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Editorial

Almost a month after a pivotal Federal Budget, the sector continues to wrestle with its implications—what will be the scope of an unrelated commercial activities tax? The ATO has released a draft Tax Ruling on charities—how will it impact on entities seeking to secure and maintain charitable status? We cover this and a number of other issues in this edition.

Suhanya Ponniah
Editor—Not for Profit Briefing
Lawyer

Exploding some myths about not for profits

Once upon a time there were “not-for-profits” and “for-profits”. That distinction remains useful and very much part of our lexicon. But language can sometimes confine our thinking. In this article we explore some of the ways in which boundaries between these concepts are blurring – and why it matters.

Myth 1: The not for profit sector is not as well managed as the corporate sector

Some suggest that for profits are disciplined and not-for-profits aren't. That's offensive to well managed not for profits, and not true of many mediocre for profit businesses. Maybe the distinction is between “great” and “good” organisations. Of course, both for profits and not for profits are represented in each category. For more: [Jim Collins on the social sector](#)

Myth 2: The corporate sector is just about making money

When Corporate Social Responsibility was becoming mainstream, there was debate about whether it is legitimate for a company to take into account interests other than maximising shareholder profit.

There is now increasing acceptance that it is legitimate for directors to take all stakeholders’ interests into account when making decisions in the best interests of the company.

In fact, companies such as [Nescafe](#) are espousing the idea of “[Shared Value](#)” : companies will do best if they look for opportunities to create social value *and* profit. In short, it's the idea of win-win. [More](#)

Myth 3: Governance of not for profits requires a different mindset

Of course there are different challenges in the not for profit sector compared with the corporate sector. And differences in culture. But many of the same people are serving on boards of both types of organisations, bringing the same skills qualifications and experience to both sectors.

And then there are the “[philanthrocapitalists](#)”, for example Bill and Melinda Gates – people who are applying their money, power and expertise to solve big societal problems on a large scale. Often by applying the approach which they have found successful in the for profit world.

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Suhanya Ponniah
Lawyer
Not for Profit

Suhanya provides advice on governance, structuring and taxation issues for Not for Profit organisations and individuals with philanthropic objectives.

Suhanya has previously practiced in the Estate Planning, Superannuation and Structuring Group at Moores Legal and hence has an understanding of Wills and bequests and their impact on the Not for Profit sector.

In addition, in 2009 Suhanya volunteered with International Justice Mission, a human rights organisation and was based in Kampala, Uganda. She served as a Legal Fellow on a project which involved advocating for the property rights of widows and orphans. Hence she has an insight into field issues for international organisations.

Suhanya has previously served on the Board of her local church, volunteered at the Asylum Seeker Resource Center in West Melbourne and has had numerous community involvements.

Suhanya has presented for legal practitioners, accountants and financial planners at seminars for Lexis Nexis, Leo Cussen, the Law Institute and Television Education Network around Australia. She also presented for the then Federal Government Department of Families, Community Services and Indigenous Affairs in public consultations on Special Disability Trusts.

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Myth 4: Not for profit is not commercial

While the idea of running a business to fund not for profit activities goes back a long way, social enterprises have become more prominent recently.¹ These are organisations that exist for public or community benefit and trade to fulfill their mission.

The May 2011 budget announcement by the Federal Treasurer included reference to the commercial activities of not for profits. Any commercial activities which are unrelated to the not for profit's purpose and which are not ploughed back into achieving the organisation's purpose will be subject to tax.²

Conclusion

Think not just outside the square, but outside the sector. There are great insights to be had out there, and no need for the not for profit sector to suffer from an inferiority complex.

Libby Klein
Senior Lawyer

¹[Finding Australia's Social Enterprise Sector](#)

²[NFP Budget briefing](#)

Charter of Rights and Equal Opportunity Act 2010

Oscillation on the Equal Opportunity Act

Attorney-General Robert Clark has said that proposed changes to the equal opportunity laws of Victoria will "[restore balance and common sense](#)"

Background

- In 2010, the then Victorian Labour Government passed the Equal Opportunity Act 2010 ("the 2010 Act") which was due to replace the Equal Opportunity Act 1995 ("the 1995 Act") in August 2011. The 2010 Act would (amongst other things):
 - impact on faith based organisations and schools and the right to employ people who share similar beliefs;
 - give coercive investigative powers to the Victorian Human Rights and Equal Opportunity Commission ("the Commission"); and
 - create a single combined role of Commissioner and Chairperson of the Board of the Commission.

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"The 2010 legislation is a far-reaching attack on the freedom of faith-based organisations and freedom of religion and belief. The amendments restore tolerance and a sense of a fair go. Faith-based organisations and political organisations should be free to engage staff that uphold their values."

Attorney-General Robert Clark, reported in February in [The Age](#).

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- One of the current government's election promises was to amend the 2010 Act to wind back some of these changes.
- In February 2011, the current Attorney-General of the Liberal Government announced an intention to reverse some of the effects of the Equal Opportunity Act 2010.

For more, refer to our article "Start/Stop for Equal Opportunity Act 2010" in the [March 2011](#) edition of the NFP Briefing.

2011 Amendments

The Government put forward the *Equal Opportunity Amendment Bill 2011* ("the Bill"). Embarrassment ensued when the Bill was defeated on May 26 due to the absence of MP Mary Wooldridge from Parliament.

On 1 June 2011 after three and a half hours of legal debate and 18 speakers (mainly about process rather than substance), the Bill was passed by a narrow 43 – 42 majority in the Legislative Assembly. The Bill will now proceed to the Legislative Council (the upper house) and if passed, will come into full effect on 1 August 2011.

The Bill will make numerous changes including to:

- remove the "inherent requirement" test for employees of faith-based organisations – more on this below.
- retain the exception in the 1995 Act which ensures that school communities are given recognition in considering what are reasonable standards of dress, appearance and behaviour for students.
- allow discrimination on the grounds of gender for particular competitive sporting activities if it will facilitate participation and is reasonable. The rationale is to address the needs of members who want to play sports such as lawn bowls with their own gender or will otherwise leave the sport.
- confirm that if reasonable adjustments have been made for those with a disability in accordance with the Commonwealth disability discrimination legislation, this will also satisfy the Victorian requirements.
- amend the powers of the Commission to conduct investigations and public inquiries.
- reinstate an independent chair of the Board of the Commission rather than the same individual being both Commissioner and Board Chair. This is in the interests of good governance.

The Bill will retain the changes made in the 2010 Act which provide that discrimination by religious bodies or schools on the grounds of race, age or disability will be unlawful.

The "Inherent Requirement" test

The 1995 Act allows a faith-based organisation to discriminate in accordance with the organisation's beliefs and principles. The 2010 Act imposed a requirement that in relation to the employment of staff, the organisation could only discriminate if conformity with those beliefs and principles is an *inherent requirement of the position*. For example, a Christian school could discriminate against non-Christians when employing a religious education teacher, but not for a maths teacher.

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Unrelated commercial activities tax

The Federal Budget announced major changes for the sector. The most controversial change was the introduction of an unrelated commercial activities tax. Our [Budget Briefing](#) contains explanation and analysis of the tax.

On Friday 27 May 2011, Bill Shorten released a [Consultation Paper](#) on this subject seeking "public views on possible approaches to implement the Government's Budget announcement to better target NFP tax concessions to the altruistic activities of NFPs".

The Paper seeks feedback on a number of questions:

- what should be the scope of the test?
- should there be an exception for small scale, low-risk activities?
- how should transitioning to the new rules be implemented?
- how should new or existing activities be identified?

The closing date for submissions is 8 July 2011.

Moore's Legal comment

In our view there are a lot of grey areas associated with the proposed unrelated commercial activities which raise more questions than answers.

For example:

- what does commercial mean?
- what does related mean?
- what does a new activity mean? What about changes to existing activities?
- what does small scale, low risk mean?
- does "commercial" mean that only business activities will be taxed? What about passive investment activities?
- what is the scope of the exception for government contractors and National Rental Affordability Scheme participants?
- when will income be regarded as retained by the entity and therefore taxed?

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The Bill seeks to remove this requirement.

The Attorney-General said:

"This restriction on the freedom of faith-based organisations under the 2010 act is in stark contrast to the position for political organisations. The 2010 act imposes no such "inherent requirement" test on political organisations. Political parties will continue to be free, as they should be, to take political beliefs into account in recruiting staff. It would be absurd to suggest that a political party should be forced to employ staff who actively opposed what that party stood for. Such a law would make it virtually impossible for political parties to operate. Yet the inherent requirement test in the 2010 legislation, if it were to come into operation, would impose such an obligation on faith-based organisations."

It is expected that the Bill will pass without further amendment.

The future

The passage of the Bill will be a win for religious organisations. However this is a highly politicised issue and the law may continue to oscillate with changes in Government and popular opinion.

Charter of Human Rights and Responsibilities Act 2006

"The Charter Act has been controversial since the day it was introduced into Parliament", said Robert Clark, Victorian Attorney-General. He has announced a review of the *Charter*.

Background

- The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("*Charter*") for the first time enacted in Victorian law, a series of human rights and responsibilities.
- The *Charter* came into full operation on 1 January 2008.
- There was a built-in review mechanism in the *Charter*. It required the Attorney-General to review the *Charter* after its first four years of operation by 1 October 2011 (section 44).

For more background on the *Charter*, refer to our articles "*Charter of Human Rights and Responsibilities – Does it apply to Not for Profits*" in our [August 2008](#) NFP Briefing and "*Exceptions to discrimination law: the CYC case - a casenote*" in our [October 2010](#) edition.

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- if income is invested and generates more income, will that be taxed?
- what tax rate will apply? Will trusts be discriminated against because the penalty rate which generally applies is higher than the 30% rate for companies?

The announcement will lead to uncertainty, definitional questions and greater compliance costs for the sector with no gain to the revenue. It is, in our view, an arid but expensive exercise.

Suhanya Ponniah
Lawyer

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Inquiry

On 19 April 2011, Robert Clark announced the establishment of a parliamentary inquiry into the operation of the *Charter* to be conducted by the Scrutiny of Acts and Regulations Committee ("the Committee") of the Victorian Parliament. The Committee has been asked to report back to Parliament by 1 October 2011 to meet the review deadline of the *Charter*.

Incidentally the Scrutiny of Acts and Regulations Committee is responsible under the *Charter* to consider any Bill introduced in Parliament and advise if it is incompatible with human rights (section 30).

The scope of the inquiry is broad and is to consider issues such as:

- whether to include additional human rights such as economic, social and cultural rights, women's and children's rights;
- the effect of the Charter on litigation, drafting statutory provisions and consideration of provisions by Parliament;
- overall cost/benefit analysis; and
- options for reform.

Submissions can be made to the Committee addressing the [Terms of Reference](#) of the Inquiry. If you wish to make a submission, the due date is Friday 10 June 2011. Guidance regarding submissions can be found [here](#).

In our view the *Charter* has the potential to significantly influence the law in Victoria and was considered by VCAT in the [CYC case](#). Therefore we eagerly await the outcome of the review.

Suhanya Ponniah
Lawyer

Draft taxation ruling on charities released

TR 2011/D2: Income tax and fringe benefits: charities

Introduction

Charities must apply to the Commissioner of Taxation for endorsement before they are entitled to income tax, GST and fringe benefits tax concessions. When an application is made, the Australian Taxation Office assesses it against the provisions of the relevant Taxation Ruling. Taxation Rulings are the Commissioner of Taxation's interpretation of the law, and they become, in effect, the law for the Australian Taxation Office.

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Moore's Legal comment

Moore's Legal welcomes the draft ruling and is pleased to see that it generally adopts the decisions of the High Court in *Word Investments* and *Aid/Watch*.

Commercial purposes and activities

Moore's Legal is concerned that the Draft Ruling appears not to take into account the High Court finding that commercial activities (both passive and non-passive) are charitable activities if they are conducted in furtherance of a charitable purpose. Accordingly, it is difficult to understand how the Australian Taxation Office ("ATO") intends to draw a distinction between passive and non-passive investment activities.

Moore's Legal queries the extent to which the Draft Ruling would need to be amended if the unrelated commercial activities tax is introduced. There are several ambiguities. For example, it is not clear whether the tax will affect an organisation's "charitable" status or whether it will allow an organisation to be endorsed as "charitable" but then taxed. Other ambiguities are set out in our article "Unrelated Commercial Activities Tax". Moore's Legal would expect some guidance on these issues to be available after the "Better targeting of not-for-profit tax concessions" Treasury consultation process has been completed.

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The relevant Taxation Ruling 2005/21 on tax concessions for charities has been out of date for several years. It did not take into account a number of important cases which had been decided since it was drafted, including *Commissioner of Taxation v Word Investments Ltd (2008) 236 CLR 204* and *Aid/Watch Incorporated v Commissioner of Taxation (2010) HCA 42 (1 December 2010)*. As a result charities have incurred increased time and costs on application for endorsement and negotiations, and in some cases, endorsement has been refused altogether.

Finally, the out-of-date Taxation Ruling has been withdrawn (TR 2005/21) and on 11 May 2011 a new draft ruling was issued: TR 2011/D2. However TR 2005/22 which is a "twin" of 2005/21 remains unchanged and appears to be also out of date.

Determining charitable status

The Draft Ruling takes into account the decision of the High Court in *Word Investments* in determining whether an organisation is charitable.

It:

- Provides that determining whether an entity is a charity requires a holistic consideration of the organisation's constituent or governing documents, activities, policies and plans, administration, finances, history and control, and any legislation governing the operation of the organisation; and
- Excludes (from endorsement as a charity) organisations that have not spelt out their charitable purpose in their constituent or governing documents; and
- Is not clear on the extent to which *Word Investments* applies to charitable funds as well as charitable institutions.

Commercial purposes and activities

The Draft Ruling takes into account the decision in *Word Investments* to some extent.

It provides that:

- an organisation can undertake commercial or business-like activities and still be charitable if the organisation was established for a charitable purpose; and,
- in those circumstances, it does not matter that the activities themselves are not intrinsically charitable.

This is slightly different from what the High Court actually decided. The High Court held, in effect, that commercial activities *are* charitable activities if they are undertaken to further a charitable purpose.

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Moore's Legal comment

Political purposes

Moore's Legal notes that the Australian Taxation Office has applied the High Court's reasoning in *Aid/Watch* to recognise as charities those organisations established to generate public debate on charitable purposes generally, and not just on the issues of poverty, religion and education. It appears to Moore's Legal that this is a logical and sensible extension of the Court's reasoning and we support this interpretation.

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The Draft Ruling also provides that an organisation can be charitable if it "holds passive investments to receive a market return to further its charitable purpose". The implication is that it is acceptable for a charity to generate revenue from shares, but not to engage in running a business.

There is no basis for this distinction in the case law. This issue was considered by Justice Sundberg of the Federal Court in *Word Investments* and he concluded that there was no basis in law for drawing a distinction between active and passive investment activities.

The ATO is perhaps relying, therefore, solely on the Budget announcement on 10 May 2011 that the Government intends to introduce an unrelated commercial activities tax that would apply to active business endeavours but not passive investments. However, that Budget announcement is not yet law.

Political purposes

The Draft Ruling takes into account the decision of the High Court in *Aid/Watch*.

It:

- Provides that a charity with political objects will not be automatically disqualified from endorsement;
- Recognises that an organisation established to generate public debate on poverty, religion, education and other recognised charitable purposes is a charity;
- Notes there is an ambiguity in the law over whether direct lobbying of parliamentarians is charitable (as opposed to generating public debate);
- Allows for some organisations to be denied charity status if they do not contribute to the public welfare. An example of this would be where the organisation has an inappropriate purpose (e.g. the promotion of anarchy) or an inappropriate means (e.g. bribery);
- Excludes from charitable status political parties and organisations established to carry out activities directly associated with political parties (such as electioneering).

Accumulation

The ATO is concerned with charitable funds or charitable institutions that accumulate surpluses and do not distribute them for their charitable purpose. The ATO takes the view that if there is ongoing accumulation of funds, it suggests that the organisation or fund has a commercial purpose and not a charitable purpose.

The Draft Ruling recognises that some accumulation is acceptable. However, a fund or organisation should review its position every year. That is, it should decide annually when and how any funds should be distributed, and if there is a surplus that is not distributed that year, there should be a record of the reasons why.

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Moore's Legal comment**Small membership base**

Moore's Legal recognises that many charitable organisations are tightly controlled and that this is to enable the organisation to function effectively and efficiently. Accordingly, Moore's Legal is concerned by the implication in the Draft Ruling that the ATO considers tightly controlled organisations with small memberships to be lacking the relevant element of public benefit. The consequences of the Draft Ruling are not yet clear in this regard.

Distributions to owners or members

Moore's Legal also welcomes the recognition that in some circumstances, a charity may make distributions to its owner or members in furtherance of its charitable purpose. It is a practical reality that a charity may have one public face but several legal entities and the Draft Ruling now confirms the ability to transfer funds between multiple entities in those circumstances.

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Small membership base

The Draft Ruling alludes to organisations which are tightly controlled through small memberships. It appears to the Australian Taxation Office that this seems to go against the grain of the concept that charitable institutions are for the public benefit. We query whether narrow control amounts to private benefit?

Distributions to owners or members

The Draft Ruling accepts that, in some cases, a charity may make a distribution to one of its owners or members.

Traditionally, the ATO has interpreted the requirement that a charity is not-for-profit to mean that it cannot provide benefits to its owners or members. However, the Draft Ruling recognises that in some circumstances, a charity might provide a benefit to an owner or member in furtherance of its charitable purpose. This would usually arise where the charity is owned by another charity or has another charity as its sole member. i.e. there is a parent company / subsidiary type relationship between two charities.

Main purpose or dominant purpose

The ATO has traditionally required a charitable organisation to have a charitable purpose as its sole purpose. However, the draft ruling now accepts that the charitable purpose must be the main or dominant purpose.

Sporting, social and recreational purposes

The Draft Ruling provides that sporting, social or recreational purposes are not charitable, even if they result in benefits to the community. The case law has signalled that this law is "ripe for review" and we expect test cases on this issue.

Elizabeth Turnour
Lawyer

Fortune does not favour the Commissioner of Taxation

In recent times, a series of cases has come before the Court in which the concept of "charity" for tax-exemption purposes has been under scrutiny, and in each one the Commissioner of Taxation ("the Commissioner") has been unsuccessful. In each case the Commissioner's narrow interpretation of the law was not accepted by the Court.

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Fiona Thomas
Senior Lawyer
Not for Profits

Fiona has been with Moores Legal for over 14 years and is a member of the Commercial and Not for Profit Groups.

She advises commercial and community organisations and has particular expertise in the areas of not-for-profit taxation, governance and structuring.

Fiona is a member of School and Church governance bodies.

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The story began in December 2008 with [Word Investments](#). It continued in December 2010 with [Aid/Watch](#). We have reported on these cases in previous Briefings.

Three further cases continue the trend:

1. Bargwanna
2. Wentworth
3. Cooperative Bulk Handling

1. Bargwanna

The case of *Bargwanna v Commissioner of Taxation (No 3)* [2011] FCAFC 18 concerned the endorsement of a public charitable trust.

Facts

The Kalos Metron Charitable Trust (the "Fund") applied to the Commissioner of Taxation in 2004 for endorsement as an income tax exempt entity.

The Commissioner said that the income and property of the Trust was not applied for the purposes for which it was established as required by the Tax Act.¹ The Commissioner claimed that misapplication was evidenced, among others, by:

- an excessive accumulation of trust income;
- the deposit of part of the trust funds in a bank account where it "offset" the trustee's interest obligations to their mortgagee; and
- part of the trust's funds was used for the benefit of the fund's accountant or his clients.

Decision

In a decision handed down on 17 February 2011, the Full Federal Court of Australia disagreed with the Commissioner. The Full Federal Court judgment is significant because the Court held that individual transactions had "to be analysed in the context of the administration of the Fund as a whole" ([71]) and subjective evidence from the trustees is relevant in this analysis.

The Commissioner had argued that because there were indiscretions in the management of the fund, the fund was not applied for charitable purposes. However the Court took the view that this requirement does not address individual misapplications of parts of the fund but has regard to the whole administration of the relevant fund. The Full Federal Court remitted the matter to the Administrative Appeals Tribunal to determine whether the fund as a whole was being applied to the relevant charitable purpose.

¹ s.50-60 of the *Income Tax Assessment Act 1997* (Cth)

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3. Cooperative Bulk Handling

The ATO has recently issued a Decision Impact Statement arising from the determination of the Full Federal Court in the *Co-operative Bulk Handling* case ([2010] FCAFC 155). In that case the Court decided that Co-operative Bulk Handling Ltd ("CBH") - the major bulk handler of grain in WA - was entitled to endorsement as an income tax-exempt association under item 8.2(a) of section 50-40 of the *Income Tax Assessment Act 1997* as an association established for the purpose of promoting the development of Australian agricultural resources, and not carried on for the profit or gain of its individual members.

In reaching its decision the Court ruled that:

- the expression "promoting the development of Australian agricultural resources" includes developing the range of resources available to facilitate and support agriculture. That is, it encompasses activities "beyond the farm gate";
- conducting activities in an efficient and profitable manner does not preclude an entity from entitlement to exemption. (Indeed, the exemption assumes that there *is* a surplus, which would otherwise be taxed);
- with regard to the non-profit requirement, any benefits derived by the members of CBH by virtue of the fact that they were grain growers did not amount to benefitting those members in their capacity as members; and
- that the statutory prohibition on the application or distribution of assets for the benefit of members is an important, but not determinative, consideration.

As a consequence of this decision the ATO is to update Taxation Ruling IT 2415 - Income Tax: Associations promoting the development of Australian Resources.

Fiona Thomas
Senior Lawyer

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In short, the Court took a "big picture" view rather than a "one strike and you're out" approach – a welcome decision for trustees.

However, the story is not over. The Commissioner is seeking special leave to appeal to the High Court.

Natalia Tripp, Elizabeth Turnour, Suhanya Ponniah

2. Wentworth

The Federal Court of Australia has determined that the facilitation of face-to-face banking services in a small rural community from which such services had been withdrawn over time - in an endeavour to reverse the "significant, negative impact upon the [town's] local economy and general prosperity" - may be income tax exempt.

From May 1998, after all the banks closed their branches, the closest branch to the town of Wentworth was in Mildura, some 30 km away. This had a significant negative impact on the town's economy. So a business community successfully lobbied the Bendigo Bank to open up a branch there. They established a company limited by guarantee to "facilitate" this by providing the premises and branch staff.

In the decision of the *Commissioner of Taxation v. Wentworth District Capital Ltd* [2011] FCAFC 42, handed down on 28th March, 2011 the Full Court of the Federal Court ruled that the company which was established for the purpose of "promoting, providing, or carrying out activities, facilities or projects including but not limited to community banking services, for the benefit or welfare of the community..." was an income tax -exempt "association established for community service purposes" pursuant to item 2.1 of section 50-10 of the *Income Tax Assessment Act 1997*.

In reaching this decision, the Court affirmed several key conclusions drawn by the trial judge about community service purposes and the entities that pursue them, namely that "community service":

- connotes practical or tangible help, benefit or advantage;
- does not include services provided for reward;
- may include the facilitation and promotion of the relevant service;
- must be the main or dominant purpose, but not necessarily the sole purpose. Other, ancillary purposes may be allowed.

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The court recognised that the tax-exemption available to the company would likely not be available to subsequent organisations facilitating face-to-face banking in the same community, and that the entry of other banks into the market place would probably terminate the exemption available to the company. However, the court ruled that an entity's tax status is to be addressed in each income year by looking at its activities and objects for that year: whether or not it would have tax status in other years under different circumstances does not affect its status for the years in question.

It is worth noting that the Commissioner did not appeal this decision.

Fiona Thomas
Senior Lawyer

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.

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.

Murray Baird
Principal
Not for Profits

Fiona Thomas
Senior Lawyer
Not for Profits

Libby Klein
Senior Lawyer
Not for Profits

Suhanya Ponniah
Lawyer
Not for Profits

Elizabeth Turnour
Lawyer
Not for Profits

Andrew Sudholz
Principal
Property Transactions

Peter Andrew
Special Counsel
Employment & Schools Law

Andrew Simpson
Principal
Bequests & Estates
Aged Care Facilities

Nils Verseemann
Senior Lawyer
Intellectual Property

Cecelia Irvine-So
Senior Lawyer
Volunteer Law

Allan Swan
Principal
Estate Planning, Superannuation & Structuring

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9 Prospect St. Box Hill Vic. 3128
12/1140 Nepean Hwy. Mornington Vic. 3931
Tel: [03] 9898 0000 Fax: [03] 9898 0333
info@mooreslegal.com.au
www.mooreslegal.com.au

MOORESLEGAL