Finding the Limits of *Aid/Watch*

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Abstract

Commissioner of Taxation v Aid/Watch Incorporated is the latest of a series of recent cases in which the High Court of Australia has exhibited what might be described as a 'generosity of spirit' to would-be taxpayers whose charitable status has been called into question. In Aid/Watch, the Court ruled that an organisation formed to monitor and evaluate the delivery of foreign aid by Australian government agencies was a charity even though it was engaged, consistently with its objects, in the sorts of political activities that traditionally have been regarded as anathema to charity. This article considers where we might feasibly locate the boundaries of the High Court's reasoning in Aid/Watch, in light of charity law as a whole. In other words, as a matter of charity law, what are the limits of Aid/Watch? Thinking about this question demands: (a) some understanding of what the High Court in Aid/Watch said with certainty; and (b) a wider review of charity law to see which of its rules and principles may bear upon cases about political purposes now that Aid/Watch has been decided.

Introduction

Charity law is in many ways the centrepiece of civil society regulation in Australia. But at the same time as our understanding of civil society has deepened, and the political, social, economic and cultural setting in which civil society activity is undertaken has changed, charity law in Australia has remained largely the same as it was in the late nineteenth century. Even as significant reform of charity law has been achieved in England and Wales, Scotland, Northern Ireland, the Republic of Ireland and New Zealand, the Australian legal landscape with respect to charity has been left mostly untouched. Much of the blame for this situation must be laid at the feet of successive governments, which for many years have talked about, but failed to achieve, substantive reform of charity law.

Against this backdrop of longstanding government inaction, recent judicial generosity to charities in Australia is worthy of note. In a trio of cases decided over the past few years, the High Court of Australia has exhibited what might be described as a 'generosity of spirit' to would-be taxpayers whose charitable status has been called into question. In *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*,[1] the Court held that a corporation remained a charity notwithstanding that, over time, it had come to be almost wholly reliant on government for its funding. In *Commissioner of Taxation v Word*

[1] (2006) 228 CLR 168 ('*Central Bayside*').

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Investments Ltd,[2] the Court confirmed the charitable status of a corporation that operated a business but applied the profits of its business to charitable purposes.[3] And in *Aid/Watch v Incorporated Commissioner of Taxation*,[4] the Court ruled that an organisation formed to monitor and evaluate the delivery of foreign aid by Australian government agencies was a charity even though it was engaged, consistently with its objects, in the sorts of political activities that traditionally have been regarded as anathema to charity. In each of *Central Bayside*, *Word Investments*, and *Aid/Watch*, the Court was asked by a would-be taxpayer to review and relax charity law with an eye to social and economic developments, and in each case the Court responded to that challenge by expanding the range of the charitable in Australian law.

Whether or not judicial interventions like those in *Central Bayside*, *Word Investments*, and *Aid/Watch* are to be welcomed depends on the answers to a variety of questions, many of which have little to do with the content of charity law and everything to do with the proper role of courts in a liberal democracy and the appropriate design of the tax and transfer system with considerations such as distributive justice and the provision of public goods in view. For present purposes, such large questions may be put to one side. Instead, I take a narrow focus, examining only *Aid/Watch* and asking just one question with respect to that case: where might we feasibly locate the boundaries of the High Court's reasoning in *Aid/Watch*, in light of charity law as a whole? In other words, as a matter of charity law, what are the limits of *Aid/Watch*?[5] Thinking about this question demands: (a) some understanding of what the High Court in *Aid/Watch* said with certainty; and (b) a wider review of charity law to see which of its rules and principles may bear upon cases about political purposes now that *Aid/Watch* has been decided.

Aid/Watch

To begin with, then, what did the High Court in *Aid/Watch* say with certainty? It seems to me that the Court said at least two things with certainty. First, to the extent that there was, prior to *Aid/Watch*, a rule in Australian law stating that political purposes may not be charitable,

[2] (2008) 236 CLR 204 ('*Word Investments*').
[3] The federal government has recently announced its intention to introduce legislative amendments to provide clarity in respect of cases like *Word Investments*: see Commonwealth of Australia, *Budget Paper No 2* (Budget, 2011-2012) 36, available at http://budget.australia.gov.au/2011-12/content/download/bp2.pdf.
[4] [2010] HCA 42 ('*Aid/Watch*').
[5] This narrow focus excludes consideration of the constitutional implications of *Aid/Watch*, which are discussed by George Williams in his contribution to this symposium.

that rule was repealed in *Aid/Watch*.[6] The majority, consisting of French CJ, Gummow, Hayne, Crennan and Bell JJ, put the matter beyond any doubt, stating that '[w]hat … this appeal should decide is that in Australia there is no general doctrine which excludes from charitable purposes "political objects"'.[7] And in her dissenting judgment, even Kiefel J rejected the proposition that 'the political nature of an organisation's main purpose should mean its outright disqualification from charitable status'.[8] Only Heydon J, who also dissented, refused to express an opinion on the validity of the rule against political purposes in Australian law.[9] In clearly repealing the rule against political purposes, the High Court in *Aid/Watch* has put Australian law out of alignment with the law of the United Kingdom, New Zealand and Canada, where a rule against political purposes is still recognised.[10]

The second clear ruling in *Aid/Watch* was the narrow ruling that determined the dispute between the Commissioner of Taxation and Aid/Watch: according to the majority, 'the generation by lawful means of public debate … concerning the efficacy of foreign aid directed to the relief of poverty' is a charitable purpose.[11] While this purpose did not meet the description of 'relief of poverty', 'advancement of education' or 'advancement of religion', the majority in *Aid/Watch* thought that it was nonetheless a purpose 'beneficial to the community'[12] in the sense necessary to bring it within the four-fold taxonomy of types of charitable purpose referred to by Lord Macnaghten in the celebrated case of *Commissioners for Special Purposes of Income Tax v Pemsel*.[13] In his dissenting judgment, Heydon J was not prepared to accept the proposition that generating public debate about poverty relief is a

[6] That there was such a rule in Australian law prior to *Aid/Watch* appears to be beyond doubt: see *Royal North Shore Hospital of Sydney v Attorney General of New South Wales* (1938) 60 CLR 396 (HCA), but note the judgment of Santow J in *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600, recognising qualifications to the rule.
[7] [2010] HCA 42, [48].
[8] [2010] HCA 42, [69].
[9] [2010] HCA 42, [51] and [63].
[10] United Kingdom: *Bowman v Secular Society Ltd* [1917] AC 406 (HL); *McGovern v Attorney-General* [1982] Ch 321 (Slade J); *Southwood v Attorney-General* [2000] WTLR 1199 (CA). New Zealand: *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA); *Re Collier (deceased)* [1988] 1 NZLR 81 (Hammond J); *In re Draco Foundation (NZ) Charitable Trust* HC Wellington CIV 2010-485-1275, 15 February 2011 (Ronald Young J); *In re Greenpeace of New Zealand Incorporated* HC Wellington CIV 2010-485-829, 6 May 2011 (Heath J). Note, however, that in this last case, Heath J was reluctant to apply the rule against political purposes, stating (at [59]) that '[i]n modern times, there is much to be said for the majority judgment in *Aid/Watch*.' Canada: *Re Positive Action Against Pornography and Minister of National Revenue* (1988) 49 DLR (4th) 74 (FCA); *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA); *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 (SCC); *Action by Christians for the Abolition of Torture v Canada* (2002) 225 DLR (4th) 99 (FCA).
[11] [2010] HCA 42, [47].
[12] [2010] HCA 42, [47].
[13] [1891] AC 531 (HL) ('*Pemsel*'), 583.

charitable purpose;[14] moreover, as I will discuss below, Heydon J took a narrower view than the majority did of what is entailed in generating public debate.[15] And Kiefel J's dissenting judgment appeared to equivocate on the question whether or not generating public debate about poverty relief could be charitable in the absence of some element of education.[16] But notwithstanding the doubts of the dissenting judges, the majority's narrow ruling was clearly stated and must now be regarded as part of the law of Australia.

Somewhere between the proposition that there is no longer a rule against political purposes in Australian law, and the proposition that generating public debate about the delivery of foreign aid directed at the relief of poverty is charitable, the limits of *Aid/Watch* are to be found. It is important that courts in future cases – and now also those charged with introducing the long-awaited statutory definition of charity into Commonwealth law[17] – identify and monitor those limits, so that charities, taxing authorities, and the soon-to-be-created regulator of charities[18] may act with confidence as to what the law requires. To a degree, guidance on finding the limits of *Aid/Watch* may be found in the judgments of the majority and the dissenters in that case. However, courts that are called upon to determine future cases about political purposes, and legislators required to fashion a statutory definition of charity, may now have to look further than *Aid/Watch*, to other rules and principles of charity law, in working out the implications of *Aid/Watch*. As I see it, at least two questions may arise for consideration.

Public debate about governmental activities

The first of these questions relates to the narrow proposition that the majority in *Aid/Watch* endorsed, which was the proposition that generating public debate about the efficacy of foreign aid directed to the relief of poverty is a charitable purpose. The question is this: in light of *Aid/Watch*, in what circumstances will generating public debate about governmental activities *other* than the delivery of foreign aid directed to the relief of poverty be a charitable purpose? The judgment of the majority provided some guidance on this matter. Recall that in *Pemsel* Lord Macnaghten referred to a four-fold taxonomy of types of charitable purpose, a

[14] At one point in his reasons, Heydon J proceeded on the assumption that generating public debate about poverty relief is charitable: [2010] HCA 42, [58]. However, he nowhere indicated whether or not he accepted that assumption.
[15] [2010] HCA 42, [58]-[59].
[16] [2010] HCA 42, [69], [73] and [86].
[17] See Commonwealth of Australia, above n 4, 37, stating the government's intention to legislate for a statutory definition to take effect from 1 July 2013.
[18] See ibid, at 322-323, referring to the establishment of an Australian Charities and Not-for-Profits Commission from 1 July 2012.

taxonomy that sets out what are typically described as the 'heads' of charity. These are 'relief of poverty', 'advancement of education', 'advancement of religion' and 'other purposes beneficial to the community'. In *Aid/Watch*, the majority had this to say:[19]

> [T]he generation … of public debate … concerning the efficacy of foreign aid directed to the relief of poverty … is a purpose beneficial to the community within the fourth head in *Pemsel*.
> …
> It … is unnecessary for this appeal to determine whether the fourth head encompasses the encouragement of public debate respecting activities of government which lie beyond the first three heads (or the balance of the fourth head) identified in *Pemsel* and, if so, the range of these activities.

There are several points to make about this passage. First, the majority appeared to accept that generating public debate about governmental activities falling under any of the four heads of charity – 'relief of poverty', 'advancement of education', 'advancement of religion', and 'other purposes beneficial to the community' – can be a charitable purpose. This means that entities that seek to contribute to public discussion of governmental activities as diverse as the provision of social welfare, the funding of non-government schools, and state sponsorship of faith-based organisations should feel confident that they are within the realms of the charitable in light of *Aid/Watch*. But secondly, the majority expressed caution about endorsing as charitable contributions to public debate about governmental activities that are not themselves charitable within the taxonomy laid out in *Pemsel*.

This leads to a third point, which is best expressed as a question. Assuming that the caution exhibited by the majority in the passage quoted above is well-founded, how is a distinction to be drawn between governmental activities that are charitable within Lord Macnaghten's taxonomy, and governmental activities that are not so charitable? The answer to this question turns, of course, on the scope of the 'fourth head' of charity, 'other purposes beneficial to the community'. The scope of the 'fourth head' is famously obscure. On the one hand, there is authority for the proposition that a purpose may be charitable under the 'fourth head' only where it is analogous to an established charitable purpose, or even only where it is analogous to a purpose listed in the preamble to the Statute of Charitable Uses of 1601, the *fons et origo* of modern charity law.[20] On the other hand, many classes of purpose have been recognised as charitable under the 'fourth head' even though they have not been analogous to established

[19] [2010] HCA 42, [47]-[48].
[20] See *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 (HL); *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 (HCA).

charitable purposes: purposes to do with animal welfare are possibly the best-known.[21] And to complicate matters further, there is a line of authority that supports the proposition that the purposes of government, whatever their precise character, may constitute such a class.[22] This line of authority has not gone unchallenged, and in at least one Victorian case a gift to a government department for its general purposes was held not to be charitable.[23] However, in my view the question whether or not the purposes of government are always charitable under the 'fourth head' is not settled in Australian law, and it may arise for consideration in future cases where the limits of the narrow ruling of the majority in *Aid/Watch* are tested.

A fourth and final point about the narrow ruling of the majority in *Aid/Watch*: the caution expressed by the majority, as to whether or not generating public debate about governmental activities is always charitable, might not have been well-founded. In this regard, it is worth noting that the majority clearly did not think that generating public debate about governmental activities is charitable because of any direct or indirect effect it might have on those activities themselves. Thus, for the majority, where a charity's purpose is to agitate for law reform, a court need not concern itself with the merits or otherwise of the law reform in question before determining that the purpose is a charitable one.[24] In this aspect of its reasoning, the majority in *Aid/Watch* departed both from the traditional rule against political purposes, founded on the notion that it is impossible for a court to determine the public benefit of law reform,[25] and from *National Anti-Vivisection Society v Inland Revenue Commissioners*,[26] a political purposes case in which the House of Lords did assess the merits of a proposed law reform and made a finding that the public benefit test was not satisfied on the evidence. Arguably, courts have in the past invoked the rule against political purposes to avoid having to determine the public benefit of law reform in cases raising controversial social issues.[27] By finding that the public benefit test may be applied in political purposes

[21] See, eg, *Re Cranston* [1898] 1 IR 431 (CA); *In re Wedgwood* [1915] 1 Ch 113 (CA).
[22] I discuss these cases in Matthew Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559, 563-566.
[23] *In re Cain (dec'd)* [1950] VLR 382 (Dean J).
[24] [2010] HCA 42, [45]: 'A court administering a charitable trust for [the purpose of seeking law reform] is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation.'
[25] *Bowman v Secular Society Ltd* [1917] AC 406, 442 (Lord Parker of Waddington): 'a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit'.
[26] [1948] AC 31 (HL).
[27] *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA), *Re Positive Action Against Pornography and Minister of National Revenue* (1988) 49 DLR (4th) 74, *Human Life International in Canada*

cases without considering the merits or otherwise of law reform, the majority in *Aid/Watch* has ensured that courts may continue to steer clear of such controversy notwithstanding that the rule against political purposes has been repealed.

Rather than taking the view that generating public debate about governmental activities is charitable because of any effect it might have on those activities, the majority in *Aid/Watch* considered 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. So much was clear from the majority's discussion of the importance of freedom of political expression to the system of government established under the Commonwealth Constitution.[28] If it is the effects of public debate on political culture, and not on governmental activities, that matter, then it is difficult to see why courts in cases like *Aid/Watch* ought to be concerned about the character of the governmental activities that are subject to public debate when determining whether or not generating the public debate in question is a charitable purpose. And this is why, in *Aid/Watch*, the majority's caution about the scope of its narrow ruling might have been misplaced.

Public debate and public benefit

To find the limits of *Aid/Watch*, then, it is necessary to consider the possible effects that public debate about governmental activities might have on political culture, which leads to the second question that I think may arise for consideration in the future in light of *Aid/Watch*. The second question is this: in what circumstances will generating public debate about governmental activities satisfy the 'public benefit' test that is applied to all purposes falling within the 'fourth head' of charity as outlined in *Pemsel*? The public benefit test applies differently to purposes falling under the different 'heads' of charity. In the case of purposes answering the description of 'relief of poverty', benefit to the public as opposed to a private class need not be demonstrated,[29] while in the case of purposes under the 'head' of 'advancement of education', courts do demand evidence that benefit is not confined to a private class.[30] In cases about purposes under the 'head' of 'advancement of religion', courts usually presume public benefit but sometimes demand that it be established on the

Inc v Minister of National Revenue [1998] 3 FC 202 and *Action by Christians for the Abolition of Torture v Canada* (2002) 225 DLR (4th) 99 may have been cases of this type.

[28] [2010] HCA 42, [44]-[45].

[29] See, eg, *Re Compton* [1945] Ch 123 (CA); *Dingle v Turner* [1972] AC 601 (HL).

[30] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL).

evidence.[31] In the case of purposes under the 'fourth head' of charity – and, after *Aid/Watch*, we know that the purpose of generating public debate about governmental activities is such a purpose – public benefit must always be demonstrated on the evidence.[32] Consequently, in future cases where entities argue that they are charitable in law because their purpose is to generate public debate about governmental activities, they will have to satisfy courts, adducing evidence as they go, that the public will benefit as a result of that purpose.

At this point, the various possible cases might be sorted into four groups. First, there are cases in which an entity has the purpose of *facilitating* public debate about governmental activities, perhaps by sponsoring conferences, seminars or meetings at which such debate might be conducted. It is highly likely that an entity with this type of purpose is a charity in light of *Aid/Watch*; the view may be attributed fairly to the majority and the two dissenting judges in that case that facilitating public debate about governmental activities is for the public benefit. However, it is worth pointing out that a strong argument can be made that an entity with the purpose of facilitating public debate about governmental activities probably satisfied the legal definition of charity even before *Aid/Watch* was decided, because facilitating public debate about governmental activities very likely was not a political purpose according to the pre-*Aid/Watch* law, and instead probably amounted to a type of 'advancement of education' that satisfied the public benefit test.[33] To my mind, this indicates the possibility that the majority in *Aid/Watch* thought that the public benefit test can be satisfied by purposes entailing the generation of public debate about governmental activities other than by facilitating such debate. But if I am wrong, and the majority did not think this, then *Aid/Watch* may amount to little more than an illustration of the settled proposition that purposes meeting the description of the 'advancement of education' are charitable where they have a public character.

That the majority in *Aid/Watch* did think that the public benefit test may be satisfied by purposes entailing the generation of public debate about governmental activities other than by facilitating it may be seen more clearly by dwelling on a second type of case. This is the case where an entity has the purpose of *contributing* to public debate on governmental activities, by making and criticising arguments and assertions in the public sphere, with the aim of

[31] See the cases discussed in Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 *Modern Law Review* 159.
[32] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.
[33] For the relevant principles, see Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths, Chatswood, 2010) Chapter 9.

informing, persuading, or even browbeating others. Aid/Watch was itself an entity with such a purpose: it regarded itself, and was regarded by the High Court, as a 'campaigning' or 'activist' group prosecuting a certain agenda with respect to Australia's foreign aid delivery.[34]

The Court was divided as to the circumstances in which the purpose of contributing to public debate on governmental activities may benefit the public. Heydon J did not address the question of public benefit in his dissenting judgment, but his reasons rested in large measure on the conceptual point that an entity cannot 'generate public debate' by seeking to impose its view on others, as opposed to contributing to public debate in a discursive way, by inviting or joining a public conversation.[35] In light of this conceptual analysis, it is reasonable to attribute to Heydon J the view that the public benefit test is met only in circumstances where an entity has the purpose of contributing to public debate in a way that does not entail 'campaigning' or 'activism'. The other dissenter, Kiefel J, addressed the question of public benefit squarely: for Kiefel J, 'reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views'.[36] This does not rule out a finding of public benefit in respect of a purpose of 'campaigning' or 'activism' about governmental activities, but it certainly expresses considerable scepticism about the possibility of such a finding.

In contrast, the majority in *Aid/Watch* was prepared to recognise 'campaigning' and 'activism' about governmental activities as contributions to public debate that are capable of satisfying the public benefit test of charity law. In my view, the majority expressed this quite clearly. The majority referred to the view of Dixon J, set out in the earlier case of *Royal North Shore Hospital of Sydney v Attorney-General for New South Wales*, that 'when the main purpose of a trust is agitation for legislative or political change, it is difficult for the law to find the necessary tendency to the public welfare'.[37] The majority went on to discuss the freedom of political expression that is instrumental to the operation of the system of government established by the Commonwealth Constitution,[38] before making the following statement.[39]

[34] For Aid/Watch's view of itself as a 'campaigning' organisation, see http://www.aidwatch.org.au
[35] [2010] HCA 42, [58]-[59].
[36] [2010] HCA 42, [69].
[37] (1938) 60 CLR 396, 426, quoted at [2010] HCA 42, [42].
[38] [2010] HCA 42, [44].
[39] [2010] HCA 42, [45].

> The system of law which applies in Australia thus postulates for its operation the very 'agitation' for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*. … [I]t is the operation of these constitutional processes which contributes to the public welfare.

I believe that this part of the majority's reasoning reveals that the majority clearly accepted that contributions to public debate about governmental activities, answering the description of 'agitation', may satisfy the public benefit test. And 'agitation' seems to contemplate precisely the 'campaigning' and 'activism' that so bothered Heydon J and Kiefel J.

When it comes to future cases in which entities have the purpose of contributing to public debate about governmental activities, the limits of *Aid/Watch* will ultimately turn on what the judges deciding those cases, and the legislators crafting a statutory definition of charity for Commonwealth law, think about the value, in a liberal democracy, of political expression taking the form of 'campaigning' or 'activism'. This question has troubled even political philosophers,[40] so there is no reason to think that judges or legislators will find it easy to answer, or that all judges and legislators will answer it in the same way.[41] That said, as I noted above there is considerable support in the judgment of the majority in *Aid/Watch* for an expansive view of the range of contributions to public debate that might satisfy the public benefit test, even where those contributions are characterised by what Heydon J described as 'rancour and asperity'.[42]

A third type of case is the case where an entity has the purpose of *lobbying* government with respect to governmental activities. It is highly unlikely that such a purpose is charitable in law, even in light of *Aid/Watch*, because lobbying, as opposed to facilitating or contributing to public debate, is highly unlikely to satisfy the public benefit test. Of course, a distinction must be drawn between an entity that has the purpose of lobbying government, and an entity that has a charitable purpose (say, 'advancement of religion') and engages in lobbying in a

[40] See, eg, Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge MA, 2000) Chapter 10, especially the discussion of John Stuart Mill's 'epistemic argument' at 380-381.

[41] For discussion of the issue, see: Elias Clark, 'The Limitation on Political Activities: A Discordant Note in the Law of Charities' (1960) 46 *Virginia Law Review* 439; RBM Cotterrell, 'Charity and Politics' (1975) 38 *Modern Law Review* 471; CEF Rickett, 'Charity and Politics' (1982) 10 *New Zealand Universities Law Review* 168; Perri 6 and Anita Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Dartmouth, Aldershot, 1995) especially Chapter 8; GFK Santow, 'Charity in its Political Voice – a Tinkling Cymbal or a Sounding Brass?' (1999) 18 *Australian Bar Review* 225; Adam Parachin, 'Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes' (2008) 45 *Alberta Law Review* 871.

[42] [2010] HCA 42, [59].

way that is ancillary to that charitable purpose. The latter type of case has never presented a problem, even where the rule against political purposes has been applied, because, as a matter of charity law, charities have always been free to engage in political activities in support of charitable purposes.[43] I say, 'as a matter of charity law', because there may well be public policy considerations against permitting even such ancillary lobbying, considerations that have to do with maintaining and strengthening democratic institutions and practices.[44] However, those considerations, which are not specific to lobbying by charities, are for another day. For the moment, I simply wish to note that in the former type of case – the case where an entity's primary purpose is lobbying government – it is difficult to see how the public benefit test could be satisfied given that the purpose entails private communications between the entity in question and government.

Finally, consider a fourth type of case. This is the case where an entity has the purpose of *forming or supporting a political party*. Although the case law reveals that courts have occasionally tolerated such a purpose, the prevailing view has been that party political purposes cannot be charitable.[45] This view has probably survived *Aid/Watch*, but it is not entirely clear on what basis it might rest now that the rule against political purposes has been repealed. To my mind, there are two possibilities. First, it might be thought that the purpose of forming or supporting a political party does not satisfy the public benefit test, because the aim of a political party is to acquire power through forming or participating in government. This proposition lacks attraction. Putting simplistic cynical impressions of party politics to one side, if the most that could be said about political parties in Australia were that the aim of such parties is to acquire power, our political system would be sadly broken. Surely political parties are formed and maintained for a variety of purposes, including facilitating political expression and participation and contributing to public debate on a range of matters relating to government. Arguably, then, in a post-*Aid/Watch* world, forming or supporting a political party may satisfy the public benefit test of charity law because it is a purpose that either answers the description of 'generating public debate about the activities of government' or is analogous to purposes of that description such that it too satisfies the public benefit test.[46]

[43] *McGovern v Attorney-General* [1982] Ch 321; *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600.
[44] See Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, Sydney, 2010).
[45] See the excellent discussion in LA Sheridan, 'Charity versus Politics' (1973) 2 *Anglo-American Law Review* 47. For the prevailing view, see *Royal North Shore Hospital of Sydney v Attorney General of New South Wales* (1938) 60 CLR 396, 426 (Dixon J).
[46] See Rickett, above n 42, 173: 'Of course political parties are essential to the well-being of society'.

A second possibility is that forming or supporting a political party is not a charitable purpose in Australian law even if it yields public benefit, on public policy grounds. I am not sure what those grounds might be: indeed, at a time when encouraging political participation is one of the great challenges that face liberal democratic states, it might be thought that the policy considerations militate in favour of viewing the formation or support of political parties as charitable. But whatever the policy grounds for the persistence of a rule against party politics in charity law, courts in future cases, as well as legislators, may have to grapple with them now that the rule against political purposes has been repealed. Interestingly, the status of party political purposes was raised during argument in *Aid/Watch*, and some members of the Court seemed far from convinced that because of public policy considerations such purposes cannot be charitable.[47] However, no trace of this line of thinking survived in the judgments of the Court.

Conclusion

The long days of government inaction on the reform of charity law may finally be drawing to a close. Firm government commitments have now been made to establish an independent regulator of charities and to introduce a statutory definition of charity into Commonwealth law. Judicial innovations like those in *Central Bayside*, *Word Investments*, and *Aid/Watch* may no longer be so urgently required to ensure that charity law keeps pace with social and economic developments. But in respect of *Aid/Watch*, careful reflection on the implications of the High Court's repeal of the rule against political purposes will still be necessary, if only because the new statutory definition of charity will have to take *Aid/Watch* into account. The reasoning of the judges in *Aid/Watch* itself, viewed in the setting of charity law as a whole, will be of considerable assistance in finding limits to the recent judicial generosity towards political purposes. But that assistance will not suffice. The limits of *Aid/Watch* will be fully revealed only in light of ongoing deliberation on some of the more difficult questions of political philosophy, questions about individual freedom, the common good, and the relationship between citizens and their government in a liberal democratic state. And that is a burden that government bears as it moves towards the implementation of statutory reform of Australian charity law.

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[47] See [2010] HCATrans 154, 143-203.