

December 2010

INDEX

Charities Behaving Badly	1
The Politics of Poverty (Aid/Watch)	1
Update - CYC Case.....	3
Public Ancillary Funds	3
Does your Organisation Need an Audit ...	4

Charities Behaving Badly

[Angel Food Ministries](#) of Georgia, USA, delivers food and financial assistance to people in need. The CEO is Wesley Joseph Wingo. His leadership team includes his wife, Linda, and their sons, Andrew and Jonathan. Angel Food Ministries paid remuneration of \$US2.5 million over two years to the Wingo family and the family also received "loans" of over \$US1 million. The story features in the [article](#) "The Nine Most Mismanaged Charities in America" posted on the 24/7 Wall Street website.

A good reputation is a prize possession for a charity. Using charity financial health rates as a guide to reputation, 24/7 Wall Street gives examples of bad charities as follows:

- Spending as much as 83% of budget on fundraising expenses.
- Distributing only 1% of all revenue directly to the intended beneficiaries.
- Nepotism in family control of charities and staff appointments
- Extravagant remuneration or "loans" to family members on staff

Perhaps a new Charities Commission for Australia might undertake a "watchdog" role to keep charities honest. Certainly this is within the scope of the role of the UK Charities Commission which publishes the financials of each charity on its website.

Moore's Legal cautions against measuring the effectiveness of a charity solely on the basis of financial measures. While consideration of financials is important to protect against the misuse of funds, in our view higher priority ought to be given to the extent to which the organisation's mission is fulfilled. Measures of impact in the community will not be confined to the financial statements.

Suhanya Ponniah
Editor - Not for Profit Briefing
Lawyer

The Politics of Poverty - High Court decides Aid/Watch

The High Court handed down its decision in [Aid/Watch Incorporated v Commissioner of Taxation](#) [2010] HCA 42 on 1 December 2010. This is a landmark decision on the meaning of Charity.

Aid/Watch

Aid/Watch was established:

1. to promote the efficiency and effectiveness of foreign aid, both by ensuring that it is delivered in the way it was intended, and by ensuring that its delivery is environmentally effective; and.

December 2010

2. for the purpose of poverty relief

It did this by researching, monitoring and running campaigns about the delivery of overseas aid. This involved tracking the delivery of aid overseas, and by educating the Australian public on the efficiency and effectiveness of Australia's aid.

The effect of Aid/Watch's objects and activities may have the indirect effect of bringing about a change in law or governmental policy with respect to foreign aid.

The Australian Taxation Office said Aid/Watch was not a Charity because it had a political object and was engaged in political activities.

The majority of the High Court said that Aid/Watch is a Charity.

Meaning of Charity

A "Charity" must have a "charitable purpose" and it must be for the "public benefit".

There are four general categories of "charitable purposes":

1. the advancement of religion;
2. the advancement of education;
3. the relief of poverty; and
4. other purposes beneficial to the community.

Politics and Charity

The High Court thought that Aid/Watch was not a Charity in categories 1, 2 or 3. This decision concerns the fourth category of charitable purpose - "other purposes beneficial to the community".

In a 5:2 decision, the Court found that:

1. Communication between the public, the Parliament and the Government is "an indispensable incident" of our constitutional system.
2. If that communication legitimately contributes to our system of government, then generating public debate is a purpose beneficial to the community if the debate relates to religion, education or poverty.

On this basis, the Court held that Aid/Watch had a charitable purpose because debate concerning the efficiency of foreign aid directed to the relief of poverty is a purpose beneficial to the community within the fourth category of charitable purpose.

Comment

Historically, the dividing line between "charity" and "politics" has been unclear and there is inconsistency in the case law. In some instances, the Courts have said that a purpose that involves changing the law cannot be charitable because the Courts are unable to determine whether the change is for the public benefit or not. It is pleasing to see this line of authority has been overturned.

This decision is significant because the Court has identified that the very engagement of the Australian public in debate may be beneficial to the community itself.

There are limits to the decision. Aid/Watch generates debate about foreign aid, which is ultimately concerned with the relief of poverty, a recognised independent charitable purpose. It is unclear to what extent generation of debate about other matters is beneficial to the community however, we look forward to seeing debate on this issue.

December 2010

In short, the decision will be reassuring to Charities who generate public debate about charitable issues. Although not directly applicable to lobbying and advocacy activities, which go further than the mere encouragement of public debate, the case does signal more scope for the fourth head of Charity.

Elizabeth Turnour
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Principal

Update - CYC Case

In our [October NFP Briefing](#) we included a case note on [Cobaw Community Health Services v Christian Youth Camps Ltd and Anor \(Anti-Discrimination\)](#) [2010] VCAT 1613 - a VCAT case on discrimination and religious bodies. CYC is on leave to appeal this matter to the Supreme Court. We will keep you updated.

Suhanya Ponniah
Lawyer

More Regulation Coming for Public Ancillary Funds

A Private Ancillary Fund is a general purpose tax deductible fund used to distribute tax deductible gifts to specific tax deductible causes. It is a helpful tool for a business, fundraisers or charitable organisations to give a tax deductible receipt to donors and then place funds to a good purpose.

It differs from a Private Ancillary Fund in that it always asks the public to contribute rather than receive gifts from an individual or closely held group.

The government proposes to increase the regulation of Public Ancillary Funds.

If the changes outlined in the [discussion paper](#) released by Treasury on 19 November 2010 are implemented, trustees of Public Ancillary Funds may need to take action.

The proposal is to introduce legislative guidelines, similar to those which apply to Private Ancillary Funds:

- allowing the Commissioner of Taxation to impose penalties;
- requiring a corporate trustee;
- introducing a "fit and proper" test for directors of the corporate trustee;
- imposing a minimum distribution rate, possibly higher than the 5% of assets which applies to private ancillary funds;
- requiring an annual audit and valuation of assets;
- requiring Public Ancillary Funds to lodge tax returns;
- showing their status as a Public Ancillary Fund on the Australian Business Register; and
- requiring an investment strategy with a conservative approach.

Transitional rules will apply. Developments will be covered in future editions of the NFP Briefing.

December 2010

Moores Legal is concerned that increasing regulation and compliance costs will distract funds and energy from the real business of philanthropic giving - making a difference in the community. There is little evidence of non-compliance with the current regime which would call for tighter regulation. It amounts to a tightening of philanthropic giving for budgetary purposes.

Libby Klein
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Does your Organisation need an audit?

We reported in our [August 2010 NFP Briefing](#) that some relief from audit and reporting provisions has been introduced to small companies limited by guarantee which are not Deductible Gift Recipients.

The requirements for a public company limited by guarantee are summarised below. There are three categories of requirements:

1. No financial report or directors' report required;
2. Financial report and directors report required, and can either be reviewed or audited;
3. Financial report and directors report required, and must be audited.

Revenue	Requirement in relation to financial report and directors' report for public company limited by guarantee	
	Deductible Gift Recipient	Other
Under \$250,000	Review or audit	No financial report or directors report is required ¹
\$250,000 - \$1m	Review or audit	Review or audit
Greater than \$1m	Audit	Audit

Watch out for:

- All companies must appoint an auditor, even if an audit is not required

Even if your company is not required to have an audit conducted, be aware that you still need to appoint an auditor at your Annual General Meeting. This is as a result of an anomaly in the *Corporations Act* - sections 327A and 327B require the appointment of an auditor even where an audit is not required.

¹ s292(3) *Corporations Act 2001*

December 2010

- Take care with the contents of your directors' report

Section 300B of the *Corporations Act* requires the directors' report for public companies limited by guarantee to set out how the activities and performance measures are consistent with the company's purpose. An area of risk for an organisation with charitable status is that the Australian Taxation Office will rely on any discrepancy between activity and purpose to cast doubt on its charitable status. Accordingly, great care needs to be taken in the directors' report. The directors report will generally be prepared by the person in charge of the preparation of the annual accounts. The directors ought not sign the directors' report without independently turning their minds to its wider implications for the tax status of the entity.

- You may want or need to have an audit conducted, even if you are not required to

Your constitution and/or funding agreements may require it, or you may want to have an audit conducted for your own governance purposes. For small organisations though, the cost can be prohibitive.

The rules are different for Associations. For example, in Victoria, a full audit is required if annual gross revenue is more than \$200,000, or if assets are greater than \$200,000. This applies regardless of whether the organisation is endorsed as a "Deductible Gift Recipient".

These legislative changes were made in the name of simplification and streamlining. Sometimes it doesn't feel that way! Moores Legal can interpret the requirements for your situation if need be.

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The Moores Legal Not for Profit Team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our Team

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Moores Legal is a law firm servicing companies and businesses, Not for Profit organisations and individuals across Melbourne in the areas of Commercial Law, Workplace Relations, Property Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, Dispute Resolution, Family Law and Personal Injury Law.

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