MOORES LEGAL

Not for Profit Briefing

August 2007

“Teaching a Man to Fish” –

Some Lessons for PBI’s

INDEX

“Teaching a Man to Fish” – Some Lessons for PBIs........................ 1

$1M Payout for Bullied School Boy..2

Working with Children.................. 2

Who’s Watching You – Charities, Political Lobbying and the Aid Watch Case................................. 3

ASX Principles Can Help Not for Profits...4

Special Disabilities Trusts – Planning for Disabled Beneficiaries.............................4

Just a Reminder.........................5

A recent decision of the Administrative Appeals Tribunal (“AAT”) will help to clarify the role of Public Benevolent Institutions (“PBI”) and their relationship with overseas partners to deliver direct relief to persons in need. The Court decision, *AAT Case [2007] AATA 1443, Re SIM Australia as trustee for SIMAID Trust* (“*SIMAID*”) found that the applicant had not established that it was an “institution” and so was not entitled to endorsement as a PBI. However the decision makes it more difficult for overseas aid and development funds.

The Australian Tax Office (“ATO”) accepts that provision of “direct relief” to persons in need can be achieved through the work of employees or volunteers of an organisation, or through agents acting on behalf of the organisation. This follows an observation by O’Connor J in *Australian Council for Overseas Aid v Federal Commissioner of Taxation*:

“It would… be surprising if a public benevolent institution could perform its role without having to rely upon various agencies…”

In *SIMAID* the Tribunal found that overseas partners of the applicant were not its “agents”. In making this finding the Tribunal observed that the overseas partners were able to act independently of the applicant, and that no line of authority existed from the overseas partner back to the applicant. Any relationship that did exist between the overseas partners and the applicant was mainly through funding arrangements.

The Tribunal also found that the purpose of the applicant was not in fact for the “direct relief of persons in need” (even if an agency arrangement had been established). The applicant’s business plan, for example, described administrative matters and not the implementation of relief in other countries. Former employees of the applicant were engaged to fundraise and promote overseas projects rather than to implement direct relief. The Tribunal concluded that the applicant had acted more like a “particularly energetic trustee” of donor’s funds rather than being engaged in direct relief of persons in need.

Whilst the case did not turn on this point, during the course of its reasoning the Tribunal accepted that a policy of helping people to help themselves was in itself a benevolent activity. It observed that sometimes “direct relief can create a dependency that makes the recipients more vulnerable than ever”. Moores Legal endorses this observation. It is consistent with long accepted wisdom in the not-for-profit sector that “it is better to teach a person to fish so they can feed themselves for a lifetime”, rather than give a person a fish on a daily basis.

We think that had the applicant been able to show the Tribunal that its overseas partners were agents acting on its behalf, and that its activities were in fact directly focussed on assisting persons in need rather than fund-raising, the outcome of the hearing may have been different.

Moores Legal assists organisations to maintain their PBI status where agency relationships may be contemplated. For an organisation that does want to focus its activities on fundraising, Moores Legal can also advise on establishing an ATO compliant “Ancillary Fund” which is ideal for this purpose.

Derek Mortimer
Lawyer

$1m Payout for Bullied School Boy

In May 2007 the New South Wales Supreme Court awarded a student in a Department of Education School $1M for damages as a result of being subjected to harassment and bullying. The Court found that the school took inadequate steps to prevent the bullying. As a result the student suffered emotional, psychological and psychiatric injuries which affected relationships and employment.

The Judge went so far as to say the boy's life had been "all but destroyed" as a result of the bullying.

What should schools do?

- There should be a clear anti-bullying policy;
- There should be an effective procedure for following up complaints;
- Bullies should be dealt with and punished as appropriate.

Murray Baird
Principal

Working With Children

In an effort to protect children from harm, State and Territory Governments across Australia have enacted Legislation that requires a background check to be completed on all adults who work with children, whether as paid employees or volunteers.

For example, the Victorian Government has enacted the *Working With Children Act 2005* ("WWC Act").

The WWC Act provides that a person over the age of 18 years cannot be involved in child related work unless they have completed a Working With Children Check ("WWCC"). A child is defined as a person under the age of 18 years of age. Child related work includes work that usually involves, or is likely to involve, regular direct contact with a child in specified circumstances where that contact is not directly supervised by another person.

The provisions of the WWC Act requiring a WWCC are being phased in over a 5 year period. The following workers are already required to have completed a satisfactory WWCC:

- Child protection workers;
- Foster carers;
- Family day carers;
- After school carers;
- Juvenile justice workers;
- School crossing supervisors;
- People who work at camp sites where children are accommodated overnight;
- Government and non Government school staff.

Over the next 12 months (1/7/07 – 30/6/08) the following workers will be required to complete a satisfactory WWCC:

- TAFE College workers;
- Child carers who provide centre-based long day care, occasional care, or in home care;
- Kindergarten/Pre-school workers;
- Refuge workers;
- Child counsellors;
- Anyone working with children in the context of a religious organisation. This would include Sunday school teachers, youth workers and Ministers of Religion.

Accordingly, it is important that all employees in the above categories undergo a WWCC before 30 June 2008.

The WWC Act exempts certain classes of people from the requirement to undergo a WWCC. Those exempted include:

- Parents working as a volunteer in relation to an activity in which their own child or children participate;
- People working with children who are related to them (a grandparent providing childcare in respect to their own grandchildren would not be required to submit to a WWCC);
- A person under the age of 18 years;
- Students under the age of 20 who do volunteer work with children;
- Teachers registered under the Victorian Institute of Teaching Act 2001;

- Police officers.

It is an offence for a person to do child related work or for an organisation to employ someone to do child related work, unless the person holds a current Working With Children Assessment Notice. This notice indicates that the holder has successfully completed a WWCC.

Penalties for breach of the WWC Act are substantial. They include imprisonment for up to 2 years and fines of up to $26,000.00 for individuals and $132,000.00 for Body Corporates.

It is important for all religious and not for profit organisations to review their programs and activities in order to determine if employees or volunteers require a WWCC.

Peter Andrew
Consultant

Who's Watching You?

Charities, Political Lobbying & the Aid Watch Case

AID/WATCH describes itself as "a not for profit activist organisation monitoring and campaigning on Australian overseas aid and trade policies and programs. We work to ensure aid-funding reaches the right people, communities and their environments."

AID/WATCH reports that the ATO revoked its charitable status in October 2006 on the basis that AID/WATCH had conducted three activities that were "political" in nature, and therefore were in breach of the requirement that all charities have a sole charitable purpose. Specifically, AID/WATCH urged the public to write to the government to put pressure on the Burmese (Myanmar) regime, delivered an ironic birthday cake on the 60^{th} "birthday" of the World Bank and raised concerns about the developmental impacts of the US-Australia free trade agreement.

The Law

Taxation Ruling 2005/21 deals with the definition of "charity" in Australian Tax Law and throws light on the concept of "sole purpose" in the charity context. The ruling provides:

- An institution is not charitable if its purpose is advocating a political party or cause, attempting to change the law or government policy, or propagating or promoting a particular point of view (para 102).
- However, if the purpose is charitable, the presence of political or lobbying programs and activities will not detract from this status, provided they are merely **incidental** to the charitable purpose (para 103).

The purpose of a charitable institution is determined having regard to its constitution, any legislation governing its operation, its activities, history and control (para 26). Presumably, then, the activities that caused concern for the ATO should have been viewed in the context of AID/WATCH's constitution, history and control.

Moores Commentary on Aid/Watch Case

The purpose of Aid/Watch is to ensure that aid funding reaches the right people, communities and environments. We assume that "right" means "neediest". In our view this purpose comes under the charitable heading of relief of poverty, sickness or distress.

We assume that this is the only reason for the existence of Aid/Watch ie. Its sole charitable purpose.

Are the alleged "political activities", purposes in themselves or merely ancillary to the sole charitable purpose? The question is "do they serve the main purpose?"

When does an activity move from serving a main purpose to becoming a purpose in itself?

The difficulty for charitable organisations is to work out when an ancillary activity may become so dominant that it becomes a purpose in itself. At the moment there is little guidance and the outcome of the Aid/Watch case will help. In the meantime there is danger in extensive or aggressive political activity.

Pressure by the ATO on perceived political activities of charitable and especially overseas aid organisations is at odds with contemporary thinking that real change will come about when governments intervene to deal with the *causes* of poverty rather than alleviating the *outcomes* of poverty.

What does this mean for your organisation?

All charities are obliged to self-assess their continued entitlement to charitable status (refer further to Worksheet 2 in the ATO's Income Tax Guide for Non-Profit Organisations NAT7967-09.2006). In particular, charities need to be aware of changes in activities and the role of lobbying or advocacy in their organisation. We can assist in working out where the line may be drawn.

The sector will await with interest the outcome of Aid/Watch's appeal to the Administrative Appeals Tribunal!

Further reading: http://www.aidwatch.org.au/

Cecelia Irvine-So
Senior Lawyer

ASX Principles can help Not for Profits

The 2nd Edition of the ASX Corporate Governance Principles & Recommendations ("the Principles") released this month by ASX Corporate Governance Council will help the business and not for profit community with a clear governance framework.

The Principles can be downloaded at www.asx.com.au.

Although the Principles are designed to assist listed public companies in good governance, they can be easily adapted for not for profit organisations.

According to the Principles, organisations should:

1. Lay solid foundations for management and oversight;
2. Structure the Board to add value;
3. Promote ethical and responsible decision-making;
4. Safeguard integrity and financial reporting;
5. Make timely and honest disclosure;
6. Respect the rights of members;
7. Recognise and manage risk;
8. Remunerate fairly and responsibly.

There is a helpful supplementary guide to issues of recognising and managing risk attached to the Principles.

Moores Legal recommends that managers and directors of not for profit organisations become familiar with the Principles and assess whether the governance practices of the organisation accord with the spirit of the Principles.

If you have any query as to how the Principles may apply to your organisation, please contact us

Murray Baird
Principal

Special Disabilities Trusts

Planning for Disabled Beneficiaries

Families which include people with disabilities, are often confronted with the issue of how to effectively plan and provide for the future of their family members. Where the disability affects the person's decision-making capacity and ability to manage finances, a trust is often established so that trustees manage the funds on behalf of the person. However since 2002, where the person is receiving the Disability Support Pension, the assets and income of the trust have been assessed by Centrelink when undertaking the means test.

From September 2006, a new type of trust was introduced by the Federal Government, termed a "Special Disability Trust". These trusts can be established during the lifetime of the person establishing the trust, or after their death in their Will. The significant benefit of the trust is that up to $500,000 of assets (indexed) can be held, in addition to a principal place of residence, without counting for the purposes of the means test of the disabled beneficiary. In addition, a person seeking to qualify for the age pension can gift up to $500,000 of assets to the trust without contravening the deemed gifting rules.

Some features of the Special Disability Trust are as follows:

1. The assets and income of the trust must be expended on the care and accommodation of the beneficiary.

2. The beneficiary must meet the definition of having a "severe disability". Where the person is 18 years of age or over, there is a three-fold test:
   i. they must be receiving the Disability Support Pension;
   ii. they must not be working or not able to work at the minimum wage; and
   iii. live in government-supported accommodation or if they had a sole carer, the carer must be eligible to receive the Carer Allowance or Carer Payment on account of the disability.

3. There are a number of regulatory rules and parameters relating to the trust, such as who the trustees are to be, the assets of the trust and audit requirements.

It is important to note that it is necessary to assess the circumstances, needs and assets of the beneficiary, and that of their family, to determine whether a Special Disability Trust would be an effective planning tool for the future. We are able to assist in undertaking this assessment and providing further advice regarding these new trusts.

Suhanya Ponniah
Lawyer

Just a Reminder...

The Australian Taxation Office recently sent out letters to all tax concession charities with a reminder that charities must regularly self-assess their continued entitlement to charitable status. A work sheet is provided in the ATO's income tax guide for non-profit organisations NAT 7967-09.2006 available at www.ato.gov.au/nonprofit (follow the prompts to forms and publications).
The letters from the ATO are simply reminders of ongoing responsibilities although the Tax Office does have a program of review of charities to ensure that organisations are still eligible for tax concession entitlements.

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

Murray Baird
Corporate Governance
Head of our Not for Profit Team

Fiona Thomas
Not for Profits

Derek Mortimer
Not for Profits

Andrew Sudholz
Property Transactions

Tim Adam
Compensation & Schools

Tina Lau
Taxation

Peter Andrew
Employment & Schools Law

Andrew Simpson
Bequests & Estates
Aged Care Facilities

Nils Versemann
Intellectual Property

Cecelia Irvine-So
Volunteer Law

Allan Swan
Estate Planning & Structuring

Philip Curtis
Estate Planning & Structuring

MOORES LEGAL

9 Prospect St, Box Hill Vic 3128 Telephone: (03) 9898 0000 Facsimile: (03) 9898 0333
info@mooreslegal.com.au www.mooreslegal.com.au