

Looking at the charitable purposes/activities distinction through a political advocacy lens: a trans-Tasman perspective

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In addition to their service delivery role, charities enable a range of process benefits, such as acting as sites of collective and political action. Indeed, political activities frequently arise from and are informed by service delivery. Developments around the world suggest some reticence about charities engaging in political advocacy, yet Australia and New Zealand no longer have a political purpose doctrine in their charity laws. This paper focuses on two contentious forms of political advocacy—election campaigning and illegal protest activities—and argues that in only some circumstances do those activities affect an entity’s charitable purpose or charitable status in Australia and New Zealand.

Keywords: charity law; charitable purposes; charitable activities; political advocacy; illegal activities; trans-Tasman

1 Introduction

In addition to their service delivery role, charities enable a range of process benefits, such as acting as sites of collective and political action.¹ Indeed, political activities frequently arise from and are informed by service delivery. However, political advocacy by charities is contentious.² Recent United Kingdom (UK) electoral legislation reform has seen regulators and charities grappling with the bounds of permitted activities and with perceptions of politicisation of regulatory action.³ In the United States (US) and Canada, where tax rules

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¹ See, eg, Helmut K Anheier and Lester M Salamon, ‘The Nonprofit Sector in Comparative Perspective’ in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (2nd edn, Yale University Press 2006) 89, 106–10; Miriam Galston, ‘Civic Renewal and the Regulation of Nonprofits’ (2004) 13 *Cornell Journal of Law and Public Policy* 289, 294–356.

² The term ‘political advocacy’ is used in this paper to mean advocating a particular point of view on an issue that in some way involves the state, in order to persuade others to that point of view.

³ In relation to the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014 (UK) c 4, see, eg, Lord Hodgson, *Third party election campaigning – Getting the Balance Right* (Cmd

purportedly prohibit political campaigning and restrict political advocacy by charities,⁴ the US Internal Revenue Service (IRS) is still reeling from the fallout over its targeting of politically aligned charities.⁵ President Trump has also issued a vaguely worded executive order to the IRS requesting that it *not* take compliance action against advocacy by religious organisations.⁶ In Canada, the imposition of increased political activity reporting and audits⁷ resulted in *Canada Without Poverty v Attorney General of Canada*.⁸ The case applied the Canadian Charter of Rights and Freedoms to effectively remove tax restrictions on political activities other than election campaigning as an infringement of freedom of expression. While the Canadian government is appealing, it intends to legislate to permit charities to conduct non-partisan political activities and to develop public policy.⁹

In New Zealand, the Supreme Court overturned the rule against political purposes,¹⁰ yet Greenpeace was still denied charity registration in 2018, partly due to its endorsement of illegal advocacy.¹¹ Following rejection of the political purpose doctrine in Australia in *Aid/Watch Incorporated v Commissioner of Taxation (Aid/Watch)*,¹² concerns about increased advocacy have manifested in a Parliamentary review of environmental organisations,¹³ electoral

9205, 2016); Debra Morris, 'Charities and Political Activity in England and Wales: Mixed Messages' (2015-16) 18 *Charity Law & Practice Review* 109, 111–24.

⁴ Internal Revenue Code (IRC) § 501(c)(3) (USA); Income Tax Act, RSC 1985, c 1 (5th supp) s 149.1(6.2) (Canada).

⁵ See, eg, Treasury Inspector General for Tax Administration, 'Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review' (Final Report No 2017-10-054, September 2017).

⁶ Exec Order No 13798, 3 CFR 346 (2018).

⁷ See, eg, Adam Parachin, 'Reforming the Regulation of Political Advocacy by Charities: From Charity Under Siege to Charity Under Rescue?' (2016) 91 *Chicago-Kent Law Review* 1047, 1048, 1050–2.

⁸ 2018 ONSC 4147 (Ontario Superior Court of Justice).

⁹ Diane Lebouthillier, Minister of National Revenue, and Bill Morneau, Minister of Finance, 'Statement on the Government's Commitment to Clarifying the Rules Governing the Political Activities of Charities' (Joint Statement, 15 August 2018).

¹⁰ *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 (New Zealand Supreme Court (NZSC)).

¹¹ *Greenpeace of New Zealand Inc* Charities Registration Board 2018-1, 21 March 2018.

¹² [2010] HCA 42 (High Court of Australia (HCA)).

¹³ Standing Committee on the Environment, Parliament of Australia, *Inquiry into the Register of Environmental Organisations* (2016) [4.83].

legislation reform,¹⁴ and repeated questioning of the Australian Charities and Not-for-profits Commission (ACNC) by Parliamentary committees about charity electioneering.¹⁵ Media coverage has been keen, with reports of charity election campaigning appearing above the fold of a national Australian newspaper.¹⁶

While there is no longer a rule against political purposes in Australia or New Zealand,¹⁷ political advocacy activities may still affect whether an entity has a charitable purpose or is for the public benefit. This paper examines that link and contrasts the positions in Australia and New Zealand. It does so by focussing on two types of contentious advocacy: election campaigning and illegal protest activities. The argument is that these contentious activities can preclude charity status in some but not all circumstances. This argument is developed as follows. Section 2 sets out the link between activities, purposes and charity status in Australia and New Zealand. Section 3 examines when advocacy activities may amount to a non-charitable, disqualifying purpose, either because that purpose is not incidental or ancillary to a charitable purpose, or because—in Australia—it is incidental, but still falls within the statutory definition of a ‘disqualifying purpose’. Section 4 discusses how political advocacy might preclude public benefit. Section 5 concludes, noting points of similarity and contrast between Australia and New Zealand which may be helpful for jurisdictions such as the UK, Canada and the US in the event that they need to choose a new approach to charity status if the political purpose doctrine or tax rules are relaxed.

¹⁴ Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018 (Cth); Foreign Influence Transparency Scheme Act 2018 (Cth). The reforms are purportedly based on concerns about foreign influence in Australian elections.

¹⁵ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 29 June 2018, 7–9 (Gary Johns, Commissioner, ACNC).

¹⁶ John Ferguson, ‘Inquiry Into Poll Tactics: Catholic Schools Leader in Jail Threat’ *The Australian* (Sydney, 14 July 2018) 1, 4.

¹⁷ Such a rule continues to apply in England and Wales and does so, in addition to the tax rules, in Canada (Donovan WM Waters, Mark R Gillen and Lionel D Smith, *Waters’ Law of Trusts in Canada* (4th edn, Thomson Reuters 2012) 789-95. Although the validity of political purposes was expressly left aside in *Canada Without Poverty*, the expansive view of Charter protection of freedom of expression and of the role that charities play in the development of public policy (n 8, [50]-[60]) raises the potential of freedom from the rule. While the tax rules constrain political activities, US courts have adopted a much looser version of the political purpose doctrine which simply precludes a purpose of promoting the success of a political party: *Restatement (Third) of Trusts* § 28 (2003).

2 Activities, purposes and charities

Much writing on charities (as discussed in subsection 2.1) concerns the scope of charitable purposes. Accordingly, the presence of political advocacy activities often grounds claims of a disqualifying political purpose. Activities can indeed be significant in evidencing a separate purpose, although due regard needs to be paid to the distinction between purposes and activities (as discussed in subsection 2.2). However, activities are also significant in other ways, as enunciated in subsection 2.3.

2.1 Charities

In Australia, whether under statute or the common law, for an ‘entity’¹⁸ to be recognised as charitable it must be not-for-profit, have purposes that are all ‘charitable’ purposes (such as relieving poverty, advancing education, advancing religion, or advancing other purposes beneficial to the community)¹⁹ and be for the public benefit.²⁰ In addition, a charity cannot be a government entity, political party or an individual.²¹ New Zealand similarly defines charities under statute and the common law as entities that are not-for-profit,²² have charitable purposes,²³ are for the public benefit²⁴ and are not political parties.²⁵ Unlike the Charities Act

¹⁸ For brevity, the term ‘entity’ is used to include legal relationships, such as trusts and unincorporated associations, as well as legal persons.

¹⁹ Under the CA 2013 (Cth), charitable purposes have been reworded under twelve heads of charity that broadly reflect the scope of the general law heads. The reworded heads include, amongst others, advancing health, advancing education, advancing social or public welfare, advancing religion and advancing culture: s 12(1).

²⁰ CA 2013 (Cth), ss 5, 6; *Aid/Watch* (n 12) [18] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The entity must also not have disqualifying purposes, such as purposes that are unlawful or contrary to public policy: CA 2013 (Cth), s 11; *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396, 426 (Dixon J) (HCA) (*Royal North Shore*).

²¹ CA 2013 (Cth), ss 4, 5(d). At common law, see *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* [2006] HCA 43 (HCA), [23], [40]-[44], [48] (Gleeson CJ, Heydon and Crennan JJ), [130]-[134], [143]-[145] (Kirby J, also noting that some bodies formed by and being part of government might potentially be charities), [181]-[185] (Callinan J).

²² CA 2005 (NZ), s 13(1)(b)(ii); Donald Poirier, *Charity Law in New Zealand* (Department of Internal Affairs, 2013) 71, 136-46.

²³ CA 2005 (NZ), ss 5, 13(1); Susan Barker, Michael Gousmett and Ken Lord, *The Law and Practice of Charities in New Zealand* (LexisNexis 2013) [4.19]-[4.32]; Poirier (n 22) ch 3.

²⁴ Barker, Gousmett and Lord (n 23) [4.19]-[4.32]; Poirier (n 22) ch 4; cf CA 2005 (NZ), ss 5, 13(1).

²⁵ Poirier (n 22) 349-50. Time will tell if this requirement has been narrowed by *Greenpeace*.

2013 (Cth) (CA 2013 (Cth)), the Charities Act 2005 (NZ) (CA 2005 (NZ)) builds on and modifies the common law, rather than seeking to codify a definition.

2.2 *Means and ends: the link between purposes and activities*

There is sometimes too great a readiness to look at particular activities in isolation, to characterise them as either charitable or non-charitable and to then assert that an entity has a non-charitable purpose. However, there is widespread recognition by courts and commentators that the character of most activities is ambiguous, depending largely upon what the activity is intended to achieve.²⁶ In essence, activities are the means to achieving a purpose—the end.²⁷ This begs the question of how purpose is determined and the role of activities in that process.

For entities other than trusts, such as incorporated entities, the courts look to activities when construing the entity's purposes, in addition to the objects and powers in the constitution and the circumstances of formation.²⁸ In contrast, the focus for a trust is upon the terms of the trust deed, especially the trust objects, and the circumstances of its formation.²⁹ Of course, trust activities may be pertinent to eligibility for charity registration or compliance with registration requirements.³⁰ Additionally, an entity's objects can be expressed at different levels of generality. Often they are expressed, at least to some extent, by reference to a means of achieving a particular end. An example of a higher level of generality is provided by a purpose

²⁶ Some cases discussing this point have arisen in the context of legislative references to 'charitable activities': *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 (Supreme Court of Canada), [54] (Gonthier J, L'Heureux-Dubé and McLachlin JJ agreeing), [152] (Iacobucci, Cory, Major and Bastarache JJ agreeing). More broadly, see, eg, *Federal Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55, [26] (Gummow, Hayne, Heydon and Crennan JJ) (*Word Investments*); *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13, [36] (Privy Council (PC)). For commentary, cf Maurice Cullity, 'The Myth of Charitable Activities' (1990) 10(1) *Estates & Trusts Journal* 7, 7; Ian Murray, 'Charitable Fundraising through Commercial Activities: The Final Word or a Pyrrhic Victory?' (2008) 11(2) *Journal of Australian Taxation* 138, 159-62.

²⁷ Sometimes they may also be incidental consequences (*Latimer v CIR* [2004] UKPC 13, [35]-[36]). Litigation to defend charges arising from the unlawful pursuit of environmental purposes provides an example.

²⁸ *Word Investments* (n 26) [17]-[18], [25]-[26] (Gummow, Hayne, Heydon and Crennan JJ). See also Gino E Dal Pont, *Law of Charity* (2nd edn, LexisNexis Butterworths 2017) [13.14]-[13.20].

²⁹ See, eg, *Word Investments* (n 26) [70] (Gummow, Hayne, Heydon and Crennan JJ); *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (Supreme Court Auckland), 396-7 (Chilwell J) (*Auckland Medical*).

³⁰ CA 2005 (NZ), s 18(3); Australian Charities and Not-for-profits Commission Act 2012 (Cth) ss 25-5(3)(b), 35-10(1)(a) and (c) (as a result of governance standard 1, which requires a charity to comply with its purposes: *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) s 45.5).

of ‘protecting the environment’, whereas a more specific purpose might be ‘to protect the environment by promoting a political party dedicated to that end’.³¹

Activities may also be relevant to all entities, in some circumstances, as activities may help determine:³²

- the relative weight of an entity’s stated objects, such that one object can then be classified as incidental to another;³³
- an entity’s purpose where it does not have a written constitution or trust deed;³⁴
- whether the stated charitable objects are a sham or a ‘cloak’ for a non-charitable purpose;³⁵ or
- the consequences of pursuing a purpose that has not yet been adjudged as charitable and hence whether that purpose is charitable.³⁶ Activities are relevant not in construing an entity’s purpose, but in evaluating whether the entity’s purpose is beneficial to the general community and so potentially within the catch-all head of charity under statute or at common law.³⁷

Thus, putting aside the rare scenarios in the above paragraph, the key role that advocacy activities might typically play for entities other than trusts would be in evidencing a non-

³¹ The distinction can also be seen in the *cy-près* context, where a general charitable intention is distinguished from a specific charitable intention: Dal Pont (n 28) [15.44]–[15.68]. See also, Jonathan Garton, ‘Charitable Purposes and Activities’ (2014) 67(1) *Current Legal Problems* 373, 387–8.

³² Robert Meakin, *The Law of Charitable Status: Maintenance and Removal* (Cambridge University Press 2008) 27–32; Murray, ‘Charitable Fundraising’ (n 26) 156–62; Garton (n 31), 389–97.

³³ See, eg *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (Court of Appeal Wellington), 693 (Somers J).

³⁴ See, eg, *Re Koeppler’s Will Trusts* [1986] Ch 423 (Court of Appeal (CA)).

³⁵ See, eg, *Auckland Medical* (n 29) 395 (Chilwell J).

³⁶ See, eg, *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA), 99 (Buckley LJ). See also *McGovern v Attorney-General* [1982] Ch 321 (Chancery), 347–8 (Slade J).

³⁷ Purposes that are not listed in ss 12(1)(a) to (j), (l), 14, 15, 16 or 17 of the CA 2013 (Cth) or that have not already been recognised in the case law need to be analysed to determine whether they fall within any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, ss 12(1)(a) to (j) of the CA 2013 (Cth) (see s 12(1)(k)), or at common law, the Charitable Uses Act 1601 (43 Eliz 1 c 4). The common law position is pertinent to the meaning of charitable purpose under s 5 of CA 2005 (NZ).

charitable purpose.³⁸ Generally, however, purposes or activities³⁹ that appear non-charitable on their face but that are merely ‘incidental or ancillary’ to an overarching charitable purpose are not characterised as amounting to an independent non-charitable purpose. Authorities usually adopt a close factual analysis in considering this issue, but broadly ask whether the object or activity is ‘conducive to promoting’ an overarching purpose.⁴⁰ That approach is reflected in the CA 2013 (Cth)⁴¹ and the CA 2005 (NZ).⁴² In *Federal Commissioner of Taxation v Word Investments Ltd (Word Investments)*,⁴³ the Australian High Court provided further guidance that is particularly useful when considering the effect of activities, as is usually the case for advocacy, that *indirectly* achieve a charitable end. The majority held that accepting deposits from the public to be invested at market rates with nil or nominal interest paid in return, operating a funeral business and distributing surpluses to other entities to support evangelical religious activities were indirect means to achieving a purpose of advancing religion.⁴⁴ In considering when the commercial activities might evidence a separate non-charitable purpose, the High Court referred to case law⁴⁵ on whether income had been ‘applied for charitable purposes’ to make the point that activities can indirectly achieve a charitable purpose:⁴⁶

One submission advanced by Mr Andrew Park QC for the successful taxpayer in that case [*IRC v Helen Slater Charitable Trust* [1982] Ch 49] may be noted:

‘The Crown’s wide submission that money subject to charitable trusts is not ‘applied for charitable purposes’ unless actually expended in the field, is revolutionary, unworkable and unacceptable in practice. There are innumerable charities, both large and small, in this country which operate on the basis of raising funds and choosing other suitable charitable bodies to donate those funds to ... If the Crown’s wide

³⁸ In the case of trusts, engaging in such activities is typically viewed solely as a breach of duties requiring enforcement, rather than as a change of purpose: see n 29.

³⁹ Or powers to carry out those activities.

⁴⁰ *Stratton v Simpson* (1970) 125 CLR 138 (HCA), 148 (Windeyer J). See also at 159–60 (Gibbs J, Barwick CJ and Menzies J agreeing); *Congregational Union of NSW v Thistlethwayte* (1952) 87 CLR 375 (HCA), 441–2 (Dixon CJ, McTiernan, Williams and Fullagar JJ).

⁴¹ Which accepts that a charity may have purposes that are ‘incidental or ancillary to, and in furtherance or in aid of’ its overarching charitable purposes: CA 2013 (Cth), s 5.

⁴² A non-charitable purpose that is ‘merely ancillary’ will not preclude an entity from having a charitable purpose, with ‘ancillary’ expressly defined as ‘ancillary, secondary, subordinate, or incidental to a charitable purpose of the [entity]’ and ‘not an independent purpose of the [entity]’: CA 2005 (NZ), ss 5(3), (4), 13.

⁴³ *Word Investments* (n 26).

⁴⁴ *ibid* [37]–[38] (Gummow, Hayne, Heydon and Crennan JJ).

⁴⁵ *IRC v Helen Slater Charitable Trust Ltd* [1982] Ch 49.

⁴⁶ *Word Investments* (n 26) [37] (Gummow, Hayne, Heydon and Crennan JJ).

argument is correct, many charitable bodies would be losing a recognised entitlement to tax relief and may, moreover, cease to be regarded as charitable.’

It is likely that the position in Australia is similar.

The High Court majority did not adopt or extend Jessup J’s musings, at the appellate court level, about whether a charity’s commercial activities must be ‘in harmony’ with its stated charitable purpose.⁴⁷ Indeed, the majority did not require any commonality between activities and objects.⁴⁸ Their Honours did, however, quote from an earlier charity case, stating:⁴⁹

In *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* [(1945) 26 TC 335 at 348] MacDermott J said:

‘the 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 in its immediate and expressed objects.’

Similarly, the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities.

While there is some ambiguity in this statement,⁵⁰ it is directed to the issue of when activities evidence a separate purpose and appears to place the emphasis on the consequences of activities in setting the contours of the range of activities (or objects) that are in furtherance of an overarching charitable purpose.

While the earlier test of whether activities or objects are ‘conducive to promoting’ a purpose clearly permits consequences to be considered, for indirect activities it poses a greater risk of non-neutral value judgements about the means of achieving a purpose.⁵¹ This can arise in several ways. First, judges have sometimes referred to whether activities are ‘in harmony

⁴⁷ *Federal Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171 (Federal Court of Australia Full Court), [97] (Jessup J).

⁴⁸ *Word Investments* (n 26) [37]-[38].

⁴⁹ *Word Investments* (n 26) [38].

⁵⁰ Cf *Dal Pont* (n 28) [3.26].

⁵¹ While focusing on the consequences of actions might itself be criticised as being a non-neutral value judgment about how to measure the worth of actions, charity law still retains several mechanisms to judge the intrinsic worth of actions. For example, we may be interested in whether a charitable purpose is achieved by way of government administration rather than voluntary association, or if criminal means are employed. These other aspects of actions are still relevant to charity status as discussed in subsections 2.1 and 2.3 by way of the not-for-profit requirement, the ‘political party’/‘government entity’ tests and the public benefit test. Further, the consequentialist test is being employed in the context of determining purpose—an end—and the test is not being used as a comprehensive theory about the normative rightness of the actions, but only to check their connection with an already sanctioned charitable purpose.

with’ or ‘bear a coherent relationship to’,⁵² or ‘naturally g[o] with’,⁵³ a charitable purpose. These formulations encourage traditional ways of doing charity. For example, a funeral business involving the rituals associated with death might be seen as sufficiently linked to a religious purpose,⁵⁴ whereas operating a health food company may not.⁵⁵ The pre-*Word Investments* view that passive investment and church bake sales are in harmony but that non-bake sale business activities are not,⁵⁶ reveals the potential for conservatism, with obvious dangers for advocacy.

Second, courts occasionally consider the degree of relatedness of activities to purpose. For instance, whether the activities directly effect the charitable purpose either because the purpose entails the delivery of goods or services, or because the production of goods and services is merely a mechanism, such as in a business that provides employment and training to people affected by a disability.⁵⁷ The more indirect the relationship, the more likely that the activities give rise to an independent, non-charitable purpose rather than being incidental or ancillary. Kirby J took this approach in dissent in *Word Investments*,⁵⁸ finding that as *Word Investments*’ commercial activities related to its religious purpose only because the ultimate destination of the funds raised was their provision to third parties, then the commercial activities were unrelated to *Word Investments*’ charitable purpose, were ‘distinct and separate’

⁵² See, eg, *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10, [62] (Gonthier, L’Heureux-Dube and McLachlin JJ). Although in dissent in the application of these principles, Gonthier J considered that the test used by the minority was effectively the same test as that used by the majority.

⁵³ *Navy Health Ltd v Deputy Commissioner of Taxation* [2007] FCA 931 (Federal Court of Australia), [65] (Jessup J).

⁵⁴ *Federal Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171, [97] (Jessup J).

⁵⁵ Cf *Re Smith (dec’d); Executor Trustee and Agency Co of South Australia Ltd v Australasian Conference Association Ltd* [1954] SASR 151 (Supreme Court of South Australia).

⁵⁶ For a discussion of passive investment, collecting and traditional commercial activities, see, eg, Murray, ‘Charitable Fundraising’ (n 26) 171–4; Joyce Chia and Miranda Stewart, ‘Doing Business to do Good: Should we Tax the Business Profits of Not-for-profits?’ (2012) 33 *Adelaide Law Review* 335, 349–51. See also *Federal Commissioner of Taxation v Word Investments Ltd* [2006] FCA 1414, [60] (Sundberg J).

⁵⁷ For a discussion of relatedness, see, eg, Chia and Stewart (n 56) 349–351.

⁵⁸ *Word Investments* (n 26) [177]–[180], [189]–[190].

and were ‘not, by any stretch of the imagination, “inherently charitable”’.⁵⁹ As a typically indirect means, advocacy is at particular risk from a relatedness test.⁶⁰

However, it is clear from the majority in *Word Investments* that the emphasis is on consequences, not ‘harmony’ or relatedness. In particular, the majority discussed the relevance of activities to characterising an entity as ‘charitable’ and stated that the focus must be on whether the activities further the charitable purpose, but not whether those activities are otherwise ‘intrinsically charitable’.⁶¹ Activities thus affect the characterisation of purpose in a range of ways. Nevertheless, campaigning and protest activities most frequently arise in a context where they are pursued as the means to achieving a more generally expressed object, such as the protection of the environment or the advancement of education, which squarely raises the issue of when activities evidence an independent purpose. Occasionally, those means may be expressed within a stated object, which raises a very similar question about when that object indicates a non-ancillary purpose.

2.3 *Activities matter beyond the characterisation of purpose*

Activities are potentially relevant to each of the charity requirements set out in subsection 2.1, especially in permitting the government/charity boundary to play out. In this regard, the CA 2013 (Cth) precludes an entity from being a ‘political party’ or a ‘government entity’, or from having a ‘purpose of promoting or opposing a political party or a candidate for political office’.⁶² While not entirely free from doubt due to *Aid/Watch* and *Re Greenpeace of New Zealand Inc (Greenpeace)*,⁶³ it also seems that in New Zealand, and at common law in Australia, an entity cannot have a purpose of being or supporting a political party or otherwise

⁵⁹ *ibid* [184] Kirby J.

⁶⁰ Indeed, Kirby J’s strict interpretation of the tax exemption in *Word Investments* was partly on the basis that charities (especially religious charities) might engage in activities with which many taxpayers find ‘offensive’, such as ‘propagation’ of ‘opinions with which many citizens might [disagree]’: *ibid* [110]–[116].

⁶¹ *ibid* [26] (Gummow, Hayne, Heydon & Crennan JJ). This paragraph of the judgment is expressly cross-referenced to the later discussion in paragraphs [37]–[38].

⁶² CA 2013 (Cth) ss 5, 11.

⁶³ *Aid/Watch* (n 12); *Re Greenpeace of New Zealand Inc* (n 10); cf Matthew Turnour and Elizabeth Turnour, ‘Archimedes, Aid/Watch, Constitutional Levers and Where We Now Stand’ in Matthew Harding, Ann O’Connell and Miranda Stewart (eds), *Not-for-profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 37, 45–6 (commenting on *Aid/Watch*).

taking part in government.⁶⁴ This aligns with normative suggestions that charity law ought to distinguish ‘party political’ from ‘political’, such that charities do not overlap with core political concepts such as political parties, Parliament or the executive.⁶⁵ It is also consistent with economic, social and political literature on the existence of the not-for-profit (including charity) sector, which emphasises that the sector exists, in part, in response to failures in government, with some of the literature also emphasising that charity purposes are pursued autonomously rather than by way of the deliberative, administrative and coercive processes of the state.⁶⁶ Thus, a purpose of establishing and supporting a political party dedicated to protecting the environment, such as the Australian Greens (Greens),⁶⁷ would preclude an entity from being a charity, even though that could be seen as a means of protecting the environment.

More broadly, illegal activities and election campaigning activities pose particular difficulties for the public benefit requirement, in relation to which Australia and New Zealand have taken divergent approaches, as explored in section 4.

3 When do election campaigning or illegal protest activities amount to a disqualifying purpose?

As identified in subsections 2.1 and 2.2, a charity must have only charitable purposes, albeit ‘non-charitable’ purposes or powers that are merely incidental or ancillary to an overarching charitable purpose do not preclude this. In addition, the CA 2013 (Cth) provides that an entity cannot have a ‘disqualifying purpose’, a term defined as meaning a ‘purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy’ or a ‘purpose of promoting

⁶⁴ *Royal North Shore* (n 20) 426 (Dixon J). Dixon J’s comment on party political purposes or involvement in government was noted but this portion of his Honour’s reasoning was not rejected by the majority in *Aid/Watch* (n 12, at [43]–[49]), albeit Dixon J’s comment about ‘influencing’ government is partly inconsistent with the reasoning in *Aid/Watch*. In New Zealand, see *Re Collier (Deceased)* [1998] 1 NZLR 81 (High Court Wellington), 90 (Hammond J). For more fulsome discussion, see Dal Pont (n 28) [12.31].

⁶⁵ Joyce Chia, Matthew Harding and Ann O’Connell, ‘Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*’ (2011) 35 Melbourne University Law Review 353, 392.

⁶⁶ See, eg, James Douglas, *Why Charity?: The Case for a Third Sector* (SAGE Publications 1983) chs 7, 8; Lester Salamon, ‘Of Market Failure, Voluntary Failure and Third-Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State’ (1987) 16 *Journal of Voluntary Action Research* 29, 36–43; Burton Weisbrod, *The Nonprofit Economy* (Harvard University Press 1988); Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press 2014) 78–85; Darryn Jensen, ‘Charitable Purposes and Political Purposes (Or Voluntarism and Coercion)’ (2015–16) 18 *Charity Law & Practice Review* 57.

⁶⁷ The Australian Greens are broadly comparable to the three Green Parties in the UK.

or opposing a political party or a candidate for political office'.⁶⁸ At common law in Australia and New Zealand, an entity's purpose cannot be against public policy, a circumstance which pertains where the purpose is unlawful.⁶⁹ Subsection 2.3 also identified that at common law an entity cannot have a separate purpose of being or supporting a political party or otherwise taking part in government. The common law position flows through to the CA 2005 (NZ) as a purpose that is non-charitable at common law will preclude an entity from being for charitable purposes under the CA 2005 (NZ) unless the non-charitable purpose is 'merely ancillary'.⁷⁰

Purposes of influencing legislation or government are no longer disqualifying in Australia or New Zealand solely on that basis. As a result, a purpose of achieving a public benefit through broader governmental means than taking part in the core party political elements of government should not be disqualifying. Indeed, as a result of *Aid/Watch*,⁷¹ *Greenpeace*⁷² and CA 2013 (Cth), s 12(1)(l), a political advocacy purpose that relates to activities of government that come within the recognised heads of charity is,⁷³ in Australia, a charitable purpose and, in New Zealand, potentially so. This could clearly apply to lawful election campaigning, at least where that campaigning is issues-based.⁷⁴ However, a separate purpose of campaigning for or against groupings of political parties would appear to constitute a disqualifying purpose. A separate purpose of engaging in unlawful activities, such as unlawful protest activities, would also clearly be disqualifying. This is subject to the proviso that such a purpose may be protected by the Australian Constitution's implied freedom of

⁶⁸ CA 2013 (Cth) ss 5, 11. Nor can a charity be a 'political party' or a 'government entity': s 5.

⁶⁹ *Auckland Medical* (n 29); cf *Royal North Shore* (n 20) 426 (Dixon J).

⁷⁰ CA 2005 (NZ) ss 5(3), (4), 13.

⁷¹ (n 12) [47]–[48]. The position at common law may be broader as the majority left undecided whether a purpose of generating lawful public debate on matters beyond a recognised head of charity would itself be charitable.

⁷² (n 10) [72]–[76] (Elias CJ, McGrath and Glazebrook JJ). As explored in section 4, the majority also identified the likely inability to demonstrate public benefit for much political advocacy.

⁷³ At common law the purpose must also be implemented by way of generating public debate by lawful means.

⁷⁴ For a discussion of the (considerable) difficulties of separating issues based political advocacy from endorsement of candidates, see, eg, Nina Crimm and Laurence Winer, 'Dilemmas in Regulating Electoral Speech of Non-profit Organisations' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds), *Not-for-profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press 2015) 61, 77–8. GetUp!, a grass roots independent political activist organisation, although not registered as a charity, provides a potential Australian example.

political communication⁷⁵ or the New Zealand Bill of Rights Act 1990 (NZ),⁷⁶ for instance because the freedom means that the activities are not in fact unlawful, or that the disqualifying purpose constraint is construed narrowly.

This section looks at when election campaigning or illegal protest activities may give rise to such a disqualifying purpose.

3.1 An independent disqualifying purpose that is not incidental or ancillary to the main charitable purpose

Where election campaigning or illegal protest activities are not incidental or ancillary to an overarching charitable purpose, this may evidence an independent purpose.

3.1.1 Election campaigning

The activities of Catholic Education Melbourne (CEM) in the by-election for the electorate of Batman in 2018 provide a useful case study. CEM is a part of the Catholic Church in the Archdiocese of Melbourne that serves and leads Catholic schools in that area. The Batman by-election was one of a number of Australian federal by-elections caused by members of Parliament breaching a constitutional requirement for election that they not be citizens of another state. It is assumed that CEM's activities were lawful and, in particular, that no electoral legislation was breached. The by-election was contested by the Australian Labor Party (Labor), Australia's main centre-left party, and the Greens but not the Liberal Party of Australia (the Liberals), Australia's main centre-right party. Before polling day, Opposition Leader Bill Shorten wrote a letter to the Catholic Archbishop of Melbourne stating that 'Catholic schools would be more than \$250 million better off' under a Labor government.⁷⁷

Following Mr Shorten's letter, CEM:

⁷⁵ For a recent enunciation of the implied freedom in the context of protest activities, see, eg, *Brown v Tasmania* [2017] HCA 43 (HCA).

⁷⁶ New Zealand Bill of Rights Act 1990 (NZ) ss 4, 6. The Act may affect construction of other pieces of legislation but will not invalidate them.

⁷⁷ Glenn Savage, 'Why is the Funding of Catholic Schools so Controversial' *ABC News* (28 March 2018) <www.abc.net.au/news/2018-03-27/why-is-the-funding-of-catholic-schools-so-controversial/9586148>, accessed 13 January 2019.

- Wrote a letter (through its director, Stephen Elder) to all Catholic school parents in Batman which compared and commented on the education policies of the political parties of the two main candidates: Labor and the Greens.⁷⁸ It stated that Labor was the only party that would provide an extra \$250 million for Catholic schools and that ‘only the ALP education policy’ supported the Catholic school sector’s objectives.⁷⁹
- Spent \$4,378.84 making 30,000 follow-up automated telephone calls to the majority of households in Batman in the week before the poll stating that ‘Malcolm Turnbull [then Australian Prime Minister, leader of the Liberals] has slashed funds from low-fee local Catholic and independent schools... The Greens seek to strip funds from Catholic schools... In contrast, Labor believes that local Catholic schools are an essential element of our education system. Labor will restore hundreds of millions in school funding cut by the Liberals... the future of our schools depends on who you support on Saturday’.⁸⁰
- Published media releases that were disparaging of the Liberals’ policies and members, with titles such as: ‘Bill Shorten is Committed to Catholic Schools, But Where is Malcolm Turnbull?’, ‘Simon [Birmingham] Said: The School Funding Shambles 12 Months On’; and ‘Mr Goldman Sachs [Turnbull] Complains of “Special Deals”’.⁸¹

While CEM does not have a written governing document, its ACNC record lists its purposes as the advancement of education and the advancement of religion.⁸² The test of an ancillary or incidental rather than separate purpose is whether the natural and probable consequences of CEM’s campaigning activities in the Batman by-election helped to achieve those educational or religious purposes. What were the consequences? Three would naturally and probably occur: first, encouraging political parties other than Labor to consider adopting education policies more favourable to Catholic schools. Second, increasing the number of people voting for Labor

⁷⁸ Paul Bongiorno, ‘Labor’s Secret Weapon in Batman Win: Catholics’ *The New Daily* (19 March 2018) <thenewdaily.com.au/news/national/2018/03/19/why-labor-won-batman/>.

⁷⁹ Samantha Hutchinson and Simon Benson, ‘How Shorten Played Catholic Ace’, *The Australian* (Sydney, 19 March 2018), 9.

⁸⁰ Ferguson (n 16) 1, 4; John Ferguson, ‘Church Resists School Rules’ *The Australian* (Sydney, 14 July 2018) 19; Bongiorno (n 78).

⁸¹ Catholic Education Melbourne, *Media Releases* (27 March 2018, 2 May 2018, 15 May 2018, 6 July 2018) <www.cem.edu.au/Media-Releases.aspx> accessed 13 January 2019.

⁸² ACNC, *Search the ACNC Charity Register* (accessed 16 February 2019) <<https://www.acnc.gov.au/charity>>.

so as to increase the chances of a Labor candidate being elected and seeking to implement Labor's education policy. Third, encouraging electors in Batman and, indirectly, more broadly to compare and contrast the political parties' education policies.

There is a strong link between these consequences and CEM's listed purposes, such that CEM's Batman campaigning activities do not reflect a separate purpose of campaigning. This conclusion would not be so clear cut if the 'conducive to promoting' test was employed by a judge who asked whether campaigning was 'in harmony' with religion and education, particularly if informed by notions of separation of church and state.⁸³ Nor is campaigning directly related to education or religion.

Of course, if CEM did not give each political party a fair chance to explain their education policies or if CEM had misrepresented the education policies of each party so as to favour one over the others,⁸⁴ the natural and probable consequences of the campaigning might then have been to further a separate campaigning purpose. Indeed, a 'lack of balance' in promoting or opposing political party policies is expressly identified in the CA 2013 (Cth) explanatory materials as helping demonstrate a disqualifying purpose, along with the 'direct nature and extent of engagement and association' with a candidate or their party.⁸⁵

3.1.2 *Illegal political advocacy*

The New Zealand Supreme Court decision of *Greenpeace* is highly relevant when considering whether unlawful activities indicate a separate purpose. The majority noted:⁸⁶

While illegal activities may indicate an illegal purpose, breaches of the law not deliberately undertaken or coordinated by the entity are unlikely to amount to a purpose. Isolated breaches of the law, even if apparently sanctioned by the organisation, may well not amount to a disqualifying purpose. Assessment of illegal purpose is... a matter of fact and degree. Patterns of behaviour, the nature and seriousness of illegal activity, any express or implied ratification or authorisation, steps taken to prevent recurrence, intention or inadvertence in the illegality, may all be relevant. On the other hand, we are unable to accept the submission by Greenpeace that only serious offending, such as would permit sanction under the legislation on a one-off

⁸³ For instance, as reflected in Commonwealth Constitution, s 116.

⁸⁴ Lack of balance has been relevant in the US in drawing a line between campaigning and other political activities: James Fishman, Stephen Schwarz and Lloyd Mayer, *Nonprofit Organizations: Cases and Materials* (5th edn, Foundation Press 2015) 471.

⁸⁵ Explanatory Memorandum to the Charities Bill 2013 (Cth) para [1.110]–[1.111].

⁸⁶ [2014] NZSC 105, [111].

basis even if not indicative of any system or purpose, is required before illegal conduct amounts to a purpose of the entity.

The Court directed the Charities Registration Board to reconsider Greenpeace's application. The Board issued its decision in March 2018, finding that Greenpeace was not entitled to registration as a charity, in part on the basis that Greenpeace had an illegal purpose.⁸⁷ Greenpeace had no express purpose of engaging in unlawful political protests, but Greenpeace members had engaged in a number of trespass and obstruction-related offences over a number of years. While the activities were described as being of 'a relatively minor nature' or 'minor to moderate nature',⁸⁸ the Board found that Greenpeace was aware that its members had engaged in illegal protest activities, that Greenpeace had no processes in place to discourage those activities and that Greenpeace had, in fact, encouraged those activities.⁸⁹ Encouragement was by way of expressing support for the relevant members and by arranging annual training to build members' skills in boarding boats or equipment. Accordingly, the Board found that the illegal activities formed a pattern of behaviour that was deliberately condoned by Greenpeace, giving rise to a separate disqualifying purpose.⁹⁰

The Supreme Court's reasoning indicates that individual instances of unlawful activities in and of themselves are unlikely to result in an independent non-charitable purpose. Second, unlawful activities not deliberately authorised, encouraged or adopted by an entity are unlikely to result in a non-charitable purpose. Third, the nature and seriousness of activities is pertinent.

In most respects, this is consistent with the natural and probable consequences approach in *Word Investments*, although it appears to build in a degree of materiality of consequences, which is consistent with the approach of the US IRS to illegal activities.⁹¹ This is apparent in the third item, the 'nature and seriousness' of the activities, as illegal activities that are minor in nature and impact are unlikely to have material consequences beyond furthering an entity's charitable purposes unless they are part of repeated behaviour that is serious when considered

⁸⁷ *Greenpeace of New Zealand Inc* Charities Registration Board 2018-1, 21 March 2018.

⁸⁸ *ibid* [93], [97].

⁸⁹ *ibid* [94], [97].

⁹⁰ *ibid* [98]. A similar conclusion was reached by the IRS in relation to an anti-war civil disobedience entity almost 45 years ago: IRS, Rev Rule 75-384, 1975-2 CB 204.

⁹¹ Internal Revenue Service General Counsel Memoranda 34, 361 (4 October 1971); Jean Wright and Jay H Rotz, 'L. Illegality and Public Policy Considerations', *Internal Revenue Service* (1994 EO CPE Text) <www.irs.gov/pub/irs-tege/eotopic194.pdf> accessed 15 January 2019.

as a whole. Isolated unlawful activities are also likely to have limited consequences unless they are very serious (eg robbing a bank).⁹²

It is also logical to enquire whether activities are undertaken or coordinated by the entity so as to be *the entity's* activities. The acts of persons who are merely members, not employees or officeholders or others with on-going decision-making functions and responsibilities, ought not generally be attributed to the entity (although this would depend on the terms of the relevant offence). However, an entity might act itself in condoning member activities and it is this scenario that is most likely to apply to unlawful protest activities. That was so in *Greenpeace* and the case demonstrates that once activities have been established as those of the entity, asking if they were undertaken deliberately is then germane to their natural and probable consequences—if inadvertent the consequences beyond the charitable ends are likely to be less material. Indeed, had Greenpeace taken action to stop members engaging in illegal activities, it is arguable that the Board would have decided differently as it would likely no longer have been possible to point to an endorsement by Greenpeace of illegal acts.⁹³

In one key respect, however, the approach in *Greenpeace* diverges from *Word Investments*. Greenpeace's purposes included the protection of the environment, or at least advocacy for the end of protecting the environment.⁹⁴ The natural and probable consequences of Greenpeace's unlawful protest activities most likely included raising public awareness about the environment and the hindering of activities that Greenpeace considered harmful to the environment. On one view, these consequences appear to further Greenpeace's environmental objective. However, the Supreme Court accepted that Greenpeace could have an independent purpose of encouraging unlawful activities.

⁹² cf *ibid.*

⁹³ cf Internal Revenue Service General Counsel Memoranda 38, 415 (20 June 1980), relating to an environmental organisation that used confrontational activities to try and stop the hunting of endangered species. The organisation had taken steps to expel from the board and the membership a member who had engaged in repeated illegal activities.

⁹⁴ *Greenpeace of New Zealand Inc* Charities Registration Board 2018-1, 21 March 2018, [30]–[35]. Cf *Greenpeace* (n 10) [71].

This suggests a view that once unlawful activities are sufficiently substantial to represent a purpose, they cannot be incidental or ancillary,⁹⁵ or, perhaps, that it is simply irrelevant to ask if they are incidental or ancillary, any unlawful purpose being automatically an independent, non-charitable one. While this represents a pragmatic approach on one level, it does raise some of the concerns expressed in subsection 2.2 about non-neutral value judgments. For example, might courts be less inclined to characterise breaches of corporate governance duties (eg duties of care and diligence) as giving rise to an unlawful purpose, than trespass? Likewise, how ready might a judge be to characterise a faith-based social justice organisation that unlawfully speaks out about conditions of offshore detention for asylum seekers as having a purpose of so-doing?⁹⁶

It is suggested that retaining some link to the *Word Investments* focus on consequences might help to address these issues. For instance, the Court in *Greenpeace* could be interpreted as looking to the consequences of the unlawful activities beyond the environmental consequences. One possible consequence is that where a charity encourages or engages in illegal activities in a substantial way, it undermines the legitimacy of the state, given that allocation of the label ‘charity’ expresses state endorsement of an entity and its activities, and that the state provides administrative and fiscal support to charities,⁹⁷ even if separate sanctions attach to the illegality.⁹⁸ The approach of using *Word Investments* (to identify activities sufficiently directed at a disqualifying end) in conjunction with asking when activities crystallise into a purpose is expanded in subsection 3.2.

The discussion so far has also assumed unlawfulness or illegality, but the matter of when an activity is so classified is potentially vexed. The New Zealand Supreme Court indicated that ‘[w]hether illegal activity cannot be taken into account unless it has been the subject of criminal prosecution may be more doubtful and is a point which should wait for an actual controversy’.⁹⁹

⁹⁵ In the US context, cf Internal Revenue Service General Counsel Memoranda 34, 361 (4 October 1971), suggesting that unlawful activities can never be characterised as furthering a charitable purpose.

⁹⁶ Secrecy may, for instance, be required as a result of *Australian Border Force Act 2015* (Cth), s 42.

⁹⁷ As to the expressive, facilitative and incentivising functions of charity law, see, eg, Harding, *Liberal State* (n 66) 38–41, 44.

⁹⁸ For a useful overview of ‘legitimacy’ see, eg, Bertrand Baide, Dirk Berg-Schlosser and Leonardo Morlino (eds), *International Encyclopedia of Political Science* (SAGE Publications 2011) 1414–25.

⁹⁹ *Greenpeace* (n 10) [112].

Despite this equivocation, the Board considered a number of sets of activities for which there were no convictions, or for which it was unclear if any conviction was obtained. Indeed, only three of ten activities considered by the Board resulted in convictions (in some the charges were dropped) and charges were not even laid for all of the other seven.¹⁰⁰ In *Auckland Medical*, the lack of a conviction—admittedly because the matter had gone to trial and the medical practitioner had been acquitted—was treated as significant.¹⁰¹ Further, constitutional or statutory protection of freedom of political communication or expression might even mean that the legislation creating an offence is invalid or should be more narrowly construed. Therefore, there are good reasons for thinking that the Board was too hasty in establishing illegality in *Greenpeace*. Nevertheless, charities will often bear the evidentiary burden. For instance, under the Australian Charities and Not-for-profits Commission Act 2012 (Cth), charities have the burden of proof in appealing against revocation decisions.¹⁰² A focus on consequences may again be relevant here as it may permit greater weight to be accorded to findings of unlawfulness rather than mere charges.

A point that flows from the above is that electoral legislation may matter to charity status in the context of campaigning activities. This is clearly pertinent given the recent amendments to Australian electoral legislation, which would impose further obligations in relation to charity advocacy. While lawfulness was assumed for the purposes of the CEM case study, if a charity campaigns in breach of electoral legislation, it is then engaging in unlawful activities. As demonstrated by *Greenpeace*, courts in such circumstances may well show readiness in finding an independent purpose.

3.2 A disqualifying purpose that is incidental or ancillary to the main charitable purpose

Traditionally, charities have been characterised as having no independent purposes, any incidental and ancillary purposes to the (exclusive) charitable purpose being ‘subservient’ or ‘subsidiary’ purposes,¹⁰³ or even expressed to be truly powers in furtherance of the charitable

¹⁰⁰ *Greenpeace of New Zealand Inc* Charities Registration Board 2018-1, 21 March 2018, [89]-[97].

¹⁰¹ *Auckland Medical* (n 29) 395 (Chilwell J).

¹⁰² pt 7-2.

¹⁰³ Cf the following statements which are premised on the existence of two purposes, with the main purpose charitable and the other ancillary or incidental: *Stratton v Simpson* (1970) 125 CLR 138 (HCA), 148-52 (Windeyer J), 159-60 (Barwick CJ, Gibbs and Menzies JJ); *Congregational Union (NSW) v Thistlethwayte* (1952) 87 CLR 375 (HCA), 441-2 (Dixon CJ, McTiernan, Williams and Fullagar JJ); *Inland Revenue*

purpose.¹⁰⁴ To have a separate purpose is thus to imply that an entity has a purpose that is not incidental or ancillary to the charitable purpose. At common law (and under the CA 2005 (NZ)), then, if an activity or object is construed as incidental or ancillary, it has not typically been necessary to take a further step and ask whether the series of activities or the object amount to a purpose, as any such purpose would not be characterised as a separate purpose from the charitable purpose. However, the definitions in ss 5 and 11 of the CA 2013 (Cth) are broader:¹⁰⁵

charity means an entity:

- (a) that is a not-for-profit entity; and
- (b) all of the purposes of which are:
 - (i) charitable purposes (see Part 3) that are for the public benefit (see Division 2 of this Part); or
 - (ii) purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i); and
- (c) none of the purposes of which are disqualifying purposes (see Division 3); and
- (d) that is not an individual, a political party or a government entity.

disqualifying purpose means:

- (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
- (b) the purpose of promoting or opposing a political party or a candidate for political office.

The statutory language precludes the assertion further above that incidental or ancillary purposes are not truly purposes, but merely powers or groups of activities, since s 5(b)(ii) expressly contemplates purposes that are incidental or ancillary and additional to the charitable purposes referred to in s 5(b)(i). Accepting that incidental or ancillary purposes can be characterised as ‘purposes’, the reference to disqualifying purposes in s 5(c) then appears to apply to incidental or ancillary purposes also since it is phrased as applying to all of the entity’s purposes. If the disqualifying purpose test had been intended to apply to s 5(b)(i) charitable purposes only, then it would have been a simple matter to expressly restrict it to s 5(b)(i) in the same way that the public benefit test applies only to s 5(b)(i) charitable purposes. To be sure,

Commissioners v New Zealand Council of Law Reporting [1981] 1 NZLR 682 (New Zealand Court of Appeal), 687 (Richardson, McMullin and Mahon JJ); *IRC v City of Glasgow Police Athletic Association* [1953] AC 380 (HL), 397 (Lord Normand).

¹⁰⁴ *Word Investments* (n 26) [19]–[20] (Gummow, Hayne, Heydon and Crennan JJ); cf *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, 405 (Lord Cohen).

¹⁰⁵ Notes and examples omitted.

it may be asserted that statutory interpretation of ‘charity’ under the CA 2013 (Cth) involves regard to statutory purpose, as well as text and context, and that the purpose was to codify the common law with minor modifications such that common law principles remain relevant.¹⁰⁶ However, while the pre-existing common law is clearly relevant, the exercise of statutory interpretation is a different frame of reference than common law reasoning by way of analogy to earlier authorities, coherence with legal principles and considerations of policy.¹⁰⁷ The text of ss 5(b)(ii) and 5(c), in conjunction with the context of s 5(b)(i), which includes an expressly limited public benefit test, means that incidental or ancillary purposes can be disqualifying purposes.

The question is how to determine when such a disqualifying incidental or ancillary purpose exists. Clearly, there must still be a *purpose* that is disqualifying. This is reinforced by the omission from the CA 2013 (Cth) of an additional provision in the 2003 Draft Charities Bill,¹⁰⁸ which rendered an entity non-charitable if it ‘engage[d] in... conduct (or an omission to engage in conduct) that constitutes a serious offence’.¹⁰⁹ Nevertheless, s 11(a) expressly defines disqualifying purposes by reference to a purpose of engaging in or promoting certain *activities*. Section 11(b) also, although implicitly, defines a purpose by reference to activities. Thus the context suggests a charity can be parsed into subsets of its activities to some extent.¹¹⁰

So what process should be used to determine whether there is an incidental or ancillary purpose that is also disqualifying? It is suggested that there are two steps. First, what objects or activities might be directed at a *disqualifying* end? Returning to the *Word Investments* approach, look at each stated object and set of activities to construct a range of natural and probable consequences. Some of those consequences will be in furtherance of the charitable purpose. However, some will not. It is the range of consequences that do not further the charitable purpose that potentially evidence a disqualifying ancillary purpose. For instance, the natural and probable consequences of engaging in or promoting some activities will be the

¹⁰⁶ Explanatory Memorandum to the Charities Bill 2013 (Cth) paras [1.16]–[1.17], [1.19].

¹⁰⁷ See, eg, *Cattanach v Melchior* [2003] HCA 38, [102] (Kirby J). See also Matthew Harding, ‘Equity and Statute in Charity Law’ (2015) 9 *Journal of Equity* 167, 171–2.

¹⁰⁸ Exposure Draft Charities Bill 2003 (Cth).

¹⁰⁹ *ibid* s 4(1)(e).

¹¹⁰ In the context of state taxes legislation, see, eg, Ian Murray, ‘The Taming of the Charitable Shrew: State Roll Back of Charity Tax Concessions’ (2016) 27 *Public Law Review* 54, 61–2.

achievement of something that is unlawful or contrary to public policy, or the promotion of a political party, even if this is also incidental or ancillary to a charitable purpose. CEM's campaigning activities are an example, where one of the natural and probable consequences of campaigning was to promote Labor. The benefit of this approach is that it helps focus on the nature of the ends rather than on the nature of the means, because the means—activities—have no intrinsic nature.

Second, do the activities or object amount to a *purpose* rather than being a mere series of activities or power to carry out activities? The approach in *Greenpeace*, discussed in subsection 3.1.2, is helpful here since the unlawful protest purpose in *Greenpeace* was, in one sense, incidental or ancillary to *Greenpeace*'s environmental object. While the political purpose doctrine has been rejected, the political purpose cases still provide insights into the process adopted by courts in identifying a political purpose even where the political activities are a means of furthering an overarching purpose. The authorities indicate that the courts have characterised political advocacy as amounting to a purpose where the advocacy is a central means to achieving the overarching (otherwise charitable) purpose of the entity. For instance, in the *National Anti-Vivisection Society* case,¹¹¹ the majority of the House of Lords considered that the repeal and replacement of animal cruelty legislation was 'a' if not 'the' 'main' or 'leading' means of achieving the overarching goal of abolishing vivisection and so a disqualifying political purpose.¹¹² In *McGovern v Attorney-General*, Slade J indicated that applying moral pressure directly to government officials to procure a change in government imprisonment decisions was Amnesty International's principal means (and hence a purpose) of achieving the release of prisoners of conscience, rather than being 'merely... one possible method of giving effect to the purposes of clause 2B'.¹¹³ The political purpose cases thus help articulate the essential quality required for a group of activities to amount to an ancillary purpose, centrality to achieving the overarching purpose, with *Greenpeace* providing tools to help identify that quality.

¹¹¹ *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL).

¹¹² *ibid* 61–2 (Lord Simonds), 76–8 (Lord Normand). Lord Porter, in dissent, took a narrower approach to the political purposes doctrine. He also considered the repeal of the legislation to be the Society's 'main method' and 'in that sense a main object', but because it was not the only method by which vivisection could be abolished, he declined to find a political purpose: at 54–5.

¹¹³ (n 36) 347. See also at 351–2 (abolishing inhuman or degrading punishments).

These two steps are applied below to illegal political advocacy and campaigning.

3.2.1 Illegal political advocacy

The natural and probable consequences of expressing support for members who act illegally in carrying out protest activities and intentionally training members in techniques required for unlawful protests is that some members will protest in an unlawful fashion. As discussed in subsection 3.1.2, repeated activities of condoning and enabling illegal protest activities by members, where those activities represent a central way to Greenpeace pursuing its environmental purposes, suggests that those alternative consequences have crystallised into a separate purpose, even if it is incidental to achieving an overarching environmental purpose. Indeed, that appears to have been the approach at common law and under the CA 2005 (NZ), such that the CA 2013 (Cth) is unlikely to result in much difference in practice for unlawful activities.

3.2.2 Election campaigning

Illegal protest activities are unlikely to be expressed in an entity's objects, but a campaigning object may well be written into a list of objects. Depending upon the phrasing of the object it might be expected that it would often raise a consequence of promoting or opposing a political party or candidate. In applying the second step, the fact of being stated as an object would suggest that the means is a significant one, going to centrality of achieving purpose, and that it is part of a deliberately authorised pattern of activities. Unless minor in nature and quantity, there would be a very high risk that any express campaigning object amounts to a disqualifying purpose.

The CEM case study provides an example of an entity engaged in campaigning activities but with no stated campaigning object. As identified in subsection 3.1.1, one consequence of CEM's activities was to increase voting support for Labor. In considering whether the activities amount to a *purpose* of promoting Labor, the activities were deliberately conducted by CEM and formed more than an isolated incident, although not an extensive pattern of behaviour. In terms of nature and seriousness, the activities affected large numbers of people, although involving relatively modest cost. However, looking at its nature, the campaigning does not appear to be a main or central means of achieving CEM's educational and religious purposes. The main ways CEM achieves these purposes is by providing learning, Catholic identity,

business advisory, enterprise, planning and infrastructure services to Catholic schools, including educational products for schools and training for education providers.¹¹⁴ If CEM was primarily an advocacy body for schools and less of a service provider, there would be greater risk that the campaigning purpose might be seen as central, particularly given the core role of government funding for education provision.

4 Activities and public benefit

The majority reasoning in *Aid/Watch* indicates that, subject to the particular ends and means involved, political advocacy which involves the generation by lawful means of public debate directed to activities of government within a recognised charitable purpose is:

- for the public welfare;¹¹⁵ and
- supportive of the constitutionally protected system of representative and responsible government in Australia—regardless of the merits of the political reforms advocated.¹¹⁶

The starting position in Australia, both at common law and through application of CA 2013 (Cth), s 6, is thus that a purpose of engaging in, or that entails, *lawful* public political advocacy, is for the public benefit. Of course, the majority in *Aid/Watch* indicated that some specific advocacy ‘ends and means’ might not be for the public welfare.¹¹⁷ For example, there is a question over unlawful campaigning or campaigning aimed at the repeal of anti-discrimination provisions.¹¹⁸ In any event, *Aid/Watch* suggests that the focus is firmly on the particular mode of advocacy, with consideration of the ends only in exceptional cases.

In contrast, in New Zealand, the Supreme Court in *Greenpeace* suggested that purposes of, or that entail, political advocacy will not commonly be charitable.¹¹⁹ It is necessary to ask

¹¹⁴ ‘Annual Report 2017’ CEM <annualreportcem.com/> accessed 15 January 2019; CEM, *Annual Information Statement* (ACNC 2017).

¹¹⁵ (n 12) [46]–[49] (French CJ, Gummow, Hayne, Crennan and Bell JJ). Although note that the language used appears to move from the concept of ‘beneficial to the public’ under the catch-all head of charity, to the separate public benefit test (see subsection 2.3).

¹¹⁶ *ibid* [45].

¹¹⁷ *ibid* [47]–[49].

¹¹⁸ Promoting public debate on the repeal of anti-discrimination laws was raised as an issue, but not answered, in the High Court hearings: *Aid/Watch Inc v Commissioner of Taxation* [2010] HCATrans 154 [1220] Gummow J.

¹¹⁹ (n 10) [73]–[74] (Elias CJ, McGrath and Glazebrook JJ).

whether the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted will generate public benefit.¹²⁰ The majority does not explain precisely what these terms mean, but it is clear that New Zealand courts should look to whether *achievement* both of a particular *end*, and by the particular *means*, is of public benefit.¹²¹ So, if an entity asserts a particular view about how to achieve an end the court must enquire into whether adopting those means to achieve that end will result in a net benefit. Further, New Zealand courts must also look to whether the *manner of promotion* is itself of public benefit,¹²² which could potentially mean looking at whether the manner is consistent with the New Zealand system of government, somewhat analogously to *Aid/Watch*.¹²³ As noted by Matthew Harding, the disadvantage of this approach to public benefit is that in addition to considering whether a particular advocacy process is consistent with a nation's system of government, judges have to consider in every case whether the achievement of a political objective by the particular means specified is of net benefit.¹²⁴

4.1 *Illegal political advocacy*

If illegality cannot be challenged on grounds of freedom of political communication or expression, it will often be difficult to assert that unlawful protest activities result in a net benefit from the generation of public debate in either Australia or New Zealand. After all, the majority in *Aid/Watch* found public benefit in the fact that the particular purpose of political advocacy under consideration was supportive of the constitutionally protected system of representative and responsible government in Australia because it involved the generation by lawful means of public debate directed to activities of government within a recognised charitable purpose.¹²⁵ A purpose of unlawfully generating public debate will raise questions about whether that debate is contributing to constitutional processes or in fact detracting from them.

¹²⁰ *ibid* [76].

¹²¹ *ibid* [73]–[76].

¹²² *ibid* [73], [76], [103].

¹²³ Cf *Greenpeace of New Zealand Inc* Charities Registration Board 2018-1, 21 March 2018, [35]; Matthew Harding, 'An Antipodean View of Political Purposes and Charity Law' (2015) *Law Quarterly Review* 181, 183.

¹²⁴ Harding, 'Antipodean View' (n 123) 183.

¹²⁵ (n 12) [45]–[49] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

4.2 *Election campaigning*

In Australia, unlike New Zealand, there is no need to consider whether achieving protection of the environment by the means of advocating Greenpeace's views on how to address issues such as climate change, sustainable fishing and enhancing fresh water quality is of net benefit. The Board's decision in *Greenpeace* indicates that if public benefit is to be determined by whether there is net benefit in asserting a particular view about changing law or policy then, for most controversial topics,¹²⁶ it will be very difficult for the decision-maker to determine whether there is a net benefit. Indeed, the Board does not appear to have tried very hard at all before determining that it could not say one way or the other.¹²⁷

Looking to CEM's campaigning activities, assuming they were conducted lawfully and without any harms that might undermine the Australian system of representative and responsible government, public benefit may be found in the public discourse generated by the campaigning. Indeed, it is implicit in *Aid/Watch* that propaganda activities are acceptable; there is no requirement for rarefied objective debate. In any event, there would be a rebuttable presumption of net benefit for CEM's purposes of advancing education and religion under the CA 2013 (Cth) and at common law.¹²⁸

If CEM had carried out the campaigning activities in New Zealand, a court would need to find that achievement of CEM's Catholic education purposes by means of supporting one party's policies would be of greater benefit than supporting another party's policies. If the sole difference was an extra \$250 million for Catholic schools, that may be possible. However, it is highly unlikely that this would be the sole difference, such that New Zealand courts would have great difficulty in finding net benefit. CEM would then need to argue that its campaigning activities are incidental or ancillary to its educational and religious purposes and point to its various other activities in pursuit of those purposes to demonstrate public benefit, again with the benefit of a presumption.¹²⁹

¹²⁶ Despite the majority in the Supreme Court rejecting the Court of Appeal's distinction between controversial and non-controversial views: *Greenpeace* (n 10) [75].

¹²⁷ *Greenpeace of New Zealand Inc* Charities Registration Board 2018-1, 21 March 2018, [50].

¹²⁸ CA 2013 (Cth) s 7 extends the common law presumption to the 'widely available' component of the public benefit test for the purposes of the statute.

¹²⁹ Poirier (n 22) 124–6.

5 Conclusion

The recent abolition of the political purposes doctrine in Australia and New Zealand raises the prospect of increased political advocacy by charities, along with new questions about when advocacy activities preclude charity status. Typically, the focus has been on when advocacy activities might crystallise into a separate disqualifying purpose, such as promoting or opposing a political party or candidate. However, the discussion has not moved far beyond accepting that advocacy activities are potentially relevant to purpose, but that bundles of activities are not automatically purposes. Australian case law has something to add as a result of *Word Investments*. Consistent with the High Court's reasoning, looking to the natural and probable consequences of activities can help identify if they are engaged in for a charitable purpose or for another non-charitable purpose. The New Zealand case of *Greenpeace* then provides tools for applying a materiality test to activities that further a non-charitable purpose, to determine whether the activities amount to a purpose. In applying the approach to campaigning and illegal protest activities, this paper has also shown that illegal activities, even unlawful protests that further an overarching charitable purpose, may be characterised as a separate purpose by reference to the non-charitable purpose's consequences. This is likely to mean that a disqualifying purpose based on unlawfulness can exist in both Australia and New Zealand even where activities are incidental or ancillary to the charitable purpose. The potential reach of 'unlawfulness' beyond a conviction and the imposition of the burden of proof on charities thus raises significant risks for many protest activities.

Due to the more restrictive wording of the CA 2013 (Cth), an incidental or ancillary purpose of promoting or opposing a political party or candidate can also be disqualifying in Australia, but—subject to public benefit—not New Zealand. The paper suggests that a similar approach should be adopted to that outlined above for identifying when activities amount to an independent purpose. First, use *Word Investments* to determine the range of consequences from activities; some furthering the charitable purpose and some furthering other purposes. Second, test materiality applying *Greenpeace*, as informed by the focus on centrality of activities to achieving an overarching purpose that is enunciated in the political purpose doctrine cases. There is thus a greater risk in Australia that an advocacy-focused body engaged in campaigning will have a disqualifying campaigning purpose.

However, advocacy activities are also relevant beyond characterising purpose, and are relevant, in particular, to the public benefit test. In Australia, *Aid/Watch* and the CA 2013 (Cth) contemplate that the generation of public debate by lawful means, such as election campaigning, would typically be of public benefit. In contrast in New Zealand, the majority in *Greenpeace* suggested that advocacy of an entity's view would typically fail the public benefit test as it is necessary to test whether achievement of an end by the very means advocated will produce a net public benefit. Where campaigning advocacy is incidental or ancillary to an overarching charitable purpose and the entity engages in a range of other activities to achieve the purpose, the public benefit test will likely be satisfied. It is unlikely to be satisfied for an advocacy-focused body engaged in campaigning.

While Australia and New Zealand may reach broadly similar results in relation to campaigning and illegal protest activities, the New Zealand approach is likely to involve courts in an essentially administrative function of selecting what projects will best implement a charitable purpose. That is because in answering the public benefit question New Zealand courts must weigh the direct and indirect, tangible and intangible, benefits and detriments from the different means of pursuing a charitable purpose. While there are differences in the legal settings, the Australian approach is more closely aligned with traditional judicial (rather than administrative) functions, requiring judges to determine when an advocacy process is itself harmful—especially to representative and responsible government—and to characterise purposes and ascertain when a bundle of activities crystallises into a purpose. The approaches to identifying purposes and to application of the public benefit test may prove useful to other jurisdictions, such as Canada, the US and the UK, as (and if) they move away from a political purpose doctrine or from tax rules that restrict political advocacy.

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