Charitable Trusts and Political Purposes: Law on the Edge of Change in Australasia

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Abstract

Historically a trust will be denied charitable status if its purposes are political, although this principle is fraught with difficulties because of the complex relationship between politics and charities. New Zealand has traditionally followed the jurisprudence of England and Wales, which determines that political trusts should be interpreted relatively widely so catching a broad section of trusts, thus excluding them from achieving charitable status. Australian jurisprudence however has displayed more reticence in its full acceptance of the political trust doctrine. Instead it has adopted a more narrow interpretation, so trusts that may fall foul of the doctrine in England and Wales and New Zealand, might successfully obtain charitable status in Australia. Then with the decision of the Australian High Court decision of Aid/Watch v Commissioner of Taxation, Australia finally departed from the jurisprudence of New Zealand and England and Wales. This article explores the Antipodean jurisdictions and critically considers Australia's significant jurisprudential shift regarding charitable trusts and political activity and whether New Zealand is on the edge of an equal change to charitable trust law.

The purpose of this paper is examine critically the diverging paths of charitable trusts of 2 jurisdictions, Australia and New Zealand, that not so long ago, ploughed the same path and examine the law of charitable trusts on the edge of change.

I think what I have to do now, prior to reviewing this law on the edge of change, I need to set out what we mean by charity at law.

Everyone has heard of charity, and in fact, the vast majority of you will at some point have given to charity, or indeed, some of you may be involved in charity.

So there is nothing difficult to understand about the concept of charity per se.

What you may not fully be clear on however is what actually amounts to something being charitable at law.

Not everything that appears to be philanthropic or generous may be charitable.

And some things that may theoretically appear to be charitable at first sight, might actually NOT be charitable at law.

And to receive all the benefits of being charitable, then certainly in many jurisdictions, an organisation has to be registered as a charity.

If you're not registered as a charity, then whilst you can still theoretically CALL yourself charitable, you will not receive the various advantages, which include:

- exemption from most income tax
- the right to apply for relief in business rates;
- eligibility to apply to certain grant making organisations;
- eligibility to receive gifts made under tax effective schemes
- Being legally charitable can help raise its profile and gain public support.

So actually it is really in an organisation's interest to obtain charitable status where possible.

The philosophy of charity is as old as the hills and in fact the first charity on record in the United Kingdom is documented as AD597!

But it took many centuries before any form of official regularisation of charity began to take effect.

This began officially with the Statute of Elizabeth, or known otherwise, as the Statute of Charitable Uses 1601.

This Act has long since been repealed but its Preamble lives on even today, and it set out basically a non-exhaustive list of purposes that could be deemed charitable.

So these included:

Relief of the poor, maintenance of sick and maimed soldiers and mariners, education of orphans etc and rather interestingly the marriage of poor maids!

Then in 1891 came the seminal case of *Commissioners for the Special Purposes of Income Tax v Pemsel.*[1]

Lord Mcnaghten in this case set out what has become the very foundation of all charitable trust law, the four heads of charity.

And still today, any organisation that wishes to obtain charitable status MUST fall under one of more of these heads, which are:

- The relief of poverty;
- The advancement of religion;
- The advancement of education;
- Any other purposes beneficial to the community. This is a catch all head.

And on top of that, every charitable purpose MUST have public benefit and that will be determined seperately from charitable purpose.

So what do we mean by public benefit – how is this assessed?

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

This is a really important factor because today's discussions are linked directly to the issue of public benefit.

So the best way to define public benefit is to give some examples.

So in the Preamble of the Statute of Elizabeth that I mentioned a minute ago, a number of non-exhaustive purposes were set out and these would have had public benefit.

So these purposes also included repairs to bridges, ports, causeways and highways.

And you can see that these would be beneficial to the community as a whole because, amongst other things, they would benefit a sufficient section of the community, not just individuals.

Repairs to highways have also been interpreted in a modern context as the "information highway", which includes the internet, which could be construed as a public infrastructure, and so has obvious public benefit. *(Vancouver Freenet)*.

Many animal welfare organisations are charitable, but the reason these are charitable is not because of the help they give the animals per se.

No, it's because the public benefit is found in the actual act of protecting an animal and therefore having an overall positive impact on society, not because protecting animals itself is charitable.

There always has to be public benefit in any charitable trust.

And this is key in what I'm discussing today.

So what might NOT have public benefit? Well, something that has private benefit – which sounds rather facetious, but let me explain as it's not always as straightforward as you might imagine!

An organisation called Canterbury Development Corporation in New Zealand sought charitable status.

Its main purposes are to promote economic development in the Canterbury area.

So this was achieved through supporting and promoting the establishment and development of businesses in Canterbury.

It also provides technical and financial advice to business, and provides financial assistance to eligible businesses.

The provision of these services was in the hope and belief that the economic success of these businesses would be reflected in the economic well-being of the Canterbury region.

So any public benefit that might have resulted from the objects of the Corporation, was, in the Court's opinion, too remote to establish the Corporation as a charity as the "public benefit is hoped for but ancillary"[2] and "not at the core of the Corporation's operation.

The private benefits to the businesses outweighed the hoped for public benefits.

So whilst it was a laudable approach, the public benefit was too remote.

The rather sad irony to that was that this case was decided prior to the terrible earthquake that hit Christchurch in 2011, which killed 185 people and caused millions of dollars' worth of damage, and of course caused untold harm to the economic prosperity of the area.

It is possible therefore that if case had been heard subsequent to the earthquake, the Court would have identified a community need that could have been assuaged by the objects of the Corporation and thus the Court might have given a different finding overall.

So as you can see, whilst something might be held to have charitable purpose, it still may fail as a charitable trust because it doesn't have sufficient public benefit.

Whilst New Zealand has codified the four heads of charity in to statute in the Charities Act 2005, and Australia has endeavoured to provide guidelines on what organisations may fall under these heads of charity, there is still no statutory definition of what is actually charitable, although Australia is considering drafting such a definition, commencing 2014.

So Australia and New Zealand have been following pretty much identical paths in the interpretation of charitable trusts.

That was until 2010, when Australia changed one area of charitable trusts law and created shock waves certainly in New Zealand.

So the really contentious issue arises in relation to trusts that have political purposes, and such trusts have for decades been declared non charitable in many jurisdictions, including Australia and New Zealand.

So what do we mean by political purpose and why is not charitable?

I need to explain this briefly before I go back to the diverging paths of Australia and New Zealand.

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[2] At [67]

So for an organisation to be charitable, all of its purposes must be charitable.

If it does have non charitable purposes, and those non charitable purposes are not ancillary to its overall purposes, then this will be fatal to its acquiring charitable status.

And dominant political purposes will render a trust non charitable.

But why specifically political purposes?

It was the seminal case of *Bowman v Secular Society* in 1917 that set out the reasons.

Trusts for political purposes are not illegal, because everyone is free to advocate for changes in the law by lawful means, but trusts for political purposes won't be valid charitable trusts because a Court can't judge whether the proposed change in the law will or will not be for the public benefit.

So it can't say that a gift to secure the change in the law is a charitable gift.

So it is the element of public benefit that is missing from trusts with political purpose that is the issue.

Now, political purpose can mean a whole raft of things, but generally it is thought to include purposes that seek to change the law, nationally or internationally, views that promote a particular point of view, and views that seek to reverse government policy or administrative decisions, nationally or internationally.

Both New Zealand and Australia have applied this doctrine consistently throughout the decades, although it would be fair to say that there have been hints from Australia that it has not always accepted this doctrine entirely without question.

So I want to talk through what has very recently happened in Australia and then see whether New Zealand is on the edge of change as a result.

So whilst it's true that from early in the 20th century, Australia hasn't wholeheartedly embraced the political purpose doctrine, the courts HAVE acknowledged and applied the *Bowman* line of authority that when the main purpose of a trust is legislative or political change, then the Court could not assess public benefit.

As a result, the trust would not be found to be charitable.

What the Court did say in recent years though (1997) is that political agitation MIGHT be charitable, if for instance, it was educational or the agitation supported the law if it appeared that the law was moving in that direction anyway.

But regardless, the *Bowman* line of authority still held strong.

However, then along came an extraordinary decision, that of *Aid/Watch*.

For those of who don't know who are what Aid/Watch are, let me explain, briefly!

Aid/Watch is an organisation that seeks to promote the efficient use of national and international aid directed to the relief of poverty.

So, 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.[3]

And it would be fair to say that this organisation has been the subject of a rollercoaster ride through the courts.

It began in October 2006, when the Commissioner of Taxation revoked the organisation's charitable status due to their political purposes.

But in 2008, the Administrative Appeals Tribunal (AAT) reversed that decision.[4]

In that decision, the President of the Tribunal, held that its purposes emphasised particular priorities in an existing government policy as opposed to actually challenging government policy.

So it did NOT fall foul of the political purposes doctrine."[5]

Then in 2009 the Full Federal Court reversed the Tribunal's decision stating that it was politically biased because these campaigns were designed to influence the government and to change policy.

So therefore it was not charitable.

This decision was appealed to the High Court.

And the High Court in 2010 delivered its judgment and changed Australian charitable trusts law completely.

The *Bowman* principle that had underpinned charitable trust law for decades was firmly uprooted and discarded.

The Court stated the *Bowman* line of authority was "not directed to the Australian system of government established and maintained by the Constitution itself."[6]

Basically the Court stated that that the political purpose doctrine should NOT apply in Australia because the doctrine was in tension with the Constitution.

What they meant by this was that the very system of governence in Australia relies on communication between the executive, legislature and electors on government and policy matters.

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[3] *Aid/Watch v Federal Commissioner of Taxation* [2010] HCA 42 at 158.
[4] Juliet Chevalier-Watts "Charitable Trust and Political Activity: Time for a Change?", above n 7, at 154.
[5] Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*", above n 40, at 370.
[6] *Aid/Watch v Federal Commissioner of Taxation* [2010] HCA 42 at [40].

So 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.[7]

As a result, the High Court held that Aid/Watch WAS charitable because its political purposes had a public benefit!

Therefore the long established *Bowman* line of authority is no longer relevant in Australia and this has far reaching consequences.

Firstly, and most obviously, this means that many organisations that were deemed to have been overtly political could now be granted charitable status in Australia.

Secondly, there is now judicial pressure on jurisdictions such as New Zealand and indeed Canada to consider such an approach.

Does this mean therefore that these jurisdictions are also on the edge of change?

So for the purposes of this paper, because of time constraints, I'll just concentrate on New Zealand.

New Zealand didn't 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*[8] was the first case in New Zealand to consider the applicability of *Aid/Watch* in its own jurisdiction.

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 on line for citizens as well as providing merchandise, training and paid access to sections of its website.

The Court stated that much of the partisan material was an attempt by the Foundation to persuade local or central government to a particular point of view.

But, the appellant submitted that 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.[9]

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[7] Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*", above n 40, at 375.
[8] *Draco Foundation (NZ) Charitable Trust v The Charities Commission* HC WN CIV 2010-1275 [3 February 2011].
[9] At [56].

But the Court was clear that whilst Australia might have declared that the general doctrine that excludes political objects from being charitable is no longer applicable to Australia, this doctrine is still very much alive and well in New Zealand, and New Zealand is still bound by *Bowman*.

Therefore *Draco* was not charitable.

Then along came the case of *Greenpeace* in New Zealand.

Everyone has heard of Greenpeace – they are infamous for their activities!

It may come as some surprise therefore to learn that Greenpeace Incorporated is not a registered charitable trust in New Zealand!

This is because of their political purposes were deemed to be main purposes, thus precluding them from obtaining legal charitable status.

In the High Court, the Court in *Greenpeace* did actually comment that New Zealand's own parliamentary system of governance might actually support the applicability of the *Aid/Watch* decision, but that should be left open for consideration by a court of appeal.

And so indeed the *Greenpeace* case reached the Court of Appeal in 2012.

Now what was very interesting indeed was that between the High Court and the appeal to the Court of Appeal, Greenpeace amended 2 of its objects, which, inter alia, had been the sticking point for the Court originally!

Basically the original objects meant that Greenpeace relied on its political activities to advance its causes, so its political purposes couldn't be regarded as "merely ancillary" to its charitable purposes.

So by amending its objects, this then meant that one of the objects, to do with disarmament, now met with national policy and New Zealand's international obligations, so had public benefit, and met the 4th head of charity, any other purposes beneficial to the community.

And the second object that had been changed, whilst still political, was now merely ancillary to the overall purposes of Greenpeace, so therefore did not render the purposes non charitable.

So the Court of Appeal recommended that the Greenpeace resubmit its application to the Department of Internal Affairs – Charities for the Board to reconsider their application on the basis of the amended objects.

So it's very likely that Greenpeace will be given legal charitable status very shortly.

Interestingly, the Court of Appeal noted that whilst there have indeed been significant developments in the law of charitable trusts and political purposes doctrine, actually, the *Bowman* line of authority still stood in New Zealand.

So you would think that that would have been the end of the matter.

Unfortunately, no, not for New Zealand.

The Court in Greenpeace was not quite finished with the political purpose doctrine.

It also said that if organisations were established for **contentious** political purposes, then these would not be charitable.

So that means by implication that if organisations were established for **NON** contentious political purposes, then these could actually be charitable.

So the dust storm caused by the *Aid/Watch* decision in Australia has not yet settled.

Australia has changed its law relating to political purposes and charitable trusts, that much is clear.

New Zealand however is teetering on the edge of change.

On the one hand, it fully accepts that it is bound by the *Bowman* line of authority, that political purposes will not be charitable because the public benefit is not measurable.

But on the other, it is now explicitly acknowledging that the *Aid/Watch* approach may not be precluded in New Zealand, as our system of governance may accept political agitation as having public benefit.

What is clear though is *Greenpeace* does not give a clear answer as to what the future might be.

And many organisations that would desperately wish to be charitable will be waiting with baited breath as to how this plays out.

We may not have to wait long, Greenpeace has lodged an appeal to the Supreme Court on the issue of political purposes.

Until then, New Zealand's laws on charitable trusts and political purposes could be said to be on the edge of change.