory construction itself[31].

23 Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time. Further, where, as here, the general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.

24 Accordingly, the use of the term "charitable" in the phrase "charitable institution" in s 50-5, item 1.1 of the 1997 Act and the corresponding provisions

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Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2) (2000) 96 FCR 491 at 504-510 [29]-[43].

29 [1948] AC 31 at 52.

30 (1999) 201 CLR 49 at 59-60 [18]; [1999] HCA 67.

31 (1999) 201 CLR 49 at 60 [19]-[20].

of the FBT and GST Acts is to be understood by reference to its source in the general law as it is developed in Australia from time to time.

Revenue law of the United States and Canada

25 In some jurisdictions the revenue law is expressed in terms which limit the exempt status of charitable institutions. Thus, the United States Internal Revenue Code limits tax exempt status to charities which dedicate no "substantial part" of their activities to attempting "to influence legislation"[32]. The result is that an institution whose purposes are charitable under the general law may be excluded from tax exempt status[33]. But that is not the form taken by the 1997 Act, the FBT Act or the GST Act.

26 The Canadian income tax legislation[34] provides for the registration of charitable organisations and charitable foundations[35]. It makes express provision for the conduct of "political activities"[36]; these are considered to be charitable activities or charitable purposes, only if they are of an ancillary and incidental nature and if they do not include the direct or indirect support of, or opposition to, any political party or candidate for public office. The special treatment in the Canadian statute law of "political activities" distinguishes it from the Australian legislation.

Charitable purposes which are "political"

27 Here lies the area of disputed principle between Aid/Watch and the Commissioner. The dispute is occasioned not by the terms of the revenue legislation itself but by the content of the general law respecting charitable purposes. The parties are at odds as to the significance now to be attached in this Court to a line of authority apparently beginning with remarks of Lord Parker of

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32 26 USC §§501(c)(3), 501(h).

33 *Regan v Taxation with Representation of Washington* 461 US 540 (1983); *Scott and Ascher on Trusts*, 5th ed (2009), vol 6 at 2580, §38.7.9.

34 *Income Tax Act*, RSC 1985, c 1 (5th Supp).

35 Section 248(1) (definition of "registered charity").

36 Section 149.1(6.1)-(6.2).

Waddington in the House of Lords in *Bowman v Secular Society Ltd*[37]. His Lordship said:

> "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."

28 From those remarks there has developed since 1917 a body of English case law construing the phrase "political objects". These objects are not seen as limited to changes to the law of England or elsewhere. Both those who advocate change and those who oppose it pursue political objects in the relevant sense. Further, a trust with a principal purpose to procure a reversal of government policy, or of particular administrative decisions of government authorities, is proscribed as a trust for "political purposes"; this is so whether the government is that in England or elsewhere. Such trusts, even if otherwise within the spirit and intendment of the preamble to the Elizabethan statute, can never be regarded as being for the public benefit in the sense required for a charitable trust.

29 These propositions were adopted by Slade J in *McGovern v Attorney-General*[38]. They were applied by the English Court of Appeal in *Southwood v Attorney-General*[39]. They were applied also by the Federal Court of Appeal in Canada in the influential decision of *Positive Action Against Pornography v Minister of National Revenue*[40], when construing the phrase "political activities" in the Canadian revenue legislation. *McGovern* was

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37 [1917] AC 406 at 442.

38 [1982] Ch 321 at 340.

39 [2000] WTLR 1199.

40 [1988] 2 FC 340 at 352-355. See also *Action by Christians for the Abolition of Torture v Canada* (2002) 225 DLR (4th) 99 at 113-117 [36]-[53], concluding that the exercise of moral pressure on government is a political purpose or activity. In the latter case, the Canadian Supreme Court refused leave to appeal: (2003) 320 NR 394 (note).

followed, with some reluctance, in New Zealand[41]. *Bowman* was adopted in India[42].

30 The only authority to which Lord Parker referred in *Bowman* was *De Themmines v De Bonneval*[43]. The trust in that case was for the promotion of the doctrine of the absolute and inalienable Papal supremacy in ecclesiastical matters by the printing and circulation of a treatise by 37 French bishops. The trust failed, as the law in England[44] then stood[45], but this was because the trust was considered to be for a superstitious use and thus at variance with English public policy[46]. In the *Anti-Vivisection Case*[47], Lord Simonds considered that Lord Parker may have been influenced by a passage in the first edition of Tyssen, *The Law of Charitable Bequests* (published in 1888) stating that the law would "stultify itself" if it were held that "it was for the public benefit that the law itself should be changed"[48]. What was involved in the concept of stultification was not further explained.

31 Tyssen referred to, but Lord Parker did not rely upon, the decision of Knight-Bruce V-C in *Habershon v Vardon*[49], where the testator's object had been

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41 *Re Collier (Deceased)* [1998] 1 NZLR 81 at 88-91. See also *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 695-696.

42 *Tribune Press, Lahore (Trustees) v Income Tax Commissioner, Punjab, Lahore* [1939] 3 All ER 469 at 475-476; *Subhas Chandra v Gordhandas I Patel* (27) AIR 1940 Bombay 76 at 80, 81; *Hidayat Beg v Behari Lal* (28) AIR 1941 Allahabad 225 at 234; Iyer, *The Indian Trusts Act*, 2nd ed (1983) at 119.

43 (1828) 5 Russ 288 [38 ER 1035].

44 But not in the Australian colonies, where the law as to superstitious uses did not apply: *Nelan v Downes* (1917) 23 CLR 546 at 550, 568, 572; [1917] HCA 51.

45 Before the enactment of the *Roman Catholic Charities Act* 1832 (2 & 3 Will IV c 115).

46 (1828) 5 Russ 288 at 297 [38 ER 1035 at 1038].

47 [1948] AC 31 at 62.

48 At 176-177.

49 (1851) 4 De G & Sm 467 [64 ER 916].

"the political restoration of the Jews to Jerusalem and to their own land". The trust was void because this acquisition of political power would be by creation of a revolution in a friendly country and would be inconsistent with the amicable relations between Britain and the Sublime Porte. Tyssen, somewhat ingenuously, later took the view that the terms of the bequest did not indicate any contemplation by the testator of "unconstitutional measures" to effect his object within the Ottoman Empire. Tyssen then added[50]:

> "The case, therefore, is an authority on all gifts for promoting alterations in the constitution of foreign countries, whatever means may be employed for effecting such alterations; and we submit that the same principle would apply to gifts for promoting alterations in our own laws, at least when such gifts are not framed as gifts to existing associations."

32 Professor Sheridan identified[51] as perhaps the earliest example of an argument concerning a charitable purpose connected with politics, the brief decision of Stirling J in *In re Scowcroft*[52]. But Stirling J had upheld a trust to maintain a village hall "for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing".

33 Moreover, in 1892, Chancellor Boyd, when upholding a trust to promote the adoption by the Canadian Parliament of legislation prohibiting the manufacture or sale of intoxicating liquor, had considered the "political aspect" of the trust[53]. In his view the organism of government was moved and statutes shaped by the education of public opinion; to seek the amendment of the law, by means according to law, could not be stigmatised as a purpose contrary to law.

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50 Tyssen, *The Law of Charitable Bequests*, (1888) at 177-178.

51 Sheridan, "Charity versus Politics", (1973) 2 *Anglo-American Law Review* 47 at 47.

52 [1898] 2 Ch 638.

53 *Farewell v Farewell* (1892) 22 OR 573 at 579-581.

The *Charities Act* 2006 (UK) ("the 2006 Act")

34 In *Hanchett-Stamford v Attorney-General*[54], Lewison J held that the 2006 Act does not change "the fundamental principle that if one of the objects or purposes of an organisation is to change the law, it cannot be charitable".

35 In England some alleviation of the rigour of this rule is found by reliance upon statements in the *Anti-Vivisection Case*[55] to the effect that a political purpose which is merely subsidiary or ancillary to a main or leading purpose that is charitable does not deny the validity of the trust. Section 4 of the 2006 Act directs the Charity Commission for England and Wales to issue guidance respecting the "public benefit" to which trustees of charitable bodies must have regard when exercising their powers or duties. The Commission takes the position that if a change or continuation of the law, policy, or the decisions of central or local governments or other public authorities would support the charitable purposes of the trust or organisation, then a campaign for that change or for preservation of the *status quo* is permissible[56].

The United States

36 Given both the late development of the "political objects" doctrine in England and its shallow root in earlier precedent, it is perhaps not surprising that, as the Commissioner accepted in submissions in the present case, courts in the United States took a different path.

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54 [2009] Ch 173 at 181-182 [22].

55 [1948] AC 31 at 51, 61-62, 75-77.

56 Charity Commission for England and Wales, *Speaking Out – Guidance on Campaigning and Political Activity by Charities*, CC9 (2008), section D1; Pettit, *Equity and the Law of Trusts*, 11th ed (2009) at 278-279.

37 In *Public Trustee v Attorney-General (NSW)*[57], Santow J, after referring to *Taylor v Hoag*[58] and *Collier v Lindley*[59], said of the United States decisions that they treated "the cause of law reform" and the "public participation in the legislative and government process [as] themselves for the public benefit".

38 The present position in the United States may be seen from three points made in the Comment upon §28 of the *Restatement of the Law Third, Trusts*, which was adopted and promulgated in 2001[60]. The first point is that:

> "A trust may be charitable although the accomplishment of the purpose for which the trust is created involves a change in the existing law. If the purpose of the trust is to bring about a change in the law by illegal means, however, such as by revolution, bribery, or illegal lobbying, or bringing improper pressure to bear upon members of the legislature, the purpose is not charitable."

The second is that:

> "The mere fact, however, that the purpose of a trust is to advocate and bring about a *particular* change of law does not prevent the purpose from being charitable. This is so whether the change is pursued indirectly through the education and persuasion of the electorate, so as to bring about a public sentiment favorable to the change, or through more direct but lawful influences, such as by proper lobbying and other persuasion brought to bear upon legislators." (emphasis in original)

The third is that:

> "Although a trust to promote the success of a particular political party is not charitable, the development and dissemination of information

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57 (1997) 42 NSWLR 600 at 618-619. See also the decision of Young CJ in Eq in *Attorney-General (NSW) v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128 at [62], and Santow, "Charity in Its Political Voice: A Tinkling Cymbal or a Sounding Brass?", (1999) 52 *Current Legal Problems* 255 at 281-282.

58 116 A 826 at 827-828 (1922).

59 266 P 526 at 529 (1928).

60 At 23-24. See also Dal Pont, *Law of Charity*, (2010) at 304-305 [12.34].

> advocating or seeking to improve understanding of a particular set of social, economic, or political views is charitable, whether because it is educational ... or because it contributes to a market-place of ideas that is beneficial to the community."

Bowman in Australia

39 Young CJ in Eq observed of *McGovern* and the recent English cases stemming from *Bowman* that they had "not been wholeheartedly accepted in Australia"[61].

40 What then is the standing in Australia of the line of English authority which stems from *Bowman*? The starting point must be that the remarks of Lord Parker in *Bowman* were not directed to the Australian system of government established and maintained by the Constitution itself. That circumstance, as explained in what follows, provides a significant consideration in deciding the content of the common law of Australia respecting trusts for "political objects".

41 Lord Parker's statement has received limited attention in this Court. It was noted by Dixon J in *Roman Catholic Archbishop of Melbourne v Lawlor*[62], but as a step towards the conclusion that there are many purposes peculiar to religious denominations which go beyond religious purposes that are charitable. In the same case McTiernan J[63] referred to Lord Parker's remarks but did so to differentiate "political or fiscal opinions" from the advancement of religion, the latter being "always presumed to be beneficial to the community".

42 In *Royal North Shore Hospital of Sydney v Attorney-General (NSW)*[64], this Court held that encouragement of the teaching of technical education in State schools was a valid charitable object and that a bequest for that purpose was not void as a trust for the attainment of a political object. Latham CJ[65] set out the

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61 *Attorney-General (NSW) v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128 at [45].

62 (1934) 51 CLR 1 at 33; [1934] HCA 14.

63 (1934) 51 CLR 1 at 54.

64 (1938) 60 CLR 396; [1938] HCA 39.

65 (1938) 60 CLR 396 at 410-412.

critical passage in the speech of Lord Parker in *Bowman*, and Starke J referred to it[66], but both did so for the purpose of denying its application to the case at hand. Rich J did not refer to *Bowman* but denied the application of the "somewhat vague and indefinite but well-known objection to gifts for public purposes" and said that acceptance of the appellant's argument would drive the case to an absurd conclusion[67]. The remaining member of the Court, Dixon J, did not refer to *Bowman* but remarked[68]:

> "The case law dealing with the distinction between charitable purposes and political objects is in an unsatisfactory condition, but the basal ideas upon which it rests may be seen. It is, of course, quite clear that any purpose which is contrary to the established policy of the law cannot be the subject of a good charitable trust. But there is a further consideration arising from the very nature of the doctrine by which charitable trusts are supported. Under all four heads of the well-known classification to which such trusts are referred, an essential element is the real or imputed intention of contributing to the public welfare. 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, notwithstanding that the subject of the change may be religion, poor relief, or education. When the subject matter is none of these and the case must fall under the fourth class, viz., that of undefined purposes for the public good, the difficulty becomes even greater."

His Honour added:

> "Again, where funds are devoted to the use of an association of persons who have combined as a political party or otherwise for the purpose of influencing or taking part in the government of the country, it is evident that neither the good intentions nor the public purposes of such a body can suffice to support the trust as charitable."

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66 (1938) 60 CLR 396 at 420.

67 (1938) 60 CLR 396 at 419.

68 (1938) 60 CLR 396 at 426.

43 This reasoning appears to proceed by the following steps: (i) a purpose contrary to the established policy of the law cannot be recognised as a charitable purpose; (ii) even if (i) does not apply, the purpose in question must have the real or imputed intention of contributing to the public welfare; (iii) when the main purpose of the trust is "agitation" for legislative or political changes, with respect to religion, poor relief or education, "it is difficult" for the law to find that (ii) is satisfied; and (iv) the source of that difficulty is the apparent paradox in a "coherent system of law" treating as for the public welfare "objects which are inconsistent with its own provisions".

44 Proposition (iv) invites further examination, particularly in the light of recent decisions in this Court. In Australia, the foundation of the "coherent system of law" of which Dixon J spoke in *Royal North Shore Hospital* is supplied by the Constitution. The provisions of the Constitution mandate a system of representative and responsible government[69] with a universal adult franchise[70], and s 128 establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident" of that constitutional system[71]. While personal rights of action are not by these means bestowed upon individuals[72] in the manner of the *Bivens*[73] action known in the United States, the Constitution informs the development of the common law[74]. Any burden which the common

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69 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-559; [1997] HCA 25.

70 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174-175 [7]-[8], 186-188 [44]-[49]; [2007] HCA 43.

71 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

72 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 46-47, 93, 125-126, 146-148; [1997] HCA 27.

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

74 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 220 [20]; [2001] HCA 63; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 245 [180]-[181]; [2004] HCA 41.

law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of that system of government[75].

45 The system of law which applies in Australia thus postulates for its operation the very "agitation" for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*. There is none of the "stultification" of which Tyssen wrote in 1888. Rather, it is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.

The submissions by Aid/Watch

46 It was with this understanding of the system of law that applies in Australia that Aid/Watch submitted that the generation by it of public debate as to the best methods for the relief of poverty by the provision of foreign aid has two characteristics indicative of its charitable status. The first is that its activities are apt to contribute to the public welfare, being for a purpose beneficial to the community within the fourth head identified in *Pemsel*. The second is that whatever else be the scope today in Australia for the exclusion of "political objects" as charitable, the purposes and activities of Aid/Watch do not fall within any area of disqualification for reasons of contrariety between the established system of government and the general public welfare.

Conclusions

47 These submissions by Aid/Watch should be accepted. By notice of contention the Commissioner submitted that the Full Court should have decided the appeal in his favour on the ground that the main or predominant or dominant objects of Aid/Watch itself were too remote from the relief of poverty or advancement of education to attract the first or second heads in *Pemsel*. It is unnecessary to rule upon these submissions by the Commissioner. This is because the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the

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75 *Coleman v Power* (2004) 220 CLR 1 at 50 [92], 77-78 [196], 82 [211]; [2004] HCA 39.

relief of poverty, itself is a purpose beneficial to the community within the fourth head in *Pemsel*.

48 It also is unnecessary for this appeal to determine 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. What, however, this appeal should decide is that in Australia there is no general doctrine which excludes from charitable purposes "political objects" and has the scope indicated in England by *McGovern v Attorney-General*[76].

49 It may be that some purposes which otherwise appear to fall within one or more of the four heads in *Pemsel* nonetheless do not contribute to the public welfare in the sense to which Dixon J referred in *Royal North Shore Hospital*[77]. But that will be by reason of the particular ends and means involved, not disqualification of the purpose by application of a broadly expressed "political objects" doctrine.

Orders

50 The appeal should be allowed, orders 1, 2 and 3 of the orders of the Full Court set aside, and in place thereof the appeal by the Commissioner from the decision of the AAT to the Full Court should be dismissed. No orders as to costs are required, there being an agreement between the parties on the matter.

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76 [1982] Ch 321 at 340.

77 (1938) 60 CLR 396 at 426.

51 HEYDON J. The issues in this appeal may be grouped under two questions. The first question is whether the purposes of the appellant fall within one of the four classes of purposes which the law calls charitable. If so, the second question is whether there is anything in the appellant's purposes which disqualifies it from being a "charitable institution" because there is something "political" about them.

The appellant's objectives and activities

52 The appellant did not contend that it advanced religion. But it contended that it fell within one or all of the other three classes into which charitable trusts are classified. It said that it had the purpose of relieving poverty. It said that it had the purpose of advancing education. And it said that it had other purposes beneficial to the community. What were its objectives and activities?

53 *The appellant's "main objectives".* Clause 2 of the appellant's constitution, headed "Objectives", opened as follows:

> "[The appellant] monitors, researches, campaigns and undertakes activities on the environmental impact of Australian and multinational aid and investment programs, projects and policies."

Clause 2 then went on to state that the "main objectives" of the appellant were to "seek to ensure" certain ends. Twelve were set out. The twelfth was to ensure the existence of a public fund to be used only to support the appellant's key purposes, ie the first eleven ends. The eleven ends were:

> "[1] aid projects and development programs and projects are designed to protect the environment and associated human rights of local communities in countries that receive Australian aid.
>
> [2] there is increased aid funding for environment programs with specific attention to renewable energy, end-use efficiency and energy conservation, small scale irrigation schemes and sustainable agriculture, land rehabilitation programs, waste management, and protection of biodiversity.
>
> [3] there are complete environmental impact assessment according to the highest standards for all projects, incorporating meaningful public/community participation.
>
> [4] aid and development projects and programs incorporate the principles of ecologically sustainable development.
>
> [5] there is respect for the rights of indigenous people and a recognition of their expertise in ecological management.

[6] aid agencies, development banks and export credit agencies conduct full and regular [consultations with] community organisations, regarding the identification, planning, implementation, monitoring and evaluation of projects.

[7] there is accountability and transparency in the Australian aid and export credit programs including freedom of information on all aspects of projects and programs of development agencies and multilateral development banks.

[8] there is greater recognition of women's needs and greater involvement of women on development projects, and greater gender equity at all levels of the development process, including in consultancy firms contracted to implement aid programs and projects.

[9] there is a halt to structural adjustment programs that contribute to environmental degradation and dislocate or damage the poorest populations.

[10] there is an increased proportion of appropriate professional staff in Australia's official overseas development agency (currently AusAID), official Export Credit Agency (currently EFIC) and multilateral development agencies and consultancy firms contracted for aid programs and projects and the development banks.

[11] there is increased funding of development education activities within Australia and an increased public awareness of the environmental and social impact of the Australian Overseas Development Assistance Program and related private investment, including input into environmental and developmental studies."

54 The Administrative Appeals Tribunal ("the Tribunal") said that two threads ran through the detailed objects described in the appellant's constitution.

> "The first is to ensure local community involvement in the planning and implementation of aid projects. The second is to ensure that aid is delivered in an environmentally effective manner."

Those are certainly two of the themes. But there are others. They relate to the role of indigenous people, consultations with community organisations, accountability and transparency, women, professional staff and educational funding.

55 *The way the appellant conducted its activities: the findings.* Turning from the appellant's purposes as stated in its constitution to the way it conducted

its activities, the Tribunal found that those activities accorded with the appellant's formal objectives of monitoring, researching and campaigning to improve the effectiveness of aid delivery. They included "publishing reports and assessments following its monitoring and research with the object that the reports and public response to them will influence government." The Tribunal gave numerous examples of the appellant's activities – submissions to government, reports, and other publications. The Tribunal found, indeed, that the "whole object" of the appellant was to influence public opinion, and ultimately government agencies and government itself. The Tribunal also said that the appellant's object was "to promote the *effectiveness* of aid, both by *ensuring* that it is delivered where it is intended and by *ensuring* that its delivery is *environmentally effective*" (emphasis added).

56 The Tribunal said that "a fundamental part" of the appellant's work was "campaigning, very often against government". As the Full Court of the Federal Court of Australia ("the Full Court") said, echoing the repeated use of that expression by the Tribunal, the appellant's role was "campaigning". The Full Court also said that its goal was "to influence, and thereby to change, the way in which aid is delivered." The Tribunal found that Dr Goodman, Chair of the appellant, had said in the appellant's 2005 Annual Report that it was "campaign focused" and "dedicated to pursuing global justice" by "targeting the policies and practices of inter-governmental institutions, transnational corporations, and, most especially, the Australian Government and its allies." The Tribunal found that he also said that the appellant claimed to expose "injustices, whether committed in the name of power politics or economic interest, and [argued] for alternatives based on the principles of sustainable livelihood, environmental justice and global equity." The Tribunal found that the appellant's "Campaign Strategy" for 2005/2006 identified various goals. One goal was to "expose the corporate beneficiaries of the aid programme". Another was to "expose the disparity between aid policy and practice". Another was to "reveal Australian aid flows to communities in conflict." Another was to "expose the corporate beneficiaries of [International Financial Institutions] lending". Another was to "demand a complete phase out of all [International Financial Institutions] support for extractive industries (oil, gas and mining)". Another was to "support communities impacted [sic] by the Australian aid and trade programme". Another was to "demand [that] core labour standards be adopted by all [International Financial Institutions] as conditions of support". Another was to "halt the pro-privatisation of water policies at all [International Financial Institutions]". Another was to "expose the environmental and social impacts of the Australian aid and trade programme". The Tribunal also found that every publication by the appellant in evidence before the Tribunal contained "adverse comments relating to Australian government policy and AusAID activities, in particular." The Tribunal specifically identified as an example a "major report" by the appellant which "placed emphasis upon a conclusion that significant amounts of money, which were not directly related to aid, were reported as expended on the aid program." The Tribunal noted that that report concluded

with a "call to action to government" to "get real with our aid program." Finally, the Tribunal found that the appellant was concerned with the "commercialisation" of aid and the provision of aid money to private Australian companies, a practice which the appellant described as "boomerang aid"; had "severely" criticised the operations of the World Bank; had advocated the abolition of an Australian agency, the Export Finance and Insurance Corporation; and had "opposed" the Free Trade Agreement between Australia and the United States of America.

57 *The way the appellant conducted its activities: the evidence.* Those conclusions of the Tribunal were supported not only by the evidence to which the Tribunal did refer, but also by other evidence to which it did not refer. The appellant described itself as a group that "campaigns on Australian involvement in overseas aid and trade projects, programs and policies." It described itself as an "activist group" and an "activist and solidarity organisation". It said that its "activist" and "[p]rotest oriented" nature was one of its "[s]trengths". It claimed to employ a "multi-level strategy to effect change". The appellant had issued media releases which "exposed" the Australian Government's "abuse of its aid program". The appellant described Australia's aid program as "mired in domestic political expediency". The appellant's constitution had been amended in 2000 to remove the statement that it "works to ensure that aid reaches the poorest in the community" from the start of its objectives. One report prepared by the appellant noted that it had been calling for one specific policy change "for almost 12 years".

Fourth class: generating debate about how poverty is best relieved

58 In relation to the fourth class, the most fully developed way in which the appellant put its case, at the very end of its address in reply, was to say that it "seeks to generate debate about how poverty is best relieved" by Australia's provision of foreign aid. Assuming that seeking "to generate debate about how poverty is best relieved" is within the fourth class of charitable objects, can it be said that the appellant was seeking to "generate debate" on that subject? No. 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 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. The appellant wanted concrete results in relation to aid – results for the environment, for local communities involved, for the rights of indigenous people and women, for the accountability and transparency of government programs, for improving staff skills, for increasing educational funding and raising public awareness about Australian aid. 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. That was the whole point of creating an "activist and solidarity organisation". Members of debating societies or other participants in debate do not need to be activist and do not need to show solidarity, but those who want practical changes do. To be "activist" is to advocate energetic *action*. A "solidarity organisation" is one which is perfectly united in a community of interests, feelings or purposes. An "activist and solidarity organisation" is one which is perfectly united in a community of interests, feeling or purposes in relation to an energetic course of action. It seeks the carrying out of deeds, not the mere uttering of words. No doubt quite a number of people and organisations who learned of the appellant's points of view might, if they thought it worthwhile, seek to controvert them. The appellant might in that sense generate debate. But it did not seek that outcome. 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.

59 The appellant pointed to two pieces of evidence which it said were to the contrary. One was a reference in one of the appellant's publications to the need for a debate about Australian aid. The other arose out of the cross-examination of Dr Goodman. He was taken to a report of the appellant which said: "We seek to push the Australian Government and multilateral institutions to promote a holistic approach." The cross-examiner asked whether "seeking to push" was synonymous with "seeking to persuade". In dealing with the group of questions that followed, Dr Goodman said that the appellant was:

> "committed to *ensuring* that aid – seeking to *ensure* that aid practices are *most effective* in alleviating poverty, addressing sustainable development and we seek to push that most certainly and this is simply another way of framing that as a holistic approach to enable local indigenous communities to start charting their own development. It's an aspect of a broader set of requirements that are widely acknowledged as being necessary [to] achieve effective aid delivery. *So I don't think it's a matter of persuading so much as presenting the arguments.* We're not specifically seeking to persuade anybody there, we're seeking to push the Australian Government to promote a holistic approach. So we're not necessarily trying to win them over. We're seeking to *ensure that they do in fact promote* the holistic approach that they say they're committed to." (emphasis added)

The appellant relied on the reference to "presenting the arguments". When those two pieces of evidence are considered in the light of the other evidence taken as a whole, they do not support the proposition that the appellant was simply concerned with generating debate or presenting arguments for their own sake. That characterisation is inconsistent with the appellant's "campaigning" and its "targeting". It is inconsistent with its desire to "expose" evils, its tendency to "demand", to oppose, to criticise, to protest, and to be "activist". Above all, it is

inconsistent with its concern for results, to be achieved with whatever amount of rancour and asperity was needed.

Relief of poverty

60 The appellant did not have the goal of relieving poverty. It provided no funds, goods or services to the poor. It did not raise funds to be distributed to the poor by others. The purposes of the appellant embraced aid to the poor, but they also embraced aid to many other sections of society as well. The goal of ensuring that there was local community involvement in the planning and implementation of aid projects was not targeted at the poor. Nor was the goal of ensuring that aid was delivered in an environmentally effective manner. Nor were the goals of respecting indigenous people and their expertise, ensuring "accountability and transparency" in relation to Australian aid programs, and increasing recognition of women's needs and involvement of women in development projects.

61 The Tribunal was correct to find that the relief of poverty had "no particular emphasis in [the appellant's] formal objectives". The Tribunal contradicted itself when it said that "[v]irtually every purpose or activity of [the appellant] is directed towards promoting the relief of poverty." The Tribunal was not correct to find that implicitly the relief of poverty was a "major objective" of the appellant. It was an objective, but diluted and diffused by many other objectives, and actually contradicted by some. The purpose of providing aid to improve infrastructure might relieve poverty, but the appellant opposed infrastructure which damaged the environment. One of its goals was to "demand" a complete phase out of support for extractive industries: these industries often damage the environment, but they also often bring wealth to many who would otherwise be poor. Similarly, the connection between opposing the Free Trade Agreement between Australia and the United States of America and relieving poverty was obscure.

Educational purposes

62 Only the eleventh of the objectives stated in the appellant's constitution related to education. Thus education is not a main or even a substantial purpose of the appellant. And the appellant's activities did not involve any systematic method or procedure for the inculcation of knowledge, the cultivation of mental or physical powers or the development of character[78]. The Full Court correctly said that characteristics of those kinds did not exhaust the category of education. It relied on the appellant's "major publications" as being research. It suggested

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78 *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645 at 661; [1955] HCA 71.

that that research improved "the sum of communicable knowledge", in the words of Wilberforce J in *In re Hopkins' Will Trusts*[79]. However, the function of the appellant is not educative, but polemical. The appellant has a particular point of view, or a series of particular points of view. Those points of view are sometimes worked out, for example, in what Dr Goodman called "major, in-depth, on the ground, researched reports". But the points of view are pressed as part of a "campaign"; the appellant engaged in the "targeting" of various government policies and seeks to "argue for" others. The appellant has attacked various government policies as involving "perversity" or "hypocrisy". The appellant's publications take a polemical stand in relation to climate change issues: its stand may be virtuous, it may even be right, but it is not educational. As noted earlier, the Tribunal found that the "whole object of [the appellant] is to *influence public opinion* by making the results of its research available, with the further goals of *influencing public opinion* and ultimately government agencies and government itself" (emphasis added). Influencing public opinion is not by itself educational, even if information has been collected for the purpose of attempting to achieve that influence. To adopt the words of Hammond J in another context, the conduct of the appellant represents "an attempt to persuade people into a particular frame of mind. There is no instruction directed; nor is there to be any systematic accumulation of knowledge."[80]

Conclusion

63 The first question in this appeal must be answered in the negative. The second therefore does not arise, and it is better not to say, one way or the other, anything about the issues – complex and to some degree obscure – which cluster around it.

64 The appeal should be dismissed.

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79 [1965] Ch 669 at 680.

80 *Re Collier (Deceased)* [1998] 1 NZLR 81 at 93.

65 KIEFEL J. The question on this appeal is whether the appellant, Aid/Watch Incorporated, is a charitable institution within the meaning of s 50-5, item 1.1 of the *Income Tax Assessment Act* 1997 (Cth) and the corresponding provisions of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) and the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth). As is explained in the reasons of the majority, that meaning is informed by the principles relating to charitable trusts established under the general law.

66 It may be accepted that what is regarded as charitable may develop or change, according to the needs of society[81]. What the different conceptions of charitable purposes, under the general law, have in common is that they all contain the provision of a benefit to the public.

67 Whether an organisation has charitable purposes is determined by reference to the natural and probable consequences of its activities, as well as its stated purposes[82]. In examining those purposes and their purported effectuation in the activities of the organisation, attention is directed to the main or predominant purposes, rather than those which are ancillary or incidental[83].

68 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[84], to agitate for change in the policies of government or in legislation in order to best advance their charitable purposes. No-one would suggest that charitable and political purposes are mutually exclusive. A charitable institution may have charitable and political purposes, provided that the political purpose is not the main or predominant purpose of the organisation. Here, the appellant's main purposes are to agitate for change in the programmes and policies of the Government or its agencies, by putting forward the views of its members.

69 I agree that there is no reason, in principle, that the political nature of an organisation's main purpose should mean its outright disqualification from charitable status. In each case it is necessary to consider the stated purposes and

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81 *Tudor on Charities*, 9th ed (2003) at 4 [1-005].

82 *The Baptist Union of Ireland (Northern) Corporation Ltd v The Commissioners of Inland Revenue* [1945] NI 99 at 106; *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 at 226 [38]; [2008] HCA 55.

83 *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 at 217 [17].

84 The first and second classes set out in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.

the activities of the organisation, in order to determine whether the main purpose is for the public benefit, the feature common to all classes referred to in *Commissioners for Special Purposes of Income Tax v Pemsel*[85]. However, reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views, as is here the case. It might have been otherwise were those activities, and the stated purposes, capable of being characterised as for the advancement of education, or as having some other evident benefit to society. A mere connection between those activities and the charitable purposes of others, to render aid, will not suffice as a public benefit.

70 Slade J, in *McGovern v Attorney-General*[86], extracted two reasons, from the speeches in *National Anti-Vivisection Society v Inland Revenue Commissioners*[87], for the rejection of trusts for political purposes as charitable. The first was that the court will ordinarily not have sufficient means of judging whether such purposes will be for the public benefit. The second was that, even if the change of law or policy might be desirable, nevertheless, the court must accept that the law as it stands is right.

71 It should not be seen as inconsistent with a court's maintenance of the existing law that it also recognises the importance and value of public discussion, education and debate about aspects of the law and changes which might be made to it. The same may be said of government policy. That recognition reflects the reality of the greater involvement, nowadays, of citizens and organisations in the shaping of law and policy. Nevertheless, it remains necessary that benefits of this kind flow from the pursuit of change before an organisation can qualify as charitable.

72 Lord Parker of Waddington, in *Bowman v Secular Society Ltd*[88], acknowledged that "every one is at liberty to advocate or promote by any lawful means a change in the law", but went on to say that a court would not hold a gift to secure a change in the law to be charitable, because it had no means of judging whether the change was for the public benefit.

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

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85 [1891] AC 531 at 583.

86 [1982] Ch 321 at 336-337.

87 [1948] AC 31.

88 [1917] AC 406 at 442.

information, upon legitimate topics. The decision in *National Anti-Vivisection Society* shows that, at the least, the courts may be able to determine that a public benefit is *not* evident in a trust. Lord Parker's statement in *Bowman* may be understood as recognising the practical difficulties which will be presented in some cases involving trusts for political purposes. Their public benefit may not be evident if they do not principally involve public debate or other educative purposes.

74 As is observed in *Tudor on Charities*[89], not every object beneficial to the community is necessarily charitable. For a purpose to be charitable it must be beneficial in a way which the law regards as charitable. That is to say, it must come within the spirit and intendment of the preamble to the *Charitable Uses Act* of 1601 (the Statute of Elizabeth).

75 The law assumes that the purposes of the relief of poverty and the advancement of education, the first and second classes referred to in *Pemsel*[90], are for the public benefit. Such an assumption does not apply to the fourth class there referred to – "other purposes beneficial to the community, not falling under any of the preceding heads." A likely benefit to the public must be evident from the stated purposes and activities of an organisation.

76 It is the fourth class which falls for consideration in this case, because the appellant's main purposes do not qualify under the first two.

77 Under the heading "Objectives", in its Constitution, the appellant describes in a preamble its role as:

> "AID/WATCH monitors, researches, campaigns and undertakes activities on the environmental impact of Australian and multinational aid and investment programs, projects and policies."

The "main objectives" which are then listed, at some length, may be shortly summarised. The Administrative Appeals Tribunal ("the Tribunal") observed[91] that two main threads run through them:

> "The first is to ensure local community involvement in the planning and implementation of aid projects. The second is to ensure that aid is delivered in an environmentally effective manner."

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89 9th ed (2003) at 7 [1-008], 98 [2-071].

90 [1891] AC 531 at 583.

91 *Re Aid/Watch Incorporated and Federal Commissioner of Taxation* (2008) 71 ATR 386 at 391 [22] per Downes J, President.

I would reverse the order of these threads, having regard to the significance given to environmental concerns in the preamble to the objectives, although the two strands are interrelated. Nothing turns upon this. In addition, the appellant's objectives are said to be to ensure "accountability and transparency" in Australian aid and export credit programmes.

78 The objectives do not explain what is involved in their pursuit and it is therefore necessary to examine how the appellant operates, in order to ascertain what is really involved. Such an examination is necessary, in any event, to the determination of whether its main purpose is charitable, as earlier discussed.

79 The appellant's processes were explained in evidence before the Tribunal. Consistent with the preamble to its objectives, it was said that the appellant begins with monitoring and then moves to research. The research is used to campaign, and to influence practices relating to the delivery of aid. Essentially, therefore, the appellant is concerned to effect changes in the practices of aid agencies. This was confirmed by evidence that the appellant has sought to persuade the Australian Agency for International Development (AusAID) to alter the way it administers aid programmes. It has advocated the abolition of an Australian export credit agency. It targets the policies and practices of intergovernmental institutions, the Australian Government and its allies. The Chairperson of the appellant denied that it was involved in lobbying government or directly influencing it. It gave, by way of example of its methods, its response, in 2006, to a White Paper on the Australian aid programme put out by the Government for comment. All of this confirms that the appellant's activities and purposes are to put forward its views as to changes it or its members consider are necessary to existing aid programmes.

80 The Tribunal considered that the purposes of the appellant included the relief of poverty, since "[a]id itself is at the heart of charity."[92] However, whilst the purposes and activities of the appellant may have a connection with aid, they can neither be seen to promote nor to advance it, in any practical way.

81 It may be accepted that an organisation established to further an accepted public purpose, carried on by another, is itself charitable. Its purpose may come within the fourth class[93]. The effectiveness of a charitable organisation may be promoted by another, by the provision of support and services, for example. The activities of the appellant are not of this kind.

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92 *Re Aid/Watch Incorporated and Federal Commissioner of Taxation* (2008) 71 ATR 386 at 395 [37].

93 *Tudor on Charities*, 9th ed (2003) at 103 [2-077] referring to *Re White's Will Trusts* [1951] 1 All ER 528; *London Hospital Medical College v Inland Revenue Commissioners* [1976] 1 WLR 613; [1976] 2 All ER 113.

82 The appellant may well consider that the changes which it seeks, from time to time, would render aid more effective, but whether that is so depends upon the correctness of its views. At some points in its reasoning, the Tribunal appears to have assumed that the appellant's views concerning the delivery of aid have been, or would be, effective. Reference was made by the Tribunal[94] to the appellant influencing the Government "to deliver more effective aid", "improve the quality of … aid", "increase or redirect … aid" and "promot[e] the most advantageous delivery of aid". But that is to assume, without more, that its views will necessarily promote the delivery of aid. Such a result cannot be said to follow from the assertion of its views. Its motives are not sufficient to establish public benefit.

83 The appellant's stated objectives do include some references to education. It is said that it seeks to ensure that there is "increased funding of development education activities within Australia", and "an increased public awareness of the environmental and social impact of the Australian Overseas Development Assistance Program and related private investment, including input into environmental and developmental studies."

84 The evidence given for the appellant before the Tribunal referred to some teaching being conducted, but principally of its members and concerning economics and methods of campaigning. There was no suggestion that it undertook public teaching. Individual members of the appellant have produced some reports, four or five in number, on aid projects, but it was not suggested that they were disseminated to the public, such as would support the characterisation of research as for the purpose of education[95]. The views of the appellant are published on its website, but this is part of its campaign to persuade others of its views, not to educate them.

85 In any event, the enquiry to be undertaken is as to the main purpose of the appellant. A Full Court of the Federal Court (Kenny, Stone and Perram JJ) held that its main purpose was its political purpose[96], which is to say, the assertion of its views. The Court considered that it was not possible to determine that the

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94 *Re Aid/Watch Incorporated and Federal Commissioner of Taxation* (2008) 71 ATR 386 at 391 [21], 396 [42].

95 *McGovern v Attorney-General* [1982] Ch 321 at 352, referring to the unreported judgment of Slade J in *In re Besterman's Will Trusts* of 21 January 1980.

96 *Federal Commissioner of Taxation v Aid/Watch Incorporated* (2009) 178 FCR 423 at 431 [37].

appellant's purposes were for the public benefit[97], since the Court was in no position to determine that the promotion of one view, rather than the other, was for the public benefit[98]. In my view, the Court's conclusion was plainly correct.

86 The submission by the appellant, that its purposes are for the public benefit because it generates public debate, cannot be accepted at a number of levels. Its assertion of its view cannot, without more, be assumed to have that effect. Its activities are not directed to that end. If they were directed to the generation of a public debate about the provision of aid, rather than to the acceptance by the Government and its agencies of its views on the matter, the appellant might be said to be promoting education in that area. But it is not. Its pursuit of a freedom to communicate its views does not qualify as being for the public benefit.

87 For these reasons, I would dismiss the appeal.

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97 *Federal Commissioner of Taxation v Aid/Watch Incorporated* (2009) 178 FCR 423 at 433 [47].

98 Referring to *Southwood v Attorney-General* [2000] WTLR 1199.