

In Defence of Religious Charitable Trusts – When the Ancient and the Modern Collide¹

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Abstract

Religious charitable trusts are no strangers to public and judicial criticism for a range of reasons, and this article considers their continued place within the charity narrative from the unusual perspective of the relationship between religious charitable trusts and commercialism, and whether such a position can be justified in contemporary society. This article does so by considering key cases from Australia and New Zealand, as well as Hong Kong. In doing so, this article demonstrates that religious trusts and commercialism make unusual but justifiable bed fellows, even in contemporary times, at least from a charitable perspective. As such, this article looks to quell some of the public disquiet concerning such trusts that continues unabated, and in doing so, this article may go some way in enhancing the quality of public conversations regarding religious charitable trusts.

Introduction

This article explores the legitimacy of religious charitable trusts from a specific point of view, that of commercialism. This might be deemed an unusual approach to take, considering that religion and commercialism may seem unlikely bedfellows, and indeed, it may well surprise laypersons that “[c]ommercial activity does not oust status as a religion”,³ nor as a charity, on the proviso that the profits are not for private benefit. However, as this article reveals, they have an ancient relationship, and the relationship continues in contemporary times, although that relationship does raise questions as to the appropriateness of religious charities taking advantage of commercial trappings because of the ethos of religion in general. This nexus between religious charities and commercialism is but one of the reasons for the sustained public and judicial criticism with regard to their continued status as charities, which in turn leads to questions being raised as to the continued place of religions in an allegedly secular society. Consequently, this article sets out just a few of those criticisms, so as to provide a framework, and then explores how religious charities may be defended from just one legal perspective, that of commercialism, and we uncover how the ancient constructs of religion sit relatively easily within the contemporary trappings of commercialism. We do this by considering key cases from Australia, New Zealand and Hong Kong, and in doing so we may find a way to enhance the quality of public conversations regarding these types of trusts.

Prior to doing so, we need to set out some introductory matters to contextualise religion and its place in charity law and commercialism, as well setting out briefly the appropriate legal foundations. Once those matters are attended to, we will explore the key issues at hand.

¹ This article is taken, in part, from the as yet unpublished Chapters 1 and 5 of the author’s PhD “Faith, Hope and Charity – a Critical Review of Charity Law’s Socio-legal Reconciliation of the Advancement of Religion as a Recognised Head of Charity” University of Waikato 2020 thus the material is substantially similar to the some of the materials within those chapters.

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³ G E Dal Pont “Charity law and religion” in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds) *Law and Religion God, the State and the Common Law* (Routledge, Abingdon, 2004) at 207.

Religion and Charity – an Overview

The history of charity “reflects the change from the concerns of the Church and its lawyers and theologians to overtly Protestant and later liberal influences”⁴ thus, religion’s influence is evident in charity’s history, especially within the Western construct. Indeed, the “common law has recognized trusts for the advancement of religion as charitable for as long as it has recognized the concepts of ‘charity’ and ‘trust’”⁵ meaning that religious institutions have been granted a range of advantages, ranging from exemption from perpetuities to current tax exemptions.

Therefore, in light of the historical correlation between religion and charity it was surprising that the Statute of Elizabeth 1601,⁶ likely one of the most influential charitable legal frameworks, failed to mention religion in its Preamble. It has been noted that this failure was not accidental, but rather it was the “result of the secular orientation of Elizabeth I, coupled with the desire of the Puritans to have a religion free of state interference.”⁷ However, notwithstanding the lack of religion in the Preamble, this statute, for the first time in legal history, set out a non-exhaustive legally recognised list of charitable purposes.⁸

As will likely be well known, these purposes were later abridged by Lord Macnaghten in the seminal case of *Commissioners for Special Purposes of Income Tax v Pemsel* as follows:⁹

Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for purposes beneficial to the community not falling under any of the preceding heads.

This grouping became the foundation for many common law jurisdictions’ determination of legally-recognised charitable purposes, which obviously includes the advancement of religion. For example, in New Zealand, the advancement of religion is set out in s 5(1) of the Charities Act 2005, whereby “... 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.” The United Kingdom’s Charities Act 2011 also includes the advancement of religion,¹⁰ as does the Australia’s Charities Act 2013.¹¹ Hong Kong does not have specific legislation setting out charitable purposes, however, its Inland Revenue Department, which is responsible for tax exemption for charitable entities, confirms that advancement of religion is a charitable purpose.¹²

⁴ Hubert Picarda QC *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional, Haywards Heath, 2010) at 3, referring to, inter alia, Gareth Jones *History of the Law of Charity 1532-1827* (Cambridge University Press, Cambridge, 1969); WK Jordan *Philanthropy in England 1408-1660* (London, 1960); and Charles Stuart Loch DCL ‘Charity and Charities’ in *Encyclopaedia Britannica* (11th ed, Vol V, 1910).

⁵ Kathryn Chan “The Advancement of Religion as a Charity Purpose in an Age of Religious Neutrality” 2017 Oxford Journal of Law and Religion 6 at 115.

⁶ Also referred to as the Statute of Charitable Uses. This article utilises the “Statute of Elizabeth” throughout.

⁷ G E Dal Pont “Charity law and religion” in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds) *Law and Religion God, the State and the Common Law* (Routledge, Abingdon, 2004) at 204.

⁸ The statute has been repealed, although the Preamble lives on as the foundations of charitable purposes in common law jurisdictions.

⁹ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (HL) at 583.

¹⁰ Charities Act 2011, s 3(1)(c) (UK).

¹¹ Charities Act 2013, s 12(1)(d) (Aus).

¹² Inland Revenue Department of Hong Kong “Tax Guide for Charitable Institutions and Trusts of Public Character” 2020 at [7] https://www.ird.gov.hk/eng/pdf/tax_guide_for_charities.pdf; see Juliet Chevalier-Watts *Law of Charity International Perspectives* (Routledge, Abingdon, 2018) at chap 9 generally.

As a point of noted, “religion” is defined variously depending on the jurisdiction, although its definition is not the issue at stake in this article. Nonetheless, for the sake of clarity, some definitions of religion will be provided, as will be confirmed what “advancing religion” also can mean. Thus, the United Kingdom defines “religion” as s 3(2) of Charities Act 2011 as “a religion which involves belief in more than one god, and ...a religion which does not involve belief in a god”.¹³ In New Zealand, the Department of Internal Affairs – Charities Services (the Charities Services)¹⁴ notes that:¹⁵

to be religious there needs to be a body of doctrines that:

- concern the place of humankind in the universe and its relationship with the infinite
- go beyond that which can be perceived by the senses or ascertained through the scientific method
- contain canons of conduct around which adherents structure their lives.

The doctrines and canons of conduct must also be sufficiently structured, clear and serious so as to be capable of advancing religion.

Also to ensure clarity throughout the paper, “advancement of religion” needs to be defined, as far as possible. Thus, advancing religion has “to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief”.¹⁶ This can be carried out “in a variety of ways which may be comprehensively described as pastoral and missionary”.¹⁷ This may include:¹⁸

- the provision of places of worship
- raising awareness and understanding of religious beliefs and practices
- carrying out religious devotional acts
- carrying out missionary and outreach work

In addition, a purpose that advances religion will only be charitable if it meets the public benefit requirement, which “means that the entity must confer a “benefit” and that it does so in respect of the public or a sufficient section of it”.¹⁹ For this particular head of charity, just like the relief of poverty and the advancement of education, the public benefit will be presumed, unless

¹³ Charities Act 2011, s 3(2)(a)(i)-(ii) (UK).

¹⁴ Department of Internal Affairs – Charities Services About Charities Services “Charities Services, Ngā Ratonga Kaupapa Atawhai, is part of the Department of Internal Affairs, Te Tari Taiwhenua, and administers the Charities Act 2005. We strive to be a modern, responsive, risk-based regulator focused on promoting public trust and confidence in the charitable sector and encouraging the effective use of charitable resources.” <http://charities.govt.nz/about-charities-services/>.

¹⁵ Department of Internal Affairs – Charities Services “Advancement of Religion/Te kōkiri hāhi <http://charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose/advancement-of-religion/>.

¹⁶ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [58], citing *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 1 WLR 1080 (QB) at 1090.

¹⁷ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [58], citing *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 1 WLR 1080 (QB) at 1090.

¹⁸ Charity Commission for England and Wales “Guidance Charitable Purposes” at [5] 16 September 2013 <https://www.gov.uk/government/publications/charitable-purposes/charitable-purposes#the-advancement-of-religion>.

¹⁹ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [99], referring to *Re New Zealand Computer Society Inc* HC Wellington CIV-2010-485-924, 28 February 2011 at [14].

the contrary is shown.²⁰ The doctrine of public benefit will be an important topic of consideration within this article.

Returning to the matter of “advancement of religion” more generally, it is said that “as a charitable purpose [it] is complex and increasingly variable”.²¹ This is no doubt in part due to the evolution of religious beliefs within society, as well as the development of religious neutrality within constitutions. It is also in part due to “charity law’s continued failure to meaningfully address the difficult issues raised by”²² this head of charity. Such issues have provided a greater voice to those “favouring the abolition of the religious charity”.²³ Evidence of this aforementioned criticism is easily found, for instance, actor and comedian Ricky Gervais, a critic of religion and of the privileges bestowed upon religious charities, memorably Tweeted:

Same sex marriage is not a privilege, [it’s] equal rights. Privilege would be something like gay people not paying taxes, like churches don’t.²⁴

This Tweet and Facebook post received over 3000 comments and 42,000 likes, and was retweeted nearly 50,000 times, as well as being shared 38,000 times. Such public attention and validation demonstrates the deep-seated sentiments that are aroused in the public when such famous individuals share their personal views on religion and its relationship with pecuniary advantages.

This show of contempt is but one small example of the negative assault on religious charities and one only has to carry out a brief scroll through various social media platforms and the press to find continued and persistent criticism and mocking of religion generally by the famous and the ordinary. One more recent criticism of religion garnered huge public attention and caused a viral explosion on Twitter, and on YouTube where its video was watched over 9 million times;²⁵ the perpetrator of that criticism was actor, broadcaster and comedian Stephen Fry. Fry was interviewed on “The Meaning of Life”, an Irish television programme. During the

²⁰ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [58]]; G E Dal Pont “Charity law and religion” in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds) *Law and Religion God, the State and the Common Law* (Routledge, Abingdon, 2004) at 215-216; it should be noted that in the United Kingdom, the presumption of public benefit has been removed as a result of s 3 of the Charities Act 2006; see also s 4(2) of the Charities Act 2011. New Zealand, Hong Kong and Australia (generally), inter alia, retain the presumption of public benefit for the first 3 heads of charity.

²¹ Kathryn Chan “The Advancement of Religion as a Charity Purpose in an Age of Religious Neutrality” 2017 Oxford Journal of Law and Religion 6 at 115.

²² Kathryn Chan “The Advancement of Religion as a Charity Purpose in an Age of Religious Neutrality” 2017 Oxford Journal of Law and Religion 6 at 113.

²³ Kathryn Chan “The Advancement of Religion as a Charity Purpose in an Age of Religious Neutrality” 2017 Oxford Journal of Law and Religion 6 at 113, referring to Christine R Barker “Religion and Charity Law” [1999] Juridical Review 30; and Peter Edge “Charitable Status for the Advancement of Religion: An Abolitionist’s View (1995/1996) 3 Charity Law & Practice Review at 29.

²⁴ Ricky Gervais Twitter 6 Feb 2014 <https://twitter.com/rickygervais/status/431262322300952576?lang=en> and Ricky Gervais Facebook 6 Feb 2014 <https://www.facebook.com/rickygervais/posts/same-sex-marriage-is-not-gay-privilege-its-equal-rights-privilege-would-be-somet/239713062819721/>.

²⁵ Pádraig Collins “Stephen Fry investigated by Irish police for alleged blasphemy” The Guardian 7 May 2017 <https://www.theguardian.com/culture/2017/may/07/stephen-fry-investigated-by-irish-police-for-alleged-blasphemy>; “Stephen Fry on God” see also <https://www.youtube.com/watch?v=-suvkwNYSQo>

interview, Fry referred to God as, inter alia, “an utter maniac, totally selfish”²⁶ and as “a capricious, mean-minded, stupid god”²⁷

As a result, Fry was investigated for blasphemy under Ireland’s then Defamation Act 2009, whereby “a person who publishes or utters blasphemous material “shall be guilty of an offence”. A conviction can lead to a fine of up to €25,000.”²⁸ It is acknowledged that this criticism was not directed towards religious charities per se but the point is that religious charities, by association with religion generally, becomes tarnished with the same brush religions generally and their continued place in an allegedly secular society. What was noted in relation to the Stephen Fry debacle was that blasphemy of the sort Fry was accused of, inter alia, might be an “encouragement to other countries whose blasphemy laws are associated with horrific human rights abuses.”²⁹ Thus, just as Gervais noted how unfairly a minority group was treated in comparison with charitable churches, similar unfairness was being levelled at countries who still promoted blasphemy laws at the likely expense of human rights.

As a result, pressure continues to mount on religion and its alleged archaic place in society, especially in relation to the pecuniary advantages that religious charities are alleged to receive as a result of being charitable. However, it is not just the famous, with their substantive fan following, who publically criticise the continued place of religions with the charity legal framework.

However, it is not just celebrities, with their inevitable influence over the public, who are placing pressure on religion in society. Criticisms have been levelled at governments for allegedly failing to prevent discrimination in the charitable sector and for favouring religion. For example, *The New Zealand Herald* questioned the Government’s stance on food giant charity Sanitarium for failing to crack down on the organisation’s charitable purposes, particularly in relation to the entity operating as a business, even though it is a religious charity. The reporter for *The New Zealand Herald* argued that the rationale of continuing to support “archaic British law”³⁰ is arguably “no longer relevant in a secular, 21st century democracy”³¹ because an organisation “should not get tax exempt status because you promote belief in a supreme being, or multiple supreme beings.”³²

²⁶ Pádraig Collins “Stephen Fry investigated by Irish police for alleged blasphemy” *The Guardian* 7 May 2017 <https://www.theguardian.com/culture/2017/may/07/stephen-fry-investigated-by-irish-police-for-alleged-blasphemy>.

²⁷ Pádraig Collins “Stephen Fry investigated by Irish police for alleged blasphemy” *The Guardian* 7 May 2017 <https://www.theguardian.com/culture/2017/may/07/stephen-fry-investigated-by-irish-police-for-alleged-blasphemy>.

²⁸ Neville Cox “Stephen Fry, the Meaning of Life, and the Problem with Irish Blasphemy Law ” *Oxford Journal of Law and Religion* 2019 8 48 at 2; Pádraig Collins “Stephen Fry investigated by Irish police for alleged blasphemy” *The Guardian* 7 May 2017 <https://www.theguardian.com/culture/2017/may/07/stephen-fry-investigated-by-irish-police-for-alleged-blasphemy>.

²⁹ Neville Cox “Stephen Fry, the Meaning of Life, and the Problem with Irish Blasphemy Law ” *Oxford Journal of Law and Religion* 2019 8 48 at 2.

³⁰ David Farrar, *Kiwiblog* 23 February 2015, citing *The New Zealand Herald*, http://www.kiwiblog.co.nz/2015/02/advancement_of_religion_should_not_be_a_charitable_purpose.html.

³¹ David Farrar, *Kiwiblog* 23 February 2015, citing *The New Zealand Herald*, http://www.kiwiblog.co.nz/2015/02/advancement_of_religion_should_not_be_a_charitable_purpose.html. Sanitarium was established by the Seventh Day Adventist Church to promote biblical principles.

³² David Farrar, *Kiwiblog* 23 February 2015, citing *The New Zealand Herald*, http://www.kiwiblog.co.nz/2015/02/advancement_of_religion_should_not_be_a_charitable_purpose.html.

The judiciary too have expressed their reservations as to the continued place of such entities on the charities registers, especially in relation to commercial religious entities. For example, Kirby J observed in the Australian High Court case *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*, “courts must recognise that this is deeply offensive to many non-believers, to people of different faiths and even to some people of different religious denominations who generally share the same faith.”³³ In addition, Mallon J in *Liberty Trust v Charities Commission*³⁴ observed that “charitable status for trusts which advance religion is not without its critics.”³⁵ Indeed, in another New Zealand case, that of *Centrepont Community Growth Trust v Commissioner of Inland Revenue*, it was questioned whether or not there is any social value in the advancement of religion and in answer, it was said that it was “a very much more doubtful proposition”.³⁶ Further, Mallon J comments this is likely because religion is difficult to define by its very nature and the measure and any effects are “usually of a very personal nature”.³⁷

The Conflict between Religion, Money and Charity

What appears to be at the root of this issue for many therefore is an apparent contradiction between religion, money and charity, although this has not always necessarily been clearly expressed by denigrators of religion. The contradiction may arise because many would view charity as the material result of charitable works, such as relief for the poor. Such relief comes about through political consciousness being raised in regard to the plight of the needy. However, religion has been said to be an illusion and “merely a well-spring of moral sentiment.”³⁸ As a result, it has been argued that utilising religion to try to resolve social issues is a waste of taxpayers’ money. Further, money could be used more effectively by taxpayers to pursue charities that are not underpinned by allegedly self-interested moralistic and intangible principles that spring from religious beliefs.³⁹

Additionally, it could be argued that granting charitable status to a religious body “gives moral credibility to an organisation”⁴⁰ because an organisation that receives legally-recognised charitable status has complied with a number of legal requirements. This indicates an entity’s purposes are “worthy enough to receive the support of the state”,⁴¹ signalling an endorsement by society.⁴² This may lead to the charitable sector losing credibility and public confidence if

³³ *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 at [155]

³⁴ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68.

³⁵ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [54].

³⁶ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [54], citing *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HL) and *AW Lockhart Centrepont Community Growth Trust v Commissioner of Inland Revenue* (1984–1987) 5 AULR 244.

³⁷ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [54], citing *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HL).

³⁸ Daniel Stevens “Rescuing Charity” in Charles Mitchell and Susan R Moody (eds) *Foundations of Charity* (Hart Publishing, Oregon, 2000) at 31.

³⁹ Daniel Stevens “Rescuing Charity” in Charles Mitchell and Susan R Moody (eds) *Foundations of Charity* (Hart Publishing, Oregon, 2000) at 31.

⁴⁰ Jane Calderwood “Controversial charities and public benefit” [2018] NZLJ March at 67.

⁴¹ Jane Calderwood “Controversial charities and public benefit” [2018] NZLJ March at 67.

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⁴² Jane Calderwood “Controversial charities and public benefit” [2018] NZLJ March at 67.

67, referring to Pauline Ridge “Religious Charitable Status and Public Benefit in Australia” (2011) *Melbourne Law Review* 35 at 1073.

it becomes “dominated by polarising organisations”.⁴³ Indeed, there are many who view religious bodies as polarising, not least because a number of religions and their sects do not support some contemporary social views, such as same-sex marriage, abortion and LBGTQIA⁴⁴ rights.

Further, granting religious bodies charitable status enables religions to take advantage of various financial exemptions not afforded to non-charitable bodies. This, in effect, gives economic support for having a particular belief system. In other words, a state endorses the advancement of religion through charity law, and in doing so enables religious charities to obtain a number of privileges not available to secular bodies. Indeed, Mallon J in *Liberty Trust* was led to ask “why should some members of the community bear a heavier burden of taxation merely because the beliefs of others entitle their organisations to exemption from taxation?”⁴⁵ This question might arise because:⁴⁶

given the very considerable concessions made to charities, and given contemporary agnosticism and even seeming indifference in many quarters to religion, what is it that today supports the concession in favour of religious charities, and more particularly, where are the edges of this head of charity to be drawn?

Having said all of that, Mallon J did endeavour to provide some sort of answer, although her endeavours will likely have little impact on the general public or judicial concerns. Her Honour remarked that “our charities law has always accepted ‘advancement of religion’ as a charitable purpose and in so doing has accepted that this is of public benefit such as to be entitled to the special status that entails.”⁴⁷ Although, she did note that the judiciary in *Hester* did caution against any extension of the bounds by saying that to do so “raises very real issues both of doctrine, and public policy”.⁴⁸ Thus, in light of the “very real issues” highlighted in the *Hester* case, as well as the public criticisms this inevitably leads to the question of “what is the public benefit of advancing religion”⁴⁹ from a commercial perspective? Although these matters are not easily answered, this article reveals that religious charitable trusts can embrace modern trappings for the benefit of communities but prior to addressing the cases that go some way to answering this question, we need to consider the relationship between commercialism and religion.

Commercialism and Religion

Commercialism and religion appear at first sight to be mutually exclusive concepts. This is perhaps because religion is considered to have numerous non-pecuniary benefits, including moral guidance, spiritual guidance and the redistribution of goods and services to those in need, as opposed to ensuring a profitable existence. Indeed, the public concept of religion does lead society to view commercialism and religion as distasteful. This in part may have its history in

⁴³ Jane Calderwood “Controversial charities and public benefit” [2018] NZLJ March at 67.

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⁴⁴ LBGTQIA - inclusive term for lesbian, gay, bisexual, transgender, queer and/or questioning, intersex and asexual, and/or allies.

⁴⁵ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [54].

⁴⁶ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [54], citing *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) at [6].

⁴⁷ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [55].

⁴⁸ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [55], citing *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) at [8].

⁴⁹ Kathryn Chan “The Advancement of Religion as a Charity Purpose in an Age of Religious Neutrality” 2017 Oxford Journal of Law and Religion 6 at 114.

greed, which is a closely connected factor with profit. Greed, is course, is one of the seven deadly sins that are so ingrained in Western Judeo-Christian society. Greed is also referred to as “mammonism”, which has religious roots, and is a word derived from Aramaic, the language spoken by Jesus. “Mammonism” means the pursuit of wealth as a key purpose.⁵⁰ According to the Bible “ye cannot serve God and mammon.”⁵¹ Consequently, the pursuit of wealth, profit and, subsequently, commercialism, does not sit easily within the religious charitable narrative.

One example of such distaste is illustrated from a Chinese perspective. The Chinese Government determined that was to be a ban on the selling of shares by temples to investors. This came about because it was discovered that some temple leaders had been planning on undertaking such activities as commercial undertakings. Commercialising religion in such a manner was criticised because it was seen as extending China’s commercial culture too far⁵² in an “already unrestrained commercial culture.”⁵³

Recent criticism has also been levelled at Islam for becoming too commercial, whereby it has been said to be “slowly and steadily becom[ing] part of our onscreen lives ... [i]t is omnipresent. Ironically more so in advertising than in entertainment.”⁵⁴

It is apparent therefore that the “faith and fortune of the religious sector is flourishing”.⁵⁵ Indeed, commercialisation does appear to be ever-present in a religious context, with the growth of megachurches, drive-in confessionals and commercial pilgrimages, to name but a few commercial ventures. This results in religious markets bearing the trappings of modern society.⁵⁶ Commercialisation, in turn, has become associated with religious charities, and this is unsurprising when one considers it within a socio-political context. For instance:⁵⁷

With the rolling back of the neoliberal state from its welfare activities in several domains in public life, faith-based organizations have increased their penetration in the public sphere ... faith-based organizations changed from simply offering charity work to being strong actors in the provision of welfare and social services.

Thus, with the emergence of the neoliberal state, religion was pushed into the public domain, and with that, the explicit embracing of commercialism.⁵⁸ However, the mercantile nature of

⁵⁰ Sheila T Harty *The Sin of Greed: How ‘Profit’ Became a Dirty Word* (Draft Paper, July 2015,) citing Matthew 6:24b *King James Bible* (Zondervan HarperCollins Christian Publishing, Nashville, 2002).

⁵¹ Sheila T Harty *The Sin of Greed: How ‘Profit’ Became a Dirty Word* (Draft Paper, July 2015).

⁵² Louise Watt “Chinese government tells Buddhist temples to ease up on the commercialism” (26 October 2012) <https://skift.com/2012/10/28/chinese-government-tells-buddhist-temples-to-ease-up-on-the-commercialism/>.

⁵³ Louise Watt “Chinese government tells Buddhist temples to ease up on the commercialism” (26 October 2012) <https://skift.com/2012/10/28/chinese-government-tells-buddhist-temples-to-ease-up-on-the-commercialism/>; see also Ian Johnson “China Seeks Tighter Grip in Wake of a Religious Revival” *The New York Times* (7 October 2016) <https://www.nytimes.com/2016/10/08/world/asia/china-religion-regulations.html>.

⁵⁴ TN Ahmed “Religion sells. And it can sell anything” (9 December 2017) <https://aurora.dawn.com/news/1142115>.

⁵⁵ Alec Spencer “Does Freedom of Religion Imply Freedom of Religious Trade?” [2017] JCULawRw 5 at 84.

⁵⁶ Bryan S Turner, Adam Possamai and Jack Barbalet “Introduction: States, Consumption and Managing Religions” in *Religion and the State: A Comparative Sociology* (Anthem Press, London, 2011) at 8.

⁵⁷ Arathi Sriprakash and Adam Possamai “Hindu Normalization, Nationalism and Consumer Mobilization” in Jack Barbalet, Adam Possamai and Bryan S Turner (eds) *Religion and the State a Comparative Sociology* (Anthem Press, London, 2011) at 210.

⁵⁸ Arathi Sriprakash and Adam Possamai “Hindu Normalization, Nationalism and Consumer Mobilization” in Jack Barbalet, Adam Possamai and Bryan S Turner (eds) *Religion and the State a Comparative Sociology* (Anthem Press, London, 2011) at 210.

religion is not a novel concept, indeed religious entrepreneurialism has been practiced by the Catholic Church for centuries. This occurred under the canon law doctrine of “indulgences” whereby the devoted may buy their way out of purgatory and into heaven. Canon law encourages Catholics to donate money to the church for the public good; in other words, for charitable endeavours, such as supporting hospitals and schools, as well as building churches and cathedrals.⁵⁹ Then there is the perhaps uncomfortable reality that in Australia alone, the Catholic Church owns indirectly, but with direct control of, AUD 100 billion in property and assets, employs circa 118,000 people, and generates AUD 15 billion from its education, health and welfare enterprises annually.⁶⁰

Thus whilst there is a valuable argument to support religious activities that raise funds to support the homeless or to provide soup kitchens, it appears more challenging morally, and perhaps legally, to support religions whose purposes are designed for commercial ventures, and particularly when it has been asserted that some such ventures have the trappings of cults and are harmful to members.⁶¹

Consequently, this article considers how the two apparently disparate concepts, charity and the mercantile, may make unlikely bedfellows. In doing so, it demonstrates the paradoxical benefits of commercialism within religious charities, and consequently, it is inferred that religious charities are likely to benefit communities through such commercial engagement, thus justifying the presence of religious charities in a modern context. We begin with the Australian High Court *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*.⁶²

Word Investments – A Case of Commercialism

In this case, the questions for the Court included whether or Word Investment’s (Word) objects were charitable, and whether an entity would be charitable if it did not carry out charitable activities beyond activities that made profits which were then targeted at entities that carried out in charitable purposes.⁶³

In brief, Wycliffe Bible Translators (Wycliffe) carried out religious missionary work. Part of that involved spreading the word of God through its Bible translation activities, and educating communities from the translated Bibles. Wycliffe formed Word as, inter alia, a means of raising funds, which passed its profits into Wycliffe. Word later expanded its operations to include financial planning services and a funeral business.

The High Court determined that commercial undertakings and achieving legally-recognised charitable status were not necessarily mutually-exclusive models. The Court came to this conclusion firstly by framing the question of charitable activities. In other words, the “activities of Word in raising funds by commercial means are not intrinsically charitable, but they are charitable in character because they were carried out in furtherance of a charitable

⁵⁹ Alec Spencer "Does Freedom of Religion Imply Freedom of Religious Trade?" [2017] JCULawRw 5 at 91.

⁶⁰ Alec Spencer "Does Freedom of Religion Imply Freedom of Religious Trade?" [2017] JCULawRw 5 at 91.

⁶¹ Sofia Zudova *On the taxation of religious charities and the public benefit of charitable exemptions* (Victorian Parliamentary Internship Research Report The University of Melbourne June 2016) at 7, referring to the Church of Scientology, the Hillsong Church, and the Paradise Community Church.

⁶² *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55.

⁶³ *Word Investments Limited* at [12] and [34]. See also Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Abingdon, 2018) chap 6 generally.

purpose.”⁶⁴ Therefore, the purposes did not have to be inherently charitable, so long as they enabled a charitable purpose to be furthered.⁶⁵ Whilst at first sight this may appear to be a rational approach, it has been subject to criticism.

It has been suggested that there was a fundamental issue in the majority of the Court’s approach whereby the activities should be determined in relation to their advanced in continuance of a charitable purpose, in contrast with supporting a distinct and non-charitable purpose. It suggests that it might be difficult to assess the correlation between mercantile undertakings and charitable purposes. For instance, there may be many activities, such as purchasing land, shares or public collections, but there is no one test that can ascertain whether these activities might promote a charitable object, or whether they are, in fact, incidental to its charitable objects.⁶⁶

Nonetheless, assistance may be found by asking if the purpose is “conducive to promoting”, “conducive to the achievement of”, or “tends to assist” with the main charitable purpose.⁶⁷ The nexus could also be assessed on “the natural and probable consequences”⁶⁸ of the undertakings. Therefore, the charitable nature of the commercial activities can be adduced through close factual analysis, instead of applying a precise test, which permits a flexible approach in determining the charitable nature.⁶⁹ This is perhaps a preferred methodology, as the concept of charity evolves as society evolves; a one-size-fits-all test is not necessarily apposite to enable charity to advance religion appropriately.

The Court’s second consideration, as mentioned, was whether an entity could be charitable if it did not carry out charitable activities beyond activities that made a profit which were then targeted at entities that carried out in charitable undertakings. The Court, confirmed that:⁷⁰

[T]he charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than its immediate and expressed objects.

Consequently, “the charitable purposes of a company can be found in a purpose bringing about the natural and probable consequence of its immediate and expressed purposes.”⁷¹ This means that “its charitable activities can be found in the natural and probable consequence of its immediate activities.”⁷²

⁶⁴ *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 at [26].

⁶⁵ Ian Murray “Charity Means Business – Commissioner of Taxation v Word Investments Ltd Case Note” [2009] Sydney Law Review Vol 31 at 316.

⁶⁶ Ian Murray “Charity Means Business – Commissioner of Taxation v Word Investments Ltd Case Note” [2009] Sydney Law Review Vol 31 at 316-317.

⁶⁷ Ian Murray “Charity Means Business – Commissioner of Taxation v Word Investments Ltd Case Note” [2009] Sydney Law Review Vol 31 at 317, citing *Stratton* (1970) 125 CLR 138 at 148; *Thistlethwayte* (1952) 87 CLR 375 at 442; and *Navy Health* (2007) 163 FCR 1 at [65].

⁶⁸ Ian Murray “Charity Means Business – Commissioner of Taxation v Word Investments Ltd Case Note” [2009] Sydney Law Review Vol 31 at 317, citing *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 at [83]; see also *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [158]; [52]; and [56].

⁶⁹ Ian Murray “Charity Means Business – Commissioner of Taxation v Word Investments Ltd Case Note” [2009] Sydney Law Review Vol 31 at 317.

⁷⁰ *Word Investments Limited* at [38], citing *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* (1945) 26 TC 335 at 348.

⁷¹ *Word Investments Limited* at [38].

⁷² *Word Investments Limited* at [38].

This approach, therefore, looks to “the effect of, rather than the motivation for, the activities.”⁷³ This approach finds support in the New Zealand High Court case *Hester v Commissioner of Inland Revenue*, where the Court referred to the “natural and probable consequences of such provision is the advancement of religion”.⁷⁴ As such, the majority in *Word* concluded that *Word* was charitable.

This suggests, therefore, that where a court can determine that profits, or any private benefits, are not the end in themselves, then the commercial activities are not the actual issue. Rather it is the fruit of those activities that is key in determining the charitable nature of the commercial entity.⁷⁵ Both the *Word* case, and in effect the *Hester* case, offer a “significant boost for charities”. This is because in an increasingly market-driven world, where funding and fund-raising becomes more competitive, self-funding,⁷⁶ this may mean the difference between a charity that merely stays in existence or that is able to operate more successfully for communities overall.

Another New Zealand case also reflects the commerciality of religion, that of the High Court’s decision in *Liberty Trust v Charities Commission*.⁷⁷ This case is of value because it illustrates how commercial principles are infiltrating the religious charitable sector in ways that are challenging the traditional concepts of religion and charity and aligning them with modern constructs.

Liberty Trust and Commercialism

In brief, one of the Trust’s main activities included acting as a mortgage lending scheme by offering interest-free loans. Liberty Trust stated that this scheme advanced religion by expounding Biblical financial principles. It is acknowledged, that on the evidence presented, there was no issue with this type of activity advancing religion because the principles being taught “are an aspect of Christian Faith as expounded by Liberty Trust.”⁷⁸ For our purposes, it is asserted that at its heart, this case is an acknowledgement of the frowned-upon religious principle of usury. Consequently, it is contended that this case demonstrates a commercial approach to religion that is appropriate in modern circumstances.

Usury, in a religious context, originally meant charging interest on loans. Historically in Christian societies, and still in many Islamic societies, charging interest was, and still is, regarded as sinful.⁷⁹ Leviticus states:⁸⁰

If your brother becomes poor and cannot maintain himself with you, you shall support him as though he were a stranger and a sojourner, and he shall live with you. Take no interest from him or profit, but fear your God, that your brother may live beside you. You shall not lend him your money at interest, nor give him your food for profit.

⁷³ Murray, above n 501, at 318.

⁷⁴ *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 at [83]; see also Ian Murray “Charity Means Business – Commissioner of Taxation v Word Investments Ltd Case Note” [2009] Sydney Law Review Vol 31 at 317.

⁷⁵ Claire Russell “Taxation Law: A Word to the Wise” 2009 Keeping Good Companies Vol 61 No 3 Apr at 181.

⁷⁶ Claire Russell “Taxation Law: A Word to the Wise” 2009 Keeping Good Companies Vol 61 No 3 Apr at 181.

⁷⁷ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68.

⁷⁸ *Liberty Trust* at [69].

⁷⁹ “Usury” Wikipedia <https://en.wikipedia.org/wiki/Usury>.

⁸⁰ Leviticus 25:35-37 *The Bible*

If the loans given by Liberty Trust had charged interest, they would likely be construed as sinful in a trade or commercial context.⁸¹ However, because they are interest free, the ethos of religion is acknowledged, whilst at the same time enabling loanees to obtain a debt-free existence. According to the Trust, Christians should not be encumbered with substantial financial liabilities,⁸² thus evidence is presented of commercial realism crossing over into the charitable sector.

Mallon J did observe that, perhaps rightly so, a “mortgage scheme ... is not an obvious candidate for the ‘advancement of religion’ category of charitable purposes”.⁸³ That, in itself, however, did not preclude the loan scheme from advancing religion. Rather, religion was taught through the loan scheme because it operated in accordance with scripture. Therefore, it promoted religion and took affirmative actions to maintain or augment religious beliefs.⁸⁴

The commercial aspect was further acknowledged explicitly by her Honour. She observed that it was undeniable that the Trust’s scheme had a commercial flavour to it, with mention of money saving, investments and tax advantages. However, Mallon J noted that commercial promotion of religion will not automatically disqualify a purpose from being charitable.⁸⁵ This reflects the approach taken in the *Word* case, as well as implicitly recognising the reality that religion and commercialism are closely associated.

Acknowledging explicitly the relationship between religion and commerce may appear distasteful to many, and as a result could undermine the role of religion within charity. However, Mallon J emphasised that “[i]mportantly, the commercial nature of the scheme is limited.”⁸⁶ This means firstly that usury, as a condemned practice, is impliedly avoided, which is implicitly recognising the sociological importance of religion within society still. Secondly, her Honour confirmed that commercialism may only stretch so far, and beyond that, commercialism may actually negate charitable status, for instance, where the founders make a profit through the scheme, which would be contrary to the doctrine of public benefit.

Whilst, therefore, providing interest-free loans does not appear to reflect the ethos of charity, and certainly not religious charities, perhaps it can be argued that quite the opposite is true. This is because the loan scheme embraces religious teachings and promotes such teachings through its loan scheme, whilst ensuring that usury is avoided, which underpins key religious principles. Further, Mallon J stated that there are limits as to the extent of commercialism within a religious charitable context thus giving boundaries, which should provide some public confidence that the principles will not be overly extended.

In addition, it can be argued that this case places religious charity firmly within the context of the modern day. This is because finances and debt are key concerns to many in this day and age. Thus it can be argued that enabling people to live debt-free so as to embrace religious endeavours will reduce the burden on communities generally. Debt is a significant challenge to many especially in the challenging COVID19 times where financial insecurity is prevalent for so many. It means that some people are unable to afford amenities or pay bills; debt causes homelessness and, in some circumstances, suicide. Reducing debt, therefore, is surely of public

⁸¹ Sheila T Harty *The Sin of Greed: How ‘Profit’ Became a Dirty Word* (Draft Paper, July 2015,).

⁸² *Liberty Trust* at [94].

⁸³ *Liberty Trust* at [93].

⁸⁴ *Liberty Trust* at [94].

⁸⁵ *Liberty Trust* at [95].

⁸⁶ *Liberty Trust* at [95].

benefit, and it can be achieved through charity law, ensuring the principles of law are applied appropriately in a transparent and accountable manner, as required by charity law. Therefore, the reality of modern commercialism sits within the ancient concepts of religion and is acknowledged through charity law to support communities.

Whilst the *Word* and *Liberty Trust* cases can be utilised to justify the association between the mercantile and religion in a charitable context, this situation is not always so clear-cut, and unfortunately can lead to confusion within the charity sector, and thus may do little to aid in the reconciliation of the advancement of religion.

Hong Kong Sheng Kung Hui

This is illustrated in the Hong Kong decision *Hong Kong Sheng Kung Hui v Commissioner of Inland Revenue*.⁸⁷ In this case, Hong Kong Sheng Kung Hui, the Anglican Episcopal Church, and its ancillary entity, the Hong Kong Sheng Kung Hui Foundation, sold a number of residential units and car park spaces. From the sales, the Church received a profit of HKD 452 million, and the Foundation made a profit of HKD 667 million.⁸⁸ This led to questions being raised in relation to the ensuing tax bill of HKD 180 million.

It should be noted that Hong Kong relies on the English charity law principles set out in this thesis, including the four charitable purposes expounded by Lord Macnaghten in *Income Tax Special Purposes Commissioners v Pemsel*,⁸⁹ in other words, “for the relief of poverty, for the advancement of education, for the advancement of religion; and for other purposes beneficial to the community but not falling under any of the preceding types.”⁹⁰ Specifically in relation to this case, s 88 of the Hong Kong Inland Revenue Ordinance states that a trade or business being carried out by a charity must set out its purposes. Thus a charity must operate to achieve those specified purposes, “which in a traditional way pertains to the promotion of charitable purposes,”⁹¹ which find their basis in the *Pemsel* definition.

The Court dismissed the assertion that the Church was not authorised to carry on a business or trade because of its Constitution, therefore could not have used its land as a trading asset. Instead, the Court asserted that the correct approach was the actual use of the asset, rather than the capacity of the user to carry out a specific trade or business. “In other words, whether or not an asset was used in the context of a trade or business was solely dependent on its actual use,”⁹² meaning, regardless of the purpose of the activities, which was advancing religion. This is distinguished from the High Court’s approach in the *Word* case.

It was asserted that the Hong Kong Court “obscurely rejected the very legitimate argument that the criterion must pertain to whether the charity used its revenue solely for charitable purposes,

⁸⁷ *Hong Kong Sheng Kung Hui v Commissioner of Inland Revenue* [2010] HKCFI 61.

⁸⁸ *Hong Kong Sheng Kung Hui* at [4]-[16].

⁸⁹ *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531 (HL) at 583.

⁹⁰ See *Li Kim Sang Victor v Chen Chi Hsia* [2016] 1 HKLRD 1153 at [72], referring to *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531 (HL) at 583.

⁹¹ Damian Bethke and Jędrzej Gorski “Rethinking Social Ventures in Hong Kong” [2014] *Richmond Journal of Global Law & Business* Vol 13 1 at 22, referring to Inland Revenue Ordinance Advance Rulings (1999) Cap 112 at 84(a) (HK).

⁹² Patrice Marceau and Patrick Cheung *National Hong Kong Report* (American Bar Association Foreign Lawyers Forum, 2010) at 17.

which in this case was the advancement of religion.”⁹³ It was further asserted that behind this rational was the incorrect view that Sheng Kung Hui’s undertakings must qualify as an undertaking for trade or business, as opposed to advancing religion. This was wrong, allegedly, because business purposes merely relate to whether business organisations are not-for-profit or, in some instances, where surfeit is disseminated to stakeholders or to social mission.⁹⁴

What this decision therefore illustrates is the continued unease that exists between commercialism, religion and charity. In particular that Hong Kong “does not welcome the combination of a make money and do good approach.”⁹⁵ Further, what has been argued is that this case is simply a selective taxation to discourage charitable organisations from undertaking significant or commercial activities, which reflects the continued unease about such practices generally.⁹⁶ This is unfortunate because such a decision, in contrast with the Australasian approach, may do little to provide legal certainty in such matters, and thus may undermine, in part, the assertions that the advancement of religion is reconcilable in this particular context. However, in answer to this, it could be argued that this is just one limited example of a common law jurisdiction choosing not to support commercialism as a charitable construct, and overall, the evidence does suggest that commercialism may be a justifiable construct within charity law. Thus, it is possible that the advancement of religion and the mercantile is reconcilable through these cases because the law recognised the value to society of commercialism and did so in a legally-justifiable manner.

Some Concluding Remarks

It is evident that the Hong Kong decision sits in contrast with the Australasian decisions, although the Hong Kong case may be welcomed by many because it may be seen as preventing businesses apparently obtaining charitable advantages. Indeed, it has been noted that should profitable fundraising increase within the charitable sector, public support may then be reduced because of the perception that commercial enterprises somehow reduce the altruism of charities.⁹⁷

However, the opposite may actually be true, and if that is correct, then Hong Kong’s approach may be detrimental overall to the charitable sector. This is because such differing approaches can send mixed messages to charities because it is not always clear how a business will be assessed by the courts. This suggests that some commercial activities, even if designed to support charitable purposes, may put at risk the charitable status of that entity. In today’s commercially-driven world where charities compete for funding and support, this may not be a welcome consideration. This consequently may undermine the activities of many charities to the overall detriment of those relying on the funds raised from commercial endeavours. Further, whilst questions have been raised as to whether commercial activities reduce the

⁹³ Damian Bethke and Jędrzej Gorski “Rethinking Social Ventures in Hong Kong” [2014] Richmond Journal of Global Law & Business Vol 13 1 at 23.

⁹⁴ Damian Bethke and Jędrzej Gorski “Rethinking Social Ventures in Hong Kong” [2014] Richmond Journal of Global Law & Business Vol 13 1 at 23, referring to Patrice Marceau and Patrick Cheung *National Hong Kong Report* (American Bar Association Foreign Lawyers Forum, 2010) at 16-17.

⁹⁵ Damian Bethke and Jędrzej Gorski “Rethinking Social Ventures in Hong Kong” [2014] Richmond Journal of Global Law & Business Vol 13 1 at 23.

⁹⁶ Damian Bethke and Jędrzej Gorski “Rethinking Social Ventures in Hong Kong” [2014] Richmond Journal of Global Law & Business Vol 13 1 at 23-24.

⁹⁷ Ian Murray “Charity Means Business – Commissioner of Taxation v Word Investments Ltd Case Note” [2009] Sydney Law Review Vol 31 at 326.

apparent altruism of charities, research suggests that there is societal support for charities that undertake some commercial and profit-driven activities.⁹⁸

Therefore, where courts find that commercial activities do sit appropriately in relation to construct of advancement of religion, the public can be assured that through charity law governance, which ensures transparency and accountability, those charities will not be unduly advantaged at the expense of non-charitable organisations as a result of their charitable status. Indeed, religious entrepreneurialism is perhaps “a reflection of the status religion plays in our society”⁹⁹ and “a lineal and logical consequence”¹⁰⁰ of the legal and constitutional recognition of religion in numerous states. As a result, such support for religion may indeed prove beneficial to the charitable sector generally as funding is likely to improve through commercial activities. Nonetheless, such charitable commercial ventures should rightly be subject to “strict scrutiny [as] they are in competition with others in the marketplace who do not enjoy any of the economic advantages”¹⁰¹ given to charities.

Consequently, commercialism within religious charities may be justifiable within the legal constraints of the charity law framework. Therefore, concerns relating to, for instance, commercialism and religion may be more readily eradicated because what has been demonstrated is that modern trappings of religion are can be compatible with the commercial world, and are meeting the needs of contemporary society. For example, by assisting with reducing debt and by enabling charities to be competitive.

Whilst such approaches may not necessarily be the perceived traditions of religion, religion now embraces many aspects of modern-day society. This is evidenced, for example, in megachurches embracing sales strategies to disseminate their message to the public.¹⁰² Indeed, although the public perceptions of the mercantile and religious charities may be negative, for instance where “religiously funded radio and television stations ... are contemporary question marks”,¹⁰³ in reality, “[c]ommercialism is so characteristic of organized religion that it is absurd to regard it as disqualifying.”¹⁰⁴

Although Hong Kong appears to reject commercialism within the construct of religious charitable trusts, this article has demonstrated that within other jurisdictions, religious commercialism may benefit the charity sector by enabling charities to operate more effectively, for example, by enabling charities to compete more effectively for funding. It is respectfully suggested that Hong Kong might wish to consider the Australasian jurisprudence in a more favourable light so as to benefit the charitable sector, not least because charity law can ensure that a religious entity’s charitable objectives will still be met so as to satisfy charity law requirements. Of course, the charity narrative should be cognisant of instances where personal wealth may be generated, say for instance, by religious leaders, but as the law has

⁹⁸ Ian Murray “Charity Means Business – Commissioner of Taxation v Word Investments Ltd Case Note” [2009] Sydney Law Review Vol 31 at 326, fn 119.

⁹⁹ Alec Spencer “Does Freedom of Religion Imply Freedom of Religious Trade?” [2017] JCULawRw 5 at 90.

¹⁰⁰ Alec Spencer “Does Freedom of Religion Imply Freedom of Religious Trade?” [2017] JCULawRw 5 at 90.

¹⁰¹ Alec Spencer “Does Freedom of Religion Imply Freedom of Religious Trade?” [2017] JCULawRw 5 at 100, citing *Word Investments Ltd*, above n 498, at [117]-[120].

¹⁰² Jack Barbalet, Adam Possamai and Bryan S Turner “Public Religions and the State: a Comparative Perspective” in (eds) Jack Barbalet, Adam Possamai and Bryan S Turner *Religion and the State: A Comparative Sociology* (Anthem Press, London, 2011) at 282.

¹⁰³ Donovan Waters “The advancement of religion in a pluralist society (Part I): distinguishing religion from giving to ‘charity’” (2011) *Trusts & Trustees* Vol 17 No 7 August at 657.

¹⁰⁴ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (“Scientology case”)* [1983] HCA 40 at [45].

demonstrated, “religious activity is not inconsistent with commercialism”,¹⁰⁵ especially in contemporary times.

However, there is still a place for caution. This is because there does not yet appear to be a definition of “commercial” or “commercial conduct”, and indeed, it has been said to be “intrinsically ambiguous.”¹⁰⁶ Such ambiguity may cause concern for the public that commercial activities may not meet the criteria of charity, or make it difficult for the public to understand whether or not an entity is charitable or not. Nevertheless, ambiguity should not necessarily be fatal for commercial operations. This is because charity law can determine the public benefit of such endeavours,¹⁰⁷ as has been determined in the *Word* and *Liberty Trust* cases, and if public benefit is not found, then the entity will not be charitable. This may go some way to reassuring a sceptical public on such matters, although the aforementioned Hong Kong approach may yet still undermine public confidence.

Overall, what this article has revealed is the realities of religion and their charitable trusts within the commercial narrative and in many ways it has demonstrated religion’s ability to embrace some aspects of the modern world. This means that religious charities, can, and should, remain stalwarts of communities, even if they incorporate some commercial endeavours. Rather the key for a court is to consider the “destination of the profits”¹⁰⁸ and in doing so, ensure that private profit is avoided. Thus, the law appears to be suggesting that if there is a “convincing public benefit rationale”,¹⁰⁹ then religious groups should be charitable, which in turn, likely can assist communities broadly, thus commercialism and religion may continue to be justifiable contemporary bedfellows.

¹⁰⁵ Pauline Ridge “When is the Advancement of Religion Not a Charitable Purpose? (2020) *Canadian Journal of Comparative and Contemporary Law* at 378.

¹⁰⁶ Ian Murray “Charitable Fundraising through Commercial Activities: The Final Word or a Pyrrhic Victory?” (2008) *Journal of Australian Taxation* 11 at 144-145.

¹⁰⁷ See also *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 and *McGarvie Smith Institute v Campbelltown Municipal Council* [1966] 11 LGRA 321.

¹⁰⁸ Ian Murray “Charitable Fundraising through Commercial Activities: The Final Word or a Pyrrhic Victory?” (2008) *Journal of Australian Taxation* 11 at 164.

¹⁰⁹ Pauline Ridge “Religious Charitable Status and Public Benefit in Australia” (2011) *Melbourne Law Review* 35 at 1082.