

Time for a Spring clean?



Checklist for review
Not for profits should review their constitutions

In this issue...

Regular review for not for profits	2
Review checklist	3
Partial rate exemptions	5
Community Savers Funding	6
Senate Committee report on	7
Public Benefits test	
Company supporting community bank is tax exempt	11

Regular review for ‘Not for Profits’



It is important for charities and other not-for-profit entities to regularly review both their constitution/rules and their activities to ensure that they are up to date, that they reflect the current intentions of the Board and members, that they do not contain archaic or unnecessary provisions and that they will still comply with the prerequisites for tax concession endorsements that the entity may have.

“now is the time for each entity to undertake a spring clean”

Perhaps now is the time for each entity to undertake a “spring clean” to review these issues.

To assist you, we have included our rules/constitution review check list. Should we be able to assist you in relation to a review of your constitution/ rules or your ongoing entitlement to endorsements and other tax concessions please do not hesitate to contact us.



Rules/Constitution Review Checklist

MAKINSON & d'APICE
LAWYERS



Your rules/constitution (hereinafter called **constitution**) should be reviewed every two to three years to ensure that it reflects your current objects, activities and operations; does not risk any endorsements or concessions you currently enjoy; and complies with current legislation.

Whilst your entire constitution should be carefully read to ensure that it reflects the current position and future direction of your organisation, the table below sets out some of the more important clauses that should be given particular attention to when reviewing your constitution.

Objects

- 1. Do the stated objects still reflect the objects and activities of the organisation?
It essential that it accurately reflects the organisation's objects and describes the organisation's activities. However, it must also meet the ATO criteria to enable you to be eligible for endorsements and tax concessions.
- 2. Has there been a change in membership classes or eligibility for admission as a member?
- 3. How are disputes between members and between members and the organisation resolved?
- 4. Has there been a change in the legal requirements and procedures at members' meetings?
- 5. Does your constitution allow you to use the latest technology to conduct your members' meetings?
- 6. Does the chair have a casting vote?

Board

- 7. Appointment of board members
*Has the procedure changed? How are board members appointed?
Can independent directors be appointed?
Are any directors representative of a subgroup, region, area of expertise, etc?
Minimum and maximum number of board members.
Are certain qualifications or expertise required?
Are directors required to be members?*
- 8. Office bearers
*Who are the office bearers?
What is the length of their term?*
- 9. Term
*Is the term of board members still appropriate?
What is the maximum number of consecutive terms a director can hold office for?*
- 10. Board meetings
*Notice required.
Who is the chair and does the chair have a casting vote?
How many meetings is a director permitted to miss before they are expelled?*
- 11. Expulsion of directors
What are the circumstances for expulsion of a director?
- 12. Vacancies
How are they dealt with?
- 13. Alternate directors
Are they permitted?
- 14. Delegated authority
*Can subcommittees be established?
What is the procedure for their establishment?
How are they to be constituted?*
- 15. Remuneration
*Are directors remunerated for their roles as directors of the organisation?
Can directors receive payment for services provided to the organisation?*

Indemnities

- 16. Are the indemnity and insurance clauses adequate?
*It is important to ensure that the indemnity and insurance provisions adequately protect directors and officers in carrying out their duties on behalf of the organisation. Inadequate indemnity and insurance provisions can expose directors and officers of the organisation to legal action which can result in their personal assets being at risk.
If in doubt about whether these provisions are adequate, consult your lawyer. This is particularly important if these provisions have not been reviewed/updated for some time.*

Winding up

- 17. Do your winding up provisions comply with the legislation and with ATO requirements for eligibility for endorsements and concessions?
Your tax concessions and/or charity or other endorsements could be put at risk if they do not comply with ATO criteria.

Partial Rate Exemptions in NSW

Following submission made by our firm, the *Local Government Act 1993* was amended to provide that when land belonging to a public charity, a public benevolent institution or a religious body is used or is occupied partly for purposes that are exempt from rating and partly for other purposes, the Council must obtain separate valuations of that part of the land that is subject to rates and only issue rate assessments in respect of that part.

This amendment to the Act came into force on 15 June 2010.

“it would be timely to review the rateable position of all properties”



Not-for-profit organisations would have recently received Rate Notices for the current rating year and it would be timely to review the rateable position of all properties owned by not-for-profit organisations and only partially occupied by them.

It may be possible to request Council to apply for a separate valuation for the rateable part of land owned by not-for-profit organisations and only levy rates on that part (unless the transitional provisions cause that part also to be exempt).

Community Savers Funding Available

Community and other not-for-profit organisations have been invited by the New South Wales Department of Environment, Climate Change and Water to apply for up to \$40,000.00 to warrant and undertake simple and low cost water and energy upgrades in their facilities.

Not-for-profit organisations which may qualify for such a grant include registered clubs (such as sporting and ex-services clubs, pre-school facilities, rural community organisations, health and aged care facilities, religious organisations, other public and community based facilities operating on a not-for-profit basis and community organisations operating out of Council or Government owned buildings.

“up to \$40,000.00 to warrant and undertake simple and low cost water and energy upgrades in their facilities.”

Specific measures detailed in the guide for applicants may be funded and these include:

- installing water efficient toilets, fixtures and fittings;
- lighting and hot water system upgrades;
- insulation and other measures to improve heating and cooling efficiency; and
- rain water tanks.



A guide is available on the internet at www.environment.nsw.gov.au/resources/grants/10779communitysaversguide.pdf and an application form can be found through www.environment.nsw.gov.au/grants/ccfpfp.htm

MAKINSON & d'APICE
LAWYERS

Senate Committee Report on Public Benefit Test



On 13 May 2010 the Tax Laws Amendment (Public Benefit Test) Bill 2010 was introduced into the Senate as a private member's bill.

This bill proposed that the Government introduce a public benefit test for religious and charitable organisations seeking tax exempt status. The bill was referred to the Senate Economics Legislation Committee for examination and this committee released its report on 7 September 2010.

Largely consistent with the Productivity Commission Report and

the recent Henry Review, the Committee recommended the establishment of a national commission for charities and consideration of a public benefit test for the endorsement of charities.

The Committee made the following relevant recommendations:

Recommendations

The Committee recommends that the incoming government work through COAG to establish a single independent national commission for not-for-profit organisations.

The incoming government should establish a working group, or use

the COAG Business Regulation and Competition Working Group.

The working group should consult extensively with the sector in a timely manner to address issues arising from the establishment of a commission which applies a public benefit test. The Australian model should draw on the Charity Commissions in the United Kingdom and New Zealand.

Senate Committee Report on Public Benefit Test



Recommendations

The Committee recommends that the working group consider the functions and role of an Australian commission which should include, but not be limited to, the following:

- promote public trust and confidence in the charitable sector;
- encourage and promote the effective use of charitable resources;
- develop and maintain a register of all not-for-profit organisations in Australia using a unique identifying number (for example an ABN) as the identifier;
- develop and maintain an accessible, searchable public interface;
- undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis;
- educate and assist charities in relation to matters of good governance and management;
- facilitate, consider and process applications for registration as charitable entities;
- process annual returns submitted by charitable entities;
- supply information and documents in appropriate circumstances for the purposes of the Tax Acts;
- monitor charitable entities and their activities to ensure that registered entities continue to be qualified;
- inquire into charitable entities and persons engaging in serious wrongdoing in connection with a charitable entity;
- monitor and promote compliance with legislation;
- consider, report and make recommendations in relation to any matter relating to charities; and
- stimulate and promote research into any matter relating to charities.

The Committee recommends that the working group consider the functions and role of an Australian commission

Senate Committee Report on Public Benefit Test

Recommendations

The Committee recommends that the incoming Government should follow the emerging international best practice and work with the Council of Australian Governments to amend legislation governing not-for-profit entities to include a definition and test of 'public benefit'. So, this represents yet another Government report recommending

the establishment of a National Committee. The Senate Committee stated that "there comes a time when a Government has to make a decision either to do something or to stop saying that it is going to do something, because the matter has been on the agenda for many years. It is now time for action".

“there comes a time when a Government has to make a decision...”



Senate Committee Report on Public Benefit Test



Dominic Grieve asked the Charity Tribunal to clarify the operation of Charity Law in the context of fee charging

This report comes at an interesting time when we look at issues currently facing the Charity Commission in the United Kingdom. The Charity Commission may have to rewrite all of its public benefit guidelines if the UK Courts find defects in its guidelines on independent schools.

In the last week of September 2010, the Attorney General, Dominic Grieve, asked the Charity Tribunal to clarify the operation of charity law in the context of fee charging independent schools. The Charity Commission has used various guidelines that it has published

since January 2008 to assess whether sample groups of independent schools, arts charities, care homes and religious charities provide sufficient public benefit to justify their charitable status.

The Independent Schools Council has also challenged the guidelines on fee paying charities and has asked for a judicial review as well.

This may be a foretaste of issues the Australian not-for-profit sector may face if a local Charities Commission is established. Time will tell.



MAKINSON & d'APICE
LAWYERS

Company supporting community bank is tax exempt; decision now subject to an ATO challenge

A Federal Court decision handed down by Perram J in *Wentworth District Capital Ltd v Commissioner of Taxation* [2010] FCA 862 ruled that a company supporting a community bank was established for 'community service purposes' and was therefore exempt from income tax.

The decision could be regarded as counter-intuitive however the Court drew a distinction between the actual provision of the community banking services, which would not have been a community service and the facilitation of such services by Wentworth District Capital Limited.

We note that this position may change, as the Australian Taxation Office has appealed the decision to the Full Federal Court.

Background

The banking services were set up following the closure of the previous Westpac Bank (the only bank in Wentworth) in 1996 leaving the town without any banking services to the Wentworth community (population of 1,400). Wentworth District Capital Limited (WDCL) subsequently entered into franchise arrangements with Bendigo Bank Limited (BBL) that enabled BBL to provide banking services using

WDCL's premises, staff and equipment. Under WDCL's constitution it did not distribute any profits to its members and included as one of its formal objects the promotion of community banking services.

What is an exempt entity?

An exempt entity is an entity whose income (irrespective of type) is exempt from income tax. An example of an exempt entity is one that has been "established for community service purposes", and the meaning of this phrase was the key issue of this case. (cont)



4th Bequest Officers' Workshop

Sydney - Friday 12 November 2010

This full day practical workshop is specifically tailored for bequest officers and fundraisers of charities and not-for-profit organisations.

Gain an understanding of the legal processes involved in estate administration, so you can ensure your organisation is not missing out on its bequest entitlements.

Receive practical tips from an experienced bequest officer, who is co-presenting this workshop with two of Makinson & d'Apice's senior partners who have extensive experience in estate law and charities law.

Secure your place now by completing the registration form available at www.makdap.com.au or call Angela Mak on 02 9233 9049 or email amak@makdap.com.au.

MAKINSON & d'APICE
LAWYERS

Company supporting community bank is tax exempt; decision now subject to an ATO challenge



The meaning of 'community service purposes'

Section 50-10 of the Income Tax Assessment Act 1997 (ITAA97), defines a 'community service' as a "society, association or club established for community service purposes (except political or lobbying purposes)".

In applying previous case law, Perram J summarized the following considerations when applying the community service exemption:

- *The kind of community service referred to in section 50-10 is a practical or tangible help, benefit or advantage conferred on the community or an identifiable section of it.*

- *A service provided for reward is not a community service at least where there is no element of subsidisation i.e. where the service is provided at normal market value.*
- *Community service purposes include the purpose of providing a community service but the purposes contemplated are not limited solely to the act of provision.*
- *The entity claiming the exemption must be 'established' for community service purposes.*
- *The purpose must be the entity's main or dominant purpose.*

The Court ruled that WDCL's main or dominant purpose was to facilitate the face to face banking services in Wentworth.

According to Perram J, *In a town with no face to face banking services, the facilitation of such services provided a substantial benefit to the community. That benefit was both real and tangible.*

It consisted of the fact that local banking then became available, increasing in a concrete way the amenity of the town.

Implications for entities seeking tax exempt status

Entities seeking income tax exemption as community service providers must provide an actual, tangible benefit to a particular community.

According to case law, the provision of the benefit does not have to be provided directly by the entity concerned and can be facilitated by way of fundraising or promotion i.e. the facilitation of community banking services rather than the provision of community banking services.

However, as previously noted this position may change, as the Australian Taxation Office has appealed the decision to the Full Federal Court.

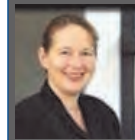
Authors: Allan Mortel, Director and David Chan, Tax Specialist - Moore Stephens Sydney



Richard d'Apice AM
+64 2 9233 9011
rdapice@makdap.com.au



Bill d'Apice AM
+64 2 9233 9013
wdapice@makdap.com.au



Nancy Bramley-Moore
+64 2 9233 9009
nbramleymoore@
makdap.com.au

Craig Munter
+61 2 9233 9035
cmunter@makdap.com.au

Alex Kohn
+61 2 9233 9036
akohn@makdap.com.au

Back issues

All issues of *Balancing Act* newsletters are available online at www.makdap.com.au. Articles in the last issues included:

Issue 16

April 2010

- National Employment Standards
- Traps for FBT Exempt and Rebatable Employers
- The new Cooperative National Laws

Issue 15


December 2009

- Watch out...don't get sidetracked
- Reducing the administrative burden - GST and salary sacrifice arrangements
- PPF regime gets a makeover
- Where there's no Will, is there a way

Please feel free to circulate this newsletter to others who may be interested. If you would like to receive future issues of *Balancing Act* via email, please register at http://www.makdap.com.au/resources_registration.cfm

Disclaimer: This publication is a non-comprehensive general outline of the law as at 21 October 2010. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

© 2010 Makinson & d'Apice

 Liability is limited by
the Solicitors Scheme
under the *Professional
Standards Act 1994*

MAKINSON & d'APICE
LAWYERS