



James Goodman
24 November 2009

Dear Productivity Commission,

Submission for the Report, 'Contribution of the Not for Profit Sector'

Aid/Watch welcomes the Draft Recommendation 6.3 of the Productivity Commission's Draft Report on the Contribution of the Not for Profit Sector. Recommendation 6.3 reads as follows: 'The Australian Government should adopt a statutory definition of charitable purposes in accordance with the recommendations of the 2001 Inquiry into the definition of charities and other organisations'. As outlined in this Submission, Aid/Watch would like some clarification as to the detail of a statutory definition of charitable status 'in accordance with' the recommendations of the 2001 Inquiry. Would the Commission recommend that all of the recommendations of the 2001 Inquiry be implemented, and if so how? Our concern, as detailed here, centres on recommendations 13 and 5 of the 2001 Inquiry, that deal with the definition of charitable purposes and activities.

Our interest in this matter stems from three-year legal case that we have been pursuing. As outlined in the attached background paper, Aid/Watch was disqualified as a charity by the ATO in 2006, for engaging in what the ATO defined as uncharitable political activities. The AAT overturned the disqualification in 2008. The ATO appealed this decision at the Federal Court in 2009, arguing that all Aid/Watch purposes were uncharitable. The Federal Court found in favour of the ATO, and in November 2009 Aid/Watch applies for Special Leave to Appeal to the High Court, to overturn the Federal Court decision. That application is pending.

Significantly, the Federal Court stated 'this area of Australian law is informed by concepts which, due principally to their antiquity, are not easily adapted to the modern context.' Legislation from England in 1601, the 'Statute of Elizabeth', defines charitable status in Australia today, namely that charities can relieve poverty or advance education or religion, or have other purposes of public benefit. Under this definition a dominant political purpose disqualifies charitable status.

The Federal Court found that Aid/Watch has a clear charitable purpose by aiming to alleviate poverty and to engage in public education, and to do this by monitoring the aid program. It rejected the ATO's claim that charities must be involved in directly alleviating poverty, in this case directly distributing aid, if they are to be defined as a charity. It also rejected the ATO's argument that conducting and publicising research, as undertaken by Aid/Watch, could not be defined as public education.

The judges then held that, because the Aid/Watch constitution seeks 'to ensure' that aid alleviates poverty, then by definition Aid/Watch has a political purpose. Aid/Watch takes a 'view' on the aid program, and seeks to 'ensure' its view prevails. It thus has a political purpose. Because this purpose is prominent in the Aid/Watch constitution, the Court's view is this is the dominant purpose of Aid/Watch. This dominant political purpose breaches the Statute of Elizabeth, so Aid/Watch is not a charity. Aid/Watch believes the Federal Court decision imposed an overly restrictive definition of charitable status, not in accord with contemporary practice (see attached background paper).

Instead of being defined by courts interpreting the common law, the definition of charities could, as recommended by the draft Productivity Commission Report, be established through federal legislation.



Aid/Watch believes that if the purpose of such legislation was to implement the Recommendations of the 2001 Inquiry, then the definition of charities in Australia could be significantly improved.

The Inquiry found that a gulf had opened up between a long-standing legal definition dating back to the reign of Elizabeth 1, and the practice of charities today. Recognising that charities do much more than distribute assistance, the Inquiry recommended that the legal definition of charitable purpose be updated and widened. Specifically, the inquiry stated that the purpose of charities today is not limited to direct assistance, and instead encompasses 'protection, maintenance, support, research, improvement or enhancement' of public benefit.

This finding of the 2001 Inquiry directly reflects the Aid/Watch case, and is expressed in the 'preferred option' under recommendation 13, that charitable purposes shall be: 'the advancement* of health... ; the advancement* of education; the advancement* of social and community welfare...; the advancement* of religion; the advancement* of culture...; the advancement* of the natural environment; and other purposes beneficial to the community... (* Advancement is taken to include protection, maintenance, support, research, improvement or enhancement).'

The inquiry also found that advocacy is an important element of charitable activity, provided it furthers these charitable purposes. Recommendation 5 states that any activity in pursuit of charitable purpose is acceptable, provided it is not illegal, is 'contrary to public policy' or involves the promotion of a political party or a candidate for political office. Whilst the concept of activities 'contrary to public policy' may need to be more closely defined, this clearly permits charities to engage in advocacy so as to influence government policies and practices.

The Aid/Watch case demonstrates the urgent need for such legislation. Aid/Watch purposes and activities would be more-than-accommodated under this definition. Indeed, such a definition of charitable status would accommodate the purposes and activities that charities are in practice engaged-with today. This was, indeed, the position taken by the 2008 Federal Inquiry into 'Disclosure regimes for charities and not-for-profits', which noted 'general support for the implementation of the recommendations of the 2001 Inquiry in order to clarify eligibility for taxation status', and itself stated 'there needs to be an ongoing clarification of these terms for the Sector'.

In 2008 the Federal Government announced a new era of social inclusion, and a new Federal partnership with charities. Much progress has been made in this regard, but if the Federal Government wants a genuine partnership with the charitable sector, it must update the ATO's definition of charitable status.

Sincerely

Dr James Goodman,
For the Aid/Watch Management Committee

BACKGROUND ON THE AID/WATCH CHARITABLE TAX STATUS CASE

The legal timeline and most recent court decision

In October 2006, the Australian Tax Office (ATO) moved to disqualify Aid/Watch as a charitable organisation. The ATO insisted Aid/Watch is not a charity on the basis that its purpose is to monitor the aid program, not to deliver aid. The ATO argued that Aid/Watch attempts to influence government aid

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programs, and this is likewise uncharitable. On both counts, the ATO imposed a restrictive definition of charitable status, at odds with current realities.

Aid/Watch appealed this decision to the Administrative Appeals Tribunal and in July 2008 the AAT President, Justice Downes, found in favour of Aid/Watch and overturned the ATO's decision.

In February 2009 the ATO appealed to the full court of the Federal Court, indicating that this case would be a test case for the charitable sector.

The Federal Court judgement was handed down on 23 September 2009. It overturned the decision of the AAT and found in favour of the ATO.

The judgement focused on the question of whether Aid/Watch has a charitable purpose. It held that there are three broad elements:

- Is alleviation of poverty a purpose of Aid/Watch? Yes;
- Is public education a purpose of Aid/Watch? Yes;
- Does Aid/Watch have a dominant non-charitable political purpose? Yes.

It is on the basis of the third element that the court found in the ATO's favour.

At the outset the judges stated 'this area of Australian law is informed by concepts which, due principally to their antiquity, are not easily adapted to the modern context.' Legislation from England in 1601, the 'Statute of Elizabeth', defines charitable status in Australia today, namely that charities can relieve poverty or advance education or religion, or have other purposes of public benefit. Under this definition a dominant political purpose disqualifies charitable status.

The Federal Court found that Aid/Watch has a clear charitable purpose by aiming to alleviate poverty and to engage in public education, and to do this by monitoring the aid program. It rejected the ATO's claim that charities must be involved in directly alleviating poverty, in this case directly distributing aid, if they are to be defined as a charity. It also rejected the ATO's argument that conducting and publicising research, as undertaken by Aid/Watch, could not be defined as public education.

It is the judgement on political purpose that is most dangerous for the charitable sector. The judges held that, because the Aid/Watch constitution seeks 'to ensure' that aid alleviates poverty, then by definition Aid/Watch has a political purpose. Aid/Watch takes a 'view' on the aid program, and seeks to 'ensure' its view prevails. It thus has a political purpose. Because this purpose is prominent in the Aid/Watch constitution, the Court's view is this is the dominant purpose of Aid/Watch. This breaches the Statute of Elizabeth, so Aid/Watch is not a charity.

What disqualifies AidWatch, for the Court, is that AidWatch's seeks to ensure 'that the delivery of aid should conform to its view'. The Court states that in doing this AidWatch 'does not take into account that government and its agencies inevitably have to make choices in determining where, how and how much aid is to be delivered'. The Court adds, 'Undoubtedly some of those choices will involve factors with which Aid/Watch is concerned. Others, however, will involve domestic and foreign political considerations that do not concern AidWatch'.

So, as a charity AidWatch can devote itself to monitoring the aid program, in order to educate the public and alleviate poverty. But it cannot take a view on the aid program. We believe that this judgement is



contradictory. The Court accepts that monitoring the aid program to alleviate poverty and for public education is a charitable purpose.. But the Court finds that the moment AidWatch seeks pursue this purpose, it ceases to be a charity.

The Full Federal Court decision is here:

Commissioner of Taxation v Aid/Watch Incorporated [2009] FCAFC 128
<http://www.austlii.edu.au/au/cases/cth/FCAFC/2009/128.html>

The Administrative Appeals Tribunal decision is here:

Aid/Watch Incorporated and Commissioner of Taxation [2008] AATA 652
<http://www.austlii.edu.au/au/cases/cth/aat/2008/652.html>

Implications for the NGO sector

The ruling in this case has implications for the charitable sector as a whole – particularly for NGOs that engage in advocacy and lobbying of the government for policy reforms. This case threatens the ability for charities to speak out fearlessly on political issues.

The broad reaching implications of this case have been recognised by the Human Rights Law Resource Centre, which together with the National Association of Community Legal Centres, has taken up this case. Their report to the March 2008 meeting of the United Nations Human Rights Commission, which assesses Australian compliance with international human rights law, specifically cited the AIDWATCH case as a potential threat to freedom of expression.

The media have also recognised the importance of this case for the sector as a whole. Please find links to articles that have tracked the case below:

The Australian, *Tax battle may affect advocacy bodies*, Rowan Callick, 23 November 2009.
<http://www.theaustralian.com.au/news/nation/tax-battle-may-affect-advocacy-bodies/story-e6frg6nf-1225801867834>

The Australia Institute, *Between the Lines, An Uncharitable Act: The Aid/Watch Case*, 26 October 2009. <https://www.tai.org.au/index.php?q=node%2F19&act=display&type=3&pubid=693>

Third Sector Magazine, *Charitable purposes versus political agendas*, 2 October 2009,
http://thirdsectormagazine.com.au/news/maintaining_the_balance_charitable_purposes_versus_political_agendas/008282/

Australian Financial Review, *Ruling threatens charities*, Marsha Jacobs, 25 September 2009

Sydney Morning Herald and The Age, *Test Case Ruling May Define Charity Status*, Adele Horin, 11 February 2009. <http://www.smh.com.au/national/test-case-ruling-may-define-charity-status-20090210-83ip.html>

ABC Radio National, *National Interest, When is a charity no longer a charity*, 25 September 2009
<http://www.abc.net.au/rn/nationalinterest/stories/2009/2697050.htm>



Sydney Morning Herald, *Canberra's gagging us, say charities*, Matt Wade, 30 May 2007
<http://www.smh.com.au/news/national/canberras-gagging-us-say-charities/2007/05/29/1180205251558.html>

ABC Radio National, Law Report, *Charity in the 21st Century*, Interview with Aid/Watch solicitor Anne Gooley <http://www.abc.net.au/rn/lawreport/stories/2008/2321272.htm>

The Appeal Process

There are two stages to the High Court appeal process. The first involves making an application for Special Leave to Appeal to the High Court. The second is the appeal itself. Factors in favour of the application for special leave to appeal are as follows:

- (i) The judgement states that the Federal Court 'as an intermediate appellate court' cannot overturn previous law (which has its origin in an English House of Lords decision which was determined in 1917), which states that a charitable body cannot engage in matters considered to be "political". This suggests the case needs to be heard at the High Court level in Australia to determine whether in today's society, where government engages in a vast number of areas, that public debate can be said to be "political" in the first instance, and if so whether it can be said that public debate is in the "public interest" and a charitable body that promotes such debate is not thereby disqualified from being considered a "charitable institution".
- (ii) The judgement overturns a decision of the AAT, made by a judge, which lends it some significance.
- (iii) The issue of the political role of charities has not been dealt with by the High Court in Australia in any depth, and the appellate law is uncertain.
- (iv) The judgement has wide implications for the charitable sector, and for issues of equity and public engagement in society at large.
- (v) Judges, and others, have expressed concern at the potential breadth and impact of the exclusion from public debate for charities, which can be categorised as "political". If so categorised the institutions charitable status is at risk.
- (vi) The judgement is based solely on the question of political debate. The Federal Court accepts that Aid/Watch has charitable purposes to alleviate poverty and provide public education. It finds these are cancelled-out by a dominant political purpose to participate in public debate.