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1 July 2011

Dear Mr Corbett,

**Submission on the Decision Impact Statement, Aid/Watch Incorporated v  
Commissioner of Taxation**

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 through legislative, institutional and/or cultural reform. Changemakers works with a wide range of charities, both philanthropic organisations and community organisations, to promote social change philanthropy.

Changemakers welcomes the opportunity to respond to the ATO's Decision Impact Statement on the High Court decision in Aid/Watch v Tax Commissioner (2010). We support the ATO's decision to withdraw and revise the Charities Tax Ruling TR2005/21. We have made a submission to the review process which should be viewed in conjunction with this submission.

We also believe that the Aid/Watch decision has implications for at least two other areas of ATO work and make the following recommendations:

- That the Public Benevolent Institution (PBI) Tax Ruling TR2003/5 be subject to a public review.
- That relevant ATO educational material be reviewed and updated, in particular the web page "charities – political, lobbying and advocacy activities".

Our rationale for these recommendations follows.

## **Need to subject PBI Tax Ruling TR2003/5 to a public review**

It is Changemakers view that the High Court decision on Aid/Watch redefined the law in two key ways. Firstly, it extended the “fourth head” in recognition of the public benefit of advancing debate and campaigning around a charitable subject matter, with the practical result that some organisations which would not have been considered charitable prior to the decision will now have access to charitable status. Secondly and most significantly for PBIs, it discarded the “political purposes doctrine”, so that political purposes are no longer regarded as inconsistent with charitable purposes. Not only did the High Court find that the Bowman decision had limited application in Australia, it also found that the Australian Constitution relies upon freedom of communication, and that charities should be free to advocate and agitate for change using legal means.

Aid/Watch was not a PBI and therefore the High Court did not specifically address PBIs in its decision. However, the High Court’s decision does apply to **all charities** and PBIs are by their very nature charities. Their enhanced status as PBIs means they must operate in line with the PBI Tax Ruling. This Ruling actively seeks to constrain the ability of PBIs to advocate freely, reflecting the “political purposes doctrine” which was in play when the PBI Tax Ruling was formulated. This must be remedied.

## **PBI Tax Ruling lacks clarity on advocacy**

The research Changemakers undertook as part of the *Freedom to Speak, Capacity to Act* report showed that the current legal situation in relation to advocacy presents difficulties for PBIs, particularly small PBIs with objects that cannot be met without advocacy. Changemakers considers the current Tax Office approach on PBI advocacy to be erroneous in the following ways:

Firstly, advocacy is seen as distinctly different to direct relief, whereas for many modern PBIs, advocacy is an important component of the direct relief provided to individuals. Those PBIs which undertake individual advocacy as a means of providing direct relief (such as advocating directly for individuals experiencing difficulties with the legal system or with payment of utility bills) deal daily with systemic problems which create the circumstances requiring direct relief. It is an obvious progression for them to advocate on those systemic issues, and such advocacy will strengthen their work with individuals, not weaken it.

Secondly, it is unclear whether PBIs are able to undertake advocacy in line with their charitable purpose without restriction or whether they need to ensure that advocacy activities are minor in extent. According to clause 95 of the PBI Tax Ruling, “other purposes or activities must be incidental to the main purpose **or** minor in extent and importance”. On this basis it can be concluded that it is currently legitimate for PBIs to undertake advocacy which is connected to their main purpose, without a quantitative restriction (consistent with the definition of incidental provided in the current and draft

Charities Tax Rulings). However, the Giftpack describes a much more definitive restriction:

“The dominant purpose of a PBI is the direct relief of poverty, sickness, suffering, distress, misfortune, disability or helplessness. Other purposes and activities must be incidental to that purpose. *They will be minor in extent and importance.*”

Thirdly, much of the PBI Tax Ruling and Giftpack as it relates to advocacy appears not to apply to those peak organisations which obtain PBI status through the ACFOA ruling. They do not have to undertake direct relief and are bodies which legitimately undertake a substantial quantity of advocacy with no risk to their PBI status. This situation is unfair and results in confusion.

A public review process should aim to ensure that the PBI Tax Ruling reflects the outcome of the Aid/Watch decision, and that the current flaws described above are rectified. This would result in greater clarity and consistency for PBIs, removing the risk that they currently perceive they face when they undertake advocacy to further their charitable objects.

### **Need to review educational material**

While Changemakers has found the educational material provided by the webpage titled “charities – political, lobbying and advocacy activities” to be very useful and much more “user friendly” than the information provided by the tax rulings, it is clearly out of date as a result of the Aid/Watch decision. The creation of new information by the ATO on charities and advocacy would be welcomed by charities and Changemakers would be happy to assist in this process.

Thank you again for providing us with the opportunity to participate in this process. For more information please contact our Charity Law Reform Project Manager, Esther Abram, on 0409 962 992.

Yours sincerely,

Trudy Wyse, on behalf of Jill Reichstein  
Chair