

Common Law Perspectives on Fundamental Public Policy - Australia

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Introduction

By one estimate, the American Civil War from 1861 – 1865 claimed the lives of 10 percent of all Northern males 20–45 years old, and 30 percent of all Southern white males aged 18–40.¹ About 620,000 to 750,000 people died, more than the number of U.S. military deaths in all other conflicts. Slavery may have been prohibited, but beliefs about racial equality were slower to change. Almost a century later—in 1954—the United States Supreme Court was obliged to rule in a case against state laws racially segregating public education. The Court ruled the laws were unconstitutional, as a denial of the equal protection laws. The decision provoked civil and political unrest in the South.² Nearly 30 years later the Supreme Court addressed the issue of racially discriminatory education practices again, indirectly through the taxation concession regime for educational institutions.³ The matter was precipitated by an IRS ruling that:

All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.⁴

Nonprofit educational institutions with racial policies were not entitled to federal tax concessions as being contrary to public policy. In Australia, one would head directly to specific racial discrimination laws, with tax concessions being an afterthought. Charity law in Australia is the gateway to taxation concessions at federal and state levels. As a second string, charity law holds the possibility of the institution running foul of the public benefit test or having an illegal purpose (not just activity), or offending public policy.

¹John Huddleston, *Killing Ground: The Civil War and the Changing American Landscape* (Baltimore, Maryland: Johns Hopkins University Press, 2002), 3.

²*Brown v. Board of Education*, 347 U.S. 483 (1954).

³*Bob Jones University v. United States*, 461 U.S. 574 (1983).

⁴The revised policy on discrimination in Revenue Ruling 71-447, 1971-2 Cum. Bull. 230.

The *Bob Jones University case* has neither been cited in Australian case law nor esteemed equity texts.⁵ Neither Australian revenue rulings nor Australian Charities and Not-For-Profits Commission (ACNC) materials cite the *Bob Jones case* directly. The Australian Taxation Office (ATO) ruling states that: “If a purpose is either unlawful or a lawful purpose is to be carried out by unlawful means it is not charitable. For example, a school for thieves might, in a sense, advance education, but it is not a charitable institution”. The ruling does not mention public policy at all.⁶ Despite this, Australia’s leading charity law text cites *Bob Jones* as supporting the proposition that public policy can only declare an institution not charitable when there can be no doubt that the activity involved “is contrary to a fundamental public policy”.⁷ Further, a seeming charitable object may be “so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred, or otherwise contrary to public policy, and therefore not charitable”.⁸ *Bob Jones* has not been discussed in any detail in Australian legal scholarship until recently.⁹ Professor Harding in his book on charities and the liberal state devotes the last chapter to an analysis of charity and discrimination.¹⁰ For Harding, *Bob Jones* is a case of an organization with discriminatory activities in the pursuit of non-discriminatory purposes, and he mused that analysis along the lines of *Boy Scouts of America v. Dale*¹¹ might have produced a more principled judgement.

So what insights do the issues raised by the US Supreme Court in the *Bob Jones case* have for Australian jurisprudence? At the risk of simplification the Supreme Court decision has three principles: (a) for the purposes of the particular section of the federal tax

⁵ Gino Evan Dal Pont and Donald R.C. Chambers, *Equity and Trusts in Australia*, 6th ed., (Sydney: Thomson Reuters, Lawbook Co. Australia, 2015); Gino Dal Pont and Tina Cockburn, *Equity and Trusts: In Principle*, 3rd ed., (Sydney: Thomson Reuters, Law Book Co. Australia, 2013); Gino Dal Pont, *Equity and Trusts – Commentary and Materials*, 6th ed., (Sydney: Thomson Reuters, Law Book Co. Australia, 2015); Michael Evans, Bradley L. Jones and Theresa M. Power, *Equity and Trusts*, 4th ed., (Sydney: Lexis Nexis Australia, 2016); J.D. Heydon, *Meagher, Gummow and Lehane's Equity : Doctrines and Remedies*, 5th ed., (Sydney: Lexis Nexis Australia, 2014); Christopher Brien, *Equity and Trusts Guidebook*, 2nd ed., (Sydney: Oxford University Press Australia, 2015).

⁶ Australian Taxation Office, TR 2011/4 *Income tax and fringe benefits tax: charities*, [269].

⁷ Gino Dal Pont, *Law of Charity*, 2nd ed., (Sydney: Lexis Nexis Australia, 2017), 72-3.

⁸ Gino Dal Pont, *Law of Charity*, 2nd ed., (Sydney: Lexis Nexis Australia, 2017), [3.45] (references omitted).

⁹ John Trone, “Governmental assistance to racially discriminatory religious institutions: free exercise and equal protection issues in the *Bob Jones University case*”, (1997) 9 *UQLJ* 298.

¹⁰ Matthew Harding, *Charity Law and the Liberal State* (Cambridge: Cambridge University Press, 2014), chapter 7.

¹¹ 530 U.S. 640 (2000).

statute, the English common law notions of charity apply; (b) racially discriminatory schools are not charitable according to the common law of charitable trusts because they infringe public policy considerations; and (c) racially discriminatory schools are not charitable by the common law as they do not provide the requisite public benefit to warrant charitable status. I propose to examine each of these principles in relation to Australian law. This includes common law and the recent Commonwealth charity statute modifications, to tease out the differences and similarities. I do not propose to examine recent UK statutory developments or Canadian constitutionally based cases in any detail.¹² *Bob Jones* has been cited incidentally in only two recent UK human rights cases. Further, the applicable discrimination legislation is quite different from that in force in Australia, although common law is largely shared. Unlike Australia, Canada has a Charter of Rights and Freedoms, and the law has again taken a different turn.¹³

Those older cases (mainly English) that Australian law has drawn upon are considered because the Australian colonies received English law on settlement, including the law relating to charitable trusts and the *Statute of Charitable Uses of 1601* (Statute of Elizabeth).¹⁴ As Australian states were formed, they adopted or closely followed the English definition of charity based on the Preamble to the Statute of Elizabeth. The four heads of charitable purpose from *Pemsel's* case¹⁵ are the foundation upon which Australian courts and legislatures have built Australian charity jurisprudence. English case authority is used consistently as a precedent. For example, the principal taxation ruling on the

¹² Australian Taxation Office, *Income tax and fringe benefits tax: charities*, TR 2005/21 & 22, dated 21 December 2005. It cites 145 English cases and only 113 Australian, with 28 decisions from other jurisdictions.

¹³ *Canada Trust Co* (1990) 69 DLR (4th) 321 and *University of Victoria v British Columbia (A.G.)* [2000] BCJ No. 520; and refer further to Adam Parachin, "Public benefit, discrimination and definition of charity" in *Private Law – Key Encounters with Public Law*, ed. Kit Barker and Darryn Jensen, (Cambridge: Cambridge University Press, 2013) chapter 6.

¹⁴ 43 Eliz. I, c.4. The Statute of Charitable Uses 1601 has been repealed with reservations that it will not affect the general law of charity, in the Australian Capital Territory: *Imperial Acts Application Act 1986* (ACT) section 4(5); New South Wales: *Imperial Acts Application Act 1969* (NSW) section 8; and Queensland: *Trusts Act 1973* section 103(1). It is not in force in Victoria, but remains in force in the other jurisdictions of South Australia, Western Australia, Tasmania, and the Northern Territory.

¹⁵ *Commissioners for the Special Purposes of Income Tax v Pemsel* [1891] All ER Rep 28, per Lord Macnaghten. For application of *Pemsel* to estate duty see *Chesterman v Federal Commissioner of Taxation* [1926] AC 128; to rates see *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corp* (1952) 85 CLR 159; *Ashfield Corp v Joyce* [1978] AC 122.

meaning of “charity” references substantially more English than Australian cases. Recently the *Charities Act 2013* was passed as a Commonwealth statute to codify and clarify contested common law meanings, while the states still have a mix of common law and limited statutory modifications.

This paper takes the following path in its journey of comparative jurisprudential exploration. First, charity status and public policy are examined, using the *Bob Jones case* as the primary US reference point. The common law’s Australian development in such matters is then explored. Second, the notion of public benefit is examined, again starting with the observations in *Bob Jones* and followed by the common law. Third, the previous two points are re-examined by taking the relatively new path of the *Charities Act 2013*. This Act clarifies the common law and acts as the gateway to taxation concessions via the ACNC and the ATO. The *Bob Jones* statutory interpretation issue (first principle) is dealt with briefly. It is not in issue in Australia, as the *Charities Act 2013* is explicitly the reference gateway to Commonwealth taxation concessions. Finally, some reflections are made about the journey and its sign posts for the future of charity law jurisprudence.

Bob Jones and Public Policy

The Supreme Court majority dealt with the issue of whether tax exempt charity status was subject to “legality and public policy”. The court relied on two cases, *Perin v. Carey*,¹⁶ and *Ould v. Washington Hospital for Foundlings*,¹⁷ noting that they established “that the purpose of a charitable trust may not be illegal or violate established public policy”.¹⁸ This was drawn from English equity law adopted in the *Perin case* and is particularly apposite. A testator left a gift to benefit “poor white male and female orphans” and the court found that: “There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons, as to who should be pupils in the colleges which he meant to found, was a lawful exercise of his rightful power to make the devises and bequests”.¹⁹ *Perin’s* case affirmed that a donor’s right to

¹⁶ (1861) 24 How. 465

¹⁷ 95 U. S. 303 (1877)

¹⁸ *Bob Jones University v. United States*, 461 U.S. 574, 501 (1983).

¹⁹ *Perin v. Carey*, 65 U.S. 465 , 507 (1861).

dispose of property was unfettered apart from illegality, or being found contrary to public policy, and such a condition based on race was not against public policy.

Having accepted that a gift contrary to public policy was fatal to any charitable trust, how did the Court in *Bob Jones* go about determining the ambit of public policy? The Court recounted that “an unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals”.²⁰ If this was not sufficient, it then turned to the Congressional record that “clearly expressed its agreement that racial discrimination in education violates a fundamental public policy”²¹ and further that the Executive Branch had also “consistently placed its support behind eradication of racial discrimination”.²² The dissenting judge also had “no disagreement with the Court's finding that there is a strong national policy in this country opposed to racial discrimination”.²³

In reality, the situation appears not to be so definitive. Marcus Owen, a former senior IRS officer, paints a context where the IRS was directly hampered by the Executive Branch in bringing the litigation and “dealing with Congress, which enacted restrictions on IRS funding to prevent the agency from issuing public rules to enable compliance with court ordered racial desegregation”.²⁴ Some may form the view that the nation was not united against the mischief, and both Congress and the Executive were reluctant to act. In any case, this was not the view of the Supreme Court.

In giving the majority decision, Chief Justice Burger added the caveat that: “We emphasize, however, that these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy”.²⁵ Two issues of note from an Australian legal perspective are that it was in the context of

²⁰ *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983).

²¹ *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983).

²² *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983).

²³ *Bob Jones University v. United States*, 461 U.S. 574, 626 (1983).

²⁴ Marc Owen, “Challenged Regulators” in *Regulating Charities: The Inside Story*, ed. Myles McGregor-Lowndes and Bob Wyatt (New York: Routledge Taylor & Francis Group, 2017), chapter 5, 88.

²⁵ *Bob Jones University v. United States*, 461 U.S. 574, 598 (1983).

the IRS's exercise of discretion rather than that of the courts and that it referred to an organization's "activities" rather than "purposes". Australian courts would analyse the situation as a charity with a valid charitable purpose with its activities being contrary to the law. Justice Powell noted that: "The contours of public policy should be determined by Congress, not by judges or the IRS"²⁶ indicating that caution was needed in a public policy call. The court also had to recognise and respect the role of the legislature. This is a theme that will be explored below, as will the origins of illegality and public policy that were adopted by the US Supreme Court from English law. The next section turns briefly to a consideration of the common law about public policy as adopted in Australia.

Public Policy Common Law History

The phrase "public policy" itself is of relatively recent origin in the law. As a concept, it has long antecedents in the English common law. Public policy applies across the full spectrum of common law, such as contract, equity, torts and criminal laws, not just charity law. Winfield traces the origins of public policy in English law to the emerging common law where notions expressed as "inconvenient" or "against reason" were used as justifications to restrain otherwise legal actions.²⁷ The general proposition at common law is that you are free to do anything at all you want unless some law expressly forbids you from doing it.²⁸ Judges, as recorded by Coke, cited principles described as "the law prefers the public good to the private good" or that which was "repugnant to the State".²⁹ The early specific areas for public policy activism were restraint of trade, wagering, interference with marriage and the stability of the family unit, and maintenance and champerty. For example, in *Gilbert v Sykes*,³⁰ a wager about the continuance of the life of Bonaparte was held to be void on the ground that it was against morality and policy. Some of these "inconveniences" such as the rule against perpetuities have become rusted on principles, often picked up and modified by statutes. Others have come and gone due

²⁶ *Bob Jones University v. United States*, 461 U.S. 574, 612 (1983).

²⁷ Percy H. Winfield, "Public Policy in English Common Law", (1928) 42 *Harv. L. Rev.* 76, 80.

²⁸ *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

²⁹ Percy H. Winfield, "Public Policy in English Common Law", (1928) 42 *Harv. L. Rev.* 76, 82.

³⁰ (1812)16 East 150

either to statutes overriding the principles or to falling out of community favour, often on the nebulous grounds of the direction of statute development.

In Elizabethan times judges regularly decided against contracts in restraint of trade,³¹ sales of offices, marriage contracts, wagers, and the rule against perpetuities was entrenched in law.³² Francis Moore in an early book on the Statute of Elizabeth gave an example:

If a man give a stock of money to be put out to young tradesmen, at 5L. per 100l. the interest money to be employed upon young students in Divinity, to provide them with living withal: this use to the Students is not a charitable use, because it depends upon usury and maintains Symony.³³

Usury, the charging of interest on loans, and simony, the corrupt offering of an ecclesiastical benefice for gift or reward, resulted in a deficient charitable use. The provision of meat, drink, and apparel for those in necessitous circumstances was a charitable use, but had to be “according to the laws, not against the law” and “that it not be given to do some act against the law”.³⁴ Further, it was not a charitable use to provide benches for beggars to ply their trade on highways, as begging was against the law.³⁵ “Poor popish priests” were not to be within a proper educational use as they were not scholars within the meaning of the law.³⁶ There is ample early evidence of how the “equity” (Moore’s expression) would exclude certain situations from being a charitable use.

As the power and influence of parliament grew, with statute laws becoming more common and encompassing a broader range of areas of private and public life, judges generally became more reluctant to encroach on areas the subject of a statute or the role of the legislature. This is amply illustrated by the comments of Mr Justice Burrough where

³¹ *Mitchel v Reynolds* (1711) P Wms 181; 34 ER 347.

³² *Duke of Norfolk’s case* (1682) 3 Ch Cas 1, 20.

³³ Francis Moore, *Reading on the Statute of Charitable Uses 1601* (1607), reproduced in G. Duke, *The Law of Charitable Uses* (first published 1767), ed. RW Bridgman (W Clarke and Sons, 1805), 132.

³⁴ *Ibid* 132.

³⁵ *Ibid* 133.

³⁶ *Ibid* 135.

he compared public policy with an unruly horse. It is a phrase that reappears in most cases involving public policy and echoes through centuries of judgements concerning the application of public policy.³⁷

A high-water mark was the House of Lords decision in the *Egerton case*, involving a will with a condition subsequent that a beneficiary acquire the title of “Duke or Marquis of Bridgewater”. An issue was whether this was void, as against public policy.³⁸ The policy alleged to have been in question was “the obligation to perform all the duties which men owe to society; and anything having a tendency to operate in opposition to that obligation is void”.³⁹ In more modern terms, this would be a conflict of interest.

The House of Lords summoned other senior judges to consider their opinions before delivering their decision. Eleven attended, with nine holding the condition valid and two dismissing it as invalid. Of the Lords themselves, four held it to be valid, and one invalid. The views ranged from public policy being a mere guide for ascertaining the object of any particular law to an abstract standard of judicial legislation, independent of time or circumstances. Other judges made statements that verged towards these polar extremes. The theme through the discussion is that the changed place of statute and a more active parliament has limited the scope of public policy. It was a matter for the tools of the legislature, not the courts.

The term “policy of the law” rather than “public policy” was used in the *Egerton Case* and neatly makes the point that the concept is anchored in the pre-existing common law rather than being a tool for dealing with newly arising issues. As Knight wrote:

Public policy, as distinguished from what might be called “political policy,” with which it has been often confounded, is that principle of law, declared Lord Truro, which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it

³⁷ *Richardson v Mellish* (1824) 2 Bing 229.

³⁸ *Egerton v Brownlow* (1853) 4 HLC 1.

³⁹ *Egerton v Brownlow* (1853) 4 HLC 1, 373.

sometimes has been, the policy of the law, or public policy in relation to the administration of the law.⁴⁰

It provided a rationale for the concept in an environment where the legislature was increasingly occupying more of the legal space and a rationale of flowing from the accepted common law.

Winfield makes a series of observations about the contemporary role of public policy. First, it is now used with great caution and deference to the legislature. Second, the concept varies with time and the needs of the community. Third, it cannot defeat clear legislative intent, and finally, it is guided by a judge's view of the tendency or trajectory of the law.⁴¹

Generally, Australia largely adopted English common law until it was altered by statute or the High Court of Australia. Shortly after the Court's establishment it affirmed in *Hutchinson v Scott*,⁴² that a contract would be void and/or illegal if it infringes public policy.⁴³ The issue has arisen frequently since then in all manner of contexts.⁴⁴ Examples are: contracts to commit a legal wrong;⁴⁵ contracts injurious to public life;⁴⁶ contracts injurious to foreign relations;⁴⁷ contracts purporting to oust the jurisdiction of the

⁴⁰ W. S. M. Knight, "Public Policy in English Law", (1922) 38 *L. Q. Rev.* 207, 212.

⁴¹ Percy H. Winfield, "Public Policy in English Common Law", (1928) 42 *Harv. L. Rev.* 76.

⁴² (1905) 3 CLR 359.

⁴³ Some contracts, such as contracts in restraint of trade, are not illegal even though they may be rendered void by a rule of public policy.

⁴⁴ *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91; *Neal v Ayers* (1940) 63 CLR 524; *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391; *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; *Nelson v Nelson* (1995) 184 CLR 538.

⁴⁵ *Neal v Ayers* (1940) 63 CLR 524 at 528, 531: "the question is whether the act constituting the offence is of such an antisocial character that the interests of the public require that the courts should for their protection decline to enforce the contract".

⁴⁶ *Wilkinson v Osborne* (1915) 21 CLR 89 (agency contract illegal where members of parliament agreed to use their positions to influence a government purchase of land).

⁴⁷ For example, giving assistance to persons acting (or intending to act) against the government of a state in friendly relations with Australia: see *Hirsch v The Zinc Corp Ltd* (1917) 24 CLR 34, 65.

courts;⁴⁸ contracts prejudicial to the administration of justice;⁴⁹ sexually immoral contracts;⁵⁰ contracts prejudicial to the status of marriage;⁵¹ and contracts in restraint of trade.⁵² Similar categories apply to equitable matters, as Australian courts have also found a trust to disturb the sanctity of marriage or the family,⁵³ infringe the rule against perpetuities,⁵⁴ or for an illegal purpose⁵⁵ will not be enforced. There is any number of statutory grounds of illegality such as avoiding insolvency provisions, taxation or family law courts.

Gifts for illegal purposes⁵⁶ and purposes contrary to public policy are not charitable. Gifts found contrary to public policy include the payment of fines of imprisoned criminals;⁵⁷ the promotion of revolution in a friendly foreign state;⁵⁸ the propagation of doctrines subversive to morality;⁵⁹ the dissemination of pernicious knowledge;⁶⁰ the advancement of military education of soldiers in a hostile country;⁶¹ and the relief of poverty in a foreign state in circumstances where that state remained in a hostile relationship with Australia.⁶² Gifts for charitable purposes abroad must be practicable to carry out and not contrary to the public policy of Australia.⁶³

There are dicta that the heads of public policy are not closed, and a flexible attitude will be taken by the court, but also that areas of public policy will change with community

⁴⁸ *Lieberman v Morris* (1944) 69 CLR 69, 84.

⁴⁹ *Callaghan v O'Sullivan* [1925] VLR 664.

⁵⁰ *Ashton v Pratt* (No 2) [2012] NSWSC 3, [37]-[52] per Brereton J (agreement to provide meretricious sexual services, that is to maintain a mistress, contrary to public policy).

⁵¹ *Money v Money* (No 2) [1966] 1 NSW 348 involved an agreement for the future separation of husband and wife. A contract may be prejudicial to the status of marriage even though it does not involve encouragement of sexual immorality: see *Minister for Education v Oxwell* [1966] WAR 39, 42.

⁵² *Buckley v Tutty* (1971) 125 CLR 353.

⁵³ *Trustees of Church Property of Diocese of Newcastle v Ebbeck* [1960] HCA 88.

⁵⁴ *Nemesis Australia Pty Ltd v Commissioner of Taxation* (2005) 150 FCR 152

⁵⁵ *Thrupp v Collett* (No 1) (1858) 26 Beav 125; 53 ER 844.

⁵⁶ *Re Collier (dec'd)* [1998] 1 NZLR 81, 91 per Hammond J (trust to promote euthanasia, an illegal practice, held not to be charitable).

⁵⁷ *Thrupp v Collett* (No 1) (1858) 26 Beav 125; 53 ER 844.

⁵⁸ *Habershon v Vardon* (1851) 4 De GJ & Sm 467; 64 ER 916.

⁵⁹ *Thornton v Howe* (1862) 31 Beav 14; 54 ER 1042.

⁶⁰ *Re Macduff; Macduff v Macduff* [1896] 2 Ch 451, 474 per Rigby LJ.

⁶¹ *Re Lowin (dec'd); Perpetual Trustee Co Ltd v Robins* [1967] 2 NSW 140, 145-146.

⁶² *Re Pieper (dec'd); Trustees Executors & Agency Co Ltd v A-G (Vic)* [1951] VLR 42, 47.

⁶³ *In Re Lowin (dec'd); Perpetual Trustee Co Ltd v Robins* [1967] 2 NSW 140, 145-146 per Wallace P and Holmes JA (gave example of trust to advance military education of soldiers in hostile state as contrary to public policy).

expectations, and in particular with statutory trends.⁶⁴ This appears to fly in the face of the maxim *cessante ratione legis cessat ipsa lex* (if the reason for a law ceases, the law itself ceases). As often happens, the countervailing maxim is that "courts which are bound by the rule of precedent are not free to disregard an otherwise binding precedent on the ground that the reason which led to the formulation of the rule embodied in such precedent seems to the court to have lost cogency".⁶⁵ There have been changes in the law's attitude to public policy matters, usually to retreat in the face of statute embodying community attitudes.

Changes have occurred in relation to the public policy rule prohibiting champerty, maintenance, and ancient public policy prohibitions such as the sanctity of marital relations where the societal circumstances have altered.⁶⁶ Australian courts have endorsed a New Zealand sentiment that, "a function of the Courts must be to develop common law and equity so as to reflect the reasonable dictates of social facts, not to frustrate them",⁶⁷ particularly when statute law alters common law public policy, such as in the case of de facto partnerships.

Australian judges, like those in England, are cautious about encroaching upon the province of the legislature and executive. In a case about a testamentary condition requiring a change of faith on the part of a donee in 1960, the High Court warned, echoing English judicial sentiments, that:⁶⁸

I am not unmindful of warnings that have been given, warnings that are more remarkable for variety of metaphor than serviceable as guides. Public policy we know is "a very unruly horse"; it is also "a treacherous ground for legal decision"; "a very unstable and dangerous foundation on which to build until made safe by decision"; "slippery ground"; "a vague and unsatisfactory term and calculated to

⁶⁴ *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, 248-9.

⁶⁵ This approach was approved in the judgment of the High Court in *Lamb v Cotogno* [1987] HCA 47; (1987) 164 CLR 1, 11.

⁶⁶ *Roux v Australian Broadcasting Commission* [1992] 2 VR 577, 605; *Green v Green* (1989) 17 NSWLR 343, 358 per Gleeson CJ, discussing the change in view about de facto relationships and public policy.

⁶⁷ *Hayward v Giordani* [1983] NZLR 140, 148

⁶⁸ *Trustees of Church Property of Diocese of Newcastle v Ebbeck* [1960] HCA 88, 415 per Windeyer J (references omitted).

lead to uncertainty and error when applied to the decision of legal rights"; and much else. And I am aware too that those who base their decisions upon consideration of public policy are likely to be reproached with "arbitrary caprice" or reminded that "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds", as Lord *Aitkin* expressed it in *Fender v. St. John-Mildmay*. But I hope it is not a mere idiosyncrasy of mine to think that planting seeds of discontent and discord between spouses is contrary to the policy of the law."

This has continued, and there is still a cautious attitude. Justice Kirby, a progressive of the High Court, suggested that:⁶⁹

Illegality, and the associated problems of statutory construction and public policy, have been described as a "shadowy" and "notoriously difficult" area of the law where there are "many pitfalls". Many of the authorities on the point are difficult to reconcile. Commentators claim that some of them are marked by "obscurities, supposed distinctions and questionable techniques of decision". They suggest that this is an area of the law which is "intensely controversial and confused". The House of Lords has recently proposed that it is ripe for thorough re-examination by the Law Commission so that it may be subjected to legislative reform. Special concern has been expressed about the danger that illegality, in some way connected with a contract, will (unless tightly controlled) let loose the "unruly horse" of public policy to a "blind gallop through the doctrinal forests of [the law]". Various other equine metaphors are invoked to express the suggested dangers of uncertainty and the potentially harsh and unjust outcomes that would follow enlargement of court discretions to decline relief on the ground that a contract is somehow touched by illegality.

So, would Australian courts faced for some reason with not being able to apply specific discrimination legislation, allow a nonprofit educational institution to exclude a class of

⁶⁹ *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, 248-9 (references omitted).

persons from attendance on the basis of race, specifically, or by implication? It is an interesting question to ponder, given the lack of specific precedent and the movement of public policy to meet contemporary situations. There are several issues that would bear upon a court's consideration in such a matter. First, the societal conditions and type of exclusion would be most relevant. In practical terms, this means that an educational institution which had a student catchment which was predominantly of a disadvantaged racial class with a privileged-only student class may be different from a student catchment which was predominantly of an advantaged racial class with a disadvantaged-only student class. The latter is what has become known as positive discrimination in human rights jurisprudence. In the Australian case, *Andrew v Andrew* the judge remarked that:

The only guiding light, consistent with the rule of law, is the identification of community standards as reflected in current legislation. Thus, although the *Anti-Discrimination Act 1977* (NSW) and similar Commonwealth legislation do not apply to testamentary dispositions, being a private sphere of life, guidance may be obtained from the prohibited grounds as applied in relation to public activities.⁷⁰

Such an attitude may well assist an Australian court to take a view in line with *Bob Jones*.

Second, the line of cases in US, English and Australian common law that upholds absolute freedom of testation and gifting of property, over public policy concerns with racial discrimination, must be distinguished. We have already discussed *Perin's case* that was cited in the *Bob Jones* decision and will discuss like Australian cases in sections below. The argument that would be put to the court is that testation and gifts are private matters, but charity law involves the public realm, so distinguishing these cases. Again, as with most public policy cases, the facts and context are likely to be critical to the outcome.

The United States Supreme Court drew upon the concept of public policy that had been used broadly across the areas of common law, including that relating to charitable gifts. While acknowledging that the judiciary needs to be cautious and sparing in such use of public policy, the court made a significant judgement call about racial discrimination.

⁷⁰ [2012] NSWCA 308; (2012) 81 NSWLR 656, [36] per Basten JA.

There was a strong history of movement towards racial equity, at least in matters of access to public infrastructure. However, it is of note that Congress, even though it had ample opportunity, had not legislated on the particular issue. It was still a matter of community division, although on the wane. On the other hand, it was not a matter of mischief that arose unexpectedly to all (including the legislature) and found itself before the court for decision. The same result may occur in an Australian court, given appropriate circumstances. My one caveat is that if parliament and the executive had behaved as in the Bob Jones situation in considered prevarication, it would be a very bold Australian court that would so act.

Bob Jones and Public Benefit

The US Supreme court uses the term “public benefit” in a sense that is different from the contemporary common English and Australian legal usage. The court uses the term “public benefit principle” about charity’s relief of the government burden in relation to the provision of general welfare by its activities.⁷¹ It is this “relief” which justifies the provision of tax concessions. However, Miriam Galston identifies a different strand of American trust law where it is “not whether the trust is in harmony with the prevailing public views as to what purposes are of advantage to society, rather the question is could the end be deemed a public good by rational men”.⁷² This is closer to the orthodox common law meaning, possibly as it originated from a time without modern notions of the national state and its welfare support to citizens. Even Galston’s statement has differences from the current orthodox common law understanding of the place of public benefit in charity law, to which we now turn.

The Common Law and Public Benefit

At common law in Australia, for a purpose to come within the technical legal meaning of “charitable”, it must be within the spirit and intendment of the Statute of Elizabeth

⁷¹ *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983), 591

⁷² Miriam Galston, “Public Constraints on Charitable Organisations”, (1984) 3 *VA. Tax Rev.* 291, 308.

(the charitable purpose requirement).⁷³ However, that is not enough, as it must also be for the public benefit, or deemed to be for the public benefit by legislation applying for that purpose. This is commonly referred to as the public benefit requirement. A purpose is for the public benefit if it offers a benefit to the community that is real and of value, either tangible or intangible, and that benefit is available to the public, not merely private individuals. There is a rebuttable presumption of benefit to the community where the purpose comes within the first three heads of charity: the relief of poverty, advancement of education, or advancement of religion. In the fourth head, the benefit to the community by analogy to the other three heads, the public benefit must be established affirmatively. This was the concept of charity adopted for income tax purposes by ATO ruling.⁷⁴

This statement is largely in line with *Pemsel's case* decided in 1891, as it became understood and refined in subsequent English cases. Public benefit is a central qualifier to the four heads. It disqualifies a purpose for the benefit of private person(s) for their bounty. The concept is itself limited by the first limb as it does not extend to any worthwhile community purpose, as the purpose must be within the spirit and intendment of the heads of charitable purpose.⁷⁵ As Mary Synge correctly observes, “the term ‘public benefit’ was not used consistently, nor at all in many cases, even where judges had used the term in previous cases, and use of the term might have been expected”.⁷⁶

In 1607, Francis Moore, writing about the Statute of Elizabeth, did not reference directly the words “public benefit” which were formulated much later by the courts.⁷⁷ The concept of a public use is present in his writing. Most clearly, repairs to bridges are charitable only if open to public passage,⁷⁸ as are watering ponds that are open to public use.⁷⁹ Gifts to “aged or impotent” are qualified that such person must be poor “because they may be rich” aged or impotent; clothing must be “for necessity only, not ornament or

⁷³ Purposes can also be deemed to be charitable by legislation and to a minor extent this occurred in state legislation and in the Commonwealth sphere in the *Extension of Charitable Purposes Act 2004* (Cth).

⁷⁴ TR 2011/4 Income tax and fringe benefits tax: charities.

⁷⁵ *Morice v Bishop of Durham* (1804) 9 Ves Jr 399, 32 ER 656.

⁷⁶ Mary Synge, “The ‘New’ Public Benefit Requirement – Making Sense of Charity Law?” (Oxford: Hart Publishing, 2015), 28.

⁷⁷ Francis Moore, *Reading on the Statute of Charitable Uses 1601* (1607), reproduced in G. Duke, *The Law of Charitable Uses* (first published 1767), ed. RW Bridgman (W Clarke and Sons 1805).

⁷⁸ *Ibid* 135

⁷⁹ *Ibid* 135.

superfluity”, and similarly, weapons for defence must not be worn “abroad for attention”⁸⁰ and gifts to pay taxes are only charitable if the tax is paid by both poor and rich alike.⁸¹ The theme here is that of prohibiting gifts that are personal bounty, above what is the perceived public responsibility to relieve poverty.

The notion of public access to infrastructure and the line between private and public benefit slowly grew into more coherent legal principles. In *Cocks v Manners*,⁸² a trust for a contemplative order lacked a public element, as it was for a small group of identifiable individuals and did not involve the public, although there would have been a different result if they served the community, particularly the poor. The concept came to be articulated in the mid-twentieth century as the necessity for a charity to be intrinsically for the public benefit and an appreciable section of the public.⁸³

It also required that the purpose be beneficial or for the public benefit,⁸⁴ sometimes requiring a balancing of benefits and disbenefits of the particular context. The cases on this principle are scarce and strong authority is difficult to find, with judges seeking to resolve cases by recourse to other matters.⁸⁵ Harding makes the observation that few cases have considered the issue from this perspective and these have decided the issues using other principles, often public policy.⁸⁶ The trend is of judges becoming increasingly timid about even contemplating the use of the principle to decide cases.

In *National Anti-Vivisection Society v Inland Revenue Commissioners*,⁸⁷ the court weighed the benefit of improving morality by tending to avert cruelty to animals against depriving society of valuable medical research and came down on the side of medical research. The judges do not set out a utilitarian “T test” for regulators to tick and flick,

⁸⁰ *Ibid* 132.

⁸¹ *Ibid* 133.

⁸² (1871) 12 EQ 574.

⁸³ *Bowman v Secular Society Ltd* [1917] AC 406; *Re Scarisbrick* [1951] AC 297; *Dingle v Turner* [1972] AC 601; *National Anti-Vivisection Society v IRC* [1948] AC 31.

⁸⁴ *National Anti-Vivisection Society v IRC* [1948] AC 31.

⁸⁵ Mary Synge, “The ‘New’ Public Benefit Requirement – Making Sense of Charity Law?” (Oxford: Hart Publishing, 2015), 40, 97.

⁸⁶ Matthew Harding, “Charitable Trusts and Discrimination: Two Themes” (2016) 2(1) *CJCCL* 227, 249.

⁸⁷ [1958] AC 31.

but bring their individual judgement to the task, making a wholistic assessment of the particular facts and circumstances.⁸⁸ In a recent case, it was argued that English fee-paying schools created a disbenefit of causing social divisiveness and perpetuating a class system, but the Tribunal dismissed this as not mounting to a disbenefit, as it rested upon amorphous value judgements and moved quickly to other issues.⁸⁹ In the Australian case of *In Re Resch* the court took the line that a private fee paying hospital relieved the burden on state-financed health facilities, thus providing a public benefit.⁹⁰ There is an emerging line of New Zealand cases that have flirted with quantification of benefits and disbenefits to decide such issues,⁹¹ but these have not been adopted in Australia.⁹² Other notable English cases, such as *Re Lysaght*⁹³ and *Re Dominion Student's Hall Trust*⁹⁴ opted for other legal remedies to resolve the issues.

Turning to an application of such principles to a Bob Jones scenario, a university as an educational institution, has a purpose which falls squarely in the advancement of education head of charity. Universities are mention specifically in the 1601 statute. As to whether racial discrimination is a purpose, rather than a mere activity is a critical issue that will be addressed shortly. If the court under Australian common law were invited to consider whether a Bob Jones style university with a purpose that included discrimination (not merely an activity) was charitable with the issue of public benefit in focus, there would be a consideration of the benefits and disbenefits. The presumption of charity would have to be rebutted by evidence to the contrary. As discussed previously in relation to public policy, the context, facts and circumstances and whether it was positive or negative discrimination may be very relevant to any decision.

⁸⁸ Lord Wright wrote “No one faced with the decision to choose between saving a man or an animal could hesitate to save the man” (page 33);

⁸⁹ *R (Independent Schools Council) v Charity Commission* [2001] UKUT 421.

⁹⁰ *In re Resch* [1969] 1 AC 514 (PC (Aust)).

⁹¹ *Re Education New Zealand Trust* HC WN CIV-2009-485-2301 [29 June 2010]; *Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277; *Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011].

⁹² Refer: Alexandra Ioppolo, "Making the Charitable Incision: Classifying Private Benefits in Charity Law" [2017] WASTuLawRw 7

⁹³ [1966] CH. 191.

⁹⁴ [1947] Ch 183.

Whether the courts would seek to resolve the issue under another legal principle in line with previous trending cases is an interesting question and a distinct possibility. However, it is unlikely that the argument that a discriminating educational charity eased the state burden of providing others with a public university education would be very persuasive in contemporary Australia.

The Charities Act 2013

The *Charities Act 2013* (Cth) commenced on 1 January 2014 and provides a statutory definition of "charity" and "charitable purpose" for Commonwealth legislation (not for states and territories).⁹⁵ The *Australian Charities and Not-For-Profits Commission Act 2012* (Cth) uses these definitions to consider the entitlement of an entity to charity registration and once registered, the ATO considers its tax exemption status. Unlike the IRS legislation, it is clear that the definition of charity used for some tax concessions is the definition set in the *Charities Act 2013*, which in turn draws extensively on the common law.

While creating a statutory definition, the *Charities Act* largely adopts the accepted principles of the common law, and tries to clarify uncertain matters, but allows for the courts and regulators as quasi-judicial decision makers to continue definition development within the structure of the Act. The Explanatory Memorandum to the Bill noted that:

The statutory definition provides a framework for considering charity and charitable purposes. However, the definition retains the flexibility inherent in the common law that enables the courts, as well as Parliament, to continue to develop and extend the definition to other charitable purposes beneficial and relevant to contemporary Australia within the statutory framework. This will ensure that the definition remains appropriate and reflects modern society and community needs as they evolve.⁹⁶

⁹⁵ For the most part, the Australian states and territories have not defined "charity" or "charitable purposes" in legislation but have left it to the courts to apply common law. However, in some jurisdictions there are statutory definitions, which, to varying minor degrees, expand or modify the common law definition.

⁹⁶ *Charity Act 2013*; Charities (Consequential amendments and transitional provisions) Bill 2013, [1.8] and [19].

Under the *Charities Act* a “charity” is defined as an entity:

- (a) That is a not-for-profit entity; and
- (b) All of the purposes of which are:
 - (i) Charitable purposes... that are for the **public benefit...**; 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...**; and
- (d) That is not an individual, a political party or a government entity.⁹⁷

To obtain some sense of how a case with a similar fact situation to that in *Bob Jones* would be considered in Australia, it is instructive to consider the statutory provisions about public benefit and disqualifying purposes. The journey begins with considering the consequences of a focus on purposes, not activities. There, unlawful purposes draw one down the side path of other statutes about unlawful discriminatory activities, purposes contrary to public policy, and finally public benefit issues. There are few cases decided under the new legislation, but common law is still applicable when not contrary to the new statutory provisions. As alluded to in the road map to this journey, it is to specific discrimination statutes that one would initially turn. Using the taxation concession provisions would be another choice. The other matter to recognise is that Australia does not have individual rights and freedoms entrenched in a formal national constitution.

Disqualifying Purposes

The definition of charity in section 5 of the *Charities Act* requires that all the purposes of the entity are charitable for the public benefit, as further defined in the Act,⁹⁸ or purposes (not necessarily charitable) “that are incidental or ancillary to, and in furtherance or in aid of” such charitable purposes.⁹⁹ A disqualifying purpose is defined in the Act and

⁹⁷ *Charities Act 2013* (Cth) section 5 (emphasis added).

⁹⁸ *Charities Act* section 5(b)(i).

⁹⁹ *Charities Act* section 5(b)(ii). For the situation prior to the provision see: *Oxford Group v Inland Revenue Commissioners* (1949) 2 All ER 537; *In Re Harpur's Will Trusts* [1962] 1 Ch 78, 87, 148-149; *Royal*

has two limbs.¹⁰⁰ The first disqualifying purpose is “the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy”.¹⁰¹ The elements of the section are:

- It is a purpose of the entity, not merely an activity that assists in achieving its purpose or an incidental purpose;
- The purpose is for engaging in, or promoting activities that are:
 - a. unlawful, or
 - b. contrary to public policy.

The section includes an example and a note that bears upon the consideration of public policy issues. Each element is now dealt with in turn.

Purpose of the Entity

A search for the charitable purposes of an entity should not be confused with a search for charitable activities. The temptation to do so is irresistible for many embarking on the inquiry. For the regulator faced with training assessing staff, a quantitative weighing of activities by time, money, labour or effort, and the setting of a metrified tipping point provides defensible bureaucratic consistency and a paper trail for justification. For the leaders of “dirty” businesses, the press, politicians, or members of the public inconvenienced by allegedly illegal activities of protesters organized by advocacy entities disrupting their daily activities, it is an unconscious judgement of convenience. In Australian law, the search for an organization’s purposes has become an understanding of the “soul” or “reason for being” of the organization. Activities play only a part in weighing the evidence to make a judgement of an organization’s purpose. The task is complicated

Australasian College of Surgeons v Federal Commissioner of Taxation [1943] HCA 34; (1943) 68 CLR 436, 447, 448, 450; *Congregational Union of New South Wales v Thistlethwayte* [1952] HCA 48; (1952) 87 CLR 375, 442; *Maclean Shire Council v Nungera Co-operative Society Ltd* (1995) 86 LGERA 430, 432-433; *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55; (2008) 236 CLR 204, 217 [17].

¹⁰⁰ *Charities Act* section 11.

¹⁰¹ *Charities Act* section 11(a).

where organizations have multiple purposes, and perhaps some unstated purposes in their formal constitutional documents.

There are no charitable activities in isolation. For example: two entities sell Bibles (activity). One is a business firm that sells for a profit (purpose) and the other is a not for profit body for distributing copies to the public (purpose). The activity is the same, but the purposes differ.¹⁰² This was expressed in a Canadian case as:

The difficulty is that the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature Unfortunately, this distinction has often been blurred by judicial opinions which have used the terms “purposes” and “activities” almost interchangeably.¹⁰³

The Australian charity law jurisdiction hails the High Court decision in the *Word Investments* case as the authority for determining charitable purposes. The majority of the High Court, in that case adopted a holistic approach involving an examination of constitutions and formation, as well as activities.¹⁰⁴ Although in dissent, Kirby J made an aligned observation, “in my opinion, the real discrimen for the characterisation of an entity propounded as a ‘charitable institution’ is what that entity actually does and what purposes it actually pursues”.¹⁰⁵ Subsequent cases adopted this approach and in *Victorian Women Lawyers’ Association v Federal Commissioner of Taxation*¹⁰⁶ the Court referred to *Word Investments* and noted:

¹⁰² *Incorporated Council of Law Reporting v Attorney General* [1972] Ch 73 (CA), 86, per Lord Russell; *Commissioner of Taxation v Word Investments Limited* [2008] HCA 55.

¹⁰³ *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Register* [1999] 1 SCR 10, 108.

¹⁰⁴ *Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55; (2008) 236 CLR 204, 17.

¹⁰⁵ (2008) 236 CLR 204, 174.

¹⁰⁶ [2008] FCA 983; (2008) 170 FCR 318

These authorities demonstrated that the question as to the true nature or character of the entity is to be assessed having regard to its objects, purposes and activities (at [11]). Allsop J formulated the task of characterization thus (at [14]):

The relevant task, as stated in the Surgeons' Case is to assess the true character or nature of the entity by reference to its objects, purposes and activities. It is an integrated, holistic enquiry directed to whether a body of facts and circumstances satisfies a legal category or conception.¹⁰⁷

A similar view was expressed in *Co-operative Bulk Handling Ltd v Commissioner of Taxation*:

[i]n considering the activities of an organisation, the relevant question is as to the ultimate purpose for which the activities are pursued...The critical question for present purposes is not as to the nature of the activities, but rather as to the purpose of *[sic]* which those activities are carried on."¹⁰⁸

In the first case involving the ACNC, the same authorities and approach were approved.¹⁰⁹

The upshot of the statutory intervention is to take isolated or episodic infringing activities out of contention as a disqualifying purpose, particularly where there is a clearly stated dominant purpose. The last resort of making a purpose out of such isolated or episodic infringing activities is to argue that there is more than one purpose and that such activities are so significant that they and other indicators amount to evidence of a second

¹⁰⁷ *Victorian Women Lawyers' Association v Federal Commissioner of Taxation* [2008] FCA 983; (2008) 170 FCR 318 at [130]. The authorities referred to are those quoted in the Full Federal Court decision in *Word Investments Ltd* [2007] FCAFC 171; 164 FCR 194 by Allsop J. His Honour referred to *Royal Australian College of Surgeons v Federal Commissioner of Taxation* [1943] HCA 34; (1943) 68 CLR 436 and the analysis of the judgments in that case by Lockhart J in *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82, 90-93.

¹⁰⁸ *Co-operative Bulk Handling Ltd v Commissioner of Taxation* [2010] FCA 508 [27], [90].

¹⁰⁹ *Waubra Foundation v Commissioner of the Australian Charities and Not-for-profits Commission* [2017] AATA 2424, although the case involved ascertaining the principal activity (not purpose) because of a slightly different legislative wording.

purpose, which is neither charitable nor in furtherance of a charitable purpose. *Community Housing Limited v Clarence Valley Council*¹¹⁰ is such a case. The organization’s main charitable purpose was the relief of poverty. Its provision of training, vocational and related education, and skills development to improve employment opportunities, was found to be neither an independently charitable purpose nor merely incidental to the relief of poverty. In that case, the offending purpose was contained explicitly in the entity’s constitution.

However, such activities are usually not explicit constitutional objects.¹¹¹ It then turns on a case made from the “context of its background and its activities and any other relevant circumstance”¹¹² that may include an analysis of income and expenses, staff engagement, website, annual report and evidence from the organization’s officers. Where the line is drawn is a matter of judgement with no judicial bright lines visible from the current authorities.

Engaging in or Promoting

The second element of the provision requires the organization’s purpose to be committing, or promoting others to commit the disqualifying purpose. If the organization’s purpose is to commit the unlawful activity, then an appreciation of a holistic enquiry is required. An explicit clause in the objects of a constitutional document to commit an unlawful activity would weigh heavily in the decision, but this is rarely the case. The absence of such a clear marker requires consideration of evidence of the organization’s other documents and its actual activity. This is often muddied by the legal fiction about corporations only being able to act through their agents and officers, and further, being legally distinct from their members.¹¹³ In particular, many criminal offences only apply to a natural person, and those that can be applied to corporations require divining of its

¹¹⁰ [2014] NSWLEC 193.

¹¹¹ *LIV v Commissioner of State Revenue* [2015] VSC 604, [173].

¹¹² *LIV v Commissioner of State Revenue* [2015] VSC 604, [188].

¹¹³ *Salomon v Salomon & Co Ltd* [1896] UKHL 1.

“controlling mind”.¹¹⁴ A complex mix of questions arises such as whether documents and agents’ actions relied upon were those of the organization or of unauthorized others.

If there is no resolution to these issues, then inquirers are faced with an even murkier assessment of whether the organization, while not itself engaging in unlawful activities, has promoted such activities to others. Again, the issue arises of whether any available evidence of promotional activity qualifies as that authorized by the corporation. Fine points considered such as the difference between an organizational promotion of peaceful protest, and actions of those attending such an event moving on to an unlawful riot or damage to property, may be moot. This is further confounded if there are few successful prosecutions of those “encouraged” by the organization to act illegally, and if the actions are episodic and minor in nature without apparently causing public harm.

The recent litigation in New Zealand involving the Greenpeace organization considers these issues, although based on the common law. The New Zealand High Court noted that:

It may be accepted that an illegal purpose is disqualifying. It does not constitute a charitable purpose and would mean that the entity is not “established and maintained exclusively for charitable purposes”. 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 sanctioned by the organisation, may well not amount to a disqualifying purpose. Assessment of illegal purpose is, as the Court of Appeal recognised, a matter of fact and degree. Patterns of behaviour, the nature and seriousness of illegal activity, any express or implied ratification or authorisation, steps are 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

¹¹⁴ *Tesco v Natrass* [1972] AC 153.

the legislation on a one-off basis even if not indicative of any system or purpose, is required before illegal conduct amounts to a purpose of the entity.¹¹⁵

The Court went on to state “Whether 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.”¹¹⁶ That Court endorsed the list of factors set out in the Court of Appeal considering the same case as being “sensible”.¹¹⁷ These were:

- (a) the nature and seriousness of the illegal activity;
- (b) whether the activity is attributable to the society because it was expressly or impliedly authorized, subsequently ratified or condoned, or impliedly endorsed by a failure to discourage members from continuing with it;
- (c) whether the society had processes in place to prevent the illegal activity or has since put processes in place to prevent the activity from occurring again;
- (d) whether the activity was inadvertent or intentional; and
- (e) whether the activity was a single occurrence or part of a pattern of behaviour.¹¹⁸

The Court returned the registration decision back to the registering New Zealand Department which, after due consideration, delivered further reasons denying registration to Greenpeace NZ.¹¹⁹ One part of their reasons dealt with illegal activities being inferred, rather than stated, as the purpose of the organization. The Department appears to have conflated the activities of not only Greenpeace NZ members but also other external Greenpeace organizations and their members, ignoring the corporate law doctrines of separate legal persona. It further relied on evidence from the Greenpeace website listing member convictions for mostly minor offences and a significant number of abandoned

¹¹⁵ *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [111].

¹¹⁶ *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [112].

¹¹⁷ *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [112].

¹¹⁸ *Greenpeace of New Zealand Incorporated* [2012] NZCA 533.

¹¹⁹ Registration Decision: Greenpeace of New Zealand Incorporated (GRE25219) Decision No: 2018-1, 21 March 2018,

<https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/greenpeace-of-new-zealand-incorporated-2>.

criminal prosecutions of members (not of Greenpeace itself). The Department also assumed that the organization's annual three day non-violent action training was evidence going to purpose, but does not appear to have established that the content of the training was to incite illegal activity. It concluded that all this amounted to unlawful activity that formed a pattern of behaviour which did not amount to isolated breaches of the law.¹²⁰ Unfortunately, the decision will not be appealed, probably due to litigation fatigue of the applicant, rather than for lack of promising grounds.

Discriminatory class restrictions for entry to an education facility that is entrenched in the formal constitutional objects of a charity would have a good prospect of being judged as a purpose. On the other hand, as explained above, if the restriction was an episodic activity, then it may not even be a purpose.

Unlawful activities

As can be appreciated from the previous section, the prohibited purpose must be to “engage in or to encourage activities” that are unlawful. Discriminatory class restrictions for entry to an education facility in Australia runs the risk of being unlawful under discrimination legislation unless excused by the provision, under an exemption. Unlike the United States, Australia does not have a Bill of Rights to establish fundamental human rights expectations for all citizens. The general proposition at common law is that you are free to do anything you want, unless some law expressly forbids you from doing it.¹²¹ The High Court has taken this position under what is known as the “principle of legality”, where it is reluctant to interpret a statute so that it limits a fundamental right or common law principle unless a statute directs such an interpretation.¹²²

¹²⁰ Registration Decision: Greenpeace of New Zealand (GRE25219) No 2018-1, [94].

¹²¹ *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

¹²² *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; *Monis v The Queen* [2013] HCA 4; *McCloy v NSW* [2015] HCA 34.

There is both state and federal legislation that would bear on a Bob Jones University fact scenario in Australia, making such conduct unlawful. The *Australian Human Rights Commission Act 1986*¹²³ established the Human Rights and Equal Opportunity Commission (now known as the Australian Human Rights Commission) to hear complaints, prosecute breaches and provide education and policy advice. Under Commonwealth legislation, there is a separate Act for each ground of discrimination, that is, age, sex (including marital status and pregnancy), race and disability.¹²⁴ Each state and territory has an Act under which it is unlawful to discriminate on a number of grounds, though these vary from state to state.¹²⁵ All legislation makes it unlawful to discriminate on certain grounds — attributes or status such as race, disability or marital status — in specified areas of public life, such as the provision of goods and services. Unless a “ground” and “area” are present, there is no unlawful discrimination.

The *Racial Discrimination Act 1975* (Cth) gives effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. Its major objectives are to promote equality before the law for all persons, regardless of their race, colour or national or ethnic origin, and make discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful. It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. To refuse entry to a university because of race would be a nullification or impairment of the human right to education as set out in Article 5(e)(v) of the Convention for the Elimination of Racial Discrimination.

Each Australian state also has an anti-discrimination Act which would make it unlawful to refuse enrolment based on race. Under the *Anti-Discrimination Act 1991* (Qld), for

¹²³ Formerly called the *Human Rights and Equal Opportunity Commission Act 1986*.

¹²⁴ *Age Discrimination Act 2004* (Cth); *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth).

¹²⁵ *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

example, it would be a less favourable treatment (section 10) on the basis of the protected attribute of race (section 7(g)) in the protected area of education (section 38). There is no relevant exemption in the *Anti-Discrimination Act 1991* (Qld), however it is similar to the federal *Racial Discrimination Act* in providing for “equal opportunity measures” (section 105).

While a similar fact situation in Bob Jones University would likely be found in breach of the statutes, there are exemptions for religious expression.¹²⁶ However, religious expression cannot be unlimited, and racial discrimination, even if based on sincerely held religious beliefs, would be outside the exemption, as “beliefs of that kind are not worthy of respect in a democratic society or compatible with human dignity”.¹²⁷ There is an express exemption for a registered ACNC charity from the main part of the *Racial Discrimination Act 1975*. The part will not affect a provision of the governing rules that confer benefits for charitable purposes, or enables such benefits to be conferred on persons of a particular race, colour or national or ethnic origin, or make unlawful any act done to give effect to such a provision.¹²⁸

The operative words of section 8(2) of the *Racial Discrimination Act 1975* (Cth) are:

This Part does not:

(a) affect a provision (whether made before or after the commencement of this Part) of the governing rules (within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012*) of a registered charity, if the provision:

- (i) confers benefits for charitable purposes; or
- (ii) enables such benefits to be conferred;

¹²⁶ *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26. The Church of Jesus Christ of Latter-Day Saints in Queensland undertook a restructure, which abolished wards containing predominantly Samoan congregations who conducted services in the Samoan language. The members of those congregations were welcome to attend other congregations, but the services were to be conducted in English and attendees were no longer allowed to use a language other than English in public worship. The Full Court of the Federal Court unanimously held that the Church had not unlawfully discriminated against the Samoan members, contrary to section 9 of the *Racial Discrimination Act 1975* (Cth), because their rights to freedom of religious expression (and other human rights) were not infringed.

¹²⁷ *R. (on the application of N) v Lewisham LBC* [2014] UKSC 62, 77.

¹²⁸ *Racial Discrimination Act 1975* section 8.

- on persons of a particular race, colour or national or ethnic origin; or
- (b) make unlawful any act done to give effect to such a provision.

A reported case considering the exemption (expressed in a slightly different form prior to the establishment of the ACNC) is *Kay v South Eastern Sydney Area Health Service*,¹²⁹ which involved a handwritten will on a will form, with some strong directions from the will-maker to her executor.¹³⁰ One of her directions was that “\$10,000 for treatment of White (and white is underlined twice) *babies*” at a local children’s hospital was to be provided from her estate. The case was decided by a very experienced charity law judge. He affirmed the English common law that “that a trust which discriminates against potential beneficiaries on the grounds of colour is not void as being contrary to public policy if the gift succeeds or runs foul of the relevant statutes”.¹³¹

He accepted that the only sensible interpretation of the gift to the Children’s Hospital was that white babies are an integral part of the gift and not just a particular method of implementing a general charitable gift, so the English cases of *In re Lysaght*¹³² and *In re Dominion Students’ Hall Trustee*¹³³ did not assist. Further, the statutory provisions of the UK discrimination legislation allowed the gift to be used to confer benefits on persons generally, ignoring the colour restriction, but this is not the situation in Australia.

The judge noted that: “Both s 8(2) of the Racial Discrimination Act and s 55 of the Anti-Discrimination Act¹³⁴ provide that a deed or will that confers charitable benefits

¹²⁹ [2003] NSWSC 292.

¹³⁰ Other directions included that certain solicitors were not to be used, certain relatives were not to get “1 cent of any money” and a concluding statement of “So goodbye to anyone who is interested.”

¹³¹ [2003] NSWSC 292, [13].

¹³² [1966] Ch 191.

¹³³ [1974] Ch 183.

¹³⁴ *Anti-Discrimination Act 1977* (NSW) section 55, which provides:

(1) Nothing in this Act affects:

- (a) a provision of a deed, will or other instrument, whether made before or after the day appointed and notified under section 2 (2), 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 which is done in order to give effect to such a provision.

on persons of a class identified by reference to any one or more of the grounds of discrimination referred to in the legislation is not affected by the Act”.¹³⁵ Further, that “The section, obviously, recognises that generally speaking testators can be as capricious as they like and that if they wish to benefit a charity in respect of, or even of, a discriminatory group, they are at liberty to do so.”¹³⁶ As the judge pointed out, the hospital might not accept the gift, but expected that “a more pragmatic approach would be that the receipt of a fund to benefit white babies would just mean that more of the general funds of the hospital would be available to treat non-white babies so that, in due course, despite the testatrix’s intention things will even up”.¹³⁷

The relevant section of the Commonwealth Discrimination Act was altered after this case, by consequential amendment at the same time as the establishment of the ACNC.¹³⁸ There are some differences brought about by the amendments. First, the previous section defined charities as those according to the laws of the states and territories, and now it is a charity registered under the ACNC provisions that are determined by the *Charities Act 2013*. Some states have a wider definition, for example, “to provide, or to assist in the provision of, facilities for recreation or other

(2) In this section,
"charitable benefits" means benefits for purposes that are exclusively charitable according to the law in force in any part of Australia.

¹³⁵ [2003] NSWSC 292, [17].

¹³⁶ [2003] NSWSC 292, [18].

¹³⁷ [2003] NSWSC 292, [19].

¹³⁸ Section 8(2) of the *Racial Discrimination Act 1975* (Cth) previously provided for exceptions relating to: (a) any provision of a deed, will or other instrument, whether made before or after the commencement of this Part, that confers charitable benefits, or enables charitable benefits to be conferred, on persons of a particular race, colour or national or ethnic origin; or (b) any act done in order to comply with such a provision. Section 8(3) defined “charitable benefits” as benefits for purposes that are exclusively charitable according to the law in force in any State or Territory. The section now states:

(2) This Part does not:

(a) affect a provision (whether made before or after the commencement of this Part) of the governing rules (within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012*) of a registered charity, if the provision:

(i) confers benefits for charitable purposes; or

(ii) enables such benefits to be conferred;

on persons of a particular race, colour or national or ethnic origin; or

(b) make unlawful any act done to give effect to such a provision.”

leisure-time occupation, if those facilities are provided in the interests of social welfare”.¹³⁹ Further, charities are not required to register under the Commonwealth legislation unless they wish to access Commonwealth taxation and other concessions, so it does not apply as widely as the previous provision. There will be some charitable trusts that fall outside the new section that would have been included previously.

Second, the previous provision related to “any provision of a deed, will or other instrument” whereas the amending provision attaches to the “governing rules” of a registered charity that are defined for the ACNC Act.¹⁴⁰ Provisions outside the enforceable rules of an ACNC registered charity will not be covered by the exemption. An ACNC registered entity that makes an isolated gift by deed, not part of its “rules” for a discriminatory purpose appears not to attract the exemption.

Some might argue that the section 8 exemption (before and after amendment) should be construed as a “special measures” exemption which authorizes positive discrimination by a registered charity for the benefit of people of a particular race. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms are not deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.¹⁴¹

This approach would be more in sympathy with the general direction of the statute. In the second reading speech to the Bill the Minister said: “The common law provides few effective remedies against discrimination in the exercise of human rights, whether it is based on race or colour or on any other grounds” and it “will also make people more

¹³⁹ *Trusts Act 1973* (Qld) s 103; *Charitable Trusts Act 1962* (WA) s 5(1); *Trustee Act 1936* (SA) s 69C; *Variation of Trusts Act 1994* (Tas) s 4(1).

¹⁴⁰ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) section 300-5 defines governing rules of an entity as: “... written rules that: (a) govern the establishment or operation of the entity; and (b) can be enforced against the entity.”

¹⁴¹ *Anti-Discrimination Act 1977* (Cth) section 55.

aware of the evils, the undesirable and unsociable consequences of discrimination — the hurtful consequences of discrimination — and make them more obvious and conspicuous.”¹⁴²

This line of argument might be bolstered by distinguishing *Kay’s case* as being confined to a testamentary fact situation, being in a private rather than a public sphere. Charity is by its very nature public, facilitated by private acts. A court may take a different view about an public organization, as it does not involve the issue of a testator being able to leave their property as they desire — characterised as a private matter. There is a stark difference between an individual making a single bequest and an organization with a public membership and a purpose of negative discrimination. These lines of argument remain to be tested in the courts. Parachin comments that the case “reveals an underlying value judgment to prioritise traditional property rights and testamentary freedom over equality”,¹⁴³ while Harding concludes that common law appears not nuanced enough to take account of modern public policy issues.¹⁴⁴

If that barrier is overcome, the issue is whether racial discrimination is recognised as a public policy. A recent testamentary case gives some hope to this occurring, as the judge said:

The only guiding light, consistent with the rule of law, is the identification of community standards as reflected in current legislation. Thus, although the *Anti-Discrimination Act 1977* (NSW) and similar Commonwealth legislation do not apply to testamentary dispositions, being a private sphere of life, guidance may be obtained from the prohibited grounds as applied in relation to public activities.¹⁴⁵

¹⁴² Mr Enderby (Attorney General and Minister for Customs and Exercise) Hansard, Thursday 13 February 1975, page 285.

¹⁴³ Adam Parachin, “Public benefit, discrimination and definition of charity” in *Private Law – Key Encounters with Public Law*, ed. Kit Barker and Darryn Jensen (Cambridge: Cambridge University Press, 2013) chapter 6.

¹⁴⁴ Matthew Harding, *Charity Law and the Liberal State* (Cambridge: Cambridge University Press, 2014), chapter 7; Matthew Harding, “Some Arguments against Discriminatory Gifts and Trusts” (2011) 31(2) *Oxford Journal of Legal Studies* 303-326; Matthew Harding, “Charitable Trusts and Discrimination: Two Themes” (2016) 2(1) *CJCL* 227-260.

¹⁴⁵ *Andrew v Andrew* [2012] NSWCA 308; (2012) 81 NSWLR 656, [36] per Basten JA.

While the decision in *Kay's case* stands, it is worthy of comparison with the same court's development in the sphere of the testator and moral duty to family dependants. Again this is a private sphere, undergirded not by common law but specific legislation giving wide discretion to judges. It also has consequences for charitable bequests that are diminished in favour of disappointed family applicants. The preferencing of testamentary freedom over social cohesion or Harding's "autonomy" is in stark contrast to the way that family provision laws have developed in Australia and New Zealand. Judges regularly interfere with the crystal clear wishes of testators in such matters. The genesis for this interference was the *avant garde* approach to social welfare in New Zealand in the 1890s, with the introduction of old age and widows' pensions.¹⁴⁶ This encouraged estate planning where even wealthy testators left their estates away from their dependants, especially wives. The legislative response was fanned by an indignant press, which reported several notorious cases of wealthy men leaving their widows and children unprovided for in their estates.¹⁴⁷ Judges were given wide discretion to interfere in the donor's disposition of testamentary assets, often favouring family over charities. In one typical case, an applicant received no provision from a large estate, which was divided equally among his four siblings. The applicant was wealthy, having assets more than \$2 million and judicial interference was still regarded as being appropriate.¹⁴⁸

On one level, it is difficult to resolve the contradiction of upholding testamentary intent with respect to provisions which are regarded as offensive to the broader community and abhorrent to those whose identity is despised, while being sanctimoniously pedantic about the equal division of property between more than self-sufficient offspring whom the testator of sound mind had good reason for disinheriting. I offer the observation that one is purely based in common law with its foundation lost in the mists of legal time. It may be an unstable platform — or an unruly animal. The other (family provision) is by a deliberative Act of the Parliament where discretion is explicitly given to the courts to make the judgement. In a leading case on the matter, the court explained their role as:

¹⁴⁶ Ann Beaglehole, *Benefiting Women*, Department of Internal Affairs, New Zealand, 1994, accessed 21 September 2018, <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj03/03-benefiting-women.html>

¹⁴⁷ James Mackintosh, "Limitations on Free Testamentary Disposition in the British Empire" (1930) 12(1) *Journal of Comparative Legislation and International Law* (3rd Series) 13, 13.

¹⁴⁸ *Vigolo v Bostin* (2005) 221 CLR 191.

Parliament may prescribe relevant factors to be taken into account, but community values are not the monopoly of Parliament. Ultimately they belong to civil society itself, to be ascertained or discerned by courts, whether by interpretation of a statute or by the expression of the general law when the application of judicial power requires it.¹⁴⁹

Does having a legislative imprimatur provide a more secure basis for a judge to feel empowered or sanctioned to make such judgements reflecting the broad morals or understandings of the community at a particular time and under certain circumstances? I surmise that when Parliament permits courts to exercise their judgement about such matters they are more likely to do so, than when called to depart from the safety of precedential wisdom, even if its basis is lost in a medieval fog.

Contrary to Public Policy

An organization with a purpose contrary to public policy will also be regarded as having a disqualifying purpose for registration as a charity. As discussed above, there is already an extensive common law jurisprudence on public policy, but does the *Charities Act* alter this jurisprudence? The general presumption of interpretation is that legislation is presumed not to alter common law doctrines. However, legislation which intends to do so will be upheld by the courts.¹⁵⁰

The general tenor of the act is to clarify the law relating to the definition of charity and alter it in some limited areas, as the Preamble to the Act declares:

...and ensuring continuity by utilising familiar concepts from the common law, will provide clarity and certainty as to the meaning of those concepts in contemporary Australia.¹⁵¹

¹⁴⁹ *Andrew v Andrew* [2012] NSWCA 308, [13].

¹⁵⁰ P. D. Finn, "Statutes and the Common Law" (1992) 22 *UWAL Rev* 7.

¹⁵¹ *The Charities Act 2013* (Cth), Preamble.

This approach is supported by the Minister’s introduction of the Bill¹⁵² and the Explanatory Memorandum.¹⁵³ It might have been safely assumed that the common law in relation to public policy would continue to apply, but for the addition in the section of an example and note to aid interpretation.

The example in the act is that “public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public, and national security”. Does this limit public policy considerations to just these matters? The Commonwealth *Acts Interpretation Act* specifically directs that “examples” may extend the operation of the section and are not exhaustive of the operation of the provision.¹⁵⁴ Further, the use of the word “may” in the *Interpretation Act* provision is designed to be permissive, allowing the court discretion to do so.¹⁵⁵ This would point to an expansive definition that is not limited only to the example.

The use of the word “includes” further supports this interpretation. It is an accepted principle of statutory interpretation that if the word “includes” is used, it is intended to enlarge the ordinary meaning of the word or phrase.¹⁵⁶ This points to a widening of the common law notion of public policy to include “the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public, and national security” rather than to restrict its meaning. Some of these subject areas would have been covered by the common law notions of public policy in any case, as discussed above. In relation to the common law and discrimination, the common law would continue to apply in Australia. The statutory definition of public policy would not appear to have altered the common law’s application to the Bob Jones scenario, and the same issues would be present.

¹⁵² Hansard, House of Representatives, 29 May 2013, David Bradbury MP, page 20.

¹⁵³ Explanatory Memorandum Charities Bill, Charities (Consequential Amendments and Transitional Provisions) Bill 2013, 5.

¹⁵⁴ *Acts Interpretation Act 1901* (Cth) section 15AD.

¹⁵⁵ Explanatory Memorandum to Acts Interpretation Act Amendment Act 2011, [103].

¹⁵⁶ *Sherrit Gordon Mines Ltd v Federal Commissioner of Taxation* [1977] VR 342, 353.

For the sake of completeness of the paper, the second disqualifying purpose is the purpose of promoting or opposing a political party or a candidate for political office, although this is not entirely relevant to the discussion at hand. Another legislative example is provided: that this limb “does not apply to the purpose of distributing information or advancing debate about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies)”. A further note explains that “the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country may be a charitable purpose” which is further reinforced by explicit mention in the definition of charitable purpose.¹⁵⁷ The Explanatory Memorandum to the Bill is at pains to point out that “the independent nature of the charitable sector is greatly valued by the public” in the context of the provision not being extended by the actual prohibiting words.¹⁵⁸ The decision of a majority of the High Court of Australia in *Aid/Watch Inc v Federal Commissioner of Taxation*¹⁵⁹ bolsters this interpretation, ruling that the “political purposes” doctrine did not apply in Australia.¹⁶⁰ Further, the majority explained that the generation by lawful means of public debate concerning some charitable purpose was itself beneficial to the community. This was based on representative and responsible government, included a universal adult franchise, and provided for constitutional change through popular referenda, and thus assumed as an “indispensable incident” communication between the executive, legislature and electors on matters of government and politics.¹⁶¹

Public Benefit under the Charities Act

Public benefit as previously identified under the common law, continues under the *Charities Act 2013* as an element of the new statutory definition of charity. As discussed above,

¹⁵⁷ *Charities Act 2013* (Cth) section 12(1).

¹⁵⁸ Explanatory memorandum to Charities Bill 2013, Charities (Consequential Amendments and Transitional Provisions) Bill 2013, page 22.

¹⁵⁹ [2010] HCA 42; (2010) 241 CLR 539.

¹⁶⁰ *Bowman v Secular Society* [1917] AC 406; *National Anti-Vivisection Society* [1947] UKHL 4; *McGovern v Attorney-General* [1982] 1 Ch 321.

¹⁶¹ Joyce Chia, Matthew Harding, Ann O'Connell, “Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*” [2011] *UMelbLRS* 9.

public benefit is a common law concept that has been developed over a long period. This development has not resulted in greater precision, with slightly different conceptions and treatments by courts, and clear paths forward are difficult to discern. Again, as noted above, judges have appeared to be timid in applying the concept when other solutions are available, however tenable. It is a chance for the clarifying statute to do its work and provide some guidance to judicial decision making in the area.

It is not proposed to repeat the common law public benefit discussion here, but to pose the question: Is there any difference between the common law and the statutory clarifications? There is no Australian case material on the new provisions, and a series of decisions is probably needed to confirm if the judiciary has sufficient guidance to produce a coherent jurisprudence. Using the measurement of benefit and, importantly “detriment” (the Irish legislation term), or “disbenefit” (the Scottish legislation word), or “any detriment or harm” (the UK Charity Commission terminology) is broadly consistent with other jurisdictions’ charity law reform. We appear not to have strayed too far from the Anglo conception of charity on this point. The actual section provides as follows:

- (1) A purpose that an entity has is for the public benefit if:
 - (a) the achievement of the purpose would be of public benefit; and
 - (b) the purpose is directed to a benefit that is available to the members of:
 - (i) the general public; or
 - (ii) a sufficient section of the general public.

Achievement of purpose would be of public benefit

- (2) For the purposes of paragraph (1)(a), have regard to all relevant matters, including:
 - (a) benefits (whether tangible or intangible) (other than benefits that are not identifiable); and
 - (b) any possible, identifiable detriment from the achievement of the purpose to the members of:
 - (i) the general public; or
 - (ii) a section of the general public.¹⁶²

¹⁶² *Charities Act 2013* (Cth) section 6.

The Explanatory Memorandum accompanying the Bill stated:

A charitable purpose must be of benefit overall and cannot be harmful on balance. In determining public benefit, consideration must be given to any possible detriment which arises from the purpose, or would commonly arise, from carrying out of the purpose to the general public or a section of the general public. Examples of detriment or harm could include damage to mental or physical health, damage to the environment, **encouraging violence or hatred towards others**, or engaging in illegal activities such as vandalism or **restricting personal freedom**.¹⁶³

In relation to the application of the new section to a Bob Jones scenario, the result is still not without considerable uncertainty. First, will judges shed their timidity or inventiveness to decide the matter on other grounds in relation to public benefit? Perhaps the existence of the statute will embolden the judiciary to feel on more secure ground and employ the concept. On the other hand, the usual sensitive nature of the issue involved, and a balance of subtle distinctions, may see the pattern of behaviour remain. Second, while education is prima facie a charitable purpose, if there is a detriment or harm such as a racial restriction on participation, might this be enough to tip the balance of public benefit, for the otherwise charitable purpose to no longer qualify? A caveat is that, as discussed above, the racial discrimination must be found to be part of the purpose of the organization and not merely an activity.

Conclusion

At the outset, three principles were drawn from the Supreme Court deliberations for comparison with Australian charity law. They were:

- a) for the purposes of the US federal tax statute, the English common law notions of charity apply;

¹⁶³ Explanatory Memorandum to Charities Bill 2013, [1.62] (emphasis added).

- b) that racially discriminatory schools are not charitable by the common law of charitable trusts because they infringe public policy considerations; and
- c) that racially discriminatory schools are not charitable by the common law, as they do not provide the requisite public benefit to warrant charitable status.

The first point raises few issues in Australia. In comparison, Australian courts are not required to engage in any deliberations about whether charity law applies to interpret the income tax concessions. By legislative design the new *Charities Act 2013* is used as a starting point for defining charities for Commonwealth statutes, including the taxation provisions. The statute is intended to clarify the common law within a statutory framework, but still be flexible enough for the judges to mould the law to meet contemporary circumstances. It is too soon to assess whether the Act will achieve this, as only one minor case has been decided to date.

Public policy as a ground of curtailing otherwise legal transactions has a long history in the English common law. These principles have flowed into Australian jurisprudence. Public policy as a judicial tool is fading, as the ambit of legislation increases, and the judiciary appears to be increasingly uncomfortable about using such common law based wide and unfettered discretions. In relation to public policy concerning gifts, the property and testamentary rights of donors appear to trump many public policy concerns that may taint the gift, such as discrimination, or infringing marital relations or religious freedom. There is a tendency for judges to seek alternative judicial tools to achieve a satisfactory solution, such as *cy-près* orders, rather than tangling with the common law. If, for some reason, the specific discrimination statutes do not apply, would the courts fall back on the common law public policy tool? As discussed above, the factual situation of the matter, coupled with the particular societal conditions and type of exclusion would be critical factors influencing the attitude of a judge. A possible line of argument is the distinction between a private property/testamentary transaction and an organization in the public realm that is given private property for public purposes. These characteristics may be enough to give the judiciary comfort to invoke public policy considerations in their deliberations. The US Supreme Court made a bold decision in the *Bob Jones case*, in comparison to the track record of Australian courts in this area.

The third point of the US Supreme Court's decision in *Bob Jones* is the recourse to the necessary element of public benefit in charity. The Court couched its explanation of public benefit in terms of relief of the fiscal burden on the government for its provision of community services. It is not a narrative that runs strongly in English and Australian jurisprudence of public benefit, although in recent years it has become part of the political discourse about charity. Australian charity law will assume public benefit for the first three heads of charity and require proof positive for the fourth head. When assessing public benefit in the fourth head or contested other heads, the courts are called upon to balance benefits and disbenefits in all the circumstances of the matter. Australian judges have not been called upon to make such decisions frequently, and again are timid in using the principle when other judicial principles can provide an acceptable solution. Decision-making is likely to be influenced by the facts and circumstances of the case and the contemporary societal context.

Like several other Anglo jurisdictions, the Australian Commonwealth has adopted a statutory definition of charity in recent years. The provision is used as a gateway to Commonwealth taxation concessions. Its design was intended to allow for the common law to continue to shape the definition of charity but within the clarifying provisions of the Act. It is still too early to assess whether the intervention will achieve this balance. The provisions do not appear to alter the common law significantly in relation to a *Bob Jones* scenario. It is yet to be seen whether, as suggested earlier, the legislative framework will act as a support for judges to be less timid in exercising their discretion about public policy, and particularly to public benefit assessments. Australia has specific discrimination legislation, and charities that have an activity of promoting negative discrimination at least could be called to account under that legislation as well as the Charities Act if they have unlawful discriminatory purposes.