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Commercial Activities for Charities

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The decision of the Full Court of the Federal Court of Australia (Stone, Allsop, and Jessop JJ) in [Commissioner of Taxation v Word Investments Limited \[2007\] FCAFC 171 \(14 November 2007\)](#) throws light on the extent to which charities (schools, churches, welfare agencies etc) can raise funds through commercial activity.

The Facts

Word Investments Ltd is a fundraising arm of Wycliffe Bible Translators Australia. Wycliffe is involved in literacy and translation work for the purposes of advancing the Christian religion. Word Investments Ltd ("Word") conducted fundraising activities to support the work of Wycliffe. Activities included the conduct of an investment fund where donors would place money on low or no interest and investment returns applied for charitable purposes. Another activity was the conduct of a funeral business.

The Australian Taxation Office wanted to deny Word the status of a charitable institution because although its objects appeared to be charitable its activities did not bear the character of a charity.

What the Court Said

The Federal Court said that the task was to "assess the true character of the entity by reference to its objects, purposes and activities. It is an integrated, holistic inquiry directed to whether a body of facts and circumstances satisfy the legal category..." It is appropriate to look at the combination of motivation, application of profits and stated objects to form a view as to whether the body is a genuine charity.

If commercial activities are conducted by an entity exclusively for charitable objects, the entity can be regarded as charitable.

Australian Nexus

A second question in the case was whether Word met the requirement of s50-50(a) of the 1997 Tax Act that it pursue its objectives principally in Australia. The Court said that the activities and the donation of funds occurred in Australia and the fact that those funds may be ultimately spent outside Australia was not the relevant inquiry.

Commentary

The decision in Word will reassure charities who have substantial commercial activities as part of their fundraising that they need not lose charitable status if their motivation, intention, objects and practices reflect the charitable purpose.

In our view the decision may require the Commissioner of Taxation to revisit Taxation Ruling 2005/21 where the implication in paragraphs 128-134 (inclusive) is that commercial operations need to be incidental to the carrying out of a charitable purpose (such as the conduct of a farm business which cared for neglected boys or the running of a canteen to promote temperance).

However the Court in Word said that there is a clear and exclusive purpose of raising funds for charity, the nature of the commercial activity is not the issue.

A Checklist to Retain Charitable Status

Where there is substantial commercial activities and an entity wishes to obtain or retain charitable status the following questions may assist:

- It is our motivation and intention to further charitable purposes?
- Do our constitutional and policy documents make this clear?
- Does our pattern of distributions show that we are only benefiting charitable purposes?

Murray Baird
Principal

Charitable Purpose and Incidental Political Activities

With a Federal election this month, many charitable organisations have considered what role they can legitimately play in the political process without jeopardising their tax concessions. The ATO has made its view on this matter public in [Tax Ruling TR 2005/21](#).

The ATO accepts that the law distinguishes between an organisation established for a political purpose (which is not charitable), and an organisation that undertakes incidental political activities to further its charitable purpose. By the term "incidental", the ATO understands this to mean activities which may be carried out by an organisation "for the sake of, or in aid of, or in furtherance of," its charitable purpose. This is so even if those activities when viewed in isolation may be regarded as political.

This general rule of "incidental activities" applies to activities a not for profit organisation may undertake in relation to supporting a particular political party on an issue of relevance, advocating for a particular law or government policy to be continued or changed, offering an opinion or position on a particular issue to the public, and undertaking political lobbying activities.

In our view an organisation that is regarded by the ATO as being charitable can enter the political process in the circumstances described above without jeopardising its tax concessions providing it remains focused on its principal charitable purpose. This is true even if the particular charitable purpose involves matters that are controversial, subject to public debate or are consistent with a position expressed by a political party. For example an environmental organisation may support the Greens.

If your not for profit organisation requires further assurances before entering into areas subject to political debate but which are relevant to its purpose, please do not hesitate to contact the not for profit team at Moores Legal.

Derek Mortimer
Lawyer

Prescribed Private Funds –Encouraging Big Givers

A Prescribed Private Fund ("PPF") is a fund established by deed of trust to which businesses, families and individuals can make tax deductible donations. The Federal Government developed them to encourage greater corporate and personal philanthropy in Australia. The first PPFs were established in 2001 and there are now around 600 in operation.

Typically they are established by families as a vehicle for future philanthropy where control over distributions is held closely. The fund is "quarantined" for distribution of capital and income to deductible gift recipients ("DGRs").

DGRs need to know how they operate to consider whether to commend them to major donors or to access trustees for potential distributions.

A PPF is regulated by a variety of sources including a [Guidelines for Prescribed Private Funds](#) issued by the Federal Government, the requirements of item 2 in the table in section 30-15 of the *Income Tax Assessment Act*

1997, and [Tax Ruling TR 95/27](#) in relation to public funds. The ATO has also produced a document for PPF's on how to complete a mandatory annual Information Return.

The [Guidelines for Prescribed Private Funds](#) were first issued in mid April 2001 followed by subsequent updates in 2002 and 2004. They include a number of "integrity assurance measures" together with a model trust deed. The Guidelines and the model trust deed do not have the force of statute nor do the subsequent revisions to the model trust deed have any effect on applicants who relied on previous versions. However in our view, the use of imperative language in the Guidelines suggests they ought to be followed where possible.

We expect that the Guidelines and model trust deed will be further revised, (we are currently up to version 3) based in part on feedback to the ATO by legal practitioners and other stakeholders in the not for profit sector. Moores Legal is an active participant in this process and will take a keen interest in further updates to the model trust deed and Guidelines once issued.

Derek Mortimer
Lawyer

ATO Compliance Program 2007-08: They're From the Tax Office and They're Here to Help

The ATO has released a list of areas it intends to focus on in 2007-08 as part of its compliance program for the not for profit sector. These areas are:

- applications for endorsement as a tax concession charity;
- endorsed charities that undertake political lobbying activities;
- endorsed charities that undertake commercial operations; and
- established Prescribed Private Funds.

We understand that the ATO accepts not for profit organisations tend to be compliant with their tax obligations but often have a low level of knowledge about the tax law. As the Commissioner of Taxation, Michael D'Ascenzo has stated:

"... we are seeing some cases where there is an unintended blurring of boundaries between legitimate activities and those which may threaten endorsement as non-profit organisation."

Accordingly, the [ATO 2007-08 Compliance Program](#) will focus on providing not for profit organisations it investigates with help and advice such as tailored information products, to ensure they stay within appropriate boundaries. The ATO may only escalate its compliance activities to audit where it believes there may be deliberate attempts to abuse tax concessions.

If your organisation is concerned that it may not be "ATO compliant" or is unsure of its taxation obligations and needs independent advice, please do not hesitate to contact the not for profit team at Moores Legal.

Derek Mortimer
Lawyer

Boards and Directors Beware Individual Penalties Under Workchoices

The seriousness with which the Workplace Ombudsman, Nicholas Wilson, is taking his role can be seen in the increase in the number of prosecutions he has launched against employers for breaches of the *Workplace Relations Act* ("The Act"). Prosecutions are up from an average of 3 per year to more than 50 in the 2006/2007 financial year. Prosecutions have not only been launched against the companies themselves, but also individuals involved in their management. In one case a Director of a company operating a hotel was fined \$4,950.00, and the Manager \$1,980.00 for applying duress to an employee in an effort to get her to sign an AWA. In another case the Director of a printing company was fined \$9,240.00 for underpaying employee wages and entitlements.

The Act provides that a person involved in a contravention of one of its civil remedy provisions can have monetary penalties imposed upon them individually.

Other provisions of the Act can be used to bring criminal prosecutions against individuals including company Directors and management. Recently, a Director of a transport company was convicted for failing to produce information to workplace inspectors when requested to do so.

All those involved in company management, whether in the not for profit sector or the commercial sector, need to ensure compliance with the Act lest they be exposed to prosecution either by the Workplace Ombudsman or the Commonwealth Director of Public Prosecutions.

Peter Andrew
Consultant – Workplace Relations

Are the Old Girls and Boys Charitable? Ex-Student Associations and the ATO

Many schools have formally established associations of ex-students. Whilst in the past some of these associations may have existed to hold reunions and other social activities of ex-students, they are now taking an increasing role in supporting the educational activities of their school. In this new role, an ex-students association may be eligible for tax concessions, particularly exemption from payment of income tax.

In its [Tax Ruling 2005/21](#), the ATO regards a purpose that is "essentially social in nature" as not being charitable. However the ATO does accept in the Ruling that an organisation established "for the advancement of education" is charitable.

To determine whether an ex-student association is essentially social in nature or constituted to advance education, the ATO will examine its purpose as set out in its constituent documents (such as a constitution), and the activities the association actually undertakes.

Examples of activities that may be acceptable to the ATO include fundraising for the provision of scholarships to persons in need to attend a school for education. The ATO also accepts that where an ex-student association is constituted to advance education, it can nonetheless retain an "incidental" social element. As Dylan J in *Barralet and others v. Attorney-General and others [1980] 3 All ER 918*, stated, such incidental social activities help to "further the esprit de corps" of members which in turn helps to cultivate the principal purpose of a charitable institution.

Alternatively, an ex-student association may prefer not to seek tax concessions in its own right, but come under the governance umbrella of the school to which it is attached. In this way it may be able to make use of tax concessions currently available to that school.

Moore's Legal has considerable experience with schools and their ex-student associations in regards to tax concessions available. Do not hesitate to contact the not for profit team at Moore's Legal if you require further advice.

Derek Mortimer
Lawyer

Dementia and Recreation Conference – Current Legal Issues

On 16 November 2007 Cecelia Irvine-So and Heidi Stabb of Moore's Legal spoke to delegates at the Total Aged Care Services Conference comprising 500-600 recreation co-ordinators, lifestyle assistants, divisional managers, nursing managers, supervisors, directors of nursing and other key persons in the dementia and aged care area.

The topics included a review and refresher on volunteer protection legislation as well as discussions of the importance of volunteer manuals, site orientations and policies and procedures. The discussion of volunteer risk management and policies was pursued in the framework of highlighting the most common five volunteer insurance claims which are:

1. Personal accident claims by volunteer workers;
2. Property claims;
3. Motor vehicle comprehensive claims;
4. Claims in relation to unfair dismissal of committee and board members; and
5. Professional indemnity claims in relation to defamation (board members).

The additional changes to Government regulation of the aged care sector imposed on 1 September 2007 were also discussed. The most recent change in this area is that all approved providers of aged care must maintain current police certificates for all relevant volunteers. "Current" means certificates obtained within the last three years. Volunteers are subject to the same requirements as employees regarding the contents of a police certificate. A person convicted of murder or sexual assault, or a person convicted of any other type of assault and sentenced to imprisonment for that conviction may not provide aged care or undertake ancillary duties - in other words, they may not be employed or volunteer in an aged care facility. There are special rules that relate to volunteers who are minors.

Aged Care Providers should also keep in mind the following additional requirements relating to police certificates, once obtained:

- They must be renewed every three years;
- There must be appropriate storage, security and access procedures in place relating to the certificates;
- Records must be kept regarding all decisions made in relation to individuals and the contents of police certificates.

Statutory Declarations are required for volunteers who have been a citizen or permanent resident of another country since the age of 16.

It is also important that aged care providers note that the Government requirements relating to the types of offences and the impact of these on a potential volunteer are minimum standards - not best practice. Providers should ideally have other policies in dealing with other offences which may appear in the police certificate such as crimes of deception like fraud.

Just to add complexity, Tasmania is the only jurisdiction where it may be discrimination to reject a potential volunteer on the basis of an "irrelevant criminal record".

The changes to the law and the continued operation of the volunteer protection legislation in all Australian jurisdictions emphasises the need for aged care providers and other not for profit organisations to ensure that the volunteer training and manuals are up to date as well as their procedures, and storage of all of these documents.

Members of our not for profit team speak on a regular basis on not for profit matters including volunteer and risk management and in some instances appear without a fee.

Cecelia Irvine-So
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

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