

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 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 (AAT) 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 AID/WATCH, for the Court, is that AID/WATCH seeks to ensure 'that the delivery of aid should conform to its view'. The Court states that in doing this AID/WATCH '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 AID/WATCH.'

So, as a charity AID/WATCH 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 AID/WATCH 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 AID/WATCH 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:

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

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>