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New Cases Look at Hot Spots in Not for Profit Law

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There have been three significant cases since our last Briefing that illustrate hot spots in not for profit law. The cases clear up the question of how much Government control will affect charitable status but leave the question of Commercial activities uncertain.

Commissioner of Taxation v Word Investments Limited 3 November 2006 Sundberg J. Federal Court of Australia

The Court held that a funeral business conducted by an entity associated with a Christian missionary society to assist grieving families and to raise funds for missions was a charity and accordingly tax exempt. The Judge found that the making of profit through a business is not inconsistent with a charitable purpose. The true question is the motivation for making the profit.

Stop Press: The ATO has appealed this decision to the Full Federal Court.

Links:

http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1414.html
<http://www.mooreslegal.com.au/PLET.aspx?c=Newsletters&s=Charities%20Alert>

Central Bayside General Practice Association Ltd v Commissioner of State Revenue

31st August 2006 High Court of Australia

An association of general practitioners established on the initiative of the Federal Government and funded to promote optimal continuing patient care was held to be charitable despite substantial government patronage. Just because the purposes of a charitable organisation coincide with government policy and funding this does not mean that it becomes a Government agency.

Links: http://www.austlii.edu.au/au/cases/cth/high_ct/2006/43.html
<http://www.mooreslegal.com.au/PLET.aspx?c=Newsletters&s=Charities%20Alert>
www.ato.gov.au/v/content/77820.htm

Catholic Church Insurances v Commissioner of State Revenue

14 July 2006 Victoria Civil and Administrative Tribunal

An insurance office associated with the Catholic Church and established under Canon Law did not confine its activities to the advancement of religion and accordingly was not charitable.

The decision concerned stamp duty on the transfer of an investment property. Although it should follow that the decision will affect the income tax status of Catholic Church Insurances, the Australian Taxation Office apparently does not intend to follow the decision and revoke tax exemption. It appears to take the view that Catholic Insurance Office is still ancillary to the religious purposes of the Catholic Church – thus taking a different view to the State Revenue Office Victoria.

Link: <http://www.austlii.edu.au/au/cases/vic/VCAT/2006/1366.html>

Murray Baird
Principal

New Deductible Gift Recipient Categories

New Deductible Gift Recipient categories from the 1st July 2006 were:

- Scholarship funds;
- Australian disaster relief funds;
- Animal welfare charities;
- Charitable services institutions;
- War memorial repair funds;
- Developed country disaster relief funds.

The Australian Taxation Office has now published **application forms** to obtain deductible gift recipient status in each of these categories. They are known as schedules. Examples are available at <http://www.ato.gov.au/nonprofit/> and following links to new DGR categories.

Organisations wishing to establish tax deductible funds should create a constitutional document (typically a trust deed or set of rules) and then complete and submit the appropriate schedule for deductible gift recipient applicants.

We expect the most popular fund will be a **scholarship fund** to promote education for Australian citizens or permanent residents studying in approved Australian courses or institutions. We would expect that most schools would wish to establish such a fund to make the funding of scholarships tax deductible.

Murray Baird
Principal

Governance:

The Chairman – First Amongst Equals

Legal obligations imposed on Directors of not for profit companies are no less than those imposed on profit driven companies.

The Australian Institute of Company Directors ("AICD") policy position paper 2006-1 <http://www.companydirectors.com.au/Policy/FAQs/Roles+Duties+And+Responsibilities/Role+of+the+chairman> describes the role of the Chairman of the Board. It responds to judicial comments by Justices Austin and White given in the course of the litigation involving the former Directors of One.Tel (the Greaves case). In that case the Court made comments to the effect that the non-executive Chairman had responsibilities extending beyond those of other non-executive Directors.

AICD says that the role of the Chairman is as follows:

- The Chairman acts as a gate-keeper of the flow of information to the Board. It is often the Chairman's decision as to when, and if, issues are to be brought to the Board for consideration. However, the Chairman must avoid any collusion with the CEO in suppressing information. The Chairman must not prevent the CEO from raising matters with the Board. The Chairman should not fail to raise any matter that would reasonably be judged worthy of attention.
- The Chairman must have a relationship of candour and confidentiality with the CEO whilst keeping a professional distance.
- Whilst the qualitative difference between a Chairman's liability and a Director's liability in failing to pass on information is no different, it is expected that the Chairman is more likely to come into possession of information that should be shared with the other Directors and therefore more open to failing to pass on that information in breach of his or her duties.
- The Board operates collegially and in a sense is collective responsibility and elevating the Chairman above the other Directors is at odds with a candour and trust promoted by this collective decision making.

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- Boards may seek external advice as a group if they are concerned about the actions of management, but does not follow that a Chairman has to seek his or her own independent advice.

The AICD also suggests that all Boards should discuss and agree upon the role of the Chairman and that that role includes to:

- act as a confidant and advisor for the CEO while at the same time reserving the capacity to lead the Board and judge the CEO's performance;
- conduct Board and Shareholder meetings with sufficient skill to allow views to be heard and decisions made within reasonable time;
- foster an environment of constructive collegiality among Directors, drawing out the best contributions from each;
- set the standard for Board members in terms of professionalism, conduct and ethical behaviour and counsel the Directors if their behaviour is below standard.

AICD says that the Chairman's functions are delegated by the Board and functions are customary rather than set down in law.

In summary, because Chairmen often practically have greater potential to breach their duties by withholding information or becoming either knowingly or unwittingly complicit in inappropriate actions of management, it is important that the Chairman be on their guard about avoiding breaches of duties. A well governed Board should expect the Chairman to raise these concerns directly with the other Directors in an open environment of collegiate candour.

We are available to provide governance training and advice and conduct Board retreats, as well as developing governance manuals and policies.

Cecelia Irvine-So
Lawyer

Workplace Relations: Sexual Harassment in the Workplace

The Christmas Party is a time for celebration. However, it can also be the time when alcohol clouds the mind and caution is thrown to the wind. This can lead to situations where remarks are made or actions taken which constitute sexual harassment. Not only is the perpetrator liable for their actions but employers can be held vicariously liable if they have not taken all reasonable precautions to prevent this type of conduct occurring in the workplace.

In this article, we will consider sexual harassment and some measures employers can take to avoid being held vicariously liable.

Sexual harassment

Sexual harassment is:

- unwelcome sexual conduct (i.e. it is examined from the point of view of how the conduct was perceived and experienced by the recipient rather than the intention of the perpetrator);
- actions which make a person feel offended, humiliated and/or intimidated; and
- where that reaction is reasonable in the circumstances (i.e. whether a reasonable person in the position of the recipient would have regarded the behaviour as offensive, humiliating or intimidating).

Sexual harassment is prohibited by law and can affect both men and women, in the workplace or off site at work-related events and activities, during and outside normal working hours.

Examples of sexual harassment include:

- unwelcome touching, hugging or kissing without invitation;
- suggestive comments or jokes or gestures;
- repeated unwanted invitations to go out on dates;
- requests for sex or sexually explicit conversation;
- making promises/threats in return for sexual favours;

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- insults based on your sex;
- sexually explicit emails or text messages (modern technology has created a range of new media where harassment can occur and which need to be regulated by the employer).

Sexual harassment is not:

- behaviour that is based on mutual attraction, friendship and respect;
- interaction which is consensual, welcome and reciprocated.

Note however that conduct of a sexual nature between teachers/students, whether consensual or not, could constitute an offence and lead to prosecution and jail and/or the end of the teacher's career.

Liability

The perpetrator (including students if they are 16 or older) is personally liable for their own unlawful acts.

Individuals and the employer can be liable as accessories if they are aware that harassment is occurring (or may be occurring) and yet do nothing.

The employer can be vicariously liable for the unlawful acts of its employees unless it takes all reasonable steps to prevent sexual harassment occurring in the workplace. Note also that employers and organizations can be vicariously liable for the unlawful conduct of their agents, this could include volunteer workers.

Steps to take

Examples of measures that can be taken to prevent sexual harassment occurring in the workplace include:

- regular training and workshops for all employees and volunteers;
- awareness campaigns;
- preparation and implementation of comprehensive policies (including on the use of technology such as computers and mobiles);
- ensuring that the policies have proper mechanisms for dealing with complaints;
- creating and maintaining a culture of appropriate behavior and respect at all levels at the workplace.

Moore's Legal can assist in implementing appropriate measures to avoid sexual harassment occurring at the workplace, including conducting training or workshops at your organization.

For further information please contact Frances Anderson at Moore's Legal.

Frances Anderson
Lawyer

The Rise of the Ancillary Fund

Subdivision 30-A, section 30-15 of the Income Tax Assessment Act, 1997 (Cth) ("the Act") establishes the ancillary fund as a Deductible Gift Recipient ("DGR") in its own right. As such, it is a useful vehicle for the receipt of tax-deductible gifts.

What is an Ancillary Fund?

An ancillary tax-deductible fund is a public fund established and maintained under an instrument of trust solely for the purpose of providing money, property or benefits to another or other funds, authorities or institutions, gifts which are tax-deductible because those funds, authorities or institutions themselves are DGRs.

Why is an Ancillary Fund Useful?

1. An organisation which operates or supports a number of DGRs (such as a church which runs a Public Benevolent Institution, school building fund and/or overseas aid fund) may choose to install an ancillary fund as an "umbrella" for the receipt of all tax-deductible giving. This enables the organisation (usually the trustee of the fund) to distribute the income of the fund to those specific DGRs as need dictates and may prevent oversubscription of certain funds to the detriment of others.
2. An organisation which would, itself, struggle to satisfy the Australian Tax Office criteria for DGR status may choose to establish a tax-deductible ancillary fund bearing its name or ideals to which

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the supporters and benefactors of the organisation can identify, and “conduit” the income of such a fund to an external, approved DGR for the support of agreed programs.

How can I obtain more information?

Moores Legal has been involved in the development and endorsement of many tax-deductible ancillary funds. If you would like to investigate the suitability of an ancillary fund for your organisation, please contact Moores Legal.

Fiona Thomas
Lawyer

Australian Taxation Office Compliance Program 2006- 2007

The current ATO compliance program points out that there are 700,000 non profit organisations in Australia collectively employing more than 1 million people during the year.

Around 188,000 of these organisations are registered with the ATO. The ATO says that compliance issues arise because non-profit organisations have limited resources to manage their tax affairs and rely heavily on volunteers.

The general approach of the Tax Office is to provide information and support so that NFPs can comply with their tax obligations at minimal cost.

New priorities in relation to Non Profits:

- updating ATO systems and information products to reflect changes in the law;
- developing information packages for indigenous grant providers and recipients;
- checking taxable clubs and associations to ensure correct reporting of non-member income;
- identifying high risk prescribed private funds in conducting target compliance activities;
- testing compliance with recent rulings on commercial activities and charities (TR2005/21 TR2005/22).

Organisations relying on the principle of mutuality for tax exemption, and those engaged in commercial activities will be targeted along with prescribed private funds.

Link: www.ato.gov.au/taxprofessionals and following the links to compliance program.

Murray Baird
Principal

Bequests: Dealing with Estates - A Guide for Not for Profits

For most Not for Profit Organisations (“NFP’s”), bequests are an essential part of their ongoing financial viability. Consequently, the competition for the bequest dollar is vigorous.

The law relating to the administration of estates is complex and NFP’s are not always fully aware of their rights as beneficiaries. This is particularly the case where difficulties emerge during the administration of the estate such as delay or where the Will is subject to a challenge that may diminish the organisation’s entitlement under the Will.

The purpose of this article is to highlight those matters that NFP's should be aware of when dealing with estates.

Viewing the Will

A Will is the essential governing document in relation to the administration of an estate. It sets out the manner and method of distribution and the rights and responsibilities of those referred to therein.

Section 50 of the *Wills Act 1997* provides a beneficiary with a right to see the Will. This includes the purported last Will and any earlier Wills.

By requesting a copy of the Will, a NFP can determine the nature of their entitlement: for example is it a specific legacy or a portion of the residuary estate.

It also enables the NFP to establish the identity of the nominated executor.

A request to see the Will should be made to the executor in writing or the lawyer acting on behalf of the estate.

Delays in Administration

If it appears that there is excessive delay in the administration of an estate, a NFP should make contact with the executor or the lawyer acting for the executor to establish the reason for the delay.

Where it is discovered that the executor has not yet applied for Probate of the Will (in the absence of a reasonable explanation), Section 15 of the *Administration and Probate Act 1958* allows for an application to be made to the Court compelling the executor to "bring the Will into Court".

An application of this nature can only be made after the expiration of 6 weeks from the date of death. In practice, the delay that would justify such an application would need to be significantly longer than this in order to succeed with the application.

Interim Distributions

Where an estate administration is likely to be lengthy, for whatever reason, a NFP should consider asking the executor to make an interim distribution prior to the ultimate wind up of the estate.

An executor's ability to comply with such a request will depend on a range of factors including the executor's access to available funds and the likelihood of a challenge being made against the estate for further provision.

It should be noted however that usually a beneficiary cannot insist on an interim distribution.

Executor's Commission

Before an executor is entitled to deduct commission, the consent of all residuary beneficiaries must be sought and obtained or a Court order made in favour of the claim.

A NFP should carefully review the executor's claim for commission particularly where the organisation has been asked to sign a consent allowing the claim.

The *Administration and Probate Act 1958* (Section 65) prescribes a maximum commission of 5% of the gross realisable value of the estate.

Commission at the maximum rate is very rare and is usually reserved for the most complex and difficult estate administrations.

Commission in the range of 1.5% to 3.5% is more usual.

Therefore, a NFP should seek advice if an executor's claim for commission appears excessive. As a beneficiary, a NFP is entitled to ask the executor to explain the activities for which commission is being sought. A request for a detailed accounting should also be made.

Claims for Further Provision

It is not uncommon for a NFP to find itself involved in a Wills dispute. Usually the dispute arises from a claim by an aggrieved family member seeking further provision from the estate.

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The prevalence of such claims has increased significantly since the 1998 amendments to the *Administration and Probate Act 1958* that expanded the category of people able to bring a claim.

If the NFP is receiving a legacy only (ie the gift of a specific amount), the applicant may not take objection to the gift being made in any event.

However, where the NFP is entitled to a portion of the residuary estate, any award of further provision will impact the entitlement received by the NFP.

The threshold issue for each organisation is its philosophical approach to such claims. Is it one of "defend the claim at all costs" or one of subtle participation in the negotiation process. This is a question for each organisation.

Regardless of the approach, the desirability of, and need for, independent legal advice needs to be addressed.

A NFP may also need to consider whether or not to be joined as a defendant to the proceeding.

Often, the need for independent representation and/or joinder depends upon the attitude of the executor. The executor's primary function is to defend the terms of the Will as written. Therefore, where the executor is independent and inclusive, separate representation and joinder would usually be unnecessary.

If the NFP suspects that the executor is not impartial or has a vested interest in the success or otherwise of the claim, separate representation should be sought and even joinder considered.

Conclusion

Estate administration can result in a wide range of questions for a NFP. Our Not for Profit Team is able to advise if and when these issues arise.

Andrew Simpson
Principal

Fund Raising and Deductible Gift Recipients

The ATO recently released an article in its September news service reminding DGRs of the restrictions placed on them in offering a full tax deduction to donors for monies donated. In summary, a gift must be genuinely given with no expectation of a benefit to the donor.

Not every gift made to a DGR in the course of a fund raising event will be deductible to the donor.

DGRs need to be aware:

- that no deduction is available for fund raising dinners which contain a small component to cover the costs of the dinner and a larger donated component. Because a donor receives a material benefit at the time of making a donation, the donation is not tax deductible. However, if you split the costs between the meal costs and the additional donation - and make this donation optional - DGRs may give a tax deduction for the donation component.
- there are special rules that apply to one off events like fetes, balls, gala shows and dinners. The rules are complex, and in our view of very limited application for typical fundraising. These special provisions relate to both tickets for events and the purchase of auction items
 - tickets: the contribution of cash or property of \$250.00 or more made for the right to participate in a fund raising event are capable of being deducted by individuals minus any minor benefit received in return. The benefit is also capped and is the lesser of \$100.00 or 10% of a GST inclusive market value of the contribution.
 - auction items: a deduction is also available to individuals for a contribution of cash of \$250.00 or more for the purchase of goods or services (that is successful bids) at auctions conducted by a DGR.

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If you intend to use these special rules, plan carefully and get professional advice;

Organizers should take care that wording on promotional material does not guarantee tax deductibility for all contributions but only genuine gifts.

Specific advice should be sought in relation to publicity materials regarding any DGR functions such that the function can be designed to provide deduction opportunities whilst complying with tax office and fundraising law requirements.

Cecelia Irvine-So
Lawyer

Education: Education Law Update – Compulsory Allergy Training

School teachers will be required to undergo training to treat children with severe allergic reactions, under legislation proposed by the Victorian government. When announcing the plans on 22 October, Premier Steve Bracks estimated that up to 5,000 children in Victorian children services and schools are at risk of anaphylactic shock, a sudden, severe and potentially fatal allergic reaction.

The legislation will require:

- more than half of all staff in schools, and all staff in early childhood services to undergo training; and
- schools and early childhood services to maintain an anaphylactic policy.

The government will provide training, which will include minimisation of the risk of allergic reactions, recognising the symptoms, and using an EpiPen to administer adrenalin to treat anaphylactic reactions.

It is anticipated that the legislation will set out the mandatory content for School policies on the prevention and treatment of allergic reactions. It is not clear whether the legislation will cover free or informal childcare provided by churches and other organisations. However, it is advisable for any organisation involved in the care of children to develop and implement policies addressing these issues.

Moores Legal can assist you in developing policies on allergy prevention and treatment and all matters relating to duty of care and risk management.

Leanne Tully
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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If you would like to receive the Not for Profit Briefing electronically please forward your e-mail address to Lee Newnham, Marketing Manager, at lnewnham@mooreslegal.com.au

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