

Aid/Watch and the Public Benefit of Advocacy for the Extra-territorial Relief of Poverty

Aid/Watch Incorporated v Commissioner for Taxation [2010] HCA 42 (*Aid/Watch*)

David Barnden

Giri Sivaraman

Maurice Blackburn Lawyers, Sydney

Abstract

The disqualification of Aid/Watch as a charity and the High Court of Australia's subsequent decision shines a spotlight on the common law definition of charitable activity. The *Aid/Watch*¹ decision enables charitable organisations to legitimately advocate for more efficient implementation of government policies on the relief of poverty and other recognised charitable goals without fear of reprisal. Initially we comment on the inherent tension the Australian Taxation Office experiences as a result of its status as a government department, its responsibilities to administer revenue collection and its role interpreting charity law. We then discuss the common law definition of charity and the Constitutional basis for the High Court's decision in *Aid/Watch*.² To conclude we outline areas of uncertainties emanating from the decision and the latest commentary made by the Australian Taxation Office.

The role of the Australian Taxation Office (ATO)

The ground breaking decision in *Aid/Watch* places limitations on what some perceive to be a tool available to an Australian government to restrict charitable organisations criticising government policy and practice. The decision of the majority of High Court judges clarifies the fact that in Australia there is no general doctrine which excludes from charitable purposes "political objects". However, it is not, as we will see, a free-pass for advocacy organisation to campaign on their chosen issues without reprisal. Charitable organisations may still be disqualified if their objects and activities impute "reasons of contrariety between the established system of government and the general public welfare".³

Many charities like Aid/Watch are dependent on benevolent donors to sustain their operations. The most significant implication of losing charitable status for Aid/Watch was not

1 In this article *Aid/Watch* (italicised) refers to the decision of the High Court of Australia. Aid/Watch (not italicised) refers to the organisation itself.

2 *Aid/Watch* was decided by a majority of 5:2. The joint majority decision was by French CJ, Gummow J, Hayne J, Crennan J and Bell J. Heydon J and Kiefel J delivered separate, dissenting judgments which are not addressed by this article.

3 *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 at 46

Cosmopolitan Civil Societies Journal, Vol.3, No.3s (Special Issue), 2011

ISSN: 1837-5391; <http://utsescholarship.lib.uts.edu.au/epress/journals/index.php/mcs>

CCS Journal is published under the auspices of UTSePress, Sydney, Australia

that the organisation was henceforth required to pay more tax, but that it was unable to receive funds from donors mandated to only fund charitable institutions. The resulting impact was crippling and Aid/Watch lost two thirds of its revenue.

It was the so-called “political objects” doctrine that the ATO invoked to disqualify Aid/Watch as a charity after the organisation agitated for change in government behaviour on sensitive foreign policy. The disqualification in 2006 followed suddenly after the ATO gave Aid/Watch an endorsement as a charity in the year before.⁴ An unavoidable circumstantial implication arose, being that Aid/Watch was suffering directly because of its public criticism of government activities. Whether or not this implication reflects the facts, organisations pushing for change in policy or government actions were concerned enough to publicly pledge support for Aid/Watch's appeal to the High Court.

The ATO is responsible for revenue collection which funds public goods and services that in turn give effect to economic and social policies.⁵ It must also assess applications for charitable status. This potential conflict, between optimising revenue collection and the granting of taxation concessions for charities, is to be addressed by establishing the Australian Charities and Not-for-Profits Commission that will administer charities.⁶

Ultimately however, the decision to revoke Aid/Watch's charity status was due to an interpretation of an unclear and unsatisfactory area of common law. The result of the subsequent High Court appeal was to legitimise Aid/Watch's functions as charitable, recognising that the organisation contributed to a Constitutionally protected ‘public benefit’.

What is a charitable organisation?

The term “charitable organisation” is not defined by the relevant taxation legislation. To be endorsed as charitable an organisation must satisfy the definition at common law. Charitable organisations help the poor, but the common law definition also includes helping others who

4 For the purposes of the *Fringe Benefits Tax Assessment Act 1986* (Cth)

5 ATO, Strategic statement 2010-15, available at <http://www.ato.gov.au/corporate/content.aspx?doc=/content/00243384.htm&pc=001/001/002/018&mnu=39504&mfp=001&st=&cy=>

6 The Hon Bill Shorten MP, Joint media release with the Hon Tanya Plibersek MP, Minister for Human Services and Social Inclusion, Making it easier for charities to help those who need it, 10 May 2011. Available at <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/077.htm&pageID=003&min=brs&Year=&DocType>

may not be poor, such as where the aim is to support education or religion. It is *Pemsel's* case from 1891 that is the authority for the requirement that a charity must (1) advance education, (2) advance religion, (3) relieve poverty or (4) advance other purposes beneficial to the community'. Of course, a 'purpose beneficial to the community' is a sweeping phrase, which becomes relevant below.⁷

The Commissioner's submissions

Disqualification as a charity, at least in England, could occur if a charity was devoted to the pursuit of political purposes.⁸ This idea is referred to as the political objects doctrine. In *Aid/Watch*, the Commissioner of Taxation argued that this doctrine also operated in Australia, and made submissions before the High Court that Aid/Watch's dominant purpose was a political one, rather than to relieve poverty.

The political objects doctrine

English authorities have decided that a trust with a principal purpose to procure a reversal of government policy, or of particular administrative decisions of government authorities, is classified as political as a trust for 'political purposes' and as a result can not be classified as charitable⁹. This is the general "political objects" doctrine which the High Court in *Aid/Watch* said did not to apply in Australia to the same extent as it does in England because the political objects doctrine was "not directed to the Australian system of government established and maintained by the Constitution itself".¹⁰ We explore how the Court relied on the Constitution to obviate the full extent of the political objects doctrine below.

Before we do, it is worth highlighting what seems to us to be the principal justification for disqualification arising from political objects, which is that political parties are not unable to be granted charitable status.¹¹ This measure of disqualification was left intact by the majority who implicitly drew a line between those parties participating in the system of government as representatives or potential representatives, and those organisations that are agitating for political change.¹² The High Court acknowledged that Courts before them had experienced

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

8 *Bowman v Secular Society Ltd* [1917] AC 406 at 442 and *National Anti-Vivisection Society v Inland Revenue Commissioner* [1948] AC 31 at 52.

9 At 28

10 At 40

11 At 38

12 At 42-45

difficulty in determining whether an organisation that agitated for legislative change could be considered as doing so for a charitable purpose.¹³ The majority was satisfied that the purposes and activities of Aid/Watch did not trigger disqualification “for reasons of contrariety between the established system of government and the general public welfare”.¹⁴ The Court dismissed concerns that the law would ‘stultify’ itself, being the notion that the legal system would invalidate itself by promoting changes in existing law. This was a notion advanced in previous authorities and texts.¹⁵

The role of the Constitution

Pemsel’s fourth head of charity is that a charity’s dominant purpose can be for the public benefit, and the Court extracted four Constitutional principles to support the proposition that Aid/Watch activities operated in the public benefit.

First, the Court recognised that the Constitution informs the development of the common law. To enable the Court to interpret the term “charitable trust” as it appeared in the relevant taxation legislation, the Court cited the decision of *Esso Australia Resources Ltd v Federal Commissioner of Taxation*¹⁶ which highlighted the complex interrelation and influence between common law and statute. The High Court’s remarks reinforced the evolutionary nature of common law, and its subsequent influence on statutory interpretation.¹⁷

Secondly, the Court referred to the s128 Constitutional process that enables the Constitution to be amended in order to establish the public benefit inherent in the common law’s ability to evolve.¹⁸ In this way the Court addressed the concerns of stultification and the apparent schism between the stability and legitimacy of the rule of law. In doing so the Court was then open to adapt the common law on charities to reflect current social needs.

Thirdly, the majority recognised that communication between electors themselves and between electors and the legislature and executive is “an indispensable incident” of the constitutional system.¹⁹ Aid/Watch, through the publication of research reports on the

13 At 43

14 At 46

15 *Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396 at 426 per Dixon J.

16 (1999) 201 CLR 49 at 59-60 [18]; [1999] HCA 67

17 At 22 and 23

18 At 44

19 At 44 per *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566 et al.

effectiveness of government attempts to reduce poverty, was found to contribute to this communication for the public benefit.

Fourthly, the majority, in a somewhat cautionary reflection upon limiting political communication, gave deference to restrictions only being permissible if the manner in which the communication is curtailed is compatible with the system of government and the Constitution.²⁰ The implication is that the general application of the “political objects” doctrine (and the ATO's decision to disqualify Aid/Watch in support of the doctrine) amounted to an unconstitutional restriction on this freedom.

It was these four processes which provided the foundation that enabled the Court to explore what is meant by the “public benefit”. Aid/Watch, the Court found, was promoting public debate about political matters by lawful means which in a broad sense enabled the organisation’s operations and activities to be classified as in the public benefit.²¹

Aid/Watch’s advocacy and extra-territorial impact

The reasoning in *Aid/Watch* appears to rest upon the fact that the subject of the public debate, being the Australian government's purpose or actions, was in the first three heads identified in *Pemsel*. In *Aid/Watch* the goal of the relevant government activities was to relieve poverty by foreign aid and the Court legitimised Aid/Watch’s advocacy efforts on the basis that it went to improving government actions.

It is worth highlighting that the communities which benefited from government’s ‘charitable’ policy and actions were not communities in Australia, but communities in countries with significantly less financial resources per capita. As a result, *Aid/Watch* has extended (a) the implied Constitutional right of political communication and (b) charitable objects and activities “for the public benefit” in such a way that permits them to be founded upon the domestic goal of alleviation of poverty for communities overseas. It follows that Aid/Watch's charity status is inextricably dependent upon the government's extra-territorial charitable activities and the relief of poverty.

20 At 44

21 At 45

The decision provides an interesting comparison to the United Kingdom case of *Habershon v Vardon*.²² In this case, the organisation's purpose was directed at communities abroad, being "the political restoration of the Jews to Jerusalem and to their own lands" which was deemed grounds for disqualification as a charity. The majority in *Aid/Watch* refer to this decision and later commentary by Tyssen, but did not comment further on the extra-territorial nature of the impacts of charitable organisations.²³

Public benefit and the relief of poverty

Aid/Watch argued that in addition to being a charity that engaged in activities for the public benefit, its dominant purpose was for the relief of poverty.²⁴ In practice *Aid/Watch* did not do any direct, on the ground work to relieve poverty, but went about achieving this goal by generating public debate on government policies and actions with the goal of improving the efficiency and efficacy of aid delivery. *Aid/Watch* argued that in generating public debate it had a tangible impact on the relief of poverty and was therefore permitted to be classified as a charity under *Pemsel's* second head, being for the alleviation of poverty.

The Commissioner argued to the contrary. The majority deemed it unnecessary to decide this point since *Aid/Watch's* dominant purpose, was found to be for the public benefit.²⁵

Impacts on the implied Constitutional freedom of political communication

Aid/Watch's reference to the implied Constitutional right of freedom of political communication,²⁶ in our view, strengthens this right and simultaneously demonstrates the High Court's willingness to revert to overarching Constitutional considerations in determining the legality of a range of administrative decisions. Previously in *Lange* the High Court explored this freedom in the context of defamation in statute and at common law. *Aid/Watch* moves the freedom into the territory of charitable trusts, and the implication is that in deciding to revoke *Aid/Watch's* charity status, the ATO did not take into account wider Constitutional considerations in its interpretation of the common law.

22 *Habershon v Vardon* (1851) 4 De G & Sm 467 [64 ER916]

23 At 31

24 At 46 and 47

25 At 47

26 At 44

It is worth noting that in *Mulholland*²⁷ the High Court restated that this freedom applied to prevent conflict between the acts of the legislature and executive, such as the creation of statute, and inconsistencies in the common law and it was not a right bestowed upon an individual. The majority in *Aid/Watch*, as in *ABC v Lenah Game Meats*,²⁸ is also careful to interpret the freedom in the context of development of common law, rather than at the level of ATO's administrative decision making.²⁹ However it is clear that administrative decision makers need to defer to Constitutional freedoms to arrive at the correct interpretation of law.

Strengthening accountability

In addition to the Constitutional implications of *Aid/Watch*, we recognise four positive effects which will, in our opinion, contribute to government accountability and strengthen the legitimacy of those advocating for the advancement of charitable outcomes.

First, there is now a bridge for organisations agitating for change in government policy or directives which have objectives to reduce poverty without having to prove that their actions or work have a direct and immediate effect on community in Australia or overseas.

Secondly, the link between domestic charitable organisations and their ultimate extra-territorial impacts is strengthened. In the purest sense of globalisation, *Aid/Watch* coordinated international research and domestic advocacy, culminating in research papers and public media statements. These efforts are to be commended, as the Australian electorate was able access independent research on the activities of the Australian government overseas.

Coordinating overseas research is arguably more difficult than if the subject matter and effects were located in Australia, or indeed in another country where the English language was pervasive, and this research and associated advocacy is now recognised as beneficial to the Australian public.

Thirdly, there is a positive outcome on the ability of a charity to close the gap between government rhetoric and action. The *Aid/Watch* decision allows advocacy without reprisal, on the government's at times seemingly aspirational goals and the activities it undertakes to implement them.

27 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 245 [180-181]

28 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 220 [20]

29 At 42 and 44

Finally, and not to be underestimated, *Aid/Watch* provides improved certainty for charities that advocate for changes to government activities which fall under the first three heads of charitable classification. These charities need no longer be concerned that advocacy and generating public debate about government activities will betray their dominant purpose as a political object and risk disqualification.

Uncertainties from the *Aid/Watch* decision

Our analysis of the *Aid/Watch* decision and experience in the charity sector identified three areas of uncertainty. The first concerns the classification of government activities within the first three of *Pemsel's* classifications. In *Aid/Watch* the relevant government department, Ausaid, was directed by a policy whose dominant purpose was for the relief of poverty. It followed that Ausaid's actions also fell into this category. The question arises: What would be the outcome if the department's objects were not for the relief of poverty, but only some of its actions amounted to a charitable activity?

By way of example we turn to the activities of the Australian Defence Force (ADF), a government department primarily engaged in military activities overseas. Applying the dominant purpose test to ADF's objects would not place it into *Pemsel's* charitable categories. However the ADF can assist in disaster relief efforts domestically and overseas, arguably contributing to relieving poverty in regions experiencing fall-out from disasters. How would the ATO, or indeed a Court, deal with an organisation whose dominant purpose was attempting to improve the ADF's operations assisting communities by promoting debate about the actions of the ADF?

Aid/Watch referred to the "activities of government" in the context of encouraging public debate and activities for the public benefit.³⁰ The Court also referred to the "ends and means involved" in a charity's contribution to the public welfare.³¹ From these remarks we draw our opinion that the dominant purpose test does not apply to the relevant government body and it is only the charity's desired outcome (in relation to the government's activities) that is relevant to the first three heads of charitable activities. Therefore, it is our view that the dominant purpose test remains applicable only to the charitable organisation itself.

30 At 48

31 At 49

The second category of uncertainty concerns the government activities which are not for the relief of poverty. An example is the regular military activities of the ADF overseas. It is not difficult to imagine an advocacy organisation whose dominant purpose is to encourage public debate about the impact on poverty by Australia's involvement in international warfare. Clearly, the organisation's purpose would be within the spirit of a charitable organisation to generate debate about the alleviation of poverty, however the government's actions would not. In *Aid/Watch* the Court was explicit that the decision did not "determine whether the fourth head encompasses activities of government which lie beyond the first three heads".³² So what if the relevant government actions are directly contrary to activities in the first three heads? And what if agitation for changes to these activities would improve the status of poverty? In considering these questions we acknowledge that Australian Courts are seemingly alive to a modern interpretation of society's requirements and are not bogged down in literal interpretations. We also take comfort in the Constitutional bases outlined in *Aid/Watch* for establishing what is for the public benefit, and are optimistic that this circumstance would secure such an organisation's charitable status.

In short, it is our view any government actions that exacerbate poverty as a result of competing interests should be open to criticism by charitable organisations, and any ensuing debate is to be fostered and protected by the Courts.

The third category concerns circumstances where an organisation addresses the activities of non-state actors that are regulated by the Australian government with the goal of advancing a charitable purpose. This situation is complicated by the existence of actions of both government and other entities.

Aid/Watch was critical of Ausaid's relief of poverty by the involvement and payment to private organisations that carried out actual work. Whilst the efficiency of these private organisations was placed under scrutiny by *Aid/Watch*, the only relevant activities referred to by the majority regarding the efficient relief of poverty, were those of the government. We argue that, given the Constitutional foundations for establishing what is in the public welfare, and that "[t]he system of law which applies in Australia thus postulates for its operation the

32 At 48

very “agitation” for legislative and political changes”,³³ a charitable organisation ought to be able to generate public debate regarding the appropriateness of government regulation which has a direct or indirect effect on the relief, or otherwise, of poverty.

The ATO’s interpretation

On 12 October 2011 the ATO published TR 2011/4, the Taxation Ruling on *Income tax and fringe benefits tax: charities*. The ruling states:

[307] *Whether generating public debate about a particular government activity or policy that lies beyond existing heads of charity can be a charitable purpose under the fourth head will be decided on a case by case basis. Arguably, all government activity or policy is intended to be 'beneficial to the community' but this does not mean generating public debate about any government activity or policy will be charitable. The subject matter of the debate will still need to either come within the spirit and intendment of the Preamble to the Statute of Elizabeth (established by analogy to existing charitable purposes if not directly specified) or be deemed charitable by legislation applying for that purpose (see paragraph 10 of this Ruling). However, it is expected that the subject matter of many areas of government activity or policy would fall under one of the first three heads of charity or the already established charitable purposes under the fourth head, and where they do, a purpose of generating public debate about that activity or policy will be charitable.*³⁴

The ATO’s comments provide some comfort regarding the uncertainties above. The tax office views the ‘subject matter of the debate’ as analogous to a charitable purpose, so it seems the analysis of a charity’s activities will fall on purely the subject matter being discussed by the charity and the objectives of the particular government entity will be irrelevant. This interpretation is supported by our comments above.

What remains unclear is the situation where the activity of a government may not be charitable, such as the example of the ADF in combat above (uncertainty 2). However, by referring to the “subject matter of the debate” and because the debate is inspired by an

³³ At 45

³⁴ Australian Tax Office, TR 2011/4, Taxation Ruling on *Income tax and fringe benefits tax: charities*, 12 October 2011, at 307.

organisation which arguably has charitable ends, we anticipate that the ATO will focus on how public discussion is framed and the desired outcome of the debate. We think this is the correct approach and is preferable to the alternative narrow view that the subject matter refers solely to the government's activity where the resultant impact may be opposite to charitable.

For the activities of non-state actors, the ATO's reference to government policy is encouraging. If the objective of an organisation were the reform of actions of private enterprise we hope the ATO would acknowledge the government's role (or potential role) in its regulation. These types of organisations which are seeking charity status are encouraged to recognise and actively pursue strategic advocacy and discussion regarding government policy in order to be afforded the constitutional protection provided to Aid/Watch.

The way forward

The door is ajar for charities to explore the limits of legitimately generating public debate. As for any organisation testing the limits of law the risks and potential demands, be they financial or on resources, can be high. That said, we commend the Commissioner of Taxation on its behaviour as a model litigant, ultimately recognising this area of law was unclear and subsequently providing test case funding, without which the High Court appeal would not have been heard.

The current government has proposed that the definition of charitable organisation will be codified in statute by the new Charities and Not-for-profits Commission.³⁵ The *Aid/Watch* decision provides an instructive, contemporary basis for this statute. We are optimistic that the High Court's careful reasoning underpinning the Constitutional bases of what is determined to be in the "public benefit" will guide law-makers to strengthen potential areas of uncertainty and legislate in favour of robust protections for charities.

35 See footnote 6