Balancing Act

Issue 2

Legal and Tax Affairs for the non-profit industry

September 2006

Bequests - Be Sure You Get Your Share

People leaving charitable bequests in their Will may have benevolent intent, however there are many challenges and consequences if proper care is not taken when the Will is being prepared.

Some of the areas of concern include identity, the wording of bequests, the choice of executor and taxation of the estate. This is why charitable institutions need to be most specific and informative when it comes to their websites and any collateral information for testators.

Richard d'Apice and Vera Visevic, partners at Makinson & d'Apice, have put together this guide to help avoid the pitfalls.

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1. **Dictionary**

   Testator means a person who has died and left a Will.

   Intestate means having died without leaving a Will.

   Executor means a person appointed by the Will-maker and named in the Will to look after the realisation of the estate, payment of debts and distribution of the estate.

   Beneficiary means a person who receives part or all of the Deceased's estate.

   Bequest means a gift of personal property by Will.

   Legacy means a gift of money by a Will.

   Devise means a gift of real estate by Will.

   Residue means what is left of the estate once all of the debts, legacies and other bequests have been paid or distributed.

   Probate means a court order by the Probate Division of the Supreme Court confirming the validity of a Will and the office of the executor appointed by the Will. It gives the Executor permission to deal with the estate of the Deceased.

2. **Identity**

   It is often difficult for a solicitor making a Will for a client to swiftly ascertain the exact name of the charity which the client wishes to benefit. This can be a particular problem with a charity which has separate corporate structures in different states or separate corporate structures at the state level and federal level. For example, with The National Trust of Australia, there are separate structures in each state, such as National Trust of Australia (New South Wales), National Trust of Australia (Victoria). There is a separate structure as well at federal level, being The Australian Council of National Trusts.

   You should therefore ensure that your correct corporate name is clearly stated on your website. Further, it would be preferable that you have copies on your website of the following:

   (a) a copy of the Certificate of Incorporation of your charity;

   (b) your various Australian Taxation Office endorsements, such as your Tax Concession Charity (TCC) endorsement and your Deductible Gift Recipient (DGR) endorsement (these should obviously be in the same name as your corporate name).

3. **Previous Names**

   If your charity has changed its name, or if it is a successor to a previous charity, there is a possibility that you may be a beneficiary under a Will under the previous name.

   It is essential to assist you in 'capturing' bequests made to you in names other than your present name, that there be an Internet link between the old name and your current name. Further, there should be sufficient information to identify you as being identical with the previous name or as being the successor of the previous charity.

4. **Wording of Bequests**

   A testator can leave a benefit to a charity for its general purposes, for example, "To The National Trust Australia (NSW) for its general purposes". Alternatively, a testator can leave a benefit to a charity for a particular purpose falling within its general purposes, for example, "To The National Trust Australia (NSW) for the purpose of bush regeneration".

   Benefits left to charities for their general charitable purposes clearly offer the charity a broader discretion in directing the benefit to areas of current funding need.

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Benefits left for specific purposes can cause difficulty in identifying suitable recipients and can give rise to the need for an application to the Attorney-General or the court for a scheme to administer the trust 'cy pres' (ie for a charitable purpose which is as near as possible to the intentions of the original testator). The need for a cy pres scheme arises when the particular purpose fails. An example is "For the education of children of migrants from (a particular small town in Ireland)", where no migrants from the particular small town in Ireland can be located, but the testator has shown a general charitable intention (eg the advancement of education).

It is therefore essential that your website contain the wording you wish testators to use in their bequest to your charity. Your website should contain the wording for both legacies and for a gift of the residuary estate and for both gifts for the general purposes of the charity and for specific charitable purposes. If you require any assistance in drafting these standard clauses, please do not hesitate to contact us.

5. Gifts Inter Vivos

Please note that in some instances it is more advantageous for your donors to make gifts to your charity inter vivos (ie during their lifetime) rather than following their death. Gifts made by donors to DGRs during their lifetime allow the donors to claim a tax deduction for those gifts. Gifts taking effect at death under the Will of a donor do not give the estate any entitlement to a deduction for those gifts.

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6. Choice of Executor

If you know that your charity is the residuary beneficiary in a person's Will, it can be very advantageous to you if you, as the charity, are also appointed as the executor of that Will. If you are a residuary beneficiary and not the executor, the executor who has been appointed will not be as motivated as you are to swiftly administer the estate. The person or entity most likely to swiftly administer an estate is the residuary beneficiary of that estate.

If it is not possible for you to be appointed as an executor, it is still beneficial for you to have good relations with the person or entity which has been appointed as the executor so as to encourage him or her in the swift administration of the estate.

7. Passive v Active Approach

Many charitable beneficiaries adopt a passive approach to the administration of an estate in which they are a beneficiary. We recommend that charities adopt an active approach in that they be in regular contact with the executor to ensure that the executor is administering the estate properly and as quickly as possible.

It is important to have an active approach where there is a Family Provision Act (FPA) claim. It is in the best interests of your charity to have a commercial and pragmatic approach to assessing the likely success of claims and actively be involved in the settlement before too much delay or cost is incurred, as opposed to being satisfied with whatever outcome is achieved in court. The resolution of even a simple FPA claim will cost no less than $30,000.00 (in 2006) for each side and the estate will usually be ordered to pay the costs of both sides if the claimant is successful. The mere instance of an FPA claim will usually mean that the executor cannot distribute any part of the estate. The delay will be at least 18 months.

8. Taxation of the Estate

Until such time as the beneficiaries become "presently entitled", the executor will pay tax on the taxable income of the estate at the maximum rate applicable to the income of a trust to which no person is presently entitled. A beneficiary becomes presently entitled as soon as the executors have completed their executorial duties (ie until he or she has obtained a grant of Probate, got in the assets, and paid all the liabilities of the deceased).

Once the beneficiaries become "presently entitled", the net income of the estate ceases to be taxed in the hands of the executors and is shown in the tax return as being distributed directly to the beneficiaries in the relevant proportions, and the beneficiaries must then include the income in their own taxation returns and it is taxed at that point. Clearly it is beneficial for a charity that it becomes beneficially entitled as swiftly as possible so that the executor shows the relevant part of the estate income being distributed to the charity and the charity (having no obligation to lodge a tax return or pay tax) receives that net income free of tax.

9. Passing of Accounts

Please note that if a charity is the beneficiary of a substantial portion of an estate, it is often the practice of the Supreme Court to require accounts to be passed in that estate following Probate. The executor can apply to the Court for the payment to him or her of a commission to recompense him or her for his or her efforts in the administration of the estate. This can often lead to delays in the distribution of the estate to the charity and increase costs. If the charity can satisfy itself as to the accuracy of the executor's accounts, it can reach agreement to dispense with the passing of accounts and can agree on the amount of executor's commission, thus reducing delay and costs.

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Are you really a charity? Read on...

Might your charity be considered a for-profit entity for financial reporting purposes under the new Australian accounting standards? Typically charities would see themselves as operating as not-for-profit entities, but following the introduction from 1 January 2005 of the Australian Equivalents to International Financial Reporting Standards (IFRS) referred to in our last bulletin, and their application to charities, a board of a charity may need to consider this issue in some detail in complying with their financial reporting obligations under IFRS. The charity's status as a for-profit or a not-for-profit entity may impact significantly on how amounts are recognised in its accounts as well as certain disclosures to be made in a charity's annual financial report. Importantly this determination could also impact significantly on how a user of such a financial report might view the charity.

IFRS defines a not-for-profit entity as an entity "whose principal objective is not the generation of profit". Therefore, determining whether your charity is a for-profit or a not-for-profit entity requires a level of judgement in respect of the substance of the charity's circumstances and, in particular, its objectives.

While there are many similarities between for-profit and not-for-profit entities, including their use of the available resources in the most efficient and effective manner and the maximising of outcomes, the principal objectives of a charity are normally to provide goods and services to various recipients rather than to make a profit. In this respect charities often have some or all of the following characteristics:-

- An absence of defined ownership interests that can be sold, transferred or redeemed.
- In some form acting in a community minded manner in respect of its primary objectives.
- An absence of allowing to its members, sponsors or supporters to share in its cash surpluses, or residual reserves on winding up.
- Cash surpluses being fully devoted to the provision of its primary objectives of delivering goods and services.
- Revenues often being received in the form of contributions rather than sales.
- Capital assets being typically held to deliver services without the intention of earning a return from them.

The charity's status as a for-profit or not-for-profit entity may impact significantly how amounts are recognised

The Australian Council of Auditors General Advisory Committee has issued a Guidance paper on determining whether a government entity is a not-for-profit or a for-profit entity. The criteria that they have set for consideration in making this determination include whether the entity:-

- was established with principal objectives as set out in legislation or in its constitution, being explicitly not-for-profit.
- is dependent for its principal activities on an allocation from a Government's budget.
- has financial targets that reflect profit concepts.
- is self funding in the longer term.
- is subject to tax or tax equivalent reporting to the Government.
- intends to pay dividends.

Other than outlining in broad ranking the relative importance of the above criteria, the Council believes that no single criterion will determine an entity's classification as a for-profit or a not-for-profit entity.

A typical charity having the characteristics outlined earlier might see itself as meeting a sufficient number of these criteria (including those relating to its objectives, tax environment and inability to pay dividends) to determine that it is a not-for-profit entity for IFRS purposes. Nevertheless, in many instances these criteria will be concluded upon in terms of the degree of the charity's position rather than in absolute terms, with the ultimate determination by the Board being based on judgement rather than in compliance with a set of prescriptive rules. These judgements are also likely to become more marginal where the charity could be seen to be competing with similar entities in the private sector, although the judgements will still be based on the degree to which the entity may be operating in a for-profit manner.

If in complying with your annual financial reporting obligations, be it in terms of public accountability or otherwise, your position under IFRS is one that remains unclear, you might wish to seek advice from your professional advisor.

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Government Funding Won't Forfeit Charitable Status

Central Bayside General Practice Association Limited v
***Commissioner of State Revenue* [2006] HCA 43 (31 August 2006)**

On 31 August 2006, the High Court handed its decision in the critical Bayside Case, which many charities have been waiting for with bated breath the past few months. The decision is most favourable to charities and allows those in the charitable sector and their advisors to take a big sigh of relief.

Facts - Very simply, the facts of the case were as follows:

- Central Bayside Division of General Practice ("Bayside") was a not for profit company limited by guarantee. Its objects, as set out in its constitution, were generally to "improve patient care and health, primarily in the Central Bayside area of Melbourne".
- Bayside received 93% of its funding from the Commonwealth and was tightly controlled in the outcomes of its work by agreements with the Commonwealth.
- The case had its origins in a determination by the Commissioner of State Revenue of Victoria in 2001 that wages paid by Bayside were not exempt from payroll tax as being wages paid by a "charitable body".
- Bayside appealed from this decision to the Victorian Civil and Administrative Tribunal, where it lost again. The Tribunal determined that whilst Bayside was a body which plainly existed for purposes beneficial to the community, it was too close to being an arm of the government or part of bureaucracy to be an organisation whose objects are charitable.
- Bayside appealed one more time to a single judge of the Supreme Court of Victoria and lost again. Justice Nettle held that the practical reality of Bayside's activities, history and control is that of an organisation formed under the aegis of the Commonwealth's 1992 general practice initiative to carry out government sponsored healthcare programs as part of the Commonwealth National Healthcare Strategy. Bayside was therefore not a charitable body.
- Not to be defeated, Bayside appealed one more time to the Court of Appeal of Victoria and lost again by a majority of 2 to 1. It was held that Bayside was not a charitable body because it performed the work or functions of government and because it was a creature of government.
- Bayside then appealed one last time to the High Court and the decision was handed down on 31 August 2006.

The decision allows those in the charitable sector and their advisors to take a big sigh of relief

Decision of High Court

- A decision was handed down unanimously in favour of Bayside.
- The main issue at hand was whether Bayside – the sole purpose of which was conceded to be charitable – was precluded from being a "charitable body" because of its relationship with the Commonwealth Government.
- The Commissioner argued that because about 93% of Bayside's funding came from the Commonwealth, there was control and influence by government to such an extent that Bayside was carrying out not its purposes, but the purposes of the government which could not of itself - being the government – have charitable purposes.
- When considering the degree of control the government had over the use of the funding, it was held that "it is common for the donors of funds for charitable purposes to attach conditions to the gift or to stipulate mechanisms pursuant to which the funds are to be expended. These conditions or stipulations do not affect the charitable character of gifts".
- "The appellant [Bayside] had a certain charitable purpose. The government wanted to advance the very same purpose. The appellant decided to advance its purpose by receiving funds from the government and spending them in the manner it did. These events did not cause the appellant to cease to be a charitable body merely by reason of the fact that the government is not a charitable body.

Many charities implement government policy in the sense that their goals – providing education, aiding the sick and the poor – are the same as those of the government... The appellant's purpose is charitable. It remains charitable even though the government is the source of the funds it uses to carry out that purpose. Its consent to the attachment by the government of conditions to the employment of those funds does not establish that the appellant is not independently carrying out its purpose.... Even if, by fulfilling its own purpose, the appellant performed the work or function of government, that did not prevent it from being a charitable body."

- "Government funding for public benefit through private sector organisations has expanded greatly in recent years in many countries, including in Australia. This development has occurred as a means of securing perceived advantages, including decentralisation; and securing the efficiency that small, local, private sector bodies can achieve. From the standpoint of legal policy, it would be undesirable for the law to needlessly expand the disqualification of such bodies from the advantages that they enjoy as "charities" under revenue law where their purposes otherwise qualify."
- "The appellant in this case was entirely voluntarily established. It is not, and has never been, part of a government department. It does not owe its existence to a statute. It is quite separate from government. It is a matter entirely for it whether it seeks government funds or subsidisation."

Conclusion

This is extremely good news for all charities which receive any form of funding from government. Their charitable status has been preserved. Common sense has prevailed.

New Legislation for DGRs

New legislation relating to deductible gift recipient categories has been introduced for charities and not-for-profit organisations on and from July 2006.

This legislation creates six new categories for DGR status:

1. **scholarship funds** – public funds established to provide money for eligible scholarships, bursaries or prizes;
2. **Australian disaster relief funds** – public funds conducted for relief of people in distress as a result of a declared disaster which occurred in Australia;
3. **animal welfare charities** – charitable institutions that provide short-term direct care and/or rehabilitation of certain animals;
4. **charitable service institutions** – charitable institutions that would be public benevolent institutions but for their health promotion and/or harm prevention activities;
5. **war memorial repair funds** – public funds established and maintained for the reconstruction or critical repair of a qualifying war memorial;
6. **developed country disaster relief funds** – which are public funds established by a public benevolent institution for the relief of people in distress as a result of a declared disaster in a developed country.

The Australian Tax Office will consider organisations that want to be endorsed under any of the above categories as deductible gift recipients provided that they have an ABN.

If they do, an application form can be obtained through the Australian Taxation Office on 1300 130 248.

Those organisations without an ABN will have to apply for one and indicate on the ABN application that the organisation wants to be endorsed as a deductible gift recipient. In completing the application, it is important to remember the important distinction between claiming that your charity is a "fund" or an "institution".

The ATO will then post the form to the organisation for completion.

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How does the SPAM Act apply to charities?

The SPAM Act was introduced at the end of 2003, establishing a scheme for regulating commercial e-mail and other types of electronic messages. Put quite simply, the Act prohibits the sending of unsolicited commercial electronic messages. Commercial electronic messages which are permitted under the Act must include information about the organisation which authorised the sending of the message. Further, the message must contain a functional unsubscribe facility.

Charities will be relieved to hear that they are exempt from many of the provisions of the SPAM Act. The following exemptions apply:

1. Electronic messages sent by charities, charitable institutions and religious organisations are called "designated commercial electronic messages" (DCEMs), provided those messages relate to goods or services being provided by the charity, charitable institution or religious organisation.
2. DCEMs are permitted under the SPAM Act.
3. Therefore charities, charitable institutions and religious organisations can send unsolicited commercial electronic messages which do not need to contain a functional unsubscribe facility. For example, a Church is permitted to send out emails relating to an upcoming fete. Such emails can be sent unsolicited and do not need to contain an unsubscribe facility.
4. The exclusion covers messages sent on your behalf. If a charity contracted a third party to email messages relating to its op shop, then these messages would be covered by the exclusion to the Act as the messages were authorised by the charity.
5. The goods or services need to be supplied by your organisation to enjoy the exemption. For example, it applies where an anti-cancer organisation promotes its own range of anti-cancer products. The exclusion would not apply if the anti-cancer organisation promoted an event from a hamburger or supermarket chain, where the organisation receives a proportion of the proceeds from a product or event.
6. If the email is not about goods or services but is "commercial" in nature, it will not benefit from the exemption. This begs the question as to whether a charity or charitable institution can send emails seeking donations. One could argue that such an email is commercial in nature but is not about goods and services being offered by that organisation.
7. It must be noted that many of the messages sent by such bodies are likely to fall outside the meaning of a commercial electronic message and would therefore not be subject to the SPAM Act anyway. This is because many such messages are not "commercial" in nature.

The NPPs set out rigorous regulation on how 'personal information' may be used and managed

How does the Privacy Act apply to you?

The Privacy Act applies to most organisations which have an annual turnover of more than $3 million. The organisation must either comply with the National Privacy Principles (NPPs) set out in the Act or in accordance with its own Privacy Policy (which has been approved by the Privacy Commissioner). The NPPs set out rigorous regulations on how "personal information" must be used and managed. "Personal information" would include names, addresses, past donations given etc. This is of great importance to charities and non profit organisations in relation to the keeping of their databases of donors. Methods, policies and procedures must be in place to ensure compliance with the NPPs at all times.

According to Ms Visevic, "One of the best ways to avoid breaching the Privacy Act is to allow only one or two full-time staff members access to the database and have a policy manual that can be distributed to all volunteers with things such as this spelt out."

Another fundraising area undergoing significant change is telemarketing, again potentially limiting the avenues for the not-for-profit and charity sector. Earlier this year, the Federal Government announced the establishment of a Do Not Call Register to protect consumers from "nuisance" telemarketing phone calls. *The Do Not Call Register Act* (Cth) 2006 was passed on 30th June 2006 and regulations are currently being drafted. Telemarketers will be required to check the Register before they embark upon a campaign and penalties for calling a number listed on the Register will include fines and injunctions.

"The Register is scheduled to be up and running some time in 2007. It will be administered by the Australian Communications & Media Authority (ACMA). Government bodies, religious organisations and charities and charitable organisations are generally exempt if the call is in relation to that organisation's goods and services. In this respect this new Act is quite similar to the Spam Act."

"You will note that the exemption is available to charities and charitable organisations, which terms are not defined in the *Do Not Call Register Act*. This begs the question - what about non profit organisations which are not strictly charities? Are they also exempt? If this question is not addressed in the Regulations, then it may end up being addressed in the courts." Ms Visevic said.

The Tax Man Cometh

The ATO has just published its 2006/2007 compliance programme. A special section in this programme is dedicated to non-profit organisations (NPOs). A copy of the programme can be downloaded from the ATO website www.ato.gov.au.

The ATO has advised that it will, in the 2006/2007 financial year, focus on:

- Educating and helping NPOs to improve record keeping practices;
- Checking that taxable clubs and associations are correctly reporting their non-member income;
- Checking that closely held charities and income tax exempt entities are not obtaining tax benefits inappropriately;
- Scrutinising the activities of NPOs that have links with aggressive tax scheme providers;
- Reviewing the concession entitlements of endorsed charities that undertake commercial activities;
- Reviewing clubs and other NPOs that have assessed themselves as being income tax exempt;
- Checking that employers comply with their PAYG withholding, FBT, reasonable benefit limit reporting and superannuation obligations;
- Educating and helping NPOs to improve accounting for GST for non-commercial supplies; and
- Educating and assisting NPOs to improve access to information for indigenous organisations.

The ATO apparently intends to undertake at least 2,900 GST audits of compliance issues and refunds in the non-profit sector. We therefore highly recommend that you seek professional accounting advice on a regular basis to ensure that you are complying with taxation requirements at all times. If you are audited and non-compliance issues arise, you should arrange to obtain professional accounting advice immediately.

The compliance programme also contains some very interesting information, such as:

- Only 22% of NPOs have their returns prepared by tax agents, which is a startlingly low figure.
- Most NPOs fully comply with their tax obligations. However, some compliance issues still arise because of the limited resources that most NPOs suffer from (in that many NPOs do not have sufficient funds to arrange for tax professionals to manage their affairs and therefore rely on volunteers who have limited tax expertise).
- Compliance issues usually occur in 5 key areas:
  - Registering – some NPOs seek endorsement when they are not entitled or alter their activities in ways which negatively impact upon their endorsement.
  - Keeping proper records – many smaller NPOs do not keep adequate accounting records.
  - Lodging forms on time – some NPOs fail to meet some of their lodgement obligations or do not meet lodgement deadlines.
  - Reporting correct information and claiming valid entitlements – a number of NPOs do not report their taxable income correctly, or fail to meet their employer and GST obligations.
  - Paying tax on time – some NPOs have difficulty paying their tax due to poor cash flow management and insufficient raised funds.

Please note that the deliberate non-compliance with tax obligations or the misuse of concessions will result in the ATO undertaking audits and imposing penalties.

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Beware – Read The Fine Print – Know Your Duty

People contemplating a role as a board member of a charity or not-for-profit organisation should seriously consider the legal implications, nature of the tasks and duties and the extent of their obligations and risks involved.

It is tempting to believe that volunteering your time for free to such organisations should be appreciated. However, as a member of the board or committee, you still have legal obligations and duties and there could be serious repercussions if you do not fulfill them, however well intentioned you may be.

It is essential to be familiar with the constituent document governing the management and operation of the organisation and the laws applicable to its particular corporate or other structure. It is also imperative to be familiar with the laws generally applicable to companies and business operations.

Non profit organisations can be either incorporated or unincorporated and most organisations begin as unincorporated associations.

This is where a group of people with similar interests or concerns for some sector of society have agreed to get together to pursue some particular activity or object. This group may establish itself on an informal basis where the members depend solely on an oral agreement (sometimes ill defined and little understood) between themselves. However, it is usual for the first members to adopt a written constitution or rules which form the basis of the relationship between them.

As a general rule, the law does not recognise an unincorporated association as being a legal entity separate from the individuals who make it up. The most important aspect of unincorporated status is the personal and unlimited liability of not only the members of the committee, but all of the members of the association.

It is tempting to believe that volunteering your time for free should be appreciated

Most organisations now operate as corporations and once an organisation is registered, it has a legal corporate personality separate from its members. It becomes a separate legal entity which is able to enter into contractual relationships, hold property, and sue or be sued in its own name.

The members have the benefit of limited liability – the corporate veil which will, in most circumstances, protect the members of the committee or board and the members of the organisation from personal liability.

It is most important to verify the status of the organisation before you commit to it.

Another issue is the fiduciary duties of a director which requires them to act honestly; exercise their powers in the interests of the organisation (and avoid misusing their powers); and avoid conflicts of interests.

Meeting the duty of good faith requires more than good intentions and an absence of self-interest.

While it is important that people continue to make contributions to society through non profit organisations, they must remain alert and astute in discharging their duties as directors and committee members.

They can do this by ensuring that any available insurance covers their duties as directors or committee members. They also need to question their board or other committee members and staff about the decisions being made and the activities of the organisation on a regular basis as this is essential for the proper discharge of their duties. If they don't, the risks are too great.

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Disclaimer: This publication is a non-comprehensive general outline of the law as at 31 August 2006. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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