
AUSTRALIAN POLITICAL LOBBYIST GROUP WINS FIGHT TO KEEP CHARITABLE STATUS

*Terrance S. Carter**

A. INTRODUCTION

On December 1, 2010, the High Court of Australia released its decision in *Aid/Watch Incorporated v. Commissioner of Taxation*.¹ At issue was whether or not the appellant, Aid/Watch Incorporated (“Aid/Watch”), qualified as a charity. Specifically, Aid/Watch claimed that its political lobbying was for the purpose of relieving poverty and for the advancement of education. Aid Watch also claimed that its objectives fell under the fourth heading in the U.K. House of Lords decision in *Pemsel*,² “other purposes beneficial to the community.” This *Charity Law Bulletin* provides a brief outline of the case, including its reference to the law in Canada.

B. ORIGINS OF THE CASE

The case originated in October, 2006, when Aid/Watch had its charitable status revoked by the Commissioner of Taxation (“Commissioner”) in Australia. Aid/Watch lodged an objection to the revocation, which was unsuccessful. On July 28, 2008, the Administrative Appeals Tribunal set aside the decision of the Commissioner and ruled that Aid/Watch was a charity. The Commissioner then appealed to the Full Court of the Federal Court, which set aside the Administrative Appeals Tribunal decision and restored the decision of

* Terrance S. Carter, B.A., LL.B., Trade-Mark Agent, is managing partner of Carters Professional Corporation, and counsel to Fasken Martineau DuMoulin LLP on charitable matters. The author would like to thank Jason Todoroff, B.A.(Hons), J.D., Student-at-Law, for his assistance in the preparation of this *Bulletin*.

¹ *Aid/Watch Incorporated v. Commissioner of Taxation*, [2010] HCA 42.

² *Commissioners for Special Purposes of Income Tax v. Pemsel* [1851] AC 531 [*Pemsel*]

the Commissioner. Aid/Watch then appealed to the High Court of Australia, the equivalent of the Supreme Court in Canada.

C. THE MAJORITY'S DECISION

The case involved two central questions. The first question was whether the appellant's activities fit into one of the four classes of purposes for charity at Common Law. Secondly, was there anything in the Aid/Watch's purposes which disqualified it from being a charitable institution?

In a five-to-two decision, the High Court of Australia allowed the appeal of Aid/Watch and the order of the Full Court of the Federal Court was set aside. The majority rejected the Full Court's finding that:

Aid/Watch's attempt to persuade the government (however indirectly) to its point of view necessarily involves criticism of, and an attempt to bring about change in, government activity and, in some cases, government policy. There can be little doubt that this is political activity and that behind this activity is a political purpose. Moreover the activity is Aid/Watch's main activity and the political purpose is its main purpose. Recognising Aid/Watch's ultimate concern to relieve poverty does [not] diminish its political purpose.³ [sic]

The High Court surveyed the law in England, the United States and Canada for comparison purposes. In doing so, it referred to Canadian income tax legislation with its unique treatment of "political activities," although obviously distinguishable from the law in Australia:

The Canadian income tax legislation provides for the registration of charitable organizations and charitable foundations. It makes express provision for the conduct of "political activities"; these are considered to be charitable activities or charitable purposes, only if they are of an ancillary and incidental nature and if they do not include the direct or indirect support of, or opposition to, any political party or candidate for public office.⁴

In making this observation, the High Court was referencing subsections 149.1(6.1) – (6.2) of the *Income Tax Act* [Canada],⁵ which in essence permits a registered charity in Canada to carry on political activities, provided that such activities:

- a) do not constitute more than 90% of the resources of the charity;

³ *Supra* note 1, at para. 7.

⁴ *Ibid.*, [2010] HCA 42, para. 26.

⁵ *Income Tax Act*, R.S.C. 1985, c 1 (5th Supp).

- b) are ancillary and incidental to its charitable purposes for foundations or its activities for charitable organizations; and
- c) do not include the direct or indirect support of, or opposition to, any political party or candidate for public office.

The majority of the High Court agreed with Aid/Watch's submission that the generation by lawful means of a public debate concerning the efficiency of foreign aid to the relief of poverty, itself was a purpose beneficial to the community within the fourth head of *Pemsel*.⁶

D. THE DISSENTING OPINIONS

Justice Heydon, one of the two dissenting judges, cited the Tribunal's decision that stated, "a fundamental part" of the appellant's work was "campaigning, very often against government."⁷ This seemed to indicate that the political activities themselves were the primary objective of Aid/Watch. Justice Heydon also observed that:

The appellant did not have the goal of relieving poverty. It provided no funds, goods or services to the poor. It did not raise funds to be distributed to the poor by others. The purposes of the appellant embraced aid to the poor, but they also embraced aid to many other sections of society as well.⁸

Justice Heydon also rejected the claim by Aid/Watch that it was educational in nature of its purpose.

Thus education is not a main or even a substantial purpose of the appellant. And the appellant's activities did not involve any systematic method or procedure for the inculcation of knowledge, the cultivation of mental or physical powers or the development of character.⁹

Justice Heydon went further to state that Aid/Watch's function was polemical and not educative.¹⁰

The other dissenting judge, Justice Kiefel acknowledged that in today's world it may be necessary for organizations to agitate for changes in government policy or legislation in legitimate pursuit of their

⁶ *Supra* note 1, para. 47.

⁷ *Ibid.*, para. 56.

⁸ *Ibid.*, para. 60.

⁹ *Ibid.*, para. 62.

¹⁰ *Ibid.*, para. 62.

charitable purposes. “No-one would suggest that charitable and political purposes are mutually exclusive.”¹¹ Justice Kiefel focused on the educational claim made by Aid/Watch. She stated that Aid/Watch in its “... freedom to communicate its views does not qualify as being for the public benefit.” She reached this conclusion by noting that:

There was no suggestion that it undertook public teaching. Individual members of the appellant have produced some reports, four of five in number, on aid projects, but it was not suggested that they were disseminated to the public, such as would support the characterization of research as for the purpose of education.¹²

E. IMPORTANCE OF THE DECISION

The judgment of the High Court is a significant success for Australian charities that are politically active in advocacy and lobbying. Aid/Watch, on their website has claimed that the decision ends a “four year gag on free speech for many NGOs.”¹³ Others fear, however, that this decision may have opened the floodgates and will allow professional political lobbyists to register as charities. The Australian law firm, Arnold Bloch Leibler characterizes the decision as adding uncertainty in the law regarding the political activities of charities. “It is unclear whether institutions that solely have political objects may be entitled to be endorsed as ‘charitable institutions.’”¹⁴ They state that, “This is likely to be a hotly contested issue in the coming years.”¹⁵ It will be interesting to see what develops in this regard in the future.

¹¹ *Ibid.*, para. 68.

¹² *Ibid.*, para. 84.

¹³ “High Court decision a win for charities’ freedom of speech” Aid/Watch News 01 Dec, 2010, available online at: <http://www.aidwatch.org.au/news/high-court-decision-a-win-for-charities'-freedom-of-speech>.

¹⁴ Arnold Bloch Leibler, “Aid/Watch Case: Important decision on tax exemptions and concessions relating to charitable institutions” Bulletin, 22 December, 2010, available online at: <http://www.abl.com.au/ablattach/taxbul101222.pdf>.

¹⁵ *Ibid.*