

## Charities and political activities: Legal Frequently Asked Questions (“FAQs”)

### Why we have prepared this FAQ?

We prepared this FAQ in response to inquiries by charities wishing to undertake political activities. Interest in this issue has gained momentum after the High Court “Aid/Watch” judgment on 1 December 2010.

This FAQ answers major questions and clarifies common misconceptions about charities and political activities. The FAQ is condensed from a presentation by Derek Mortimer on the Aid/Watch judgment to the Law Institute Victoria not for profit conference, 15 April 2011.

### Who we are

We are a boutique law firm that specialises in the law relating to not-for-profit organisations and charities. Principal of the firm, Derek Mortimer, has more than fifteen years experience advising not-for-profit organisations on legal issues. He represents the not-for-profit sector on the Law Institute Victoria commercial law executive committee.

### FAQs

#### What are “political activities”?

The Australian Tax Office (“ATO”) accepts that “political activities” by charities include conducting public petitions, publishing research, promotion of a view on issues during an election, and lobbying governments, which aim to change or retain laws and policies. The Aid/Watch judgment states that charities may also “generate debate” on political issues.

#### Can charities undertake “political activities”?

Yes. The relevant ATO tax ruling states that charities may undertake political activities that are “incidental” to the charity’s “purpose”. “Incidental” activities are activities that are “for the sake of, or in aid of, or in furtherance of” a charity’s purpose.

#### What is the difference between a charity’s “purpose” and its “objects”?

The “purpose” of a charity is its reason for existence. A charity’s purpose is found by reference to the charity’s founding documents and its activities, amongst other things. The purpose must be what the law regards as a “charitable purpose”.

Like human beings, charities sometimes have problems identifying their reason for existence. This problem is not readily resolved by lawyers and is more of an internal problem for the charity.

The “objects” are a written statement in a charity’s founding documents that set out why the charity exists and what it intends to do. The Aid/Watch judgment states that a charity may have a political activity (such as law reform) as an object. All charities must have “objects”. If well drafted, the objects should clearly state the charity’s “purpose”.

### **Can a charity have many “purposes”?**

Not really. A charity can only have one overriding “purpose”. For example in the *Word Case* the High Court stated that a requirement to find a “true, main, dominant or paramount purpose” applies “precisely” to entities which have an “objects” clause.

### **Compared with the overall activities of a charity, must “incidental activities” only be minor in size?**

This question is misunderstood in the charity sector. As a statement of law and as a statement of the ATO’s interpretation of the law, the answer is “No”.

Whether an activity is “incidental” depends on the *connection* the activity has to a charity’s purpose, not the *quantity* of the activity. Consider the following:

- The ATO is clear. Its Tax Ruling says this about the term “incidental”:  
“As the notion of being incidental is relational (how some matters are related to other matters) it is not amenable to determination simply as a percentage, a level of activity or a number.”.
- The High Court concluded in the *Word Case* that charitable activities of an entity can be found in “... the natural and probable consequence of its immediate activities.”.
- Justice Santow notes in an academic article on political activities that:  
“The court indeed has some latitude in construing the ‘incidental and ancillary’ requirement so that it is not so much a crude requirement directed merely at the level of activity. Rather it is concerned primarily with whether the political activity is genuinely directed to promoting indubitably charitable ends”.

### **References**

*Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* (2008) 236 CLR 204 (“the Word Case”) – see paragraphs [18] and [38].

Santow, GFK 1999, ‘Charity in its Political Voice - a Tinkling Cymbal or a Sounding Brass?’ 18 *Australian Bar Review* – see page 230.

Tax Ruling TR 2005/21- see paragraphs [127 + footnotes], [155], [162] and [165].

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#### *Disclaimer*

*The information presented on charities and political activities in this FAQ is of a general nature only and does not constitute legal advice. If you require legal advice on these issues relating to your particular circumstances, please contact Derek Mortimer.*