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Watching Aid and Advocacy

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Activists often look to colourful actions to draw attention to issues, and delivering a birthday cake must surely fall into this category. However, AID/WATCH, the small, non-government organisation (NGO) that monitors the quality of overseas aid, never expected that their ironic 60th birthday cake delivered to the World Bank asking it to retire would be described by the Australian Tax Office (ATO) as unacceptable political activity and used against them.

However, in October 2006, an ATO decision removed 'charitable' status from the NGO. This is the status that allows donations to non-government organisations to be tax-deductible. AID/WATCH does not receive government or corporate support, and works on a budget of approximately $80,000 annually, so that donations are their life-blood, and tax-deductibility was important for their continued existence. The ATO recognised that AID/WATCH's constitutional objectives were entirely 'charitable', and that they practised these by a range of different research and educational activities, including through the provision of advice to governments in Australia and overseas. However, the ATO also pointed to three activities that they did not see as being consistent with 'charitable' status. These activities were urging the public to write to the government to put pressure on the Burmese

military regime, raising concerns about the development impacts of the US–Australia Free Trade Agreement and delivering the birthday cake.

Although the ATO may lack a sense of humour, it does not lack resources, and AID/WATCH then found itself in a David and Goliath situation of having to defend itself with few resources and with its energies depleted by a series of court cases and appeals. Four years later in December 2010 in a significant decision that had implications for free speech and democracy in Australia, the High Court of Australia upheld AID/WATCH's right to advocate.

NGOs have an important place in our democracy. The three sectors of government, business and community all have contributing roles. However, it is the NGO or community sector that is a reflection of the multiplicity of points of view held by citizens. The sector can be chaotic and contradictory, but so is the society of which it is a reflection. This is pluralism in practice. A healthy civil society made up of many NGOs expressing different viewpoints leads to healthy debates on possibilities and to better policy-making. NGOs can call governments to account. They are uniquely placed to respond to the impact of government policy or lack of government policy, on failure to implement promises, on unintended consequences of policy and on unethical or corrupt behaviour. Smaller regional groups or specific interest groups can provide information from their members that can improve policy in local regions or in relation to specific subjects. Having their roots in the community and having their members know the practical impacts of government action gives NGOs legitimacy. This mediating role of NGOs between citizens and their government becomes all the more important when the size and power of modern government has increased its inaccessibility, and political party memberships are no longer representative of the community at large. The

pooling of resources, both financial and intellectual, by individual citizens in NGOs can improve research and the quality of alternative arguments. NGOs provide a balance to the views of powerful organised, economic interests, they promote equity, and their informal nature allows flexibility for rapid response to new political situations. It is also the community or non-government sector that is best able to provide long-term thinking as to how our society might develop and where we might go. We might wish for this perspective from government, but in practice government is bound by the short-term electoral cycle. The corporate sector may talk of social responsibility, but they have a legal responsibility to their shareholders to maximise profits, and this bottom line dominates business thinking. It is the community/non-government sector that is best able to articulate a vision of society that looks into the future.

NGO advocacy during the Howard Government

The attack on public advocacy that the ATO decision represented was part of a series of measures during the period of the Howard government aimed at silencing dissent or restricting the ability of NGOs to advocate publicly.[1] The behaviour of the Howard government towards NGOs did not reflect a pluralist outlook, but was consistent with a view of democracy that political theorists call public choice theory.[2] It is a view that describes our democracy in market terms, rather than as the contestation of ideas and principles. Instead of seeing our democratic practice as happening in a public sphere where NGOs, business and other interests debate the merits of their cases, this market view of the state describes NGOs as 'rent seekers' attempting to overturn the right of elected representatives to be the sole source of ideas.

During the Howard government, NGOs were commended if they provided services such as to the homeless and needy, or for repairing the environment. These actions

were consistent with the market theory of the state that promoted smaller government and the dropping of many government services. At the same time, many barriers were raised to discourage NGO debate and advocacy in the public sphere. There was a discourse that sought to disparage the role of NGOs in our democracy with the prime minister referring to NGOs as special interests, single issue groups, and elites. Immediately after the 1996 election that brought the Coalition government to power, NGOs faced de-funding, with claims that those affected were mostly public critics of the Coalition.[3] Some of the poorest and least powerful of groups were targeted. Forced amalgamations silenced alternative views as specific interests were subsumed, and a general trend was to target those whose advocacy did not fit with the government's family and moral agenda. Apart from defunding, a key tool that was used to silence NGO advocacy was confidentiality clauses. These were found in the contracts of almost any group that accepted government funds and they restricted NGOs' ability to speak to the media.[4] This had a significant effect in gradually silencing many NGO voices in the media, so that the public were less likely to hear alternative points of view. Our democratic debate was poorer for the loss of these voices.

There were vitriolic attacks on NGOs under parliamentary privilege, with some NGOs being singled out. The politically influential Wilderness Society experienced the disruptive effects of not just one, but five simultaneous tax audits by the ATO that attempted unsuccessfully to find some impropriety in the Wilderness Society's affairs. The government's interest in limiting public advocacy was reflected in the Charities Bill 2003, which sought to define charities and charitable purposes, but also had taxation deduction implications, and in a Protocol commissioned by the government from the conservative think tank, the Institute of Public Affairs. Although neither was acted on directly, their intent was pursued through

other means. First, the government passed the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005, which was seen as an attempt to 'license' NGOs and monitor their advocacy on a continuous basis. Second, it passed further legislation that required charitable organisations to establish their credentials with the ATO in order to retain charitable status.[5]

This legislation came into effect in 2005, strengthening the ATO's role in policing eligibility, and the ATO quickly released two draft rulings that restricted the ability of NGOs to receive tax deductibility, and affected GST exemption and salary packaging if public advocacy was undertaken. The ATO found difficulties in defining charities and charitable activities and the final rulings released in 2006 clarified some issues. However, there were still significant restrictions. The ruling banned charities from having a purpose of 'propagating or promoting a particular point of view'[6] and although incidental political activities were acceptable there was a loophole that allowed the ATO to infer a non-charitable political purpose from an organisation's activities — hence the reference to the birthday cake delivered to the World Bank. Any activity taking a 'particular point of view' could be defined as shaping the organisation's purpose. The significant philanthropy organisation, Changemakers, which focuses on supporting NGOs through philanthropy, advised its donors and supporters that they interpreted the ruling as meaning that as political and lobbying purposes were not charitable, charities could engage in political activities (advocacy) where it was merely incidental to their charitable purposes, while organisations that only engaged in public advocacy activities were likely to be ineligible for charitable status, and a purpose of supporting a particular party or its line was not charitable.[7] The fine line drawn between advocacy that was 'incidental' and permissible, and advocacy that was an 'end' in itself and not permissible, created

considerable legal imprecision and ambiguity. Inevitably, donors and philanthropic organisations became wary of donating to NGOs.

During the Howard government, the Australian aid program had become increasingly politicised, and tensions between AID/WATCH and the government had sharpened. In 2006, when AID/WATCH revealed the misuse of some Federal tsunami aid, the foreign minister himself telephoned AID/WATCH's office and threatened to de-fund the organisation, only to be informed by staff that under its constitution the organisation did not accept government funding![8]

The AID/WATCH case

It was in this political environment that in 2006 the ATO removed AID/WATCH's charitable status because of political activities, claiming it had taken a 'particular point of view' on the aid program. AID/WATCH initially began quietly defending itself with a pro bono tax lawyer internally appealing the ATOs ruling, but when that failed, it publicised the ATO decision. In response the secretary to the treasurer stated that the very fact AID/WATCH had made its case public proved it was a political organisation, not a charity. When AID/WATCH released a report in June 2007 that criticised the use of Australian aid to gain access to the Iraqi wheat market, the Foreign Minister's office refused to answer the criticisms, and instead labelled AID/WATCH as 'extremist'.[9]

The manner in which AID/WATCH defended itself is an important lesson in the defence of free speech and in strategic campaigning by NGOs. Once its appeal to the ATO was rejected, the AID/WATCH committee was very strategic and clear in how they responded.[10] They began by seeking support within the larger not-for-profit sector, widening the issue to show that it was a threat to the whole sector, not just an attack on one small NGO. In so doing, they went to the core of the relationship between NGOs and the Howard government,

characterising the decision as part of government attacks on free speech by NGOs that were politically driven. AID/WATCH's argument was based firmly on the pluralist view that free speech in a democracy is to be valued and that NGOs provide important avenues to question governments and improve policy — avenues that should be facilitated.

AID/WATCH's first avenue of appeal was to the Administrative Appeals Tribunal (AAT). It was during the appeal that the ATO focused on three unacceptable 'political' activities: presenting a birthday cake to the WTO calling on it to retire, supporting release of political prisoners in Burma, and promoting a petition against the free trade agreement with the United States. In a setback to the ATO, the AAT found that AID/WATCH was entitled to status as a charitable institution, that its major objective was the relief of poverty, that the organisation's activities included the advancement of education, and because AID/WATCH did not have changes to the law as a main object, that it was not disqualified from charitable status. (Although it could be disqualified, if its objects and activities concentrated too much on trying to influence government.) The ATO then appealed the decision to the Federal Court, which upheld the ATO decision, focusing again on AID/WATCH's purposes, but on this occasion finding against the NGO.

AID/WATCH faced enormous stress as a result of all these legal actions, firstly to the ATO, then the AAT, and finally to the Federal Court, and the actions were stretched out over a number of years. The time and effort to run any court case is considerable. Yet this tiny organisation had no resources to fund its defence and its mostly volunteer staff and committee had to give much time and effort. By the time it had lost its case in the Federal Court, AID/WATCH had only one defence left. That was an appeal to the High Court. The implications were dire if they lost as there was the potential for costs to be made

against them. At this stage, the importance of having publicised the implications of the issue for the whole not-for-profit sector became clear, because the committee was successful in finding financial backers in the NGO sector who were prepared to cover costs in the event that the appeal failed. The committee also worked hard to keep the campaign in the media by encouraging different parts of the NGO sector to speak out on their behalf and in rallying supporters in the wider community to write letters of support to the media.

Once in the High Court, the AID/WATCH legal team tried successfully to move the legal issue from a debate about what met the definition of 'charity' to a debate about the implied rights in the Constitution on freedom of political communication or free speech. In the earlier cases they faced, a lot of time had been spent focusing on how to determine a 'public benefit' from an organisation's objects and activities. The approach at the High Court was to open the debate up to a constitutional argument founded on the principle that public debate on political spending is beneficial to the public interest — running an argument founded on the implied right of political communication identified by earlier High Court decisions.[11] This line of argument was not simple because Australia does not have a guaranteed right of free speech, and success was by no means assured. However, by a majority of five to two the High Court judges agreed that AID/WATCH was not disqualified from charitable status by virtue of its main purposes, which included generating public debate about the effectiveness of foreign aid. Moreover, they also found that there is no general doctrine in Australia to exclude political objects from charitable purposes.[12]

When the decision was announced in December 2010, it was greeted with much joy within the NGO community. The Howard government years had taken their toll when NGOs' right to engage in public advocacy was under attack, and the

decision seemed to open a new page in Australia's democratic history by affirming that the public advocacy of NGOs was a part of our political democracy. Many lawyers cautioned that the decision was only limited, it could still be interpreted in various ways by the government and ATO, and parliament could still legislate to change the law on the definition of a charity.[13] While noting this, constitutional lawyer George Williams pointed out that the High Court's reliance on the constitution meant that any attempt by government to change this definition might 'run foul of the constitutional freedom of political communication and be struck down in the courts'.[14]

The last act in the four-year AID/WATCH saga took place on 12 October 2011 when the ATO, in response to the High Court decision, released its final tax ruling for charities. This has made it clear that it is legitimate for charities to advocate publicly. It clarifies that there is no general doctrine in Australia which excludes a charity from having political purposes and that there is no limitation on charities if their purpose is to influence legislation, government activities or policies. It is even possible for charities to seek to persuade members of the public to vote for or against particular candidates or parties in an election and to distribute material designed to underpin a party political campaign.[15] No longer need NGOs fear their actions will remove their charitable status, and no longer need donors and philanthropic trusts withdraw from funding NGOs. But even more importantly, the highest court in our land has implied that freedom of political communication is relevant in a case concerning NGO advocacy.

The NGO sector has much to learn from AID/WATCH's response to the attempt to limit public advocacy by discouraging donations. 'At all times, the Committee was aware of the risks in challenging this decision, and the steps that were taken were calculated from day one,' according to Associate Professor

James Goodman, who is a long-term member of the Committee.[16] AID/WATCH was strategic in their response and did not treat the threat as simply a legal challenge to their funding. Instead they saw it within the wider political context that was attempting to silence NGO advocacy. While they did their utmost to ensure their legal work was the very best possible, they also responded with a public campaign because the issue was much bigger than just the future of AID/WATCH. By doing so, they were able to harness the larger NGO sector to their cause, which was critical to them on a number of occasions, and the way they did so was textbook campaigning. First they worked to get the support of like-minded NGOs and have them understand the implications for the whole sector. Then they called on this wider group to also campaign by speaking in the media and rallying wider public support. The awareness they created was important for publicising the repression that the whole sector had been experiencing and in defending the principle of free speech.

None of this was relevant to the actual outcome of the court case, but it was crucial in other ways. It ensured that AID/WATCH was able to take the risk of proceeding with an appeal to the High Court when it needed to do so. Its work with the wider sector ensured that the democratic implications for all NGOs were understood and the wider sector recognised the need to provide financial assurances in the event that the case was lost and costs had to be paid. More importantly, the publicity and public support, first from a broad cross-section of NGOs, and then from the wider progressive community made it an issue for government interest. Fortunately, this coincided with a Federal Labor government that was more sympathetic to the argument for NGO advocacy, having abolished the gagging mechanism of 'confidentiality clauses' soon after coming to power.[17] It was in this public context that the ATO finally issued their 2011 ruling.

By making it a public campaign on the right of NGOs to advocate, AID/WATCH was instrumental in enhancing community awareness of the democratic role of NGOs.

Building an alliance of like-minded advocates for their cause enabled this small NGO with only a couple of staff members and a volunteer committee to take on the might of a powerful government department and go to the highest court in the land. They did not falter and run away when faced with a David and Goliath situation. Instead they reacted with clarity of purpose based on their belief in freedom of speech in a democracy. Fortunately, their case was upheld and their position justified. Their example sets a commendable standard for other NGOs to follow. Our democratic right to freedom of speech and the health of our democracy have been strengthened in the process. This has happened not just as a result of the favourable decision, but by the campaign that helped embed in public opinion an understanding of the democratic right of NGOs to speak out and question government policy. We can only hope that AID/WATCH and other brave NGOs continue to deliver birthday cakes to make us smile and to change our thinking on issues that matter in our democracy.

Endnotes

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17 Australian, 2008, p. 1.

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