



Kathy Riley
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Adelaide SA 5000

C/- Reichstein Foundation
2nd Floor
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Melbourne 3000
22 June

Dear Ms Riley,

Re: Draft Taxation Ruling TR 2011/D2 – Income and fringe benefits tax: charities

Changemakers Australia is an incorporated national organisation which aims to support the growth of social change philanthropy in Australia. This includes promoting the important role advocacy plays in achieving systemic change. Changemakers works with a wide range of charities, both philanthropic organisations and community organisations, to promote social change philanthropy. Changemakers is also a charity itself, with Tax Concession Charity status.

Earlier this year Changemakers surveyed a range of not for profit organisations to uncover the impact of legal restrictions on advocacy and the options for resolving barriers to advocacy for public policy reform. Our report *Freedom to Speak: Capacity to Act*, considered the impact of the High Court decision on *Aid/Watch v Tax Commissioner* and concluded that a number of the barriers would be resolved by the reflection of this decision in the Tax Ruling. Accordingly, we have been very interested to review the draft Tax Ruling and consider whether it does accurately reflect the High Court decision.

In summary, Changemakers concludes that the draft Tax Ruling does uphold the High Court decision on *Aid/Watch v Tax Commissioner*. By reflecting the High Court's determination that the "political purposes doctrine" does not and never did apply in Australia, charities can now confidently undertake advocacy without restriction, beyond the requirement to act in accordance with the law and in line with public policy.

Our primary concern regarding the draft Tax Ruling relates to the special attention given to "direct lobbying of parliamentarians". We understand that the draft Ruling considers that a **purpose** of direct lobbying would not have sufficient "public debate" characteristics in order for an entity to qualify as an "Aid/Watch" style charity under the fourth head. However, we contend that lobbying – which is essentially a more value laden way of describing the act of communication with parliamentarians – is clearly a type of activity which the High Court considered to be 'an indispensable incident' of the Australian constitutional system.

Our understanding of the draft Ruling is that charities are allowed to lobby and that charities are able to include law reform and lobbying in their objects. However, we are

concerned that by singling out “direct lobbying”, the ATO is unintentionally sending out a message that lobbying is restricted. This concern was highlighted at the recent forums Changemakers held with the Council of Social Service organisations in Victoria and NSW. At both forums people raised concerns with Changemakers along the lines of “what is lobbying and what won’t charities be allowed to do”.

It would be a perverse outcome of the Ruling if it led charities to believe (rightly or wrongly according to the law) that they can legitimately agitate for change using public campaigning tools, but they are not supposed to raise matters directly with decision makers. Our recommendation is that the reference to ‘direct lobbying’ be removed.

In addition we believe that the draft Ruling could be improved by adopting some minor changes aimed at improving clarity and accessibility. It is important to understand that the final Ruling needs to clearly convey the Tax Office’s interpretation of the law to people who are not lawyers. All charities need to abide by the Ruling, but not all charities are in the financial position to have in-house counsel or the ability to seek professional legal advice. We have drawn upon our interviews with people from the not for profit sector in an attempt to anticipate how individuals may interpret the draft Ruling and the meaning that particular words may convey.

Finally, while we understand that the Ruling draws upon hundreds of years of common law, we believe that modern words and terms should be used in the Ruling. We have identified a number of examples where the language is out of date and have made recommendations for its modernisation.

Changemakers would like to thank the Tax Office for the opportunity to provide feedback on the draft Ruling and also for the ATO’s help and support in our efforts to engage the wider not for profit sector in this issue.

Yours sincerely,

Jill Reichstein
Chair

Changemakers Australia

Recommended changes to draft ruling

Sole purpose

[5] '**sole purpose**' is used in this draft Ruling to mean the only or the 'main or predominant or dominant' purpose of an institution as described in paragraph 26 of this Ruling. It has been used because the only purposes a charitable institution can have are charitable purposes or purposes incidental or ancillary to charitable purposes. It also helps avoid misunderstandings that can arise because of different usages (especially in a taxation context) of various terms that have been used by the courts to describe the required purpose.

Comments

While we appreciate the intention behind this definition, we are concerned that the use of the term 'sole purpose' may mislead organisations into thinking they can only have one purpose. This is particularly so if the reader has not read the definition in this paragraph first. The phrase 'sole purpose' is also confusing when there are references to 'independent purposes' (see eg [68]).

This situation can be resolved by either using a different term which is less restrictive (such as predominant) or by referencing back to the definitions whenever 'sole purpose' is used. We have continued to use 'sole purpose' in our suggestions below but would appreciate some consideration of how to resolve our concern in the finalization of the draft.

Political activities—draft ruling

67. There is no general doctrine in Australia which excludes a charity from having political purposes.⁶¹

68. Following the High Court's decision in *Aid/Watch*, an entity can be charitable if it has a purpose (including a sole⁶² purpose) of generating public debate with a view to influencing legislation, government activities or government policy in relation to subject matters that come within one of the first three heads of charity or the already established charitable purposes under the fourth head of charity, as long as the ends to be achieved are not inconsistent with the rule of law and the established system of government. Examples of purposes that have been held to be charitable under one of the four heads of charity are in Appendix 2 from paragraph 292 of this Ruling.

69. An entity can pursue a purpose of generating public debate by expressing a singular point of view, including by campaigning or by agitation.

70. It will not necessarily be charitable to generate public debate about legislation, government activity or policy relating to subjects beyond the existing heads of charity. Whether this is charitable will be decided on a case by case basis. The subject matter to which the debate is directed will still need to either come within the spirit and intent of the preamble to the Statute of Elizabeth (and this is usually established by analogy to existing charitable purposes) or be deemed charitable by legislation applying for that purpose (see paragraph 10 of this draft Ruling).

71. Political parties are not charitable. A sole purpose of engaging in activities associated with political parties, such as engaging in political campaigns, is not charitable. However, an entity could seek to persuade members of the public to vote for or against particular candidates or parties in an election for public office, or distribute material designed to underpin a party political campaign, if that activity is incidental to its charitable purpose.

Comments

We agree with the substance of the section on political activities, but believe that the structure and the terms could be made clearer, especially for the reader unfamiliar with charity law. We have proposed a restructure of the paragraphs as above.

We believe it is clearer to bring together first the elements of the text that are clearly established by Aid/Watch as charitable: namely, the existing heads of charity; the reference to examples of established purposes; and the ability to generate public debate through campaigning. We believe it is important to use words such as ‘campaigning’ (or ‘activist’ or ‘agitating’), as used in Aid/Watch itself, to indicate the scope of the High Court’s decision. We have sought to separate the various components of the text into discrete paragraphs for the sake of readability and clarity.

We have removed reference to “direct lobbying” on the basis that lobbying activities are consistent with the High Court’s statements on our constitutional system and the need for communication between electors and legislators.

We have sought to clarify that while a purpose of engaging in electioneering- type activities is not charitable, incidental engagement in such activities is charitable (bringing together the text in [291] of the draft ruling into this paragraph to make this clearer).

We have also made minor amendments to the text to ensure the accessibility of the text. The sentence beginning ‘Arguably’ in current [68] (second dot point) of the draft ruling has been restructured to make it simpler. The reference to ‘spirit and intendment’, while reflecting the judicial language, has been changed to ‘spirit and intent’ to make it more accessible. We have preferred the phrase ‘incidental’ rather than ‘no more than incidental’ as being clearer and less likely to imply a quantitative requirement (contrary to para 27). Finally, we have sought to clarify the reference to ‘electioneering’ to specify the kinds of activities contemplated by that phrase.

Political activities—Explanation

Political purposes

270. Until the High Court's decision in *Aid / Watch* it was generally accepted that 'the political purposes doctrine' applied in Australia. The 'political purposes' doctrine previously held that organisations with a sole political purpose did not satisfy the technical legal meaning of 'charity'. The rationale was that a Court is unable to determine whether such a purpose satisfies the public benefit requirement of a charity.

271. In *McGovern & Ors v. Attorney - General and Anor* [1981] 3 All ER 493, which considered whether Amnesty International was a charity, Slade J defined political purposes broadly to include:

- furthering the interests of a particular political party;
- procuring changes in the laws of the country or a foreign country;
- procuring a reversal of government policy in the country or a foreign country; and
- procuring a change in particular decisions of government authorities in the country or a foreign country.

273. In *Aid / Watch*, the High Court held that this doctrine did not apply in Australia, stating that 'in Australia there is no general doctrine which excludes from charitable purposes 'political objects' and has the scope indicated in England by *McGovern v. Attorney - General*'²⁴¹.

274. The Court considered in that case whether an organisation whose purpose was to ensure that foreign aid was delivered in a particular way, and which aimed to influence government to this end, could be charitable. The organisation was concerned with promoting the effectiveness of Australian and multinational aid provided in foreign countries by means of improved investment programs, projects and policies. It researched 'generally in partnership with people that are recipients of aid and non-government organisations; it brought the issues it identified to light by publicly releasing the research reports and it campaigned for changes to the ways in which aid was delivered through media releases and public events designed to influence relevant agencies to alter the way aid programs are administered'.

274. The High Court held that the organisation was charitable. In doing so, the Court reversed the decision of the Full Court of the Federal Court. The Full Court had concluded that the organisation's concern with the effectiveness of aid delivery was clearly aimed at the relief of poverty, but that its attempts to persuade the government to its point of view and to bring about a change in government activity and policy was political activity, behind which was a political purpose. As a result, it held the organisation could not be charitable.²⁴⁰

276. The High Court's rejection of the 'political purposes doctrine' in *Aid/Watch* was based on the inconsistency between the doctrine and the system of law in Australia provided for by the Constitution. The provisions of the Constitution mandate a responsible and representative system of government. The majority of the High Court stated that:

Communication between electors and legislators and the officers of the executive and between electors themselves on matters of government is 'an indispensable incident' of that constitutional system.²⁴²

277. They stated at paragraph 45:

The system of law which applies in Australia ...postulates for its operation the very 'agitation' for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*It is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.

278. The majority accepted the submissions of *Aid/Watch Incorporated* that the generation by it of public debate as to the best methods for the relief of poverty by the provision of foreign aid had two characteristics indicative of its charitable status.

279. The first characteristic was that its activities were apt to contribute to the public welfare, being for a purpose beneficial to the community within the fourth head identified in *Pemsel*.

280. The second characteristic was that '...whatever else be the scope today in Australia for the exclusion of 'political objects' as charitable, the purposes and activities of *Aid/Watch* do not fall within any area of disqualification for reasons of contrariety between the established system of government and the general public welfare'.²⁴³

281. The majority concluded that 'the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community under the fourth head of charity'.²⁴⁴ For this reason they found it unnecessary to rule on the submissions of the Commissioner that the Full Court should have found that the main or predominant objects of *Aid/Watch Incorporated* were too remote from the relief of poverty or advancement of education under the first or second heads of *Pemsel* .

282. The majority did not consider it necessary to decide whether the encouragement of public debate about **any** government activity could be charitable under the fourth head in *Pemsel*. They said at paragraph 48:

It also is unnecessary for this appeal to determine whether the fourth head encompasses the encouragement of public debate respecting activities of government which lie beyond the first three heads (or the balance of the fourth head) identified in *Pemsel* ...

283. The subject matter of many areas of government activity or policy would be likely to fall under one of the first three heads of charity or the already established charitable purposes under the fourth head. Where they do, a purpose of generating public debate about that activity or policy will be charitable. Examples of purposes that have been held to be charitable under one of the four heads of charity are in Appendix 2 from paragraph 292 of this Ruling.

284. However, whether generating public debate about a particular government activity or policy that lies beyond existing heads of charity can be a charitable purpose under the fourth head will be decided on a case by case basis. It is not necessarily the case that generating public debate about any government activity or policy will be charitable. The subject matter of the debate will still need to either come within the spirit and intent of the preamble to the Statute of Elizabeth (and usually established by analogy to existing charitable purposes) or be deemed charitable by legislation applying for that purpose (see paragraph 10 of this draft Ruling). 284. More generally, the majority of the High Court also confirmed that there could be instances where, as Dixon J said in *The Royal North Shore Hospital of Sydney v. Attorney - General (NSW)*²⁴⁵, purposes that might otherwise seem to come within one of the four heads in *Pemsel* do not contribute to the public welfare, but said that this would be: by reason of the particular ends and means involved, not disqualification of the purpose by application of a broadly expressed 'political objects' doctrine.²⁴⁶

285. The use of illegal means such as bribery to achieve an end, and ends that are against public policy (for example the promotion of anarchy) are examples of 'ends and means' that would disqualify a purpose on the basis that it does not contribute to the public welfare.

286. Following the decision in *Aid / Watch*, an entity with a purpose of generating public debate regarding government policy, activities or legislation directed towards subject matters that come within one of the four heads of charity can still be charitable.²⁴⁷ This is on the basis that public debate on these matters is itself beneficial to the community under the fourth head and therefore a charitable purpose.

287. An entity that promotes a particular point of view may still be considered to be 'generating public debate' in the sense referred to by the High Court. *Aid/Watch* itself was described as a 'campaigning', 'activist' organisation.

288. The majority of the High Court did not provide specific guidance on whether direct lobbying of parliamentarians would fall within 'generating public debate' or whether that concept is limited to more indirect activities of educating and persuading the public. However, it will be more difficult for an institution with an independent purpose of direct lobbying of parliamentarians to be able to show that such lobbying will be beneficial to the community on a similar basis to that referred to in paragraph 283 of this Ruling and therefore charitable. Direct lobbying does not in itself have the element of public debate which was essential to the majority decision in *Aid / Watch*.

Party political

289. The decision in *Aid/Watch* has not changed the view that political parties are not charitable, or that it a main purpose of engaging activities directly associated with political parties, such as participating or intervening in election campaigns, would not be charitable. As Dixon J said in *The Royal North Shore Hospital of Sydney v. Attorney - General (NSW)*²⁴⁸:

... where funds are devoted to the use of an association of persons who have combined as a political party or otherwise for the purpose of influencing or taking part in the government of the country, it is evident that neither the good intentions nor the public purposes of such a body can suffice to support the trust as charitable.

Political or lobbying activities which are incidental

290. However, if the main purpose of an organisation is charitable, its status will not be affected by non-charitable political activities that are incidental to the charitable end.²⁴⁹

291. For example, an institution with a main charitable purpose could seek to persuade members of the public to vote for or against particular candidates or parties in an election for public office, or distribute material designed to underpin a party political campaign, provided the activity was incidental to its main charitable purpose.

Comments

The amendments to this section of the explanation reflect the changes made to the corresponding part of the draft ruling itself (see above).

In addition, we have restructured the beginning of this section to make it clear from the outset that the political purposes doctrine no longer applies in Australia. The current text does not make this clear until the fourth paragraph of this section, which is apt to confuse readers. We have also deleted [272] because it appears to us to be unnecessary and potentially confusing.

Anachronistic language

Example 2 - Purposes beneficial to the community

74. *Women Engineers is a not for profit organisation with objects that provide for the development, advancement and promotion of women in various fields of engineering. The organisation also seeks to address the disadvantages experienced by women in engineering. Whilst membership of the organisation is limited to tertiary qualified female engineers, the purpose of advancing women in engineering is a purpose that is beneficial to the community as it is aligned to current social norms aimed at eliminating gender discrimination (as evidenced by anti-discrimination legislation) and is charitable in its technical legal sense .*

Other charitable purposes under the 'fourth head' of charity

314. To qualify as a charitable institution under the fourth head, an institution must have a purpose that is both beneficial to the community and within the spirit and intent of the preamble to the Statute of Elizabeth.³⁴⁷ The following are cases where the Courts have accepted that the purposes are charitable under the fourth head of charity. The cases have been grouped into broad categories only to provide guidance on the range of purposes that have been considered under the fourth head. Each case must depend on its own facts, and the list is not exhaustive. ...

Indigenous persons: aiding disadvantaged Aboriginal or Torres Strait Islanders,³⁹⁰ developing radio and television programs relevant to Indigenous people and training Indigenous people as communication workers;³⁹¹ ...

peace and human rights : working to promote, protect and fulfill human rights, research into human rights violations,³⁹⁵ and working for the elimination of war;

In line with our concern about the use of anachronistic language in the Ruling, we suggest more modern terminology be adopted in these instances.