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Do Charity and Politics Mix?

With the run up to the Federal Election 21 August 2010, intersections between aspirations for the not for profit sector and politicians deserve attention. First, what happened to the government's response to the Productivity Commission report released January 2010? The Productivity Commission made over 30 recommendations including smarter regulation, building of knowledge systems, effective sector development and better government funding. We appreciate that most of the recommendations of the Henry Tax Review in May were immediately shelved. Will the Productivity Commission Report also lie on the shelf with so many other reports to which the resources of the sector have contributed?

Meanwhile former democrats leader Cheryl Kernot was standing for the senate in NSW including a promise to champion the not for profit sector.

Meanwhile the Australian Taxation Office has told the High Court that politics and charity don't mix.

In this briefing we comment on the Aid/Watch case and we will watch the High Court's decision with interest.

Murray Baird
Principal
Not for Profit Group

Advocacy and Lobbying: Aid/Watch Decision expected soon

Aid/Watch is a not for profit organisation that believes the most effective way of addressing aid and development issues is through political advocacy.

The High Court has heard an appeal by Aid/Watch Incorporated against a decision of the Commissioner of Taxation to refuse charitable status on the grounds of its political activity.

The High Court heard this case in mid-June, and the judgment is expected in the next few months.

In the course of the preliminary hearing the High Court asked:
"What is offensive in influencing government?" The Court went on to say:

"One of the problems is that governments now have such an enlarged role in poverty, education, religion that pursuit of those charitable objectives at one stage or another is going to have an intersection with government activity....[This] was not true 150 years ago."

The High Court decided that it was time to air the matter and settle the law.

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Aid/Watch's argument

Aid/Watch, argued that its "ends" were to benefit the poor. It claimed that its "means" were to influence government through lobbying and advocacy.

The ATO's argument

ATO referenced earlier cases referring to this "political exception" for charities. The argument is that the Court is not in a position to judge whether a political viewpoint is for the public benefit, and doing so, ventures into Parliament's territory.

Is this the death of advocacy?

In the modern era of charities, organisations inevitably undertake a level of advocacy in furtherance of their goals.

It is perhaps comforting that the ATO observed that letters of support had been submitted by various charities concerned that their incidental political activities would disqualify them as charities. Counsel for the ATO clearly stated this was not the intention and cited the example of a Blind Society campaigning for guide dogs in restaurants. The approach they took was to ask whether the main purpose or thrust of a trust was political.

Waiting for Guidance

We will comment on the outcome of the High Court appeal in our next briefing.

Suhanya Ponniah and Murray Baird
Lawyer *Principal*

Some useful developments from the Australian Taxation Office...

New materials

The Australian Taxation Office has released the following materials:

- [Frequently Asked Questions](#) regarding Tax Concession Charities. The FAQs explain the process for obtaining endorsement as a Tax Concession Charity including common errors, and an overview of GST and FBT.
- [Guidance](#) for non-profit clubs, societies and associations which rely on the principle of mutuality for their exemption from income tax.
- an updated model trust deed for Private Ancillary Funds (PAFs) which has been drafted to take into account the Private Ancillary Fund Guidelines. For a discussion of the requirements of the Guidelines, see the article in our [September 2009 Briefing](#).

Australian business register upgraded

If you have checked your organisation's status on the [Australian Business Register](#) lately, you may have noticed that more detail is now shown - for example regarding the basis on which Deductible Gift Recipients are endorsed.

We recommend checking your status on the Register. If the details that appear are wrong, you should raise this with the Australian Taxation Office.

Elizabeth Turnour and Libby Klein
Lawyer *Senior Lawyer*

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... and some clues as to what the Australian Taxation Office is focussing on

ATO has published its 2010-11 Compliance program. Based on the program and our recent experience we expect the ATO to focus on the following issues:

- have you been conducting annual self-assessments of your eligibility for tax concessions?
- do you have good governance practices?
- are you getting your GST right?
- if you are a public benevolent institution, are you really eligible for that status?
- are you sending money overseas?
- for public ancillary funds – are you breaching trust obligations for example by distributing to other ancillary funds? Or by making distributions directly to overseas entities?
- for clubs – are you getting your calculation of mutual income right?
- changes to arrangements to "take advantage" of the decision in Word Investments i.e. charities engaged in commercial activities.

Don't panic if you receive a letter from the ATO describing your organisation as being at "high risk" of losing its tax status. Seek clarification and double check the facts in the ATO's letter. It might be a storm in a teacup.

Libby Klein
Senior Lawyer

Simpler annual reports for NFP Companies

If your organisation is a company limited by guarantee with revenue under \$250,000 then you no longer need to prepare a financial report or a directors' report – unless you are endorsed as a Deductible Gift Recipient ("DGR"), or your constitution requires it.

DGRs

All DGRs must have an audit or review and are entitled to produce a "streamlined" annual report. DGRs with revenue under \$250,000 can choose to have a review rather than an audit, unless the constitution requires an audit.

Distribution of annual reports

The requirements for distribution of annual reports via the internet have been simplified.

More detail is available at [ASIC](#).

Libby Klein
Senior Lawyer

When Associations turn Toxic

A recent power struggle in the Wilderness Society (TWS) highlights the governance challenges in large associations.

TWS has 45,000 members and an annual budget of \$15 million. But its Annual General Meeting in November 2009 was attended by only 14 members who changed the Constitution in an apparent attempt to shore up the position of the Executive Director. When other members found out they were furious. The dispute initially went to the Tasmanian Supreme Court and the parties later attended

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mediation in an effort to resolve their differences. The outcome of the secret meeting was eventually set aside by the Court.

What went wrong? Often governance difficulties can be traced to personality differences. In this case, it also appears that governance arrangements appropriate to a small State-based environmental organisation were no longer effective in a substantial national body.

The case highlights the vulnerability of an organisation to reputational damage through bad governance and the need to periodically evaluate whether governance arrangements effectively serve the mission of an organisation. When disputes arise, different factions can each believe that their actions are in the best interests of the organisation. An external governance advisor can often avert the damage caused by warring factions. A call for external help can be the best antidote when things turn toxic.

Murray Baird
Principal

Religious body exemptions under anti-discrimination legislation

How can religious organisations discriminate in provision of services? Two court cases focus on the issues.

OV & OW v Members of the Board of the Wesley Mission Council [2010] NSWCA 155 (6 July 2010)

A foster care agency of the Wesley Mission denied an application by a same sex couple to be foster carers. Wesley Mission argued that the discrimination was protected by an exemption for religious bodies under s 56(d) in the *Anti-Discrimination Act 1977 No 48* (NSW).

The Supreme Court of New South Wales Court of Appeal criticised the Administrative Decisions Tribunal for construing the exemption narrowly and directed the Tribunal to reconsider the matter having regard to the nature of Wesley Mission. In particular, to consider who established the Wesley Mission, what religion it was established to propagate and whether the discrimination conformed with the religious doctrines that the Wesley Mission was, at the time the discrimination occurred, established to propagate.

The Court of Appeal decision highlights for religious organisations how important it is to clearly articulate their religious beliefs in their constituent documents if they intend to rely on the exemptions.

Cobaw Community Health Service Ltd v Christian Youth Camps Ltd A208/2008

Cobaw Community Health Service brought an action against Christian Youth Camps Ltd (“CYC”) in the Victorian Civil and Administrative Tribunal when CYC refused to confirm a booking of a conference centre to a health service for a conference for same sex attracted young people to deal with issues of discrimination and homophobia. CYC argued that it was entitled to discriminate on the grounds of its religious beliefs.

The hearing has concluded but no decision has been handed down yet. At issue is the scope of religious exemptions under the *Equal Opportunity Act 1995*.

Legislative changes

These cases should be read in the light of the *Equal Opportunity Act 2010* (Vic) which will replace the *Equal Opportunity Act 1995* (Vic) from August 2011.

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Significant changes include:

- An increased emphasis on the importance of equality;
- A shift in focus to systemic discrimination rather than just individual complaints by:
 - imposing duties on organisations to proactively eliminate discrimination; and
 - changing the function of the Victorian Equal Opportunity and Human Rights Commission
- The application of the Act to volunteers as well as employees;
- A narrowing of the exemptions for religious organisations.

We will provide some further commentary in a forthcoming edition of Not for Profit Briefing.

If your organisation is concerned about any of its practices or policies concerning discrimination, it should contact Moores Legal for specific advice.

Elizabeth Turnour
Lawyer

More legislative change on the way for Victorian associations

Further changes to the *Associations Incorporation Act 1981* (Vic) are making their way through the Victorian parliament. Changes are anticipated to take effect some time before December 2011. We will provide detailed commentary in our next edition.

Libby Klein
Senior Lawyer

Useful links – Moores Legal's website

We have recently added [Fact Sheets](#), [Fact Finders](#) and [Useful Links](#) relating to Not-for-Profits to our website. If you have suggestions for further resources you would find helpful, please advise [Lee Newnham](#).

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.

DISCLAIMER: This Not for Profit Briefing is of a general nature only. Specific legal advice should be sought rather than relying on this Briefing.

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