

Charities can be political

Aid/Watch Incorporated v Commissioner of Taxation [2010] HCA 42

By Elizabeth O'Shea

On 1 December 2010, the High Court handed down a decision that ended almost four years of uncertainty for the charitable sector. In a David versus Goliath moment in 2006, the Australian Tax Office (ATO) deprived the small grassroots organisation, Aid/Watch, of its charitable status. With this judgment, Goliath was defeated and the High Court confirmed that Aid/Watch can keep its charitable status.

This decision, with its emphasis on the benefit of political communication, will send ripples through the charitable sector. There are several significant findings in this judgment. The High Court has ruled that generating public debate by lawful means is beneficial to the community. Reasoning such as this from the highest court in the land has enormous implications for many Australian charities, whose tax status was threatened by the ATO decision. The High Court also reflected on the history and make up of the Australian Constitution. It found that agitation for political and legislative change is an important part of the Australian democratic process.

Aid/Watch monitors, researches and reports on the performance of the Australian government's overseas aid programs. Between 2010 and 2011, the Australian government will spend \$4.3 billion of tax payer money on foreign aid. Organisations like Aid/Watch play a crucial role in examining how this is done. It is no surprise, then, that a watchdog like Aid/Watch regularly raises the ire of the government.

In 2006, Aid/Watch was critical of the spending of the Tsunami Aid fund. Later that year, the ATO withdrew Aid/Watch's charitable status for its 'political activities'. This had a significant effect on the small organisation, which relies on charitable donations. It also had chilling effect on many organisations across the entire charitable sector, fearing they could be next.

In 2008, the Administrative Appeals Tribunal overturned the ATO's decision, but in 2009 the ATO appealed successfully to the Federal Court. The High Court agreed this year to hear the case on appeal.

There has never been a statutory definition of charities in Australia. Over time, the definition of charity has evolved through the common law. Indeed, the foundation for this area of law is the Statute of Elizabeth, a document from 1601, which sets out the four charitable purposes:

1. Relief of poverty
2. Advancement of education
3. Advancement of religion
4. Any other purpose for the public benefit

Firstly, the High Court noted that the law of charities is not fixed: it has evolved to accommodate new social needs. Many charities provide services, such as food for the poor and shelter for the homeless. The High Court acknowledged that

modern charities also regularly monitor and comment on government policy regularly. Indeed, in the modern political world, charities are constantly being asked by government to 'take a view' on policy initiatives and make submissions. The High Court judgment confirms that this is sensible: a charity to assist the homeless could provide an important contribution to public policy in relation to public housing, for example.

As such, the distinction between politics and charity is not clear: it is no longer possible to imagine a charity that would abstain from policy debates, and the pursuit of charitable purposes has become inseparable from policy advocacy.

Secondly, the decision embraced the history and nature of the Australian political system. The High Court noted that 'agitation' for legislative and political changes has long been part of Australian democracy and is reflected in our Constitution.

This is significant, because the decision to withdraw Aid/Watch's charitable status had the potential to restrict freedom of political communication. In 1992, the High Court had recognised that free political communication was a necessary part of our representative democracy, as established by the Australian Constitution. The ATO's political disqualification prevented charities from having a dominant political purpose, and as such restricts freedom of political communication.

The High Court, in its judgment, instead recognised that the generation of public debate by lawful means is beneficial to the community for the purposes of charity law. This is clear in the case of Aid/Watch itself: in fields where the government dominates, such as providing overseas aid, taking a view on policy is a valuable contribution to the community. More fundamentally, it sends a very clear message to the entire sector. The High Court recognised the work of charities generally in generating political debate. This judgment confirms that such contributions are in the public benefit.

There was an acknowledgement that the common law should move with the times. This is a legal area that has long been overlooked by the legislature, a fact that the High Court had previously acknowledged. It was up to the High Court to resolve a potential clash between the constitutionally entrenched freedom of political communication, and the common law of charity.

The outcome of this case shapes the role of charities in Australian public life. Given the centrality of charities in Australian civil society, this is a test case of the quality of our democracy. With this decision, the High Court has given strength to those democratic principles. ■

Elizabeth O'Shea is the head of Maurice Blackburn's Social Justice Practice, which litigates matters in the public interest. Maurice Blackburn represented Aid/Watch during this case.