

April 2008

Charity Begins at Home

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– The Family Charitable Trust

The Administrative Appeals Tribunal has affirmed that a family can establish and run a charitable trust even though distributions ultimately end up overseas and the trust makes limited distributions until it has built up a substantial corpus.

In the case of [TACT v. Commissioner of Taxation \[2008\] AATA 275 \(7 April 2008\)](#) the AAT allowed an Appeal against a decision of the Commissioner of Taxation to refuse to endorse a charitable trust as a Tax Concession Charity.

These are the facts. A family established a charitable trust and made donations into the trust. The trust also earned income providing accounting services to a company associated with the family.

The husband and wife were trustees and decided to build up the fund by making limited distributions until it reached \$1M so that it would be able to make significant worthwhile contributions from its annual income. Some distributions were made to an Australian charity that provided care for orphans in Bangladesh. The Commissioner had three problems:

1. The trust was running a business concern and therefore was not solely for charitable purposes. The Commissioner abandoned this line of argument during the case;
2. The trust had not pursued its charitable purpose solely in Australia because it made distributions to an Australian charity that pursued its activities in Bangladesh. The Tribunal said that if payments were made in Australia by the Trust then this was sufficient, irrespective of where the money was ultimately spent.
3. The Commissioner said that accumulating trust income was not being applied for charitable purposes. The Tribunal said that a fund would still be regarded as being applied for charitable purposes even if it is accumulated for the purpose of augmenting the value of the fund (for ultimate benefit of charities).

Whilst the case has value as affirming the role of family charitable trusts, it also confirms that trusts may accumulate income whilst building a corpus and may make distributions in Australia even if those distributions benefit charitable works overseas.

Murray Baird
Principal

Codes of Practice

– What makes them effective?

A Code of Practice sets out the conduct expected to reach a standard required or recommended. A code is not a law but is generally created by an organisation to regulate members. Adapted from “industry” applications, it is typically developed by a “peak body” to regulate the conduct of member organisations.

Why create a Code of Practice and what makes them effective?

A code of practice can demonstrate the "professionalism" of an organisation. It can discourage further regulation being "imposed" by governments. Notable examples of codes of practice in the not-for-profit sector include the

Australian Council for International Development Code of Conduct and the Fundraising Institute of Australia draft Codes of Practice.

It is not unusual for a code of practice to have an "aspirational" element, such as a statement of goals that the organisation may like to achieve. However for the purposes of satisfying the public and government regulators a code of practice usually has mandatory requirements that persons to whom the code applies must adhere to.

To be enforceable a code of practice must state in plain English to whom the code applies, the precise point at which a breach of the code can be determined, and provide for enforceable and significant sanctions for breaching the code. These factors tend to distinguish an effective code of practice from one which may be better described as a declaration of aspirations or "Mission Statement" of an organisation.

It is usual for a code of practice to require members to have an effective complaints handling process. The Australian Standard AS4269-1999 *Complaints Handling* provides useful guidance. An effective complaints handling system would include for example the means of access to persons who wish to make a complaint, a complaint review mechanism independent of the person against whom a complaint is alleged, and a hearing and appeals procedure.

An effective complaints handling process would also include means for an organisation to collect data on complaints, conduct periodic reviews of the code of practice and complaints handling system and provide for adequate resources to undertake such functions.

A useful document for organisations wishing to develop a code of practice is the [Guidelines for Developing Effective Voluntary Industry Codes of Conduct](#) published by the Australian Competition and Consumer Commission. A starting point for organisations wishing to develop or review an existing code of practice is to identify those industry issues that a code would need to address. This could be achieved by consulting with all stakeholder groups within the industry.

It would be usual then to establish a code development committee to define code objectives and identify the particular rules necessary to achieve those objectives. It is at this point that we would recommend organisations consult with their legal advisers.

The benefits of plainly expressed, clear legal drafting of a code of practice and its complaint process will help to ensure a code of practice is enforceable and also respected by stakeholders including the members of the public and government regulators.

Moore's Legal has expertise in regards to development of codes of practice and complaints handling processes for not-for-profit organisations. If you wish to discuss development of a code of practice for your organisation please do not hesitate to contact us.

Derek Mortimer
Lawyer

With \$300million at Stake: the law is a hodge-podge

The New South Wales Supreme Court recently considered some interim issues in a case concerning a claim arising out of the death of Nathan Chaina who drowned whilst on a hike at a school camp conducted by Scots College. **Mathew Chaina v The Presbyterian Church (NSW) Property Trust and 15 Ors** Supreme Court of New South Wales 7 April 2008

Nathan's parents and family companies are suing the Presbyterian Church (NSW) Property Trust and 15 other defendants claiming damages for nervous shock which they sustained arising from Nathan's death.

Liability has been admitted and the question is whether the family companies associated with Nathan's parents are entitled to up to \$300M damages because of the inability of Nathan's parents to function effectively as key employees of those companies.

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As the case proceeds there will no doubt be substantial argument over the linkages between Nathan's death and loss of profits. In the meantime the case is an illustration of some key issues in risk management:

- an inquest found that Nathan and his school friends had not been adequately trained for the hike and that the school failed to take precautions for the boys' safety;
- the case raises the question of a separate incorporation of activities of the Church such as the School for governance and risk management purposes;
- the case highlights the possible financial risks in exercising duty of care in not for profit activities.

In an earlier consideration of the case Justice Howie of the NSW Supreme Court referred to the implications of "tort reform provisions" using words such as anomalous, unfair and a hodge-podge. The Judge said:

"Had the deceased been killed in a motor vehicle accident on his way to camp, the company Plaintiffs could receive no compensation for loss as a result of any nervous shock suffered by his parents. Yet they submit they can make a claim seeking damages, as I understand it, of over \$300m., because the child died at the camp. This is not withstanding that the provisions of the Act limit the damages that can be awarded to personal plaintiffs, here the parents and two brothers of the deceased. This situation seems on its face to be anomalous and unfair."

Murray Baird
Principal

Charter of Human Rights & Responsibilities

- Does it apply to Not for Profits?

The Victorian *Charter of Human Rights and Responsibilities Act 2006* ("Charter") came into full operation on 1 January 2008. It imposes human rights obligations upon "**public authorities**". The government, its departments and agencies clearly fall within the definition of a "public authority". But a private entity can also be a "public authority" where:

- it is "an entity established by a statutory provision that has functions of a public nature";
- that entity's "functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)."

The first of these potentially impacts charities (most commonly religious organisations) that are incorporated under their own act of parliament. The second potentially impacts a wide range of charitable entities, particularly where those entities receive government funding for their work.

Unfortunately, the Charter is not clear on when charities will be considered to be a "public authority", and we are aware of some uncertainty within the charitable sector about whether compliance is required or not. The key is whether the entity is exercising a "public function".

Private schools

Private schools are not "public authorities". The Charter states that "[a] non-government school in educating students may be exercising functions of a public nature but as it is not doing so on behalf of the State it is not a public authority for the purposes of this Charter."

Hospitals and religious bodies

The Explanatory Memorandum to the Charter makes comment on both private hospitals and religious bodies. While the Explanatory Memorandum does not have the force of law, it gives some insight into the intended application of the Charter:

"It will apply where a religious body may be a public authority when undertaking a public function (e.g. denominational hospitals), and also where a religious body may be interacting with a public authority, for example where the religious body is funded or licensed by the public authority to undertake certain functions."

No guidance is given as to what such functions by a religious body may be, and whether it may apply to functions under the *Marriage Act*.

What is a public function?

The Charter does set out a number of issues to be considered when assessing whether an entity is performing a public function:

- Is the function conferred on the entity by or under a statutory provision?
- Is the function connected to or generally identified with functions of government?
- Is the function of a regulatory nature?
- Is the entity publicly funded to perform the function?
- Are the shares in that entity held by or on behalf of the State?

However, even considering these issues does not, in many cases, provide a clear answer.

Arriving at an answer

Because the 5 issues that the Charter requires to be considered are a non-exhaustive list, it is possible to consider any other relevant issues. In our research to understand the Charter, we have found guidance in various British court decisions, interpreting similar provisions in British legislation.

Of course, if in doubt, the safest option is always to comply unless compliance is onerous or inconsistent with your mission and values.

We are in a position to be able to provide advice and guidance on whether the Charter may apply to a charitable entity.

Nils Versemann
Senior Lawyer

When the Law is in Doubt

In the last year there have been some tensions over differing interpretations of Tax Law by the Courts and the Commissioner of Taxation .

This was illustrated in [Commissioner of Taxation v. Indooroopilly Children Services \(Qld\) Pty Ltd \[2007\] FCA FC 16](#), where the Full Federal Court said:

"From the material that was put to the Full Court, it was open to conclude that the [Commissioner of Taxation] was administering the relevant revenue statute in a way known to be contrary to how this Court had declared the meaning of that Statute".

In [Cajkusic v. Commissioner of Taxation \[2006\] FCA FC 164](#) the Commissioner was refused special leave to Appeal to the High Court against a decision of the Full Federal Court. He was concerned with the decision of the Full Federal Court about how tax falls on beneficiaries of trusts. The Full Court said that the terms of the Trust Deed determined whether there was taxable income.

In the Commissioner's [decision impact statement](#) he expressed the view that the case was essentially confined to its facts rather than establishing a wider principle. Accordingly, he would not feel bound to apply the decision to other cases. He said that he would be looking for other cases to test the law again as soon as possible. In the meantime, although he would not actively target taxpayers on this issue, he would apply his interpretation in rulings and decisions.

The decision of the Full Court of the Federal Court in [Commissioner of Taxation v Word Investments Ltd \[2007\] FCAFC 171](#) is currently on Appeal to the High Court. In that case the Full Federal Court said that fundraising for charitable purposes in commercial activities was not inconsistent with charitable status even if funds were ultimately applied overseas. The Commissioner disagrees.

Following that case, the Tax Office published the following statement in its [non-profit news service No. 0190](#):

"We will continue to apply the Tax Office view pending the High Court decision on the application for special leave to appeal and any subsequent decision should the application be granted".

We understand this to mean that the Commissioner does not presently regard himself as bound by the decision of the Full Court of the Federal Court of Australia.

In the [compliance program 2007-2008](#) of the Australian Taxation Office the Commissioner has stated that a specific compliance issue will be the activities of non profit organisations that actively engage in commercial activities [which] may be indirectly self-assessing themselves as exempt from income tax.

These tensions are implicit where the Commissioner has the role of standing at the gateway to tax concessions whilst being charged with collection of revenue. The theory of resolving a conflict between the Courts and the commissioner is clear. The executive arm of government (represented here by the ATO) does not have the last word. The Court view ought to prevail unless Parliament intervenes.

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We query whether the establishment of a Charities Commission as in other like jurisdictions would ease the tension by separating the role of gatekeeper and revenue collector.

Murray Baird
Principal

Ructions in Associations – How to fast track a resolution

How does an incorporated association deal with an intractable dispute with a member?

In Victoria a court will generally not interfere with the decision of a private tribunal unless it has “really gone astray”. A “private tribunal” may include a committee established by an incorporated association to determine disputes between members and the association.

The leading case is *Australian Football League & Ors v Carlton Football Club Limited & Anor* [1998] 2VR which has been affirmed in *Haynes v Couzens (VAFA)* [2000] VSC 345 and subsequent cases. Both cases involved footballers who were unhappy with the decisions of football tribunals.

There are two situations where a court may interfere in the decision of a private tribunal; to protect private rights, and (in limited circumstances) where a decision of a private tribunal is seen not to be made in accord with the principles of natural justice.

An example of private rights is where a member of an association is prevented from earning an income due to a decision by their association. A court generally will only intervene where a breach of natural justice had been alleged when a decision was plainly absurd or so unreasonable that no reasonable person could arrive at it.

Resolution of disputes between members and an association is usually commenced by a process within the association. Under the *Associations Incorporation Act 1981* (Vic) for example the rules of an incorporated association must provide a dispute resolution process. Where the dispute is unable to be resolved that dispute resolution process may provide for appointment of a mediator.

To limit the cost and delay involved in the resolution of civil disputes the Magistrates Court has developed a “fast track” system to hear proceedings where a pre-hearing mediation has been conducted by an “acceptable mediator”.

An “acceptable mediator” may include a person appointed by the Dispute Settlement Centre of Victoria or an accredited mediator. The “Model Rules” for incorporated associations developed by Consumer Affairs Victoria also provide for appointment of a mediator by the Dispute Settlement Centre of Victoria.

Where a mediation conducted by an acceptable mediator has not resulted in resolution of a dispute and at the request of the parties to do so, the Magistrates Court will list the proceeding for a final hearing at the earliest available date. The Magistrates Court will also give the matter a priority on the day of listing. Unless requested by the parties the Magistrates Court will not refer the proceeding to a further pre-hearing mediation.

The upshot of this process is that an association and its members can “fast track” a hearing in a Magistrates Court in Victoria providing that they first attempt to resolve the dispute with an acceptable mediator.

We recommend associations check that their rules contain a dispute resolution procedure which ideally requires appointment of an “acceptable mediator”.

If your association requires further assistance on dispute resolution please do not hesitate to contact the not-for-profit team at Moores Legal.

Derek Mortimer
Lawyer

The Limits of the Religious Exemption in Discrimination Law

Most States prohibit discrimination in employment, education and access to goods and services on the basis of race, gender, marital status, disability, sexual preference, and age.

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There is generally an exception for religious bodies which are exempt from discrimination laws for one of two reasons:

1. Where a practice of that body conforms to the doctrines of the religion; or
2. Where a practice is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

On 2 April 2008 the NSW Administrative Decisions' Tribunal found that a Christian religious organisation broke the law by refusing to accept a gay couple's application to become foster parents.

The religious organisation claims it was allowed to discriminate relying on the usual exceptions i.e. that the practice was consistent with the doctrines of the religion or necessary to prevent injury susceptibilities of the adherents of the religion.

The difficulty with assessing the impact of the case is that the Tribunal issued a suppression order so that the publication of the decision and the parties names is not allowed.

The Public Interest Advocacy Centre (PIAC) which represented the couple seeking to foster a child has issued a press release to the effect that "the public can expect religious organisations to comply with the same law as non-religious organisations when providing services".

We suspect that this is a broad interpretation of a decision which probably turned on its immediate facts but we cannot comment further unless and until the suppression order is lifted and the decision becomes public.

In passing, it seems to us undesirable that laws should be interpreted in a way that is binding on parties but which cannot be published in the community.

Murray Baird
Principal

Sports Club Governance

Sport forms an important and integral part of the community life of many Australians. The Australian Sports Commission estimates that 80% of all Australians participate in sport in Australia. Many sporting clubs now recognise that their boards and their constituent documents need to be as fit as the people who play the sport.

We have worked with numerous sporting organisations, both large national highly regarded and highly played sports and smaller local clubs or specialised boutique sports. A common thread is a recognition that there is often a need for change at the board level - either to accommodate current governance thinking or to accommodate growth and changes in the organisation.

Common changes that sporting clubs wish to make include;

- migration from an incorporated association to a company limited by guarantee - especially if they are to perform the function of a national body.
- change from a representative based or zone based board to a skilled based board.
- change from a purely representative board to a hybrid skills based and hybrid zone/ representative board.
- transition from a one tiered representative board to a several tiered model - for example local clubs appoint state bodies which in turn appoint the national board.

It is less common for sporting bodies to adopt the model whereby the members of a company limited by guarantee are the same people as the board, because member participation is key in sports.

A useful resource for sporting clubs considering their governance position is the Australian Sports Commission's Governance Principles - a good practice guide for sporting organisations. Some key principles in the good practice guide include:

- Principle 1.4 - the members of an organisation should elect the majority of the board of directors and may consider a one state one vote system rather than proportional systems;
- Principle 1.6 - which requires the board to confirm the strategic direction of the organisation;
- Principle 1.7 - the appropriate structure and skill set - mix on the board.

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A copy of the governance principles can be obtained in the following web link [Guide to best privacy practices for sporting organizations](#). We have reason to believe that a review of the principles might take place and a new set may be prepared shortly.

Cecelia Irvine-So
Senior Lawyer

Workplace Relations Update

No more Australian Workplace Agreements. No more Fairness Test. As of 28 March 2008, the Rudd Government has already made these two major changes to the Federal *Workplace Relations Act 1996* ('the WR Act').

However, nothing is ever simple in the world of workplace relations. In place of AWAs, we now have Individual Transitional Employment Agreements ('ITEAs'). The Fairness Test has been replaced by the No Disadvantage Test ('NDT'). And numerous other changes are due to come into operation over the coming months and years, under the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (which we will refer to as 'the Amending Act').

Workplace Agreements

Employers should be aware of the following key changes to the law relating to agreement-making:

- AWAs may no longer be made.
- Existing AWAs will continue to operate until terminated or replaced. Existing AWAs cannot be varied except in limited circumstances.
- Some employers and employees may make ITEAs. Only employers who had at least one employee on an AWA as at 1 December 2007 are eligible to make an ITEA. ITEAs will have a nominal expiry date of no later than 31 December 2009 and no ITEAs may be made after that date.
- New Collective Agreements may be made (subject to the NDT – see below).
- Existing Collective Agreements will continue to operate. Variations to these agreements will now be subject to the NDT.

The No Disadvantage Test requires that an individual or collective agreement "*does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment*" of the employee/s "*under any reference instrument*" relating to one or more of the employees. A reference instrument could be, for example, a collective agreement or an award. The NDT will be administered by Fair Work Australia, which will take over the role of approval of workplace agreements.

Minimum Employment Terms and Conditions

National Employment Standards

Over the past two years employers may have become familiar with the Australian Fair Pay and Conditions Standard ('the Standard'). Although the Standard still applies for the time being, it will soon be superseded by the National Employment Standards ('NES'). The NES is to be finalised by 30 June 2008 and will commence operation on 1 January 2010.

The Act will set out the NES, including the following matters: maximum weekly hours of work, 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 pay and a Fair Work Information Statement.

The Federal Government is seeking the co-operation of all States and Territories to create a uniform national long service leave standard.

Modern Awards

'Modern awards' will be developed by the Australian Industrial Relations Commission, and are intended to cover matters not included in the NES. There will be 10 "allowable modern award matters", including minimum wages. The Amending Act sets the ambitious target for the Commission to complete the award modernisation process by the end of 2009.

Implications for employers

- Employers who have used AWAs in the past, must now shift their attention to whether they wish to make ITEAs, collective agreements or common law contracts.

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- Employers bound by collective agreements should consider whether they wish to vary existing agreements or make new agreements.
- Employers who use ITEAs or who vary or make new collective agreements, need to understand the implications of the No Disadvantage Test.
- Employers should also be aware of the award modernisation process and track any changes that are made to awards applying to their employees.
- Although the NES will not come into operation for some time, employers should review the NES and identify where the more costly adjustments will be for their businesses. It may also be prudent to consider revising standard contracts of employment to cater for some of these adjustments.

Employers can expect more changes to the WR Act later this year and beyond. As a starting point to prepare themselves to meet these changes, employers should familiarise themselves with the Labor Government's proposed reforms as set out in its Forward with Fairness Policy Implementation Plan. Our November 2007 Employment Alert covered the main features of this Policy – back copies are available on request.

For more information, please contact the Workplace Relations Team at Moores Legal.

Leanne Tully
Senior Lawyer

Allergy Legislation in Force – Term 3, 2008

All Victorian schools and children's services will have new obligations relating to children at risk of severe allergic reactions, under legislation passed on 27 February 2008.

The *Children's Services and Education and Training Reform (Anaphylaxis Management) Act 2008* now mandates the implementation of an Anaphylaxis Management Policy. The Regulations have not yet been released, but are expected to include requirements as to the content of the Policy and staff training requirements. All staff in early childhood centres will be required to have EpiPen training and, where there is a child diagnosed as being at risk of anaphylaxis, all staff will be required to have comprehensive anaphylaxis management training. In the school setting, staff responsible for an at-risk student will be required to have comprehensive training. The new obligations will apply from 14 July 2008.

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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