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How do we Regulate Activities within a Charity Law Framework Focussed on Purposes?

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Abstract

The law about when an entity is or is not a charity focuses on that entity's purposes, not its activities. Yet, much of the current civil society debate centres on particular charity activities: election campaigning, the discriminatory provision of goods and services, or carrying on large-scale commercial activities. The issue arises in many jurisdictions around the world. This article focuses on examples drawn primarily from Australasia to argue that there are alternative sources of regulation of relevance to Australasian charity activities and that evaluation and reform efforts would be best spent in focussing on these alternatives. In particular, broadly-applicable regulatory rules that apply to all entities engaging in activities such as anti-discrimination legislation; as well as charity-specific rules that might be justified as guarding against the charity/government or charity/business boundaries, or as rectifying charity deficiencies such as difficulties in raising equity capital. While the discussion focuses on how Australia and New Zealand might better regulate charity activities, the article informs that discussion by considering regulatory approaches to particular issues in the UK, Canada and the US.

KEYWORDS

Charity law; charities; for-purpose; activities; regulation

INTRODUCTION

In countries such as Australia, New Zealand, Canada, the UK and the US, when the state marks out classes of civil society entities worthy of state approval and eligible to receive state support (by way of tax and other concessions), it does so primarily by reference to the purposes intended to be achieved by those entities. Yet many of the current civil society controversies relate to the means – the activities – adopted to achieve those purposes. Civil disobedience activities are at the core of Australian government concerns about environmental charities, not whether the preservation of the environment is a charitable purpose. While foreign influence and unstated purposes trouble politicians about civil society organisations speaking out on political issues, electioneering activities by home-financed entities routinely raise questions of charities 'sticking to their knitting' rather than becoming involved in the business of government. The extent to which civil society organisations may discriminate in pursuit of religious purposes underlies proposed legislative reforms in Australia and the *Family First* (2020) litigation in New Zealand. Despite the Australian High Court decision of *FCT v Word Investments* (2008) and subsequent in-depth analysis, the issue of commercial activities and the charity/business boundary remain live issues in Australia and are expressly being considered as part of New Zealand's taxation and *Charities Act* reviews.

In light of the controversy over such activities, this article emphasises the limited extent to which activities currently affect the charity status of civil society organisations in Australia and New Zealand. To help think about the ways in which we might wish to more closely regulate charity activities in Australasia, the article then discusses how activity-based regulation already applies, in some cases fairly extensively, to charities. It does so in two parts. First by justifying and examining generally applicable regulatory rules that apply on the basis of activities rather than charity status. Second by considering when charity activity-specific regulation might be required and considering what can be learned from political

advocacy and commercial activity examples drawn not just from Australia and New Zealand, but also from the UK, US and Canada.

THE LIMITED ROLE FOR 'ACTIVITIES' IN DETERMINING CHARITY STATUS

Taking Australia as an example, both under statute and at common law, for an 'entity'[1] to be charitable it must:

- have purposes that are all 'charitable' purposes (such as relieving poverty, advancing education, advancing religion, or advancing other purposes beneficial to the community);[2]
- be for the public benefit (*Charities Act 2013* (Cth) ss5, 6; *Aid/Watch* (2010): [18]); and
- be not-for-profit (*Charities Act 2013* (Cth) s5(a); at common law this is contained within the public benefit requirement, see, eg, Garton (2013): [2.15]).

In addition, a charity cannot:

- be a government entity, a political party or an individual (*Charities Act 2013* (Cth) ss4, 5(d); at common law, see *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168[3]); or
- have, at common law, a purpose against public policy such as an unlawful purpose (*Royal North Shore* (1938): 426)[4] or, under the *Charities Act*, 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 or opposing a political party or a candidate for political office' (*Charities Act 2013* (Cth) ss5, 11). Nor can a charity be a 'political party' or a 'government entity' ((*Charities Act 2013* (Cth) s5).

Activities are relevant to these various elements but, as discussed below, for entities with an overtly charitable set of objects in their constitution or trust deed, the legal test of charity generally does not regulate the means or activities adopted to pursue those objects other than at the margins. That is, party political activities, the activities of government and the provision of private benefits are broadly precluded. But, except for the public policy/unlawful purpose requirement, it is otherwise quite difficult to regulate specific activities. Parachin terms this the 'square peg, round hole problem' (Parachin (2020)).

Charitable purpose

In particular, and especially for charities in a legal form other than that of a trust, activities may impact on the characterisation of an entity's purposes in a number of ways (Murray, 2019: 33-8; Garton (2014): 387-88). For instance, in construing an entity's purpose, the courts typically examine the objects stated in its constitution, its activities and the circumstances of its formation (*FCT v Word Investments* (2008): [17]-[18], [25]-[26]). Activities might also help determine the relative weight of an entity's stated objects to confirm whether its member-services object is incidental to its community benefit object, or *vice versa* (see, eg, *South Australian Employers' Chamber of Commerce and Industry Incorporated v Commissioner of State Taxation* [2019] SASCFC 125).

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 (*Vancouver Society* (1999): [54] (Gonthier J, L'Heureux-Dubé and McLachlin JJ), [152] (Iacobucci, Cory, Major and Bastarche JJ);[5] *FCT v Word Investments* (2008): [26]; *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13, [36]. For commentary, see Cullity (1990): 7; Murray (2008): 159-62). In essence, activities are the means to achieving a purpose - the end.[6] As reflected in section 5 of the *Charities Act 2013* (Cth) and in *FCT v Word*

Investments (*2008*), activities 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, but instead as supporting the stated purpose. Cases that consider whether objects or activities are incidental or ancillary to an overarching charitable object broadly ask whether the object is 'conducive to promoting' an overarching charitable purpose (*Stratton v Simpson* (1970) 125 CLR 138, 148, 159-60; *Congregational Union (NSW) v Thistlethwayte* (1952) 87 CLR 375, 441-2). In *Word Investments*, the Australian High Court 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 (*FCT v Word Investments* (2008): [37]-[38]). While the High Court majority did not purport to lay down a nexus test for this conclusion, their Honours stated:

> *In* Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue *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.* (*FCT v Word Investments* (2008): [38])

As the statement was directed to when activities might evidence a separate non-charitable purpose, it appears to set the contours of the range of activities or objects that are in

furtherance of an overarching charitable purpose. That is, would the natural and probable consequences of the activities or objects help to achieve the charitable purpose?

Thus for charities with a set of overtly charitable objects stated in their constitution or trust deed, particular activities will only infrequently result in the finding of a different purpose. That is, to result in a non-charitable purpose, activities such as electioneering, discrimination or commercial operations would generally need to be shown to not support the stated objects in the constitution or trust deed. That is likely to be rare.

Public benefit and not-for-profit requirements

The not-for-profit and public benefit requirements also play only a limited role in controlling activities. The public benefit test requires that the achievement of the **purposes** would be of net benefit (not detriment)) (*Charities Act 2013* (Cth) ss5(b), 6(2); *Re Pinion* [1965] Ch 85; *Gilmour v Coats* [1949] AC 426). It also means that the entity must have **purposes** that are for the public benefit, which requires that benefit is widely available (*Charities Act 2013* (Cth) ss5(b), 6) or, at general law, that the entity bestow a benefit in relation to the public or a section of the public rather than a private class of individuals (*Thompson v FCT* (1959) 102 CLR 315: 321–3). Inherent in this requirement (at general law) and separately expressed under legislation, is the not-for-profit requirement that an entity must not distribute assets or benefits to persons falling outside the section of the public for whom the entity pursues its purposes (*Re Delius (deceased)* [1957] Ch 299).

As the public benefit requirement applies to an entity's purposes not each of its activities, it is not a regulatory tool that readily controls activities. It may be relevant, for instance, where a charitable purpose entails particular activities. For example, some purposes may entail the pursuit of discriminatory activities. A purpose of promoting the traditional religious view of the family might require discriminatory activities against single parent or same sex families

that result in a net detriment (*Re Family First* (2018): [65], though this finding was overturned on appeal: *Family First* (2020));[7] and the same might be said of an entity with a purpose of 'provid[ing] adoption services to heterosexuals and such services to heterosexuals shall only be provided in accordance with the tenets of the Church' (*Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2012] UKUT 395).[8] Some political advocacy purposes may require the generation of public debate by unlawful means. The stated purpose of a vegan organisation such as '[t]o end commercialised animal abuse and exploitation in Australian animal agriculture facilities by increasing industry transparency…' (Aussie Farms (2019): cl 2) might, in light of the publication of an interactive map of abattoir and animal farm locations, be construed as entailing activities of trespass. Following *Aid/Watch* (2010): [45]-[49], one would have to closely question whether the generation of debate by such unlawful means contributes to constitutional processes or in fact detracts from them and hence is of net detriment.

However, courts are typically fairly cautious in finding that purposes are of net detriment. For instance, a charitable trust for 'treatment of <u>White</u> babies' has been held valid (*Kay v South Eastern Sydney Area Health Service* [2003] NSWSC 292; Dal Pont (2017): [15.25]). This reflects the general approach of the courts and the fact that the public benefit test is focussed on purposes not activities (Parachin (2020): 147-50. See also Synge (2018): 365). Courts have, however, been far readier to take notice of activities of distributing funds or services to members and to treat them as breaching the not-for-profit or public benefit requirement (see, eg, Garton (2013): ch 6; Dal Pont (2018): [3.23]-[3.29]; *South Australian Employers' Chamber of Commerce and Industry Incorporated v Commissioner of State Taxation* [2019] SASCFC 125 [191], [238]).[9]

Government entity/party political limits

The restrictions on being a government entity or political party or having a purpose of supporting or opposing a political party clearly preclude certain party political activities and the pursuit of purposes through the deliberative, administrative and coercive processes of the state, which is consistent with the economic, social and political literature on the independence of the not-for-profit (including charity) sector from the state (Douglas (1983): chs 7, 8; Salamon (1987): 36–43; Weisbrod (1988); Harding (2014): 78–85; Jensen (2015–16)). Thus, a purpose of establishing and supporting a political party dedicated to protecting the environment, such as the Australian Greens, would preclude an entity from being a charity, even though that could be seen as a means of protecting the environment.

Public policy

The one part of the charity test that permits scrutiny of activities is the public policy exclusion. Although formally focussed on an entity's purposes, in practice courts have used the public policy test to render an entity non-charitable on the basis of activities, especially discriminatory activities. *Bob Jones University v United States* (1983) 461 US 574 is one of the most famous examples, in which the US Supreme Court found that religious tertiary education institutions that imposed racially discriminatory admissions practices[10] on the basis of religious beliefs, were non-charitable. This was even though the discriminatory admissions practices were arguably a means (from the particular religious approach of the university) to the end of advancing education. Having a purpose of conducting unlawful activities would also be against public policy or, under the *Charities Act*, a 'disqualifying purpose' (*Re Collier* [1998] 1 NZLR 81: 90; *Charities Act 2013* (Cth) s11(a)). However, upon moving beyond a purpose of conducting unlawful activities, public policy becomes a very unwieldy ground to strike at particular activities as it is very difficult indeed to draw any general guidance about the principles that determine what is against public policy (Parachin (2020): 133-8). Hence,

courts use the ground sparingly (see, eg, *Bob Jones University v United States* (1983) 461 US 574, 592).

There is also the issue that the public policy test is formally focussed on an entity's purposes and so merely carrying out discriminatory or civil disobedience activities, for instance, does not automatically breach the test. Those activities would generally have to be sufficiently material to colour the entity's purposes, as in *Bob Jones*. Australia provides slightly more leeway here for regulators than other jurisdictions such as the US, Canada, the UK and New Zealand. That is because, under the *Charities Act*, activities that are incidental or ancillary to a charitable purpose may still amount to a 'disqualifying purpose'. This is due to the statutory definition of charity separately referring to 'charitable purposes' and 'purposes that are incidental or ancillary' and then stating that none of those two groups of purposes may be 'disqualifying purposes' (*Charities Act 2013* (Cth) ss5, 11). Adding to this broadened power of regulators is that some disqualifying purposes are defined by reference to sets of activities: '*(a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or*' (*Charities Act 2013* (Cth) s11(a)).

ARE THERE OTHER WAYS TO RESTRICT ACTIVITIES IF WE MOVE BEYOND THE COMMON LAW AND STATUTORY ENCAPSULATIONS OF WHAT IS A CHARITY?

We saw above that the legal test of charity status deters private benefit, party political and governmental activities through the charity form. The public policy rule potentially permits broader scrutiny of unlawful, discriminatory or other activities, but to invoke public policy requires a certain degree of materiality and the rule offers very limited guidance for regulators and charities. From a rule of law perspective[11] and from a regulatory perspective of seeking to influence behaviour, it is thus not an ideal vehicle upon which to rely.

This part therefore examines other legal rules that could be used to regulate charity activities. The first part examines rules applying broadly to all entities conducting particular activities – charities and non-charities. The second part investigates circumstances where we might wish to impose activity rules specifically on charities.

Broadly applicable rules based on the activities, rather than charity status

There is a rule of law argument for applying the same rules to all equivalent entities engaged in the same activities; that is, that the same laws should apply to all persons so that they are treated equally (Dicey (1959): Pt II Ch IV; Saunders and Le Roy (2003): 5; Santoro (2007): 163-4). It should therefore be no surprise to find that we do regulate some specific fields of activities in which charities – and other entities, including market and government entities – traditionally engage.

For instance, many education, health and aged care activities are highly regulated. Commonwealth funding for tertiary education providers is contingent on compliance with aspects of quality standards and accountability requirements, as well as with matters such as 'fairness' (Watt (2015): 8-26; Dow and Braithwaite (2013): 5-6). Fairness includes that providers must 'treat fairly' or treat 'equally and fairly' all current students and all persons seeking to enrol as students (*Higher Education Support Act 2003* (Cth) s19-30, sch 1A s18; *Higher Education Support (VET) Guideline 2015* (Cth) s41). Quality assurance is also directly imposed for teaching and research training by way of registration and accreditation of institutions and courses (Dow and Braithwaite (2013): 5), on-going quality standards and on-going monitoring by bodies, such as the Tertiary Education Quality and Standards Agency and Australian Skills Quality Authority (Dow and Braithwaite (2013): 12-16). Non-government primary and secondary education providers are subject to state regulation relating to registration and to ongoing compliance in relation to a range of operational

quality, safety and organisational capacity requirements regarding curriculum, staff qualifications and governance procedures (Varnham (2013): [160-5]). In addition, to access funding provided by the Commonwealth via the States, the *Australian Education Act 2013* (Cth) requires that non-government primary and secondary school providers have ongoing quality improvement processes in place; and generally within the year that it is received 'spend, or commit to spend' recurrent education funding, short term emergency assistance funding and capital funding (ss78(2)(a), 85(2)(a), 93(2)(b); *Australian Education Regulation 2013* (Cth) ss29, 30, 31).

In terms of health, individual states and territories have responsibility for licensing private hospitals and regulating the safety and quality of health services provided (Australian Institute of Health and Welfare (2016): 30-1). In broad terms, the licensing arrangements set safety and quality standards for differing classes of facilities or services, as well as imposing suitability requirements for operators and licence holders (Australian Institute of Health and Welfare (2016): Appendix 125-9). The *National Safety and Quality Health Service Standards* also apply. Residential aged care and home or community-based aged care service providers must be approved under the *Aged Care Act 1997* (Cth) and are subject to on-going safety and quality standards as well as monitoring (*Aged Care Act 1997* (Cth) s7-1). Approval is based on ability to meet these standards, as well as the applicant's ability to provide aged care (*Aged Care Act 1997* (Cth) s8-3).

These safety and quality standards, along with expenditure requirements, where applicable, effectively require a minimum level of service delivery activities from year to year and thus indirectly limit the use of funds for other activities such as advocacy or electioneering. Fairness standards would preclude some (not all) forms of discrimination.

Likewise, when it comes to foreign interference in Australian elections, recent Australian electoral legislation requirements apply across the board to charities and other non-party political actors (*Commonwealth Electoral Act 1918* (Cth) pt XX). If electoral expenditure (being certain expenditure on matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in a federal election) thresholds are exceeded then the relevant entity must register and report donations used for that expenditure to the Australian Electoral Commission. Depending on whether an entity meets the 'third party campaigner' or higher 'political campaigner' threshold, foreign donations are potentially either capped for use for electoral expenditure, or prohibited entirely beyond a cap. This electoral regulation can clearly affect foreign influence of charities and charity electioneering, but is intended to leave issues-based advocacy largely unaffected (Revised Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth) [66]), even if the border between electioneering and issues-based advocacy is a difficult one (Crimm and Winer (2014): 77-8). Third party campaigners and political campaigners are also required to disclose their 'electoral expenditure', which is to be placed on a public 'transparency register'.

Australian anti-discrimination legislation also applies broadly to all entities in relation to certain types of activities - described as 'covered areas' - such as the provision of education, provision of goods, services and facilities, employment etc and on certain protected grounds such as age, sex, race, religion etc (Australian Human Rights Commission (2014)). However, there are very material exceptions for charities, at least for purposes that entail but that do not explicitly promote discrimination (Dal Pont (2017): [7.20]). Section 70 of the *Equal Opportunity Act 1984* (WA) provides an example exemption for:

> *(a) a provision of a deed, will or other document… that confers charitable benefits or enables charitable benefits to be conferred on persons of a class identified by*

reference to any one or more of the grounds of discrimination referred to in this Act; or

(b) an act that is done in order to give effect to such a provision.

We explored above the difficulties in attempting to use the public benefit or public policy requirements of charity law to regulate discriminatory activities. Anti-discrimination legislation, which explicitly countenances balancing competing rights and freedoms, and currently does little to regulate discriminatory activities by charities therefore holds much potential. For instance, in liberal societies, such as Australia and New Zealand, state intervention to restrict one set of rights to prioritise others is typically justified by reference to proportionality (does a law have a legitimate objective and implement measures that are suitable and necessary to achieve that objective) and John Stuart Mill's harm principle (does the public benefit from advancing one set of rights outweigh the harm caused by limiting the other rights - as state coercion is only justified to prevent harm). See Australian Law Reform Commission (2015): [2.63]; Harding (2014): 226-33. Such an approach could provide a principled basis for deciding between competing rights. While reasonable minds may differ on whether it is an improvement or not, the Australian debate on proposed religious freedom legislation (Attorney-General's Department (2019); Australian Human Rights Commission (2020)) clearly demonstrates the way in which anti-discrimination legislation can be used to more explicitly guide which sets of activities are deemed acceptable where there is competition, for instance, between freedom of religion or freedom of association and freedom from discrimination. However, it must be acknowledged that various submissions characterised the second exposure drafts of the religious freedom legislation as departing from standard proportionality and harm principles: Law Council of Australia (2020); Australian Human Rights Commission (2020).

Specifically targeting charity activities

The above discussion focussed on regulation of activities by all entities engaged in those activities; charities and non-charities. However, there are also examples of regulation specifically targeted at charity activities. Given the rule of law desire to apply the same rules to entities engaged in the same activities, it is worth considering why regulation might be limited to charity activities.

Tax concessions and other privileges provided by the state are typically proffered as the primary reason why charities should be treated differently and subject to additional oversight (see, eg, Dal Pont (2017): [20.1]-[20.2]; Benson (2001): 230-1, 235-7; Weinrib and Weinrib (2001): 67-8). However, it is not so clear that all tax treatment is a privilege – eg non taxation of social welfare charities may actually reflect the average tax rate of benefit recipients (Krever (1991): 3-5). This approach also ignores the fact that tax concessions (and some other privileges) are routinely provided to vast segments of the marketplace without similar calls for extra oversight (as to the enormous size and range of business tax concessions, see Treasury (2020); compare Malani and Posner (2007): 2031). In Australia, the resources industry is a case in point where material tax concessions are provided to encourage greenfields exploration and mineral development so as to make up for the risky and capital intensive nature of these activities (Treasury (2020): 77, 132, 134), albeit a number of other industry groupings receive significantly more tax support, such as primary production and financial and insurance services businesses (Productivity Commission (2019): 26).

It seems easier to justify regulation of charity-specific activities on either of the following two grounds. First, to guard boundaries between charities and government and charities (for-purpose) and the market (for-profit). That is because state endorsement/public recognition of an entity as a charity marks it out as a different and socially sanctioned entity – an expressive

function (compare Harding (2014): 38-41). Also, because, to some degree, the point of the charity sector is that it pursues the public good by non-governmental means (Salamon (1987): 36–43; Jensen (2015-16); Harding (2014): 78-85) and that, unlike the market, it better promotes other-regarding or altruistic modes of action (Dees (2012); Harding (2014): 78-85).

Second, regulation might help to address problems that are relatively specific to the charity form (Garton (2009): ch 4). For instance, the 'philanthropic failures' identified by Salamon, such as the difficulty that charities and other not-for-profits have in raising equity capital (Salamon (1987)). Tax concessions provided to charities play a role in this way to address difficulties in raising equity capital (in relation to the income tax exemption, see Hansmann (1981)). Likewise, regulation might assist to bolster trust in charities so as to address the information asymmetries discussed by Hansmann and Garton that are particularly prevalent in areas where charities operate and in some areas seem to apply almost entirely to charity activities, such as the provision of overseas or other aid where benefits are provided to persons who will not give feedback to the funders (Garton (2009): ch 3; Hansmann (1980): 843-5). The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) regulatory regime could be viewed in this regard, especially (divs 40, 45, 50 and 60):

- governance standards 1 (amongst other things, a charity must comply, in an ongoing way, with its character as a not-for-profit entity) and 5 (which requires a charity to ensure that its directors/trustees comply with duties of loyalty and diligence);
- external conduct standards 1 (amongst other things, a charity must take reasonable steps and maintain reasonable internal control procedures to ensure that its activities outside Australia and the use of its resources outside Australia (including resources given to third parties) are consistent with the charity's not-for-profit character) and 3 (anti-fraud and corruption); and

- annual information disclosure requirements and publication of much of that information on a public charities register.

Given controversy in these areas, political activity and commercial activity restrictions are examined below to determine their scope and whether they fit within the proposed justifications for targeting charity activities.

Political activity restrictions

As discussed at the outset, there are some restrictions on political activities in Australia. However, other jurisdictions go further. In New Zealand, while purposes of changing the law or government policy are no longer viewed as against public policy (theoretically permitting lobbying or advocacy activities), the *Re Greenpeace* [2014] NZSC 105 decision means that one must enter into a detailed examination of whether the end that is advocated, the particular means promoted to achieve that end and the manner in which the cause is promoted will generate public benefit. (Murray (2019): 50-1; Harding (2015)). The test is very difficult to satisfy for advocacy purposes and their corresponding activities, though this obviously does not preclude the more common circumstance of advocacy activities in support of a non-advocacy purpose.

The US and, until recently, Canada have gone further in limiting charity lobbying and prohibiting charity campaigning (that is, electioneering) through tax rules. For instance, in the US, section 501(c)(3) of the *Internal Revenue Code* provides that for charity registration, 'no substantial part of the activities of [the charity] is carrying on propaganda, or otherwise attempting to influence legislation', with some ability to elect out of this vague test into a more certain cap or percentage of expenditure test under section 501(h), albeit the caps are relatively low, going up to only the lesser of 20% or $1m of expenditure. In relation to

campaigning, section 501(c)(3) states that the charity must ‘not participate in or intervene in … any political campaign on behalf of (or in opposition to) any candidate for public office’.

In Canada, the case of *Canada Without Poverty v A-G (Canada)* (2018) ONSC 4147 has led to legislative amendments that retain a prohibition on campaigning (*Income Tax Act* (Canada) ss149.1(6.1) and (6.2) provide that a registered charity must not ‘devot[e] any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office’), but that expressly permit non-partisan ‘public policy dialogue and development activities’, ie political advocacy (*Income Tax Act* (Canada) ss149.1(1), (10.1)).

Restricting campaigning activities, rather than just purposes (as Australia does) makes some sense in terms of drawing a boundary between charities and party political actors. However, as already identified above, there are material difficulties in working out when a charity’s activities are campaigning versus issues-based advocacy. GetUp’s activities provide a case in point and have been the subject of several Australian Electoral Commission inquiries to investigate which side of the line they fall upon (Australian Electoral Commission (2010)). We might also question whether charities should be singled out for this boundary drawing and whether generally applicable electoral regulation as in Australia might be a better way to address the boundary issue, since the party political boundary seems equally relevant for the for-profit sector.

The US and Canadian experience provides some evidence of the difficulties in using charity-specific regulation of campaigning activities. For instance, although interpreted broadly in the Treasury regulations, the US campaign restriction is not always robustly enforced, with the US Internal Revenue Service (IRS) still reeling from the fallout over its targeting of politically aligned charities (Fishman et al (2015): 463-97; Treasury Inspector General for Tax Administration (2017)). President Trump has also issued a vaguely worded executive

order to the IRS requesting that it *not* take compliance action against campaigning by religious organisations (Exec Order No 13798, 3 CFR 346 (2018)). Furthermore, the US institutional response has included the proliferation of tax concession categories to explicitly political lobbying and campaigning entities that can remain connected in various ways with registered charities – eg via Internal Revenue Code §501(c)(4) social welfare organisations and §527 political action committees (Fishman et al (2015): 494-502; Hopkins (2019): 399-400).[12] Moreover, this is in the broader US context of the existence of some general electoral law regulation of campaign financing, but with that regulation materially limited by the *Citizens United* 130 S Ct 876 (2010) decision, which effectively removed caps on not-for-profit and for-profit corporation electoral expenditure (Fishman et al (2015): 502-6). In Canada, the *Canada Without Poverty* case resulted from the imposition of increased political activity reporting and audits by the Canada Revenue Agency which has led to a partial governmental about turn and much public criticism of (and support for) the Agency (Parachin (2016): 1048, 1050–4).

Given these overseas experiences, Australia may be better off relying on its generally applicable electoral legislation to regulate charity campaigning activities. Beard has looked in detail at the regulation of Australian charity political activities and suggested that the electoral legislation can fill this role, but that it ought to be better focussed on the independence of charities (and other non-political parties) from government and political parties (Beard (2019): 40-2). As discussed at the outset, Beard is right to look to ‘independence’ as a key boundary demarcation. However, as acknowledged by Beard, more work needs to be done to consider how concepts of ‘autonomy’ or ‘voluntarism’ (in respect of the charitable sector) and of ‘undue influence’ (in respect of political parties) could be employed to help elaborate that boundary (Beard (2019): 42-4). Beard’s insight is that part of that process should involve recourse to public law values, eg transparency, integrity and

representativeness, to ensure electors can make their choice without undue influence being brought to bear (Beard (2019): 42-4). Ideally, similar concepts should also have the potential to be applied to the for-profit/political party divide. Looking at the Australian electoral regulation framework, as noted by Beard it could do more to illuminate charities' political influence over political parties, because, at present, much campaign activity expenditure is omitted as being too remote from the tightly-focussed definition of 'electoral expenditure' (Beard (2019): 52-3). Though, to be fair, in capping foreign donations or the use of foreign donations, the regime does protect the representativeness of Australian views.

Commercial activity restrictions

As demonstrated by the earlier discussion of *Word Investments*, Australian charity law and tax rules do not prohibit charities from conducting commercial activities or seek to tax the income from unrelated business activities. In New Zealand charities are also permitted to undertake commercial activities and business income is exempt from income tax to the extent that a charity 'carries out its charitable purposes in New Zealand' (*Income Tax Act 2007* (NZ) sCW 42(1)(a)). However, Australia recently contemplated taxing unrelated business income (Sinodinos (2013); Chia & Stewart (2012)) and New Zealand is currently contemplating taxing such commercial activities (Robertson and Nash (2019); Tax Working Group (2019) 21–22, 103–104).

Other jurisdictions do restrict business activities. The US and UK tax certain forms of unrelated or non-primary purpose business income of charities (Internal Revenue Code §511; HMRC (2019)). Canada simply prohibits unrelated business income for charities that register for tax concessions (*Income Tax Act* (Canada) s149.1(2)).[13] Restrictions are usually justified on the basis of competitive neutrality between charities and for-profit businesses. However, the general consensus is that neutrality is typically not undermined by income tax

concessions (though input tax concessions, such as fringe benefits tax exemptions, may do so) as their very purpose is to make up for charity difficulties in raising equity finance (Chia & Stewart (2012)).

More fundamentally, the focus here seems misguided in that commercial activities do not define the business/charity boundary. Instead, it is the purpose of distributing profits to members and controllers that is the key boundary issue. As noted by Lind in a recent issue of this journal, Australia (as is also the case for New Zealand) is only just starting to grapple with how to set that boundary in the context of social enterprises, presently one of the most pressing boundary areas (Lind (2019)). Several of the trust-bolstering measures discussed above would help minimise profit distribution activities. For instance, the governance and external conduct standards and disclosure requirements. However, there is likely to be room for improvement. For instance, in New Zealand, the chief charity regulator, the Department of Internal Affairs does not have extensive governance standards or external conduct standards that it can enforce (Department of Internal Affairs (2019): 22, 45). Further, the US and, to a lesser extent, Canada, also provide fairly extensive excise tax sanctions specifically framed to apply to various private benefit activities and some of which can be levied upon the recipients of private benefits, rather than the relevant charity (see, especially, IRC §4958; *Income Tax Act* (Canada) s188.1(4); Fremont-Smith (2004): 252-64, 299-300).

CONCLUSION

Many current civil society controversies revolve around the divisive nature of the activities engaged in by charities. For instance, election campaigning and other political advocacy, the discriminatory provision of goods and services, or carrying on large-scale commercial activities. However, the law relating to charity status has little to say about activities, focussed as it is on purposes. Charity activities, nevertheless, are already subject to regulation

– both that applying generally to all entities engaged in particular activities and that applying specifically to charities. This article has suggested that broad based activity regulation in Australia already meaningfully constrains a number of contentious charity activities in the education, health, aged care and foreign donation spaces. However, there is material scope for anti-discrimination legislation to provide more nuanced guidance on how to weigh competing rights and freedoms in the context of charity activities.

Specifically-targeted restraints on charity campaigning activities or commercial activities also exist in some jurisdictions and have been proposed from time to time in Australia. However, campaigning restrictions appear to miss the point that it is independence – of charities from political parties and government – and of political parties and government from charities, that is the key matter that needs to be protected by regulation. There is much scope here for general electoral legislation to perform this task and for the regulation to apply not just to charities but also to for-profits and other actors. Taxing or otherwise prohibiting commercial activities also seems to miss the mark. The real issue with the business/charity boundary is prohibiting private profits from being distributed to members or controllers, as highlighted by the social enterprise debate. Hopefully, by focusing attention on these alternative means of regulating charity activities a more productive discussion can ensue.

NOTES

[1] For brevity, the term 'entity' is used to include legal relationships, such as trusts and unincorporated associations, as well as legal persons.

[2] The *Charities Act 2013* (Cth) rewords charitable purposes 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).

[3] At [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).

[4] Arguably, an entity also cannot have a purpose of being or supporting a political party or otherwise taking part in government (*Royal North Shore* (1938): 426). 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* (2010).

[5] In the context of legislative references to 'charitable activities'.

[6] 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.

[7] Due to its interpretation of *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, the first instance decision in *Family First* appeared to give only limited weight to the benefits arising from the generation of public debate. On appeal, the Court of Appeal adopted a more expansive interpretation of *Re Greenpeace*, according more weight to the benefits arising from public debate: *Family First* (2020): [153].

[8] The case was decided under human rights legislation, rather than charity law. Compare *Canada Trust Co v Ontario Human Rights Commission* (1990) DLR (4th) 321.

[9] Albeit that the provision of many private benefits is very hard to police. For example, it is difficult to track private benefits that controller-members provide to themselves, such as greater remuneration and better working conditions (Garton (2010): 217).

[10] Admission was denied to 'applicants engaged in an interracial marriage or known to advocate interracial marriage or dating'.

[11] Being that laws should be 'prospective, open and clear', 'relatively stable' and formulated under a framework of open, clear, stable and general rules to as to permit people to be 'guided' by the law: Raz (1977): 198-202; Santoro (2007): 174.

[12] The basket of tax concessions afforded such entities is less than for charities.

[13] The Canadian Special Senate Committee on the Charitable Sector has recommended loosening this rule.

REFERENCES

Aid/Watch Inc v FCT (2010) 241 CLR 539.

Aussie Farms Inc (2019) *Constitution*. Available at: www.acnc.gov.au/charity.

Australian Electoral Commission (2010) *GetUp Limited (Webpage)*. Available at: www.aec.gov.au/Parties_and_Representatives/compliance/AEC_Advice/2010-nov-get-up.htm

Australian Human Rights Commission (2014) *A Quick Guide to Australian Discrimination Laws*. Sydney.

Australian Human Rights Commission (2020) *Religious Freedom Bills Second Exposure Draft: Submission to the Attorney-General's Department*. Sydney.

Australian Institute of Health and Welfare (2016) *Australia's Health 2016*. Australia's Health Series No 15. Canberra: AIHW.

Australian Law Reform Commission (2015) *Traditional Rights and Freedoms: Encroachments by Commonwealth laws*. Report No 129. Canberra: ALRC.

Attorney-General's Department (2019) *Freedom of Religion (Webpage)*. Canberra: Commonwealth of Australia. Available at: https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Freedom-of-Religion.aspx

Barker, S., Gousmett, M. and Lord, K. (2013) *The Law and Practice of Charities in New Zealand*. Wellington: LexisNexis.

Beard, J. (2019) Charities, Election Campaigning and the Australian Constitution. *Melbourne University Law Review*, 43 (2): Advance.

Benson, P. (2001) Equality of Opportunity and Private Law. In D. Friedmann and D. Barak-Erez (eds) *Human Rights in Private Law*, 201. Oxford: Hart Publishing.

Charities Act 2005 (NZ).

Charities Act 2013 (Cth).

Chia, J. and Stewart, M. (2012) Doing Business to Do Good: Should we tax the business profits of not-for-profits? *Adelaide Law Review,* 33 (2): 335-370.

Crimm, N. and Winer, L. (2014) Dilemmas in Regulating Electoral Speech of Non-profit Organisations. In M. Harding, A. O'Connell and M Stewart (eds), *Not-for-profit Law: Theoretical and Comparative Perspectives*, 61. Cambridge: Cambridge University Press.

Cullity, M. (1990) The Myth of Charitable Activities. *Estates & Trusts Journal* 10 (1): 7.

Dal Pont, G. (2017) *Law of Charity*. Chatswood: 2nd ed, LexisNexis.

Dees, G. (2012) A Tale of Two Cultures: Charity, problem solving, and the future of social entrepreneurship. *Journal of Business Ethics* 111 (3): 322.

Department of Internal Affairs (2019) *Modernising the Charities Act 2005: Discussion document*. Wellington: New Zealand Government.

Dicey, A. V. (1959) *Introduction to the Study of the Law of the Constitution*. London: MacMillan & Co, 10th ed.

Douglas, J. (1983) *Why Charity?: The Case for a Third Sector*. Beverly Hills: SAGE Publications.

Dow, K. and Braithwaite, V. (2013) *Report, Review of Higher Education Regulation*. Canberra: Commonwealth of Australia.

Family First New Zealand v Attorney-General [2020] NZCA 366.

FCT v Word Investments Ltd (2008) 236 CLR 204.

Fishman, J., Schwarz, S. and Mayer, L. (2015) *Nonprofit Organizations: Cases and materials*. St Paul: 5th ed, Foundation Press.

Fremont-Smith, M. (2004) *Governing Nonprofit Organizations*. Cambridge MA: Belknap Press.

Garton, J. (2009) *The Regulation of Organised Civil Society*. Oxford: Bloomsbury.

Garton, J. (2010) The Future of Civil Society Organisations: Towards a theory of regulation for organised civil society. In M McGregor-Lowndes and K O'Halloran (eds). *Modernising Charity Law*. Cheltenham: Edward Elgar, 207-27.

Garton, J. (2013) *Public Benefit in Charity Law*. Oxford: Oxford University Press.

Garton, J. (2014) Charitable Purposes and Activities. *Current Legal Problems* 67: 373.

Hansmann, H. (1980) The Role of Non-profit Enterprise. *Yale Law Journal*, 89 (5): 835.

Hansmann, H (1981) The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation. *Yale Law Journal*, 91: 54.

Harding, M. (2014) *Charity Law and the Liberal State*. Cambridge: Cambridge University Press.

Harding, M. (2015) An Antipodean View of Political Purposes and Charity Law. *Law Quarterly Review*, 131: 181.

HMRC (2019) *Charities: Detailed Guidance Notes, Annex i: Tax Exemptions for Charities*. Available at: www.gov.uk/government/publications/charities-detailed-guidance-notes/annex-i-tax-exemptions-for-charities

Hopkins, B (2019) *The Law of Tax Exempt Organizations*. New Jersey: 12th ed, Wiley.

Income Tax Act, RSC 1985 c1 (Canada).

Jensen, D. (2015–16) Charitable Purposes and Political Purposes (Or Voluntarism and Coercion). *Charity Law & Practice Review* 18: 57.

Krever, R. (1991) Tax Deductions for Charitable Donations: A tax expenditure analysis. In R. Krever and G. Kewley (eds), *Charities and Philanthropic Organisations: Reforming the tax subsidy and regulatory regimes*, 1. Australian Tax Research Foundation.

Law Council of Australia (2020) *Religious Freedom Bills - Second Exposure Draft: Submission to the Attorney-General's Department*. Canberra.

Lind, A. (2019) The Non-distribution Constraint and Social Enterprise: Can share capital fund non-profit organisations? *Third Sector Review*, 25 (2): 233-57.

Malani, A. and Posner, E. (2007) The Case for For-profit Charities. *Virginia Law Review*, 93 (8): 2017-67.

Murray, I. (2008) Charitable Fundraising through Commercial Activities: The final word or a pyrrhic victory? *Journal of Australian Taxation*, 11 (2): 138.

Murray, I. (2019) Looking at the Charitable Purposes/Activities Distinction through a Political Advocacy Lens: A trans-Tasman perspective. *Oxford University Commonwealth Law Journal*, 19 (1): 30-54.

Parachin, A. (2016) Reforming the Regulation of Political Advocacy by Charities: From charity under siege to charity under rescue? *Chicago-Kent Law Review* 91: 1047.

Parachin, A. (2020) Regulating Charitable Activities through the Requirement for Charitable Purposes: Square peg meets round hole. In J. Picton and J. Sigafoos, J. (eds), *Debates in Charity Law*, 129. Oxford: Hart Publishing.

Poirier, D. (2013) *Charity Law in New Zealand*. Wellington: Department of Internal Affairs.

Productivity Commission (2019) *Trade and Assistance Review 2017-18*. Canberra: Commonwealth of Australia.

Raz, J. (1977) The Rule of Law and its Virtue. *Law Quarterly Review*, 93 (2): 195-211.

Re Family First New Zealand [2018] NZHC 2273.

Robertson, G. (Finance Minister) and Nash, S. (Revenue Minister) (2019) Government Responds to Tax Working Group Report. Media release, 17 April 2019.

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

Salamon, L. (1987) Of Market Failure, Voluntary Failure and Third-Party Government: Toward a theory of government-nonprofit relations in the modern welfare state. *Journal of Voluntary Action Research*, 16 (1-2): 29-49.

Santoro, E. (2007) The Rule of Law and the 'Liberties of the English': The interpretation of Albert Venn Dicey. In P. Costa and D. Zoro (eds), *The Rule of Law: History, theory and criticism*, 153-99. Springer.

Saunders, C. and Le Roy, K. (2003) Perspectives on the Rule of Law. In C. Saunders and K. Le Roy (eds), *The Rule of Law*, 1. Federation Press.

Sinodinos, A. (Assistant Treasurer) (2013) *Integrity Restored to Australia's Taxation System*. Media Release, 14 December 2013.

Synge, M. (2018) Public Benefit Post-Pemsel. In M Harding (ed), *Research Handbook on Not-For-Profit Law*. Cheltenham: Edward Elgar, 363-86.

Tax Working Group (2019) *Future of Tax: Final report*, vol I. Wellington: New Zealand Government.

Treasury (2020) *Tax Benchmarks and Variations Statement 2019*. Parkes: Commonwealth of Australia.

Treasury Inspector General for Tax Administration (2017) *Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review: Final report no 2017-10-054*. Washington DC: Department of the Treasury.

Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue [1999] 1 SCR 10

Varnham, S. (2013) *Halsbury's Laws of Australia: Education and Research*. LexisNexis.

Watt, I. (2015) *Report, Review of Research Policy and Funding Arrangements*. Department of Education and Training.

Weinrib, L. E. and Weinrib, E. J. (2001) Constitutional Values and Private Law in Canada. In D. Friedmann and D. Barak-Erez (eds) *Human Rights in Private Law*, 43. Oxford: Hart Publishing.

Weisbrod, B. (1988) *The Nonprofit Economy*. Cambridge, MA: Harvard University Press.

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