

# CHARITABLE TRUSTS AND POLITICAL PURPOSES: SOWING THE SEEDS OF CHANGE? LESSONS FROM AUSTRALIA.

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## I. INTRODUCTION

The recent case of *Aid/Watch v Commissioner of Taxation*<sup>1</sup> has created sea changes in Australia in relation to charitable trusts, and as a result our Antipodean neighbours appear to be blazing trails in the evolution of charitable trusts, whilst at the same time, New Zealand resolutely remains entrenched in the annals of charitable trust history. Can, and indeed should, New Zealand continue this traditional approach, as pressure mounts to explore more liberal interpretations of charitable trusts and political purposes? This article explores the two jurisdictions and considers critically, in light of very recent controversial judgments, the diverging paths being taken by the jurisdictions. Before any analysis of the proposition, there must first be a contextualisation of the legal position of charitable trusts and political purposes.

## II. THE LEGAL CONTEXT

The philosophy of charity is rooted firmly in the annals of history and the oldest active charity on record in the United Kingdom is documented as AD597.<sup>2</sup> However, it would take many more centuries before an official system of regularisation would take effect; this began officially with the Statute of Elizabeth known otherwise as the Statute of Charitable Uses 1601. This Act was primarily intended as “an accountability tool to ensure that charitable assets were applied to charitable ends”<sup>3</sup> and has long since been repealed, although in the modern context it is its Preamble that is the cornerstone of that which may be construed as the principle of charitable law, and the yardstick against which charitable purposes are measured; if a purpose falls

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1 *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

2 Gareth Morgan “The Spirit of Charity” (paper presented at Professorial Lecture, Sheffield Hallam University, England, April 2008) at 5.

3 Oongah Breen “Pensel Plus?: Charitable Purposes – An Irish Perspective” (UCD Working Papers in Law, Criminology & Socio Legal Studies, University College Dublin, Research Paper No 43/2010) at 2.

within the spirit and intendment of the Preamble,<sup>4</sup> then prima facie, it is charitable. The Preamble sets out the non-exhaustive list of purposes that are deemed to be charitable and these purposes include:

- The relief of the aged, poor and impotent;
- The maintenance of sick and maimed soldiers and mariners;
- The repair of bridges and churches;
- The marriage of poor maids.

In the now seminal case of *Commissioners for the Special Purposes of Income Tax v Pemsel*,<sup>5</sup> Lord McNaghten set out the four heads of charity under which all charitable trusts must fall and “these heads are still the very foundation of charitable trusts in contemporary times.”<sup>6</sup> The four heads of charity are most certainly well documented, although no review of charity is complete without their citation; they are as follows:

- The relief of poverty;
- The advancement of religion;
- The advancement of education;
- Any other purposes beneficial to the community not falling under any preceding heads.

These four heads of charity have now been codified in New Zealand in the Charities Act 2005 as follows:<sup>7</sup>

In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

A trust may fall within one or more of the four heads, however, there are still further tests that must be satisfied before a trust may be construed as being charitable under the Act. Section 5(2) of the Act requires that the purpose must be for the public benefit:

(a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood;

4 *Morice v Bishop of Durham* (1804) 9 Ves 399 at 405, 32 ER 656 at 658.

5 *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.

6 Juliet Chevalier-Watts “Charitable Trust and Political Activity: Time for a Change?” (2011) 19(2) WLR 145 at 145.

7 Charities Act 2005, s 5(1).

In other words “the purpose must be directed at benefiting the public or a sufficient section of the public.”<sup>8</sup> In addition, the promotion of amateur sports may be a charitable purpose if it is the means by which a charitable purpose is pursued in accordance with s 5(1) of the Act as set out above.<sup>9</sup>

The United Kingdom and Eire share similar statutory requirements,<sup>10</sup> and Australia published the Charity Definition Inquiry in 2001, and has recently established the Australian Charities and Not-for-Profits Commission, which is tasked, inter alia, with developing policies and legislation for that sector. In addition, the Australian Government is looking to introduce a statutory definition of charity.

### III. THE POLITICAL PURPOSE DOCTRINE

Whilst the purposes of an organisation must be charitable, if it also has non-charitable purposes, this will not necessarily be fatal to the acquisition of charitable status, which will be discussed in more detail in this article. In New Zealand, the Charities Act 2005 states that any non-charitable purposes, for instance advocacy, must be ancillary to the charitable purposes of the organisation<sup>11</sup> and ancillary is defined as:<sup>12</sup>

(a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and

(b) not an independent purpose of the trust, society, or institution.

For decades, case law, and more recently statute in a number of common law jurisdictions, has determined that a trust will be denied charitable status if its main or dominant purposes are political. This is perhaps a surprising notion because politics and charities have had a long-standing relationship, beginning with the Statute of Elizabeth which was born out of a charged political environment.<sup>13</sup> Even after the enactment of the Act, it is clear that politics and charity have remained intertwined, so “where a State may have failed in some respect, charity fulfilled that need as a consequence of that failing,”<sup>14</sup> and depending on the Government and their policies at the time, the type and amount of charitable input varied. It is clear however that the heads of charity as we know them now, as provided by Lord McNaghten in *Pemsel*, have their roots in government policy, irrespective of the government

8 Charities Commission “Registration Decision: Greenpeace of New Zealand Incorporated”(15 April 2010) at [12].

9 Charities Act 2005, s 5(2)(A).

10 Charities Act 2006 (UK) and Charities Act 2009 (Ireland).

11 Section 7.

12 Section 4.

13 Alison Dunn “Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process” (2008) 71 MLR 247 at 251.

14 Juliet Chevalier-Watts and Sue Tappenden *Equity, Trusts and Succession* (2013, ThomsonReuters, Wellington) at 282; see also Alison Dunn “Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process” (2008) 71 MLR 427.

in power at the time, thus reinforcing the concept of the interrelationship between politics and charity.<sup>15</sup> “Regardless however of the implicit affiliation between charities and politics”,<sup>16</sup> any organisation that seeks to “obtain or retain its charitable status...must avoid having political purposes and avoid engaging in political activity.” *Re Wilkinson (Deceased)* clarified those purposes that may be construed as being political as:<sup>17</sup>

Any purpose with the object of influencing the Legislature is a political purpose, and similarly, in my view, a purpose that the central executive authority be induced to act in a particular way in foreign relations or that the people be induced to accept a particular view or opinion as to how the central executive shall act in the foreign relations of this country, is, in the broadest sense, a political purpose[.]

To understand this tense relationship therefore it is important contextualise the jurisprudence that underpins this doctrine.

The case of *De Themmines v De Bonneval* is perhaps one of the earliest cases to consider the issue of charitable trusts and political purposes and the Court determined that:<sup>18</sup>

“it is against the policy of this country to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the pope...over the sovereignty of the state.”

The gift therefore reverted to the donor. Lord Parker of Waddington in the case of *Bowman v Secular Society*<sup>19</sup> referred to the authority of *De Themmines* when he set out his now iconic observations regarding charitable trusts and political purposes:<sup>20</sup>

The abolition of religious tests, the disestablishment of the Church, the secularization of education, the alternation of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognize such objects as charitable...a trust for the attainment of political objects has always been held invalid.

However his Lordship clarified this statement, noting that trusts for political purposes are not illegal, because everyone is at liberty to advocate for changes in the law by lawful means, but rather trusts for political purposes cannot be held as valid charitable trusts because:<sup>21</sup>

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.

15 Chevalier-Watts , above n 6, at 146.

16 Juliet Chevalier-Watts “Politics and Charity” [2009] NZLR 53 at 54.

17 Chevalier-Watts, above n 6, at 146.

18 Re Wilkinson (Deceased) *Perpetual Trustee Estate and Agency Company of New Zealand Limited v League of Nations Union of New Zealand* [1941] NZLR 1065 at 1077.

19 *Bowman v Secular Society* [1917] AC 406 at 442; see also *Thornton v Howe* 31 Beav 14.

20 *De Themmines v De Bonneval* (1828) 5 Russ 287 at 292, 38 ER 1035 at 1037.

21 At 442.

The cases of *Bowman* and *De Themmines* were cited as authority in *McGovern v Attorney-General*,<sup>22</sup> “where the Court was tasked with considering whether the purposes of a trust established by Amnesty International met the criteria for charitable status”<sup>23</sup> and Slade J confirmed that “[t]rusts to promote changes in the law of England are generally regarded as...being non-charitable...”.<sup>24</sup> Slade J’s dictum in *McGovern* represents a landmark in the development of the principle that political purposes cannot be construed as charitable and his Honour helpfully set out 5 types of trust that would be deemed trusts with political purposes that can be drawn in large part from *Bowman*, and also in some part from *National Anti-Vivisection Society v Inland Revenue Commissioners*,<sup>25</sup> which are as follows:<sup>26</sup>

1. Trusts that further the interests of a political party;
2. Trusts to procure changes in the laws of England and Wales;
3. Trusts to procure changes in the laws of foreign countries;
4. Trusts to procure a reversal of government policy or of particular decisions of government authorities in England and Wales; and
5. Trusts to procure a reversal of government policy or of a particular decision of government authorities in foreign countries.

This categorisation appears very broad indeed, and is certainly more expansive than the Australian view, which will be addressed later in the paper, and as such is likely to catch a wide variety of activities. However his Honour did assert that this is not an exhaustive list, although for the purposes of the particular judgment it would suffice in its exploration, thus leaving room for further additions should a Court feel it pertinent. However, in qualifying this list, his Honour was at pains to note that this categorisation should only be directed at trusts whose purposes are political and should not be directed at trusts whose trustees employ political means to further the objects of a trust.<sup>27</sup>

The judiciary of England and Wales therefore adopted a liberal approach in the interpretation of trusts whose purposes are political that could encompass a wide variety of activities of organisations. However, whilst Australia certainly has adopted the doctrine of political purposes, it does not appear to have done so with such enthusiasm as its Commonwealth cousin, which suggests that Australia has, even from early on, been nurturing the view that the doctrine is not set in concrete, although it could not necessarily have been foreseen how dramatic the change would actually be, and indeed whether such a change was justiciable. It is to this issue that this paper now turns.

22 *McGovern v Attorney-General* [1982] 1 Ch 321.

23 Chevalier-Watts, above n 6, at 147.

24 *McGovern v Attorney-General*, above n 22 at 334

25 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

26 *McGovern v Attorney-General*, above 22 at 340.

27 At 340.

## IV. AUSTRALIA AND THE POLITICAL PURPOSE DOCTRINE

Early Australian case law suggests a reluctant adoption of this doctrine<sup>28</sup> and this perhaps paved an early path for the Australian courts to begin to follow a diverging road from New Zealand and English jurisprudence.

In the case of *Royal North Shore Hospital of Sydney v Attorney-General*,<sup>29</sup> one of the issues for the Court was whether a trust to provide a prize for the best essay promoting the extension of technical education in state schools was charitable. Dixon J stated that the “case law dealing with the distinction between charitable purposes and political objects is in an unsatisfactory condition”<sup>30</sup> thus affirming the discord felt by the Australian judiciary in relation to this doctrine. However, his Honour could not deny that when a main purpose of a trust is to agitate for legislative or political change, then the Court will necessarily find it difficult to assess public welfare, even if the subject of change may be one of the three heads of charity. If the purpose falls under the fourth class, “that of undefined purposes for the public good, the difficulty becomes even greater.”<sup>31</sup> Regardless however of his Honour’s initial criticism of the scope of the political doctrine, it was apparent that he was also willing to set out a relatively broad interpretation of the doctrine, which perhaps foreshadows the later views of Slade J in *McGovern*. Dixon J, in the instant case, referred specifically to trusts that fund a political party, or for the purpose of “influencing or taking part in the government of the country”,<sup>32</sup> or that seek to “establish a means of affecting or interfering with the government administration” and asserts that such trusts cannot be charitable. However, this is as far as his Honour is prepared to go in the expansion of the doctrine and he sought to distinguish those non-charitable trusts from those trusts that merely “mould opinion or spread doctrine on the subject of technical education.”<sup>33</sup> This latter type of trust could be “regarded as coming within the objection that it is political in character.”<sup>34</sup> Dixon J therefore acknowledged the authority of *Bowman*, albeit reluctantly, although his interpretation of the meaning of political certainly appears to fall somewhat short of the expansive meaning asserted by Slade J in *McGovern*, suggesting therefore that jurisprudentially, Australia was limiting the application of the doctrine, so enabling it to reject the doctrine at a later stage in a justifiable manner.

28 Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*” (2011) 35(2) MULR 353 at 357.

29 *Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396.

30 At 426.

31 At 426.

32 At 426.

33 At 427.

34 At 427.

Latham J in *Royal North Shore* also favoured an approach similar to that of his learned colleague Dixon J. Latham J noted that a trust for the purpose of political agitation would be an invalid charitable trust and it would not be difficult to:<sup>35</sup>

Suggest reasons of public policy which would prevent recognition by the law of the establishment in perpetuity of a trust for the promotion of a particular political object as such, or for the maintenance and advocacy during the indefinite future of the principles of a particular political party.

Indeed, such trusts “might become a public danger.”<sup>36</sup> However, his Honour was cautionary about the influence of *Bowman* and asserted that it should not “be regarded as making it impossible to establish a trust as a charitable trust merely because the subject matter of the trust might be associated with political activity.”<sup>37</sup> This is because legislation is a moveable feast and it is nigh on impossible to predict if a subject “might not at one time or another become the subject of political propaganda.”<sup>38</sup> Thus whilst both Latham and Dixon JJ certainly acknowledged the relevance of the political doctrine, and appear to be bound to a certain extent, their full acceptance is notably absent and they appear to seek a limitation to its expansion in Australia.

Rich J, in the case of *Royal North Shore*, took a more critical approach of the political doctrine than that of his learned colleagues, and stated that to find that the trust in question not charitable would be driving “to an absurd conclusion” based on on a doctrine that was already “vague and indefinite.”<sup>39</sup> His Honour was of the view that a gift for political purposes not being charitable cannot include “every public object even if religious, eleemosynary or educational ceases to be charitable if the State is concerned in or affected by the trust.”<sup>40</sup>

Whilst the Judges in *Royal North Shore* supported slightly different interpretations of the applicability of the political doctrine in Australia, and all acknowledged the authority of *Bowman*, all were of the view that applying the doctrine to the set of particular facts would be stretching the doctrine too far and indeed, such an application may lead to political purpose extending to anything that may be associated with political activity. Such a judgment suggests therefore an early fraying around the edges of the apron strings tying Australian jurisprudence to English jurisprudence on the political purpose doctrine. The question therefore must be asked, how have later Australian cases reacted when faced with assessing this very doctrine and do these judgments lead inevitably to the startling conclusions in the *Aid/Watch* case?

35 At 412.

36 *Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396 at 413.

37 At 412.

38 At 412.

39 At 419.

40 At 419.

Justice Santow in the case of *Public Trustee v Attorney-General of New South Wales*<sup>41</sup> lent his voice to the rising tide of criticism being levelled at the doctrine. His Honour confirmed that “a trust to support a particular political party or its doctrines is clearly not charitable” and any purpose which is contrary to the established policy of the law also cannot be thought of as charitable,<sup>42</sup> but acknowledged that this is still not a clear cut definition because it does not make a “distinction between supplementing the law when it may already be moving in a particular direction, and directly opposing its well established policy.”<sup>43</sup> In addition, his Honour noted that the approach adopted by Slade J in *McGovern* has uncertain footing because, firstly, it “did not square with the unchallenged activism of prominent charities in the eighteenth and nineteenth centuries.”<sup>44</sup> Secondly, Slade J relied on *National Anti-Vivisection* as authority, and Lord Simonds in that case had already acknowledged that there “was an undoubtedly a paucity of judicial authority”<sup>45</sup> for such an approach, with the case of *Bowman* being the strongest prior authority. It is perhaps unsurprising therefore that Australia has struggled to accept fully the applicability of the doctrine of political purposes, and the recent outright rejection of the doctrine is perhaps therefore nothing more than a natural consequence of the evolution of the Australian jurisprudence of the doctrine.

Santow J however was not yet complete in his challenge to the apparent political doctrine authority. He asked: “[m]ust the pursuit of charitable objects by means of political agitation invalidate those objects?”<sup>46</sup> Interestingly, support for this argument is found in *Royal North Shore*, where the Court suggested that the pursuit of charitable objects through political agitation would render a trust non charitable.<sup>47</sup> However, a more flexible approach is to be found, perhaps surprisingly, in *McGovern* by Slade J, where he stated that “the mere fact that trustees may be at liberty to employ political means in further the non-political purposes of a trust does not necessarily render it non-charitable.”<sup>48</sup> In the face of such apparent conflicting views, Santow J pragmatically attempted to define *agitation* and how it may be viewed in the context of charitable trusts:<sup>49</sup>

Pressure for political change can range from direct lobbying of the government for legislative change to attempts to educate and persuade the public and change public opinion on a particular issue. Whether such pressure for change is termed agitation

41 *Public Trustee v Attorney-General of New South Wales* [1997] 42 NSWLR 600.

42 At 603.

43 At 604.

44 At 606 citing examples of the English charity COS acting as a pressure group to influence social welfare and the Howard League for prison reform.

45 At 607 citing *National Anti-Vivisection Society*, above n 25, at 63.

46 At 616.

47 At 616 citing *Royal North Shore Hospital of Sydney v Attorney-General*, above n 29, at 420, 412 and 426.

48 At 616 citing *McGovern*, above n 22, at 340.

49 At 617.



with its pejorative overtone, propaganda...a campaign...or merely and legitimately education...may be to some extent in the eye of the beholder, influenced by tone and style.

Thus *agitation* may encompass a number of actions and as a result may indeed allow a trust to be charitable. In applying this multi-faceted definition to the instant case, Santow J confirmed that the objectives of the trust were to be achieved through public meetings and other means of influencing public opinion for the benefit of a disadvantaged group, this did not, in his Honour's view, render the trust political. It is suggested therefore that Santow J's dictum is a logical attempt to set out a more comprehensive definition of a political trust as a result of reviewing the uncertain jurisprudence to date. The author accepts that this is not a perfect, nor perhaps exhaustive, characterisation, but what it does do is provide more clarity in two respects: that of the action of *agitation* and also in relation to objects that reflect the direction in which the law is travelling.

Such an approach also provides fertile grounds in which this approach may be planted and nurtured, and contemporary cases such as *Aid/Watch*, whilst at first sight are controversial, are perhaps the inevitable harvest of such a planting. Indeed, it was the notion of *agitation* that was at the heart of the *Aid/Watch* decision, and perhaps therefore a fundamental piece in the jigsaw that enabled Australia to reject legitimately the political purpose doctrine in its entirety. It is appropriate therefore to turn now to the case of *Aid/Watch* and address its impact on the jurisprudence of the political doctrine. The paper will then assess New Zealand's response to Australia's methodology and consider whether the antipodean cousins may actually be sharing the jurisprudential approach as opposed to following apparently diverging paths.

## V. THE AID/WATCH DECISION

*Aid/Watch* is an organisation that seeks to promote the efficient use of national and international aid directed to the relief of poverty. Its activities include research and campaigns. These campaigns are designed to stimulate public debate and to bring about changes in government policy and activity in relation to the provision of foreign aid.<sup>50</sup> The organisation has been the subject of a rollercoaster of decisions through the courts.

In October 2006, the Commissioner of Taxation revoked the organisation's charitable status, but in 2008, the Administrative Appeals Tribunal (AAT) reversed that decision.<sup>51</sup> The President of the AAT, Downes J held that *Aid/Watch* fell within the first and second *Pemsel* heads, and if it did not fall within those, then it would also fall under the fourth head.<sup>52</sup> In addition, it "was also found to be emphasising particular priorities in an existing government policy rather than challenging government policy, and so did

50 *Aid/Watch v Commissioner of Taxation* [2010] HCA 42 at 158.

51 Chevalier-Watts above n 6, at 154.

52 *Aid/Watch Inc v Federal Commissioner of Taxation* [2008] AATA 652 at [41].

not fall afoul of the political purposes doctrine.”<sup>53</sup> The AAT also confirmed that promoting the effectiveness of aid advanced the relief of poverty, even though it did not directly relieve poverty, because the relieving of poverty is so fundamental to aid.<sup>54</sup>

However, in 2009, the Full Federal Court reversed the AAT’s decision. Whilst the Court did agree with the AAT that the indirect efficiency of aid delivery would relieve poverty,<sup>55</sup> it rejected the AAT’s view that its purposes were not political:<sup>56</sup>

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. Its attempt to persuade the government necessarily involved criticism of, and an attempt to change, government activity and policy...

As a result the Federal Court held that Aid/Watch’s main purposes and activities were political and thus not charitable. Interestingly, the Court rejected the notion that “undue emphasis” on political means could disqualify an organisation from charitable status,<sup>57</sup> thus providing further clarity on the interpretation of political purpose. Nevertheless, the Federal Court was clear that it was bound by the political purposes doctrine. It noted that:<sup>58</sup>

The “natural and probable” consequence of Aid/Watch’s activities is an effect on public opinion and then on government opinion. Relief from poverty, however, is not either a natural or probable consequence precisely because governments have to take into account factors that institutions such as Aid/Watch do not need to consider.

The Court did not doubt that Aid/Watch’s efforts on one level were not in conflict with government policy because there was no suggestion that the Government was not committed to delivering aid efficiently, and nor that it did not give due regard to environmental concerns. On another level however, Aid/Watch’s concern was that the delivery of aid should “conform to its view of the best way to achieve these objects.”<sup>59</sup> In doing so, Aid/Watch could not take into account “that government and its agencies inevitably have to make choices in determining where, how and how much aid is to be delivered.”<sup>60</sup> Relying on Young CJ’s view in *Attorney General (NSW) v NSW Henry George Foundation Ltd*, the Federal Court confirmed that whilst there may be weaknesses in the political doctrine “it would seem that the main or dominant purpose test is where the law has reached at the present time.”<sup>61</sup> As

53 Chia, Harding and O’Connell “, above n 28, at 370.

54 *Aid/Watch Inc v Federal Commissioner of Taxation* above n 1, at [4] and [23].

55 *Federal Commissioner of Taxation v Aid/Watch Inc* (2009) 178 FCR 423 at [18].

56 Chia, Harding and O’Connell, above n 27, at 371.

57 At 371 citing *Federal Commissioner of Taxation v Aid/Watch*, above n 55, at [39] – [40].

58 *Federal Commissioner of Taxation v Aid/Watch*, above n 55, at [47].

59 At [41].

60 At [41].

61 At [42] citing *Attorney General (NSW) v NSW Henry George Foundation Ltd* [2002] NSWSC 1128 at [54].

a result, the Court concluded that the AAT erred in concluding that Aid/Watch's main purpose was not political, and accordingly determined that its main purpose was political, thus not charitable.<sup>62</sup>

The conclusion of the Federal Court went somewhat to reaffirming the notion of the political purpose doctrine in Australia, and whilst acknowledging that its foundations were not necessarily as firmly grounded as would be judicially acceptable, Australia was still bound by those concepts, and the issue of whether a political purpose is the dominant purpose or subsidiary would be a key consideration for a Court in determining charitable status.

Regardless, however, of the Federal Court's clarifying view regarding this matter, in 2010 the High Court of Australia ploughed a new furrow relating to the political purpose doctrine and uprooted any notion that the *Bowman* line of authority may be firmly established in Australian jurisprudence. The majority of 5 judges overturned the Federal Court's decision, with Heydon and Kiefel JJ in dissent. The Court spent time setting out Australia's jurisprudence regarding *Bowman* and their starting point was that the remarks of Lord Parker in *Bowman* "were not directed to the Australian system of government established and maintained by the Constitution itself."<sup>63</sup> This then, the Court explained, "provides a significant consideration in deciding the content of the common law of Australia respecting trusts for political purposes."<sup>64</sup> Their Honours confirmed that *Bowman* has received little attention over the years in Australia,<sup>65</sup> and indeed rejected the notion that the political purpose doctrine should apply in Australia because the doctrine was in tension with the Constitution.

This was explained as follows. The Australian Constitution mandates "a system of representative and responsible government with a universal adult franchise"<sup>66</sup> and it provides for constitutional change through popular referenda and so is assumed to be indispensable regarding communication between the executive, legislature and electors on government and policy matters. The very system itself therefore requires agitation in order for legislative and policy changes to occur; this is then presumed to be for the public welfare.<sup>67</sup> Thus, Santow J's views in the *Public Trustee* case regarding the notion of agitation falling outside the political purposes doctrine are given credence here by the High Court, and support the author's view that the Court is legitimising the rejection of the doctrine.

This was a bold, and surprising, move by the High Court to use the Constitution in such a manner, because the "case extended an existing constitutional principle relating to freedom of political communication

62 At [47]-[48].

63 *Aid/Watch v Federal Commissioner of Taxation*, above n 1, at [40].

64 At [40].

65 At [41], referring to *Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396.

66 At [44].

67 Chia, Harding and O'Connell, above n 28, at 375.

from its electoral base into the protection of the political activities of non-government organisations";<sup>68</sup> its effect may be long lasting and far reaching, and already New Zealand is beginning to feel the first shock waves, which will be addressed shortly.

Australia's Constitution does not contain a Bill of Rights, nor an express recognition of freedom of speech but the High Court has acknowledged that the Constitution implies that Australian parliaments cannot pass laws that may unduly interfere with citizens' communications about political matters.<sup>69</sup> Sections 7 and 24 of the Constitution state that members of the Federal Parliament must be "directly chosen by the people." This implied freedom takes precedence over statute or common law and if "it can be shown that the freedom applies, it trumps everything else."<sup>70</sup> This freedom is now enabling the courts to develop the common law, as considered in *Lange v Australian Broadcasting Commission*,<sup>71</sup> where the High Court considered defences that are appropriate with regard to dealing with speech and political figures. However, whilst the courts may be at liberty to use this freedom, it is rarely used, and when it is, it is narrowly construed,<sup>72</sup> hence academic surprise at its explicit application in the case of *Aid/Watch*.

In widening the application of freedom of speech, the Court accepted *Aid/Watch*'s submission that the "generation by lawful means of public debate concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head of *Pemsel*."<sup>73</sup> So the High Court has taken "freedom from its electoral context as provided by ss 7 and 24 of the Constitution in to the charitable realm"<sup>74</sup> and in doing so, rejected the notion that the *Bowman* line of authority underpinning the political purpose doctrine should apply in Australia. This does mean that should a "statute seek to close down public advocacy or 'agitation' for legislative or political changes...there may be good grounds to argue that this breaches the Constitution."<sup>75</sup> The High Court failed to clarify what is actually meant by *agitation* in this context although it is thought to include publication of critical comment that would generate support for legal and policy change, although the Court did only speak of *agitation* for legislative and policy change, as opposed to *agitation* outside of such parliamentary and government realms.<sup>76</sup>

68 George Williams "The Australian Constitution and the *Aid/Watch* Case" (2011) 3(3s) *Cosmopolitan Civil Societies Journal* 1 at 1.

69 At 3, referring to *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

70 At 3.

71 At 3, citing *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

72 At 4.

73 *Aid/Watch v Federal Commissioner of Taxation*, above n 1, at [47].

74 George Williams, above n 68, at 5.

75 At 5.

76 At 7.

Whilst the High Court in *Aid/Watch* could be said to have removed “a doctrinal anomaly and the muddle it engendered”,<sup>77</sup> there are still concerns with this radical removal of the common law doctrine. At no stage did the majority in the High Court go beyond the stating of the common law doctrine of political purposes in the United Kingdom, Canada and the United States and whether they are ancillary or subsidiary to the trust’s overall purposes. As addressed earlier, the subject of non-charitable purposes, and clearly political purposes fall under this head, has always been of key importance to any court and Charities Commissions in determining whether an organisation is charitable: if a non-charitable purpose is ancillary to the main purpose of the organisation, then this will not automatically be fatal in obtaining charitable status. The Full Federal Court was certainly compelled to consider the issue of non-charitable purposes, and confirmed that the main purpose of *Aid/Watch* was to persuade government to its point of view and to bring about policy and government change, thus this is political activity, and its main activity.<sup>78</sup> However, once the High Court set out the political purpose doctrine for various jurisdictions, it did not provide any discussion regarding the issue of non-charitable purposes being ancillary or dominant, and instead asserted that the line of authority stemming from *Bowman* was not directed to the Australian system of government.<sup>79</sup> To ignore this fully established jurisprudence was surprising, although perhaps the High Court believed that such a discussion was of no consequence because it was clear in its assertion that the political purpose doctrine no longer had a place in Australian common law.

What this does mean, however, is that there is now no restriction on the amount of advocacy in which organisations may engage, and whilst some organisations may previously have been uncertain as to whether they were engaging in dominant or ancillary amounts of advocacy, the *Aid/Watch* case has now removed the *chilling* effect about which the charitable sector has complained, and has allegedly prevented charities from engaging in advocacy for fear of losing their charitable status,<sup>80</sup> at least in Australia for the time being.

Whilst the method that the Court used to undermine the application of the political purpose doctrine stemming from *Bowman* in Australia might have been surprising, the actual rejection of the *Bowman* line of authority is perhaps not at all surprising, given the reluctance of the judiciary over the years in its applicability. Santow J’s dictum in particular, in *Public Trustee*, as discussed amongst others, was undoubtedly instrumental in helping to sow the seeds in the soil of Australian jurisprudence that had already been tilled

77 Chia, Harding and O’Connell, above n 28, at 377.

78 *Federal Commissioner of Taxation v Aid/Watch*, above n 55, at [35].

79 *Aid/Watch v Federal Commissioner of Taxation*, above n 1, at [40].

80 Chia, Harding and O’Connell, above n 28, at 377.

by previous Australian cases when considering the political purpose doctrine. The political purpose doctrine specific to Australia has now successfully taken root. What then are the implications for such new growth?

Obviously the most profound consequence of the *Aid/Watch* decision is that “advocacy has been accepted as a legitimate charitable activity”<sup>81</sup> and so for the majority of the Court, where a charity’s purpose is to agitate for reform to legislation, a Court now does not need to concern itself with whether the law reform is meritorious, or otherwise, before determining if the purpose is a charitable one.<sup>82</sup> It will be recalled earlier in the paper that courts have historically been very reluctant to determine the matter of public benefit relating to political purpose because the courts are in no position, and have no means, of judging the merits of that particular law reform.<sup>83</sup> In the *Aid/Watch* case however, the Court clarified 2 points: firstly, the rule against political purposes has been repealed, and secondly, by finding that the public benefit test might be applied in political purposes cases without actually addressing the issue of whether the change in law might be beneficial, the Court managed to side step the whole issue. In effect, what the majority in *Aid/Watch* determined was that “generating public debate about governmental activities is apt to produce public benefit because of its effects on the political culture of liberal democracy in Australia.”<sup>84</sup> So therefore the High Court legitimised the rejection of the doctrine and this could be said to be a natural consequence of the judicial disquiet that had been reflected in the antecedent judgments over the years.

Whilst the decision of *Aid/Watch* has been welcomed for many reasons,<sup>85</sup> not least because it has opened up the doors for a wide range of organisations to take advantage of being charitable without concern about engaging in advocacy, and those organisations undoubtedly will make important contributions in fighting for public welfare in matters such as health, poverty and suffering,<sup>86</sup> jurisprudentially there are concerns that the decision may not be so welcome.

It was noted earlier that the AAT found that *Aid/Watch* relieved poverty and advanced education, and may otherwise fall under the fourth *Pemsel* head, with which the Full Federal Court agreed, although they determined that it was political. However, the High Court stated that the organisation’s purposes fell within the fourth *Pemsel* head and provided no explanation for rejecting the earlier characterisations of the AAT and the Federal Court. It is

81 At 378.

82 Matthew Harding “Finding the Limits of *Aid/Watch*” (2011) 3(3s) *Cosmopolitan Civil Societies Journal* 34 at 39.

83 *Bowman v Secular Society* [1917] AC 406; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA); *Re Positive Action Against Pornography and Minister of National Revenue* (1988) 49 DLR (4<sup>th</sup>) 74.

84 Harding, above n 82, at 40.

85 See generally Chia, Harding and O’Connell, above n 28.

86 Williams, above n 68, at 7.

unsettling that the High Court felt confident enough to sweep away decades of jurisprudence regarding political purpose and charitable status by basing its decision superficially on its own constitutional framework,<sup>87</sup> thus making a landmark decision, whilst failing to provide legal clarity on fundamental charitable matters.

Further issues arise in relation to the actual meaning of “public debate” and “political activities”. It is not clear whether “‘political activities’ other than generating public debate, such as private lobbying of government officials or political campaigning”<sup>88</sup> may be charitable, and neither is it clear whether public benefit “lies primarily in the generation of public debate itself”<sup>89</sup> or “in the charitable purpose which is being debated”,<sup>90</sup> or perhaps a combination of the both. So the *Aid/Watch* decision is a double edged sword: on the one hand it has swept away decades of jurisprudential uncertainty and criticism in one fell swoop in Australia, and opened up the gates for greater freedom of expression and a dynamic change in the charitable industry, and on the other, it has provided unsettling legal uncertainty with regard to the continued meaning of political activity and charitable purpose. What then has been its influence in New Zealand?

## VI. ARE THERE FERTILE GROUNDS IN NEW ZEALAND FOR NEW GROWTH?

New Zealand did not have long to wait before the effects of the case of *Aid/Watch* were being felt in the courts. The case of *Draco Foundation (NZ) Charitable Trust v The Charities Commission*<sup>91</sup> was the first case in New Zealand to consider the applicability of *Aid/Watch* in its own jurisdiction. This case arose as a result of the Charities Commission of New Zealand (as it was) rejecting Draco Foundation’s application for charitable status. Prior to the publication of the decision, my view was that the High Court would deny the applicability of the principles enunciated in the *Aid/Watch* case in New Zealand because:<sup>92</sup>

- The High Court in *Aid/Watch* made it clear that the Australian constitution allows for such political agitation and that agitation provides public benefit; and
- New Zealand does have a general doctrine that would deny organisations charitable status if their non-charitable purposes are more than ancillary to their main purposes.

87 Chia, Harding and O’Connell, above n 28, at 380.

88 At 383.

89 At 384.

90 At 384.

91 *Draco Foundation (NZ) Charitable Trust v The Charities Commission* HC Wellington CIV-2010-1275, 3 February 2011.

92 Chevalier-Watts, above n 6, at 156.

These views were given support in the judgment of Young J in *Draco*. The purpose of the Draco Foundation is to protect and promote democracy and natural justice in New Zealand. It does this, inter alia, through research and engaging in public debate on results; raising awareness of an involvement in the democratic process; organising conferences and making public comment. It also provides free resources online for citizens as well as providing merchandise, training and paid access to sections of its website. The appellant submitted that its purposes are educational, therefore they fall within the head of advancement of education and also that through moral improvement they are charitable under the fourth head of charitable purpose. The appellant denied that its main purposes are political.<sup>93</sup>

The key matter for this paper is the consideration of the partisan or political material. The Commission determined that the material available on the websites amounted to propaganda under the guise of education, thus offending the rule that a trust for political purposes cannot be charitable.<sup>94</sup> The Court confirmed that much of the partisan material was an attempt by the Foundation to persuade local or central government to a particular point of view, and publicising one side of a debate is not advancing education.

The Court referred to the Canadian case of *Action by Christians for the Abolition of Torture v The Queen in Right of Canada*,<sup>95</sup> where the Court held that attempts to sway the government by writing of letters and other methods on contemporary matters was a political activity. However, the appellant submitted that the High Court of New Zealand should adopt the Australian approach as set out in *Aid/Watch*. This, Draco stated, would allow the organisation to pursue its political agenda through advocacy without falling foul of the political purpose doctrine.<sup>96</sup>

The Court did acknowledge that Draco's purpose to enhance and maintain communication between electors and legislators and executive officials does contribute to the public welfare through public debate, and therefore prima facie, is charitable. However, the Court was very clear that whilst Australia has declared that the general doctrine that excludes political objects from being charitable is not applicable to Australia, such a doctrine is still very much alive and well in New Zealand, and whilst *Aid/Watch* sought to cut a swathe through the *Bowman* principles that underpin this doctrine, New Zealand is still bound by *Bowman*, and as such, is still tending to that well established principle.<sup>97</sup>

In addition, the Court noted that there may be other reasons as to why *Aid/Watch* would not have application in the instant case:<sup>98</sup>

93 *Draco Foundation (NZ) Charitable Trust v The Charities Commission*, above n 91 at [20].

94 At [53], referring to *Molloy*, above n 83, at 695.

95 *Action by Christians for the Abolition of Torture v The Queen in Right of Canada* (2002) 225 DLR 4<sup>th</sup> 99 (FC).

96 *Draco Foundation (NZ) Charitable Trust v The Charities Commission*, above n 91 at [56].

97 At [57]-[59].

98 At [60].



That includes the proposition that *Aid/Watch* applies only to those cases where the charitable purpose involves relief of poverty. And secondly, that the decision in *Aid/Watch* is reliant upon Australian constitutional principles not applicable in New Zealand.

However, whilst Young J did acknowledge that the new line of Australian authority may not have applicability in New Zealand in the *Draco* case, there was no requirement actually to assess the strength of that reasoning because *Bowman* identifies the law in New Zealand, thus rendering that examination unnecessary. Young J therefore sent out a rather clouded message. On the one hand, his Honour was clear that the *Bowman* line of authority that underpins the political purpose doctrine remains good law in New Zealand, and as such, the seeds of change from Australia should not be allowed to germinate on New Zealand soil. On the other hand, this acknowledgement was not entirely grounded on firm footing. His Honour acknowledged that whilst the New Zealand method of governance and constitution may preclude such political agitation from being charitable, and that *Aid/Watch* may only be applicable in cases relieving poverty, he was not prepared to assess the strength of either of those propositions, therefore leaving the gate open for further judicial examination, and indeed propagation.

However, perhaps this is not such a surprising approach. This was the first time that a Court in New Zealand has had the opportunity to examine the contemporary Australian jurisprudence of charitable trusts and political activity in the context of New Zealand, and whilst it is clear that Australia has been voicing its vexation regarding the doctrine for many decades, New Zealand has been more conservative in its application of the doctrine. It is, perhaps, entirely reasonable that the Court should therefore conservatively reject the Australian jurisprudence whilst also acknowledging its possible applicability. After all, charitable trusts have always been a moveable feast and there are many modern day charities that would not have been conceivable a mere 100 years ago.

The next much awaited instalment in the chapter of the political purposes doctrine in New Zealand came about later in 2011 in the High Court case of *Re Greenpeace New Zealand Plc*,<sup>99</sup> where again, the case of *Aid/Watch* was a point of consideration.

Greenpeace New Zealand Inc's overall purpose is to promote a philosophy that encompasses the protection and preservation of nature and the environment and the organisation had benefited from being charitable until the Charities Act 2005 came in to force. When that occurred, organisations were obliged to apply to the Charities Commission<sup>100</sup> for registration as a legal charitable entity. The Commission declined Greenpeace's application on the basis of its political activity. The appeal "was framed as whether a modern law

99 *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815.

100 On the 31 May 2012, Parliament passed the Charities Amendment Act (No 2) 2012. This resulted in the winding up of the Charities Commission in New Zealand and the disestablishment of the Board. From the 1 July 2012, the core functions of the Commission transferred to the Department of Internal Affairs - Charities.

of charities ought to exclude from registration societies that promote charitable objectives through the use of advocacy.”<sup>101</sup> Heath J confirmed that the genesis of the exemption of political activities from charitable purposes evolved from *Bowman*, and affirmed the notion of the inapplicability of political objects in relation to charitable trusts, and very specifically to the matter of persuading the public towards peace as opposed to war by undertaking a specific course of action as per the objects of Greenpeace.

His Honour then clearly acknowledged the applicability of the *Bowman* line of authority in New Zealand, stating that *Bowman* was applied in *Molloy v Commissioner of Inland Revenue*,<sup>102</sup> and explicitly affirmed that the Court was bound by that decision,<sup>103</sup> thus dispelling any notion that New Zealand might follow Australia’s novel jurisprudence of rejecting that line of authority. Heath J confirmed that at the time of the *Molloy* decision, which concerned a donation to the Society for the Protection of the Unborn Child, where the donee claimed that she was entitled to deduct that sum from her assessable income for that year, that “there was vigorous public debate over the possibility of liberalisation of the law relating to abortion”,<sup>104</sup> and indeed, the starting point for determining whether the political activity exception should apply were Lord Parker’s observations in *Bowman*. In the *Molloy* case, Somers J stated that those who engage in advocating for changing the law and those who vigorously oppose changing the law in relation to abortion are both engaged in carrying out political activities.<sup>105</sup> As a result “the inability of the Court to judge whether a change in the law will or will not be for the public benefit...must be as applicable to the maintenance of an existing provision as to its change.”<sup>106</sup>

In making reference to this, Heath J in *Greenpeace* was clearly entrenching the concept that the *Bowman* line of authority was explicitly applicable as part of New Zealand jurisprudence, and in particular, to the factually similar political undertakings as addressed in *Molloy* and *Greenpeace*. As if there could have been any doubt as to that matter, Heath J turned his attention to the slightly later case of *Re Collier (deceased)*,<sup>107</sup> where a testatrix had left her estate to promote, inter alia, the ideas of world peace and to enabling people to die with dignity; in particular the Voluntary Euthanasia Society was deemed to satisfy the latter object. Hammond J in *Re Collier* did not discuss *Molloy*, although his Honour did explore the issue of political trusts and he set out 3 rationales for the doctrine, although his view was that two of them were “distinctly debateable.”<sup>108</sup>

101 *Re Greenpeace New Zealand Incorporated*, above n 99, at [6].

102 *Molloy v Commissioner of Inland Revenue*, above n 83.

103 *Re Greenpeace New Zealand Incorporated*, above n 99, at [44].

104 At [45].

105 At [46] citing *Molloy v Commissioner of Inland Revenue*, above n 83, at 695.

106 At [46] citing *Molloy v Commissioner of Inland Revenue*, above n 83, at 696.

107 At [49] citing *Re Collier (deceased)* [1998] 1 NZLR 81.

108 At [50] citing *Re Collier (deceased)*, above n 107, at 89.

The first rationale set out by Hammond J in *Re Collier*, as cited in *Greenpeace*, was that “a coherent system of law ‘could scarcely admit that objects which are inconsistent with its own provisions are for the public welfare.’”<sup>109</sup> However, as noted by Heath J, Hammond J in *Re Collier* referred to the alternative viewpoint as set out in the United States of America where it is commonplace for Judges to make suggestions about changes in the law, “whether in judgments or writing extra-curially.”<sup>110</sup>

The second rationale set out by Hammond J in *Re Collier* was the category of prohibited political charitable trusts that perpetuate advocacy of a particular point of view – otherwise termed as propaganda trusts.<sup>111</sup> However, Hammond J also criticised this view point and thought it contentious because whilst outright disobedience to the law is illegal and obviously not charitable, where the Courts move beyond that explicit issue, then perhaps it is more of a grey area. This is because in reality judges are consistently making decisions about the “worth” of bequests,<sup>112</sup> therefore to say that judges are not in a position to make judgments about the value of a matter is not strictly accurate.

The third rationale cited by Hammond J in *Re Collier* “related to the rejection of trusts to support a political party. This is based on the undesirability for the advantages of charity to be conferred on trusts which overtly ‘secure...a certain line... of political administration and policy.’”<sup>113</sup> Hammond J could see no contention with this particular rationale, although clearly his Honour was troubled by the other two rationale.

It is obviously no coincidence that Heath J took such pains to emphasise the views of Hammond J in *Re Collier* to this extent and indeed, his Honour in *Greenpeace* stated explicitly that his learned colleague “considered that the general political activity exception was based on questionable foundations.”<sup>114</sup> Whilst Heath J set out clearly the discomfort felt by Hammond J about the actual doctrine, his Honour also then revealed that his learned colleague “found himself required by authority to apply it, in the circumstances of the case.”<sup>115</sup> The use of the words “in the circumstances of the case” suggest that should Hammond J have found himself outside of those constraints, he would not have felt so bound by a principle in which he had so little faith, and therefore may well have chosen to plough new jurisprudential furrows.

However, whilst Hammond J had “considerable sympathy for the viewpoint which holds that a Court does not have to enter into the debate at all”,<sup>116</sup> rather a Court could “sieve out debates which are for improper

109 At [50] citing *Re Collier (deceased)*, above n 107, at 89 in which Hammond J cites *Royal North Shore Hospital of Sydney v Attorney General for New South Wales*, above 29, at 426.

110 At [50] citing *Re Collier (deceased)*, above n 107, at 89.

111 At [50] citing *Re Collier (deceased)*, above n 107, at 90.

112 At [50] citing *Re Collier (deceased)*, above n 107, at 90.

113 At [51] citing *Re Collier (deceased)*, above n 107, at 90.

114 At [52].

115 At [52].

116 At [52] citing *Re Collier (deceased)*, above n 107, at 90.

purposes”,<sup>117</sup> and then could indeed leave “the public to debate to lie where it falls, in the public arena...”,<sup>118</sup> he could see “no warrant to change these well-established principles.”<sup>119</sup>

Here then, Heath J in *Greenpeace* provides evidence of some quiet discontent regarding the political doctrine in New Zealand jurisprudence, much as Australia did some years previously. However, there is one clear difference between the two jurisdictions: New Zealand, whilst dissatisfied with the jurisprudence, has been unable to shake the shackles still tying it to the doctrine stemming from the *Bowman* line of authority, and whilst Australia had been quietly sowing the seeds of a new line of authority ready to be harvested so readily in *Aid/Watch*, as addressed earlier in the article, there appears, prima facie, to be little fertile soil for a new line of authority to grow in which in New Zealand due to its rigid adherence to that doctrine.

However, Heath J then turned his attention to the decision in *Aid/Watch*. His Honour confirmed that *Aid/Watch*’s activities contributed to the public welfare and were for purposes beneficial to the community within the fourth *Pemsel* head, and the activities should not be subject to the disqualification political rule because of the contemporary structure of the Australian system of governance. Interestingly, Heath J made a point of referencing the dissenting Judge’s views, those of Heydon and Kiefel JJ. The former was “critical of the majority’s view that those who encourage energetic action to achieve a particular political goal could be seen as educating the public on the pros and cons of a particular political issue.”<sup>120</sup> In particular, Heydon J, similarly to Heath J, relied on Hammond J’s dicta in *Re Collier*, and took the view that *Aid/Watch* “intended to persuade people to a particular point of view; there was no attempt to provide a balanced assessment of opposing views from which knowledge could be accumulated and independent decisions made.”<sup>121</sup>

Kiefel J took a slightly different approach, and whilst her Honour had no issue with the political nature of the organisation and was not convinced that this should disqualify it from achieving charitable status, “she was influenced by the way in which *Aid/Watch* had targeted the policies and practices of inter-governmental institutions, the Australian Government and its allies, as opposed to encouraging rational debate.”<sup>122</sup> In other words, her Honour argued that if its purposes were for the public benefit, then this would meet the charitable requirements, however, its activities are not directed to that end because its purposes are directed to the acceptance of the Government and its agencies of *Aid/Watch*’s views on the provision of aid, not that of public debate about the provision of aid.

117 At [52] citing *Re Collier (deceased)*, above n 107, at 90.

118 At [52] citing *Re Collier (deceased)*, above n 107, at 90.

119 At [52] citing *Re Collier (deceased)*, above n 107, at 90.

120 At [56].

121 At [56] citing *Aid/Watch*, above n 1, at [60], [61], [62].

122 At [57] citing *Aid/Watch*, above n 1, at [69].

Interestingly, Heath J in *Greenpeace* gave no specific view about the considerations of the dissenting Judges, but it is submitted that by their very inclusion, his Honour clearly felt those views were of merit. The fact that those views reflect, at least in part, his Honour's own submissions, suggests that Heath J is emphasising the still very real consideration that the doctrine is valid, and indeed that whilst Australia may have scythed away the political purpose doctrine underpinned by *Bowman*, the dissenting opinions still have some validity. So leaving questions hanging about his own view on the dissenting opinions in *Aid/Watch*, Heath J acknowledged the judgment of *Re Draco* and its rejection of the *Aid/Watch* decision in New Zealand.

His Honour highlighted the other two reasons why Ronald Young J in *Re Draco* believed that *Aid/Watch* ought not to be applied in New Zealand: that it should only be applied to cases where the charitable purpose involved the relief of poverty, and that *Aid/Watch* was reliant on the Australian constitution, which were not applicable in New Zealand.<sup>123</sup> Heath J refrained from comment on Ronald Young J's point regarding the relief of poverty exclusion, and instead, focused his thoughts on the matter of the purportedly differing political systems and stated that he has:<sup>124</sup>

...no real concerns that the political system in Australia ought to bring about a different conclusion, having regard to our mixed member proportional system of parliamentary election, our reliance on select committees to enable policy to be properly debated and the existence of ss 13 and 14 of the New Zealand Bill of Rights Act 1990, dealing respectively with freedom of thought, conscience and religion, and freedom of expression.

Whilst his Honour felt it important enough to comment that the system of New Zealand governance actually may support the applicability of *Aid/Watch*, his Honour went no further in his investigation, and merely stated that the question should be left open for consideration, "in an appropriate case, by the Court of Appeal or the Supreme Court."<sup>125</sup>

This then is reminiscent of earlier Australian cases where the courts expressed their discontent with the political purposes doctrine and impliedly began legitimising the final rejection of the doctrine. Is New Zealand therefore to follow that path?

The Court of Appeal case of *Greenpeace of New Zealand Incorporated*,<sup>126</sup> which will be addressed shortly, suggests not yet, as the legal ground is not yet fertile enough to encourage any growth at the immediate time, and this is supported by Heath J's view in the High Court *Greenpeace* case where he felt "constrained to apply the full extent of the *Bowman* line of authority on the

123 At [58].

124 At [59].

125 At [59].

126 *Re Greenpeace of New Zealand Incorporated* [2012] NZCA 533, [2013] 1 NZLR 339.

basis that I am bound to do so by the Court of Appeal decision in *Molloy*.<sup>127</sup> However, his Honour also felt bound to add explicitly that in “modern times, there is much to be said for the majority judgment in *Aid/Watch*.”<sup>128</sup>

Heath J therefore presents a rather confused and mixed picture. Firstly, his Honour provides confirmation that political purpose doctrine underpinned by *Bowman* is applicable in New Zealand, but only because he felt bound by the Court of Appeal decision of *Molloy*. Secondly, whilst his Honour clearly felt it necessary to highlight the dissenting views in *Aid/Watch*, there was no explicit appraisal of those views, thus inviting questions as to whether the *Bowman* line of authority is finding its footing rather becoming loose in New Zealand jurisprudential soil. Thirdly, his Honour failed to clarify one of the points raised by Ronald Young J, that of whether *Aid/Watch* is specific only to relief of poverty cases, and additionally, that New Zealand governance principles may actually allow *Aid/Watch* to be applied now in Aotearoa. Indeed, it has been argued that the *Aid/Watch* principles could be mounted in any democratic country.<sup>129</sup> If that is correct, then any subsequent appeals should provide some evidence as to whether New Zealand could legitimately reject the political purpose doctrine, in line with Australia.

Therefore it was with great anticipation that the author awaited the judgment in the very recent appeal case of *Greenpeace of New Zealand Incorporated* to the Court of Appeal. It is to that judgment that this paper now turns to explore whether New Zealand is adopting a more liberal approach regarding charitable trusts and political purposes.

As the Court of Appeal stated, “the nature and purposes of Greenpeace are best understood from its objects,<sup>130</sup> and it was two of these objects that were of issue to the Charities Commission (now the Department of Internal Affairs - Charities). These two objects read at the time as:<sup>131</sup>

2.2 Promote the protection and preservation of nature and the environment, including oceans, lakes, rivers and other waters, the land and the air and flora and fauna everywhere and including but not limited to the promotion of conservation, disarmament and peace.

2.7 Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society and support the enforcement or implementation through political or judicial processes, as necessary.

The Court of Appeal then heard advice that the Board of Greenpeace had resolved to recommend to a general meeting of Greenpeace that these objects be amended, and now read:<sup>132</sup>

127 *Re Greenpeace New Zealand Incorporated*, above n 99, at [59].

128 At [59].

129 Myles McGregor-Lowndes and Matthew Turnour “Options for Development of the New Zealand Law of Charities” (2011) Working Paper No CPNS 56 The Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, May at 14 citing Mark Van Dadelnszen “Charities and Societies” (2011) *NZ Lawyer* March at 14.

130 *Re Greenpeace of New Zealand Incorporated*, above n 126, at [7].

131 At [7].

132 At [9].

2.2 Promote the protection and preservation of nature and the environment, including oceans, lakes, rivers and other waters, the land and the air and flora and fauna everywhere and including but not limited to the promotion of conservation, disarmament and peace, **nuclear disarmament and the elimination of all weapons of mass destruction.**

2.7 Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society **listed in clauses 2.1-2.6** and support **their** enforcement or implementation through political or judicial processes, as necessary, **where such promotion or support is ancillary to those objects.**

As a result therefore, the proposed amendments had a significant impact on the specific issues raised at this appeal.<sup>133</sup>

The Court of Appeal noted that whilst there have indeed been significant developments in the law of charitable trusts since the prohibition on political purposes doctrine, “the rationale for the prohibition has not necessarily been undermined.”<sup>134</sup> In the Court’s view there is little doubt that, as with Australia and Canada, New Zealand could be “described as a modern participatory democracy with well-developed constitutional arrangements for public involvement.”<sup>135</sup> In addition, New Zealand also has a Bill of Rights that protects freedom of thought, religion, conscience and expression.<sup>136</sup> All of which clearly far removes this jurisprudence from the English jurisprudence of over 100 years ago.<sup>137</sup> Nonetheless, the Court believed it of utmost importance to “distinguish between exercising those rights to support purposes which are recognised as primarily charitable and pursuing purely political purposes”,<sup>138</sup> and the Court explicitly remarked that it was not prepared to depart from the decision of the Court in the *Molloy* case, which “established that a society established for contentious political purposes could not be said to be established principally for charitable purposes.”<sup>139</sup>

What is interesting is the explicit use of the words *contentious political purposes*, leaving the possibility open, therefore, of political purposes without contention as being broadly acceptable within the charitable trusts jurisprudence. Indeed, the Court goes on to acknowledge that the prohibition on political trusts, as entrenched by s 5 of the Charities Act 2005, has “produced some continuing and anomalous results, which have led to criticism and suggestions for reform.”<sup>140</sup> Nevertheless, the Court was quite clear, the prohibition on political objects is part of the current law of New Zealand and it was not persuaded “that there are good grounds for overriding it.”<sup>141</sup>

133 At [10].

134 At [59].

135 At [59]; see also *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 45-46.

136 New Zealand Bill of Rights 1990, ss 13 and 14.

137 *Re Greenpeace of New Zealand Incorporated*, above n 126, at [59].

138 At [59].

139 At [60].

140 At [63]; compare *McGovern v Attorney General*, above n 22, with *Re Green’s Will Trusts* [1985] 3 All ER 455 and *Re Inman* [1965] VR 238.

141 At [63].

Whilst this then provides evidence that New Zealand is still supportive of the entrenched approach towards political purpose trusts, which has been eschewed by our Antipodean cousins, the Court then appeared to muddy the waters once again. In their view, New Zealand should adopt the approach of Australia with regard to the use of the term “charitable”, where it “was to be understood by reference to its source in the general law as it was developed in Australia ‘from time to time’”.<sup>142</sup> The Court did add, however, that any development in the law “must be consistent with and constrained by the provisions of the Act.”<sup>143</sup> As evidence of support for the evolution of the law of charitable trusts, the Court sought to agree with views of Hammond J in *DV Bryant Trust Board v Hamilton*, where his Honour stated:<sup>144</sup>

It would be unfortunate if charities law were to stand still: this body of law must keep abreast of changing institutions and societal values. And, it is to New Zealand institutions and values that regard should be had. This is not, of course, to say that “new” heads of charity will be allowed to spring up overnight without close scrutiny; rather (adapting some pertinent words from the preface to the Book of Common Prayer) Courts should, in appropriate cases be prepared to entertain adjustments “to things once advisedly established”. That philosophy of necessity mandates a cautious approach, and one which will usually proceed by analogy; but neither does it set its face against change to what is considered to be charitable, in law.

The dictum of the Court in the *Greenpeace* appeal case reflects the very real challenge being placed firmly at the feet of New Zealand’s courts – that of acknowledging the ever-changing status of the law of charity, whilst being bound by the shackles of the common law. Australia has broken free of these constraints, for the reasons set out in this article, and in doing so, planted the seeds of change within the jurisprudence of New Zealand. The Court is clearly supporting the ethos of change where appropriate, thus providing evidence that the seeds of change are germinating here in New Zealand, which echoes the early Australian jurisprudence. So whilst outwardly New Zealand does not support eschewing the political purpose doctrine, it is showing inward signs of legitimising the eventual possible rejection of the doctrine.

Turning to the matter of the objects of *Greenpeace* that were at issue for the Court, the Court was of the view that the amendments made by *Greenpeace* to the two controversial objects “will remove the element of political contention and controversy inherent in disarmament generally”<sup>145</sup> and instead, would then “constitute...an uncontroversial public benefit purpose.”<sup>146</sup> So in other words, the Court explicitly applied the test from *Molloy*, where the Court is not required to determine wherein the public good lies because it is self-evident as a matter of law.<sup>147</sup> The public benefit would be achieved in a number of respects. Firstly, in recognition of New Zealand’s

142 At [67].

143 At [67].

144 At [67], citing *DV Bryant Trust Board v Hamilton* [1997] 3 NZLR 342, at 348.

145 At [76].

146 At [76].

147 At [76].



international obligations as a signatory to the Nuclear Non-Proliferation Treaty, therefore a similar approach should be adopted in the *Greenpeace* case where promotion of nuclear disarmament would be for the public benefit.

Secondly, the promotion of nuclear disarmament is in accordance with domestic law and is enacted in the New Zealand Nuclear Free Zone Disarmament, and Arms Control Act 1987, whose purpose is to, inter alia, promote and encourage an effective and active national contribution to the essential process of disarmament.<sup>148</sup>

Thirdly, successive New Zealand governments have confirmed their intentions to support the Treaty on the Non-Proliferation of Nuclear Weapons 1968, which reflects overwhelming national public opinion.<sup>149</sup>

Fourthly, the reference in object 2.2 to “the elimination of all weapons of mass destruction” is consistent with national treaty and statutory obligations, therefore the Court was able to accept that the amended clauses were within the fourth head of charity, that of any other purpose beneficial to the community, and there could be no grounds for holding them outside the spirit and intendment of the Preamble of the Statute of Elizabeth.

Therefore, whilst the Court acknowledged the reality that change is a natural occurrence for the jurisprudence of charitable law, it still fully relied on the historical doctrines set out in the case of *Molloy*, suggesting therefore that New Zealand is still fully entrenched in the annals of charitable trust history. However, this may not be strictly accurate.

The Court in the *Greenpeace* appeal case did clearly state that charitable trust law should recognise that the promotion of peace through nuclear disarmament and the elimination of weapons of mass destruction as a charitable purpose under the fourth head of charity, thus reflecting a clear evolution in charitable trust law. The fact that the Court was able to utilise and apply adequately the historical doctrines to be able to support this novel charitable purpose suggests therefore that there is perhaps no requirement after all to propagate the changes so embraced in the Australian jurisprudence, because New Zealand’s approach is still admirably sufficient to be able to determine accurately public benefit in such controversial issues.

In relation to the amended object 2.7 submitted by Greenpeace, the Court was of the view that advocacy was intended to be merely ancillary and not independent from Greenpeace’s primary charitable purposes, thus it would meet the requirements of s 5 of the Act.<sup>150</sup>

The result of the appeal to the Court of Appeal by Greenpeace has been mixed in terms of proving judicial clarity. On the one hand, the Court provided evidence that the political purpose doctrine is still firmly entrenched and the Court was perfectly able to determine public benefit, even in controversial circumstances, without the need to reject the political purpose doctrine. On the other hand, it is clear that the path of *Greenpeace* through the courts has

148 At [78].

149 At [79].

150 At [83]-[91].

highlighted judicial disquiet regarding the contemporary requirement of the political purpose doctrine. Perhaps therefore New Zealand is on the path to giving itself permission to allowing the doctrine to be rejected if cases present more controversial issues than those that have done to date. If such cases do not present themselves, then New Zealand is still at liberty to apply the political purpose doctrine.

This is not, however, the end of the story. The Court believed that the appropriate course of action was to exercise the power of the Court to refer Greenpeace's application for registration to the chief executive and Board of the Department of Internal Affairs - Charities for reconsideration in light of amendments made to its objects and the findings of the Court.<sup>151</sup> The Department of Internal Affairs - Charities is yet to release its deliberations on this matter.

It is undeniable that the path of the *Greenpeace* case through the courts has been rocky. This article highlights criticisms that could be levelled at the lack of overall certainty provided in the High Court in determining this case, and the lack of willingness by the Courts to follow the contemporary approach of Australia, and whilst the Court of Appeal has provided evidence that whilst change can be welcomed, it is still restrained from adopting a more liberal approach. However, this does not necessarily mean that, as a matter of law, the jurisprudence of New Zealand is stultified. The Judges were constrained by earlier decisions and these cases are "evidence of the proper processes for common law development in New Zealand."<sup>152</sup> If such changes are to occur, then it would be for a case to overrule that of *Molloy* in a superior court, which the Court of Appeal was not prepared to do in *Greenpeace of New Zealand Incorporated*. Interestingly, Greenpeace has successfully launched an appeal to the Supreme Court on the matter of public benefit. This appeal may then yet provide a determinative answer as to whether the courts are prepared to over rule the application of *Molloy* and *Bowman* in New Zealand that underpin the doctrine of political purpose.

Nonetheless, as it stands, whilst there is clearly evidence that there is no stultification of the common law as a matter of law, it may be argued that the decisions of *Re Draco* and *Greenpeace* "have the practical effect of stultifying the common law's development in this area"<sup>153</sup> because organisations that wish to take advantage of charitable status may be dissuaded from advancing cases through the court system due to high costs or indeed because of the inevitable publicity that would eventuate from such processes.

There is no answer to the matter of publicity, however, Heath J in the High Court case of *Greenpeace* may have gone some way to alleviate any concerns over costs because his Honour did not follow the usual rule that

151 At [101]-[102].

152 Myles McGregor-Lowndes and Matthew Turnour "Options for Development of the New Zealand Law of Charities" (2011) Working Paper No CPNS 56 The Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, May at 14.

153 At 14.

the successful party should be awarded costs, because there were issues of public importance.<sup>154</sup> Should further cases arise citing issues of equal public importance, New Zealand courts could choose to follow this precedent.

Whilst it is clear that New Zealand is tentatively receptive to expanding their jurisprudence on political activity and charitable trusts, it is also clear that they remain cautious about whether New Zealand really should also scythe away the annuals of charitable trust common law and follow in the wake of their Tasman cousin. The Court of Appeal case of *Greenpeace* admirably shows that new charitable purposes should be accepted and are not in discord with historical methods of applying the traditional laws, and only time will tell as to whether the Supreme Court will follow that same approach.

## VII. CONCLUSION

The opening remarks of this article asked can, and indeed should, New Zealand continue to follow the traditional jurisprudence in light of the sea changes created by its antipodean cousin. In attempting to answer to that question, one must look to the evolution of the jurisprudence. It is evident that from the nineteenth century in England, the judiciary were planting the early seeds of the exception to charitable trusts, that of political activities, although it was not until the now iconic case of *Pemsel* that the seeds began to germinate fully throughout the English jurisprudence. The English courts adopted a wide interpretation of the term “political purpose”, and as a result, it could encompass many activities carried out by organisations including trusts that furthered the interests of political parties; trusts that sought to procure changes in national and international laws, and trusts that sought to procure a reversal of national and international government policy or particular decisions of government authorities. Whilst English courts adopted a wider interpretation with enthusiasm, Australian jurisprudence was more reticent in its adoption of the political purpose doctrine, and case law shows that Australian courts, even from early on, had begun to follow a diverging path from their Tasman and European cousins.

In a number of cases prior to the ground-breaking *Aid/Watch*, the Australian judiciary expressed concern that political purpose had its roots in uncertain footing, and that such heritage led to its being vague and indefinite. Australia therefore was clearly endeavouring to plough its own furrows of jurisprudence and in doing so, it adopted a more restrictive interpretation of the political doctrine, meaning that trusts that may fall foul of the wide interpretation of the doctrine in England and Wales would actually be construed as charitable in Australia. However, the process of planting a new jurisprudence has not necessarily been a smooth undertaking for the Australian courts, as reflected in the journey through the Courts of the case of *Aid/Watch*, eventually ending

<sup>154</sup> At 14, citing *Greenpeace*, above n 99, at [78].

in the High Court of Australia, where at last, the harvest that undermined the application of the *Bowman* line of authority in Australia bore fruit. Whilst it is evident that discord still exists in Australia, as reflected in the majority decision of the High Court in *Aid/Watch*, it is evident that Australia has now firmly established this contemporary jurisprudence.

New Zealand did not have to wait long for the effects of the *Aid/Watch* to be felt, and the case of *Re Draco* was the first to test how fertile the jurisprudential grounds of New Zealand would be to plant the seeds of change in Aotearoa. Young J was clear that the *Bowman* line of authority was still good law in New Zealand, although his Honour did mention that New Zealand's own system of governance may preclude the type of political agitation as discussed in *Aid/Watch* from being applicable in New Zealand, and indeed, *Aid/Watch* may only in fact be applicable in cases that relieved poverty. Unfortunately for New Zealand however, his Honour refrained from expanding further on these matters, thus leaving perhaps more questions than answers as to whether New Zealand may yet prove fertile grounds for a contemporary approach to political activities and charitable trusts. The case of *Greenpeace* proved equally frustrating in terms of clarifying whether changes may be on the horizon in its journey through the courts, although the Court of Appeal has shown that old laws and new principles can sit comfortably alongside one another without too much apparent discord, thus suggesting that whilst the seeds of change may have been planted, New Zealand sees no value yet in tending that harvest.

My view is that it is not necessary for New Zealand to move away from its traditional path. The issues of public and private benefit have been readily resolved<sup>155</sup> by the Charities Commission, and the Courts, and supported by the Charities Act 2005,<sup>156</sup> and whilst there is indeed limited contemporary common law, this does not necessarily mean that charity law in New Zealand is being stultified by lack of legal development. Australia based its *Aid/Watch* decision, in essence, on its system of political governance, which has not proven to be of merit, nor relevance, in New Zealand. Decades of case law supports the continuing of the status quo in New Zealand. I, for one, however, eagerly await the response from the Department of Internal Affairs – Charities in relation to their reconsideration of the registration of *Greenpeace* in light of the Court of Appeal judgment, and the appeal by *Greenpeace* to the Supreme Court.

155 At 15.

156 Charities Act 2005, s 5(4).