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Waiting on Word from the High Court

The High Court heard oral argument on the Appeal by the Commissioner of Taxation in the Word Investment Case on 27 August 2008 and will accept further written submissions filed by 12 September 2008. A decision of the Court is expected before Christmas.

The Issues

The case involves an auxiliary of a missionary society raising funds by conducting a funeral business.

The case raises two issues:

1. Is an organisation raising funds for charitable purposes by commercial activity, a charitable institution?
2. Does an entity that distributes to Australian charities in Australia, who may spend the money overseas, incur its expenditure and pursue its objectives in Australia?

Commissioner's Appeal from Federal Court

The Full Court of the Federal Court determined that Word was entitled to be endorsed as a charitable institution because it distributed the profits of its activities to other charitable institutions in Australia. The Commissioner of Taxation ("the Commissioner") sought special leave to appeal to the High Court.

Special leave applications are the process by which the High Court sifts which cases ought to be heard in that Court. The Court must be satisfied that there is a question of law of public importance or that the interests of the administration of justice require consideration by the High Court.

At the leave hearing, Justice Kirby noted the importance of the issue for revenue law given that charitable institutions in the modern age increasingly turn to commercial enterprises to fund their work.

Accordingly, the High Court granted special leave to the Commissioner to Appeal the decision of the Full Court of the Federal Court on that basis.

The charitable sector will eagerly await an authoritative answer to this vexed question.

Derek Mortimer
Lawyer

Office for the Community Sector

In April 2008, the Victorian government announced a \$13.87 million plan to support the not-for-profit sector. At its centrepiece will stand a new "Office for the Community Sector", due to be established later in 2008, and intended to initially operate for 3 years. The Office for the Community Sector, under the auspices of the Minister for Community Development, the Hon Peter Batchelor, will be tasked with implementing the action plan set out in The Victorian Government's Action Plan: Strengthening Community Organisations.

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The Action Plan includes a wide range of measures to develop the not-for-profit sector and reduce regulatory burden, including:

- amending the restriction on trading activities of incorporated associations under the *Associations Incorporation Act 1981* (Vic), to provide greater operational flexibility to associations in recognition of their contemporary needs;
- setting up a portable long service leave scheme to help the not-for-profit sector retain skilled workers;
- expanding access to information and support services that help not for profits meet challenges such as performance, long-term strategy and capacity development;
- \$2 million to help establish a Community Enterprise Catalyst to give emerging community enterprises the support they need to get started and succeed, such as business and financial advice;
- \$5.3 million to establish 12 local Community Foundations in disadvantaged areas to bring community agencies and business supporters together to identify needs and fund local community projects;
- providing funding for the sector to consider establishing a new representative body for community organisations.

The Action Plan has also announced the intention of Consumer Affairs Victoria to explore options to improve access to affordable, external dispute resolution mechanisms for associations and co-operatives.

It is intended that the points under the Action Plan will be legislated for during 2008. None of the major action points appear to have been implemented yet, but will be the subject of future articles as further details become available. The full text of the Action Plan can be downloaded at <http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf/allDocs/RWP5FCB0E3A722237C7CA25727C00059BFB?OpenDocument>.

Nils Verseemann
Senior Lawyer

Anti-Money Laundering – What you need to know

The amount of money being laundered globally each year is estimated at over \$A1.5 trillion. Of this an estimated \$A200 billion is laundered in the Asia-Pacific region annually.

Banks are required to have extensive risk management systems in place in order to combat money laundering and the financing of terrorism.

However, these obligations are not limited to banks. For example, an organisation which provides hire-purchase arrangements, conducts a loans business, issues debit cards, accepts deposits, or provides insurance may have obligations under the Act.

These requirements are set out in the Anti-Money Laundering and Counter-Terrorism Financing Act 2006. Any organisation which supplies a “designated service” under the Act needs to comply with the requirements.

Examples of designated services include

- a bank, building society, credit union:
 - opening an account for a customer;
 - accepting money on deposit; or
 - issuing a debit card.
- a loan provider making a loan, as part of carrying on a loans business;

- an account provider issuing a chequebook.

To view the complete list of designated services go to http://www.austrac.gov.au/designated_services.html

If your organisation provides a designated service, such as accepting deposits, you should already have an AML/CTF Program in place.

An AML/CTF program consists of policies and procedures for:

- assessing the money laundering risk of customers, products and services;
- conducting ongoing customer due diligence;
- conducting employee due diligence; and
- conducting customer identification and re-verification.

If you think your organisation may have anti-money laundering obligations, the best place to start is to seek advice, or visit the website for the government regulator, AUSTRAC (The Australian Transaction Reports and Analysis Centre): www.austrac.gov.au.

Some useful educational material - including a quiz to test your knowledge of AML - is available at http://www.austrac.gov.au/elearning/mod_modules.html

Libby Klein
Lawyer

The Aid/Watch Case - There is more than one way to fight poverty

The decision in *Aid/Watch Incorporated and Commissioner of Taxation* was handed down 28 July 2008.

Aid/Watch researches, monitors and campaigns about the delivery of overseas aid. Its objective is to promote aid programs that are environmentally sound and effectively delivered. Is it a charitable institution? Yes, says Justice Downs, President, Administrative Appeals Tribunal of Australia in his Judgment 28 July 2008.

One of the Heads of Charity is the relief of poverty. However an organisation with the object of changing the law is not a charity.

The Judge relied on the fact that provision of overseas aid is an important part of government policy as is the protection of the environment.

The Judge put it out that the role of charity may simply be the advancement of charitable objects and not necessarily direct distribution of aid or (in the case of education and religion) the direct teaching or preaching.

The case seems to signal a fresh approach to the role of charities in advancing concepts for the good of the community through education, campaigning, and policy formulation.

It will be a comfort to charitable organisations who have been reluctant to transparently apply resources to public campaigns for fear of losing charitable status.

The Australian Taxation Office has lodged an appeal.

Murray Baird
Principal

Prescribed Private Fund: Mandatory Guidelines?

Prescribed Private Funds ("PPF") allow families and individuals to establish and donate to their own charitable fund for the ultimate purpose of disbursing those funds to deductible gift recipients. Founders of PPFs and their professional advisers has been guided by several versions of the *Guidelines for Prescribed Private Funds* issued by the Federal Government ("the *Guidelines*"). The latest version of the *Guidelines* is "version 3" issued in May 2004. Whilst not having the force of law, in practice the Australian Taxation Office ("ATO") uses the *Guidelines* to determine whether an application for listing as a PPF is entitled to such listing.

As distinct from other tax deductible funds, ultimate approval for listing a PPF rests not with the ATO but with the Assistant Treasurer. This has made it difficult at times to determine who is "calling the shots".

However the Government announced in the 2008/2009 budget that it will now introduce measures to give statutory force to the *Guidelines*, effective from 1 July 2009. We understand an updated version of the *Guidelines* supported by statute may require PPF trustees to undertake regular valuation of assets owned by the PPF at market rates and increase the size of the compulsory distributions made by the PPF. The updated *Guidelines* will also give the ATO greater statutory basis to regulate PPFs.

Moore's Legal will be involved in the consultation process undertaken by Treasury to develop an updated *Guidelines*. We believe that there are benefits for Trustees of PPFs and persons wishing to establish PPFs for any updated and legislated version of the *Guidelines* to give certainty as to their obligations and requirements. However, there is a danger that PPFs will become so carefully regulated that they will become unattractive as a charitable giving vehicle.

We will also be on hand to provide our prospective PPF clients with the most up-to-date advice when the *Guidelines* are finally resolved by Treasury and given statutory force.

Murray Baird
Principal

Can Professional Associations Get Tax Concessions? - The VWLA Case

The recent Federal Court case of *Victorian Women Lawyers Association v Commissioner of Taxation* [2008] throws light on a number of recurrent issues in charities law:

- What may first appear to be a professional association could be categorised as an association for the advancement of education or, as in this case, a purpose beneficial to the community such as equal opportunity and advancement of disadvantaged groups.
- Benefits to members of an organisation such as social and networking functions that are directed to a larger object are in aid of that larger object and not an end in themselves. Will it have implications for school alumni associations who might hold social functions to support the educational objectives of a school?
- Campaigning and lobbying activities will not necessarily disqualify an organisation from being a charity. Much of the Court's deliberation in this case revolved around whether the lobbying aspects of the Association's work would prevent it from being a charity. Political organisations are particularly not considered to be charities (see our discussion of the *Aid/Watch* case in this issue).
- The characterisation of an organisation must be assessed "holistically". You do not just look at the Constitution but history of formation and activities are relevant considerations.
- Charity need not benefit the whole of the public but may benefit a section of the public.

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Accordingly a number of defences which the Commissioner of Taxation sought to put around charitable organisations appear much wider than the Commissioner had argued.

In this case the Court found that VWL's principal purpose was to remove barriers and increase opportunities for participation by and advancement of women in the legal profession in Victoria. Therefore, the Court found it to be a charitable institution.

Although the Australian Taxation Office ("ATO") considered an Appeal, the last date for lodging an Appeal (25 July 2008) has passed without an Appeal being lodged.

Implications of the Decision

The decision gives some guidance to other organisations in the community that they may qualify as a charity even where they perform some lobbying or social functions. However, the case is clear that the dominant purpose needs to be of value and genuine benefit to the community. We would expect to see similar organisations following the path of the VWL, and seeking to be treated as charities in the future.

Cecelia Irvine-So
Senior Lawyer

Murray Baird
Principal

The Tax Commissioner says prevention is better than cure

On 30 August 2008 the Tax Commissioner launched the [ATO Compliance Program](#) 2008 - 2009 to let the community know where the focus and attention will be in the next 12 months. Issues for not for profits are as follows:

- Not for profit organisations have limited resources for managing their compliance and the ATO will provide help and advice to comply, with a minimum of cost.
- There will be increase in litigation to get guidance from the Courts as to what constitutes a charity. One example given is *Commissioner of Taxation v Word Investments Limited* heard recently in the High Court.
- There will be a GST guidance document designed to help not for profit organisations avoid mistakes.
- There will be increased review of applications for endorsement as charities and deductible gift recipients.
- There will be post endorsement checks to make sure that charities are not being used for private benefit, tax minimisation or failing to comply with requirements.
- There will be continued monitoring of prescribed private funds with extensive reviews in the compliance year.
- Clubs where commercial activities become a main purpose will be monitored.
- Refunds of franking credits will be checked carefully.

The charitable institutions ought to take a compliance program into account in risk management.

Murray Baird
Principal

National business names - coming soon?

About time!

The current system of registering business names has its problems. Registration is sometimes refused to not for profit entities, on the basis that they are not operating a business. Those organisations frequently need a business name in order to open a bank account or register a domain name.

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Registration is on a state by state basis. This means that in order to register a business in every state and territory, 8 separate applications must be lodged. Government fees total approximately \$1,000. Also, because a business name cannot be registered in a state more than 2 months before commencing business in that state, it is not possible for an entity to secure a business name prior to commencing operations in that state. This can create problems for entities that intend to commence operating interstate in future.

To address some of these problems, the creation of a national business names registration system has been identified as a current "hot spot" by the Council of Australian Governments ("COAG"). COAG has asked the Business Regulation and Competition Working Group to present an implementation strategy for a national system to COAG in October 2008. It has been confirmed that it will still be possible to register a business name in only one state or territory if desired.

At this stage, there have been no announcements as to any other reforms being made to the business name registration system. However, the Commonwealth Innovation Minister, the Hon Dr Craig Emerson MP, has announced that this reform alone will reap a \$1 billion benefit over 10 years.

Murray Baird
Principal

Volunteers and Tax

The Tax Office has released a new version of its guide *Volunteers and Tax* (NAT 4612-04.2008). This publication explains the tax treatment of common transactions between non-profit organisations and their volunteers, and covers the following topics:

- Honoraria
- Allowances
- Reimbursements
- Are expenses incurred by volunteers tax deductible?
- GST
- FBT
- PAYG withholding obligations

The new version incorporates the following changes since the guide was last issued in March 2005:

- The GST registration threshold increased from \$100,000 to \$150,000 for non-profit organisations.
- The threshold for withholding from a supplier that does not provide an Australian business number (ABN) increased to \$75, excluding any GST. Previously this was \$50.
- The ABN withholding rate decreased from 48.5% to 46.5%.
- A valid tax invoice is not required in order to claim GST credits for purchases not exceeding \$82.50 (GST inclusive). Previously this was \$55.

How to get a copy: *Volunteers and Tax* can be downloaded from the ATO's website – go to <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/8729.htm>

Alternatively paper copies can be ordered online or by phoning **1300 720 092** and quoting the NAT number 4612.

Libby Klein
Lawyer

National Employment Standards

On 16 June this year the Federal Government released their proposed 10 National Employment Standards (NES). These standards represent the Government's attempt to prescribe minimum terms and conditions of employment for Australian Employees. The 10 NES are:

- Maximum weekly hours;

- Requests for flexible working arrangements;
- Parental leave and related entitlements;
- Annual leave;
- Personal/carer's leave and compassionate leave;
- Community service leave;
- Long service leave;
- Public holidays;
- Notice of termination and redundancy; and
- Fair work information statement.

The NES represent a significant increase in the number of areas over which the Government is attempting to set legislative minima. The current pay and conditions standard only covers 5 areas.

The Government hopes to have the legislation incorporating the NES pass through both houses of Parliament by the end of the year with commencement from 1 January 2010.

Some of the standards cover conditions of employment that are familiar, while others introduce new concepts or significantly expand the coverage of conditions that are only currently applicable to some employees. In this article we will focus on these new and expanded standards.

Requests for Flexible Working Hours

In recognition of the difficulties of balancing work and family responsibilities, the Government proposes to allow Employees who have responsibility for the care of a child who is under school age to request changes to their working arrangements to assist them in caring for the child.

In order to qualify to make a flexible working arrangements request, an Employee must have 12 months service with the Employer. Casual Employees must have been employed by the Employer on a regular and systematic basis for 12 months and have an expectation that such regular and systematic employment will continue.

The request must be in writing and the Employer must respond in writing within 21 days. The Employer may refuse the request only on "reasonable business grounds". The term reasonable business grounds is not defined. If an Employer cannot agree to all aspects of an Employee's request, negotiation is encouraged to see if a mutually acceptable arrangement can be reached.

Parental Leave

Parental Leave has been available to Employees for some time. The NES significantly expands the extent of Parental Leave Entitlements. Currently, Parental Leave is available to either the father or mother for up to 12 months. The NES allows both parents to separately take a period of up to 12 months leave. It also allows one parent to request an extension of up to 12 months on top of the initial 12 month period. An Employer must agree to an extension unless they have reasonable business grounds for refusing. There are a complex set of rules governing the situation where both parents take leave. In some circumstances one parent's leave entitlement may be reduced if the other parent's is extended.

Community Service Leave

Community Service Leave is an entirely new category of leave. It is available in two circumstances:

- Jury service leave;
- Leave to carry out a voluntary emergency management activity.

To be entitled to leave to carry out a voluntary emergency management activity, an Employee must:

- carry out an activity that involves dealing with an emergency or natural disaster;
- carry out the activity on a voluntary basis;
- be a member of or have a member like association with a recognised emergency management body;
- be requested by the emergency management body to assist with an emergency or natural disaster.

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Community Service Leave would cover volunteer work with fire fighting services, state emergency services, coast guard and other search and rescue services.

With the exception of leave for jury service, the Community Service Leave is unpaid. Permanent Employees on jury service will be paid at their base rate of pay for up to 10 days less any jury pay they receive. Casuals are not entitled to any payment.

Notice of Termination and Redundancy

While Employees have been entitled to statutory notice periods on termination for some time, the NES now provides for statutory redundancy entitlements. Previously, redundancy entitlements have usually been provided for in awards or collective agreements. If an Employee was not covered by an award or collective agreement, then redundancy entitlements did not apply.

Under the NES an employee terminated due to redundancy can receive up to 16 week's pay depending on their length of service.

However, not all Employees will be entitled to redundancy pay. The NES excludes the following Employees:

- those who work for an Employer who employs fewer than 15 Employees;
- those who have fewer than 12 months service at the time of termination;
- those whose employment is terminated as part of a transmission of business and who will take up employment with, and whose service is recognised by the new Employer or who have rejected an offer of employment with the new employer that was on substantially the same terms and conditions as their previous employment;
- employees who are on probation, casuals, trainees or employed for a specific time or to complete a specific task.

Conclusion

It remains to be seen how the NES will impact upon the average Employee. If the legislation is passed, Employers will need to come to terms with the sometimes complex provisions of the standard to ensure compliance. Consideration will also need to be given to the NES when drafting Employment Contracts.

Peter Andrew
Consultant

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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