

# Aid/Watch Case Addresses Tax Exempt Status

Jonathan Casson



**Jonathan Casson, Partner, Holman Webb Lawyers, reports on *Aid/Watch*, the landmark decision concerning whether organisations engaging in political communication and lobbying could be considered 'charitable institutions' - qualifying for tax exemption.**

*Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 is the latest in a line of cases between the Tax Commissioner and Not-For-Profit (NFP) organisations over the last decade regarding the tax authorities' attitude to eligibility for tax-exempt status. By a majority, the High Court ruled that *Aid/Watch*, an organisation concerned with promoting effectiveness in foreign aid by way of political advocacy and lobbying, was a charitable institution. It was expressly held that there is no general doctrine which excludes "political objects" from charitable purposes.

This decision overturned over a century of case law establishing that political purposes disqualify an organisation from being endorsed as charitable. The High Court in *Aid/Watch* held that, as the term 'charitable institution' is not defined in tax legislation, its definition can change over time to accommodate new thinking and new social needs, just like other judge-made law. This willingness to consider charity as an evolving concept is consistent with the attitude witnessed in other recent decisions, including that of the High Court in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55, and that of Justice French (now the High Court Chief Justice) in the Federal Court's decision of *Victorian Women Lawyers' Association Inc. v Commissioner of Taxation* [2008] FCA 983.

## The Case

The primary question was whether *Aid/Watch*'s public advocacy fitted into one of the categories of charitable activity as laid-down in *Pemsel's case* [1891] AC 531 HL and enshrined in statute, and in particular whether it fitted within the fourth category of charitable activity as being for "other purposes beneficial to the community".

The majority held that public debate about how best to deliver foreign aid was a beneficial, and thus charitable, purpose. This is because activities by which entities 'agitate' for legislative and political change contribute to the public welfare because they support the operation of the constitution of Australia, which mandates a system of representative and accountable government. Freedom of political advocacy and communication is "an indispensable incident" of such a government.

...2

## The Implications

A positive implication of this decision for charities may be an increased ability to carry out campaigning and advocacy activities, rather than merely providing educational information, without jeopardising their charitable status. This could be extremely advantageous for charities as legislative change is often the most effective method through which to generate societal improvements.

It remains unclear, however, whether the activities must be directed toward one of the first three categories of charitable purpose or whether generating public debate in relation to government activities generally would be a charitable purpose within the fourth *Pemsel* category. Arguably political campaigning per se may be a charitable purpose or at least not disentitle endorsement. The majority appeared to imply this conclusion by referring to “agitation” for legislative and political changes as “constitutional processes which [contribute] to the public welfare”. However, the Court expressly left open the resolution of this issue, as it was beyond the demands of the case.

How this decision is likely to impact upon non-charitable not-for-profit organisations is less clear, as the reasoning of *Aid/Watch* focuses primarily on the definition of ‘charitable institution’. Perhaps professional and mutual not-for-profits will have more scope to advocate on behalf of members’ interests, particularly in relation to government policy.

*Jonathan Casson is a partner at Holman Webb Lawyers  
and can be contacted at [jonathan.casson@holmanwebb.com.au](mailto:jonathan.casson@holmanwebb.com.au)*

*This article first appeared in Associations Edition 28 – March 2011*