

RECENT DEVELOPMENTS IN THE NOT FOR PROFIT SECTOR

COUNCIL OF AUSTRALIAN GOVERNMENT (COAG)

In September 2008 the COAG Meeting introduced a range of new initiatives which were agreed in principle by all States and the Commonwealth. (At the time WA still had a Labor Government.) Their aim is to reduce bureaucratic red-tape and the consequent cost to the commercial and Not-For-Profit Sectors, and also quite clearly, the cost to Government. A worthy objective and likely to be supported by all sectors of the community – but subject to Constitutional issues and public concern for State rights.

Currently legislation on the same core issues vary in detail in different parts of the country, so the complications that arise for those entities that operate in more than one State or Territory are significant.

The most recent reports available, following the COAG July 2009 Meeting in Darwin, include some matters that may be of interest to charitable and religious entities–

- Payroll Tax harmonisation – to ensure common terminology, tax base and administrative arrangements. Target date – July 2012;
- Licences of Tradespeople – currently a separate licence is required for each State. Target date – June 2012;
- National Consumer Policy Framework – to include a national generic consumer law and decision making process. – Target date – December 2010;
- Business Names Registration – aim is for a national system. Currently the different States seek to work co-operatively to minimise duplication. Target date – April 2011;
- Standard Business Reporting – a project welcomed by the business community. Not to be confused with the Standard Chart of Accounts project currently developing for the Not-For-Profit Sector (NFP). Target date – July 2010;
- Charity licences were also on the agenda, but no current comment from COAG. This appears to have been moved to the agenda for other Government initiatives.

It is likely that other initiatives will develop from COAG later, as it will help to reduce the current confusion caused by multiplicity of laws across the nation. These initiatives recognise the growing trend for business and also the NFP Sector to be active across State boundaries.

STANDARD CHART OF ACCOUNTS PROJECT (SCOA)

The Queensland University of Technology Centre for Philanthropy and Non-Profit Studies (CPNPS) has been working with Government to develop an SCOA for the NFP Sector. It has already been implemented in Queensland and New South Wales and is in the process of being developed for introduction into Western Australia.

A more recent COAG initiative, supported by a recommendation from the Senate Enquiry into Charities, is for the SCOA to be developed on a national basis. The national SCOA is likely to be introduced in the near future.

The CPNPS is working closely with the different areas of Government and also with representatives of the Sector to ensure consistency in terminology.

It is anticipated that the SCOA will be a voluntary matter but many organisations will find it of considerable benefit. Standardisation of financial reports within the Chart, but with flexibility to meet the individual entity's needs, is the key objective here. The benefit for those entities receiving Government grant funding is that they will be able to produce reports from their computerised software without having to export data to Excel for reformatting and restructuring.

It is anticipated that there will be cost saving for the NFP Sector and also for Government, as this programme gradually develops.

THE SENATE ENQUIRY INTO CHARITIES

In June 2008 the Senate agreed to examine the "Disclosure Regimes for Charities and Not-for-Profit Organisations". The purpose of the Enquiry was to review the appropriateness of current disclosure regimes, the regulatory impact and also examine measures that can be taken to assist the Sector to improve governance, accountability and transparency. The Committee has presented its recommendations now and some key recommendations are: -

- The establishment of a single independent national regulator for Not-for-Profit organisations similar to the United Kingdom's Charities Commission. (This recommendation is wider than the charity sector.)
- The development of a national fund-raising Act in co-operation with the States and Territories. This is aimed at replacing the current legislation for fund-raising, which requires charities to obtain a Licence in each State and Territory.
- Request the Henry Review into Taxation to examine taxation matters affecting NFP organisations with a view to simplifying arrangements and reducing compliance costs.
- Development of a website portal to publish information on the aims and activities of NFP entities in Australia.

There were a number of other recommendations that are linked to this, but it should be clear to all that there are changes coming. Charitable entities in receipt of funding grants will be more affected than churches that are funded from direct donations only, but there will be an impact in respect to the preparation, presentation and lodging with Government departments of financial reports.

HENRY REVIEW ON AUSTRALIAN TAX SYSTEM

The Henry Review was established by the Federal Government primarily to examine the impact upon business taxation matters. As a subsidiary to this, and as a consequence of the Senate recommendations, the Henry Review has commenced to examine taxation matters as they impact on the NFP Sector. Submissions received by the Review identify the complexity of Tax Rules that impact on the Sector and many suggestions regarding changes to reduce the complications have been submitted. The Tax Review Committee have not as yet publicly responded in this area, but changes can be anticipated.

WA ASSOCIATIONS INCORPORATIONS ACT

Many of you are aware that the present 1987 Act is to be replaced with a new Act. The change of Government in WA last year slowed the procedure down, but this is still a very active matter and the new Act will come to Parliament in the foreseeable future. No date is available at this time, but the Department of Commerce (formerly DOCEP) gives assurance that the matter is active.

When this new Act comes in, all incorporated associations in the State will be required to upgrade their Constitutions to comply with the new Act. Reasonable time will be given to enable these changes to be implemented, however the new Act will introduce some additional obligations.

The present Act imposes no reporting obligations on associations and has little in the way of regulatory teeth. The proposed new Act will change that substantially. Nevertheless, Department of Commerce have consulted widely with the Sector to ensure that the new Act is user-friendly wherever possible. The new Act will introduce new requirements which, we understand, will include: -

- An annual report to be filed. This is to include names and contact details of office bearers, a statement of solvency and perhaps some other minor financial information. With larger associations some fuller financial reporting may be required.
- Associations will need to have an identifiable contact point. Whether this will be by a Public Officer, or a Registered Office, or other methodology is not known at this stage.
- Simplification of incorporation procedures by the removal, in most instances, of the need for a public newspaper advertisement.
- Audit obligations will be introduced for larger associations. The most recent information regarding this suggest an audit would be optional

for associations with total revenue below \$500,000, but it would be obligatory for larger associations. However, these levels may change in view of discussions across Australia relating to consistency in regulation.

- Constitutions will be obliged to have provision for disputes and mediation. Alternatively, the provision in the model rules provided under the Act will be imposed. The Act requires unresolved disputes to be referred to the State Administrative Tribunal (SAT) for decision. Following negotiations with the Department, they have agreed in principle to allowing review bodies established by peak organisations to deal with such disputes, provided the final recourse to SAT will still be available. This means that peak bodies such as State or national sporting associations and State or national Church structures can be utilised. Details will need to be awaited with the legislation.

RECENT COURT DECISIONS

Word Investments: - Word Investments, a Company Limited by Guarantee, is a subsidiary of Wycliffe Bible Translators. It operated a funeral business to raise funds for Wycliffe's activities. Through Wycliffe, most of these funds went to support overseas projects for Bible translation. ATO argued that it was not a charity as it was operating a commercial activity and therefore needed to pay income tax on its surplus income. This raised enormous interest regarding the circumstances under which Tax Concession Charity (TCC) endorsement is available.

Ultimately the High Court found in favour of Wycliffe but on very specific grounds. The judgement held that Word was a charity and entitled to pass on its surplus income to Wycliffe as: -

- Its Objects under its Constitution were identical with the Objects of Wycliffe.
- Its activities were consistent with its Objects.
- Its Board had maintained a consistent policy; and
- The Company had operated in a consistent manner.

This High Court decision was contrary to key principles in Taxation Ruling TR 2005/22 "Income Tax: Companies Controlled by Exempt Entities".

One of the 2009 budget announcements was that the Government will amend the Tax Act to fully scrutinise organisations that seek to transfer money to overseas charities and other entities. The intent of the amendment is to reverse the High Court decision in Word that charities and other income tax exempt entities can, in certain circumstances, direct funds to overseas projects. Such a legislative change was predictable and introduces more legal complications that impact upon the charitable community. This has particular significance for Christian community for obtaining and retaining TCC endorsement, as entities that intend to send most of their income

overseas will be affected. There are currently some concessions in this area, so these changes are awaited with interest.

SIMAID: - SIMAID was operating as an overseas aid fund. It changed its procedures for its activities. The Federal Court held that it had lost its standing as an “Institution” and therefore could not qualify as a charitable institution. It was held that it was a charitable fund, and as such, was not eligible for Public Benevolent Institution (PBI) endorsement. This raised some important issues about the difference between a charitable institution and a charitable fund, – however, these distinctions have always been there.

Victorian Women Lawyers’ Association: - The Federal Court held that this Association was entitled to TCC endorsement. The Association’s Objects were very wide, but it seemed to be primarily an association that was a professional body for women members of the legal profession and therefore was not eligible to be a charity. However, the diversity of its activities caused the Court to accept that the principle purpose of the Association was to remove barriers and to increase opportunities for the advancement of women in the legal profession, being a profession where there was substantial under-representation of women.

Aid Watch: - This is an organisation whose primary Object was to support the environmental impact of overseas aid programmes. It did not carry out direct charitable activities itself. It also had a substantial advocacy role with Government. ATO argued that Aid Watch was really an arm of Government and not eligible for TCC endorsement. The Australian Administrative Tribunal held that Aid Watch was entitled to TCC endorsement and concluded that it was not essential to carry out charitable activities directly. Support activities such as those carried out by Aid Watch were acceptable. Note that this relates to TCC endorsement. The position with a PBI where activities need to be carried out directly is quite different.

Bargwanna – Trustee for Kalos Metron Charitable Trust: - This Federal Court decision was handed down in June 2009 (last month) and was an appeal by ATO to reverse a decision of the Administrative Appeals Tribunal (AAT) relating to TCC endorsements. The Federal Court found in favour of ATO and reversed the AAT decision.

In this case appropriate accountability procedures were not followed and the Trustees and their accountant/adviser intermingled funds belonging to the charitable trust with their own funds. As a consequence they derived personal benefit, where there was no appropriate arm’s length consideration.

The legal argument related to the issue of whether the charitable fund was applied for the purposes under which it was established in accordance with Section 50 – 60 of the Tax Act. The case examined the issue of whether the activities that were not charitable were nevertheless ancillary to the purpose of the fund. In a complex case, a reasonable person would conclude that the Trustees of the fund had failed in their fundamental duty under the terms of the Trust Deed.

OTHER MATTERS

Tax Ruling TR 2005/22 “Income Tax: Companies Controlled by Exempt Entities” and TR 2005/21 “Income Tax and Fringe Benefits Tax: Charities”, remain in place. ATO considered that these two Tax Rulings represent good law and apply these Rulings in respect to the tests as to what is a charity. Commercial activities by charities will continue to be viewed in accordance with these requirements.

Our current recommendation is that the use of a corporate structure for commercial activity, where those commercial activities are substantial, is not desirable. We recommend the establishment of a separate trust to operate as a charitable institution. Such a Trust may not qualify as a charity, but its income can be distributed to a charity, and so retain its tax-free status.

ANTI-MONEY LAUNDERING

In 2008, the Government introduced anti-money laundering and counter-terrorism laws. This legislation was introduced in co-operation with other major commercial nations. Its purpose, as you can imagine, is to give the Government better controls over the movement of substantial sums of money – particularly overseas. It identifies that not-for-profit organisations are particularly vulnerable to be used by terrorist organisations. ATO review of applications of TCC endorsement take these requirements very seriously.

The Commonwealth Attorney General’s Department have now issued a publication entitled “Safeguarding Your Organisation Against Terrorism Financing”. This is a publication specifically for not-for-profit organisations. It can be accessed on-line at - www.nationalsecurity.gov.au/npo

PRESCRIBED PRIVATE FUNDS – LEGISLATIVE CHANGES

Amendments to Tax Laws regarding Prescribed Private Funds (PPF) were introduced into Parliament late in June 2009. Key issues provided in the amending legislation include: -

- Replacing the current complex rules regarding accumulation of funds with a simpler minimum annual distribution rate;
- An obligation to develop and maintain an investment strategy;
- Introduction of valuation rules for assets that minimise compliance costs;
- A requirement that funds distribute at least \$11,000 per annum.

These changes have the objective of encouraging philanthropists to establish smaller PPFs.

AUSTRALIAN RESIDENTS WORKING OVERSEAS

Changes to Income Tax exemption for employment income for Australians working overseas are effective from 1 July 2009. (This matter was given wider attention in the earlier session on Income Tax). The objective of the changes is to ensure that personal exertion income is assessable in Australia on a world basis, and the previous exemptions provided for Australians working overseas for periods exceeding three months have been withdrawn. The aim here was to prevent the tax avoidance arrangements that were being experienced, particularly by people working off-shore for short periods. Nevertheless, the changes have far wider impact than this.

The original intention was to ensure that all Australian resident workers were affected by this, other than Australian consular staff and personnel working on overseas aid projects. However, a late change to the Bill presented to Government by Missions Interlink (the Missions arm of Australian Evangelical Alliance), has meant that there is also an exemption for missionary personnel with missions that are members of Missions Interlink. This has provided a concession for missionary staff on low income. Government accepted the valid argument that this imposed no significant threat to fiscal revenue, so the earlier, simpler rules will continue to apply for many - but not all - missionaries working overseas.

Note the important distinction. These changes apply to Australian residents only. Many missionaries having served overseas for a period of time (commonly around three years), are deemed not to be Australian residents while working overseas and their tax status is different.

The publication by Australian Not-for-Profit Network Inc. "Missionary Tax Guide" will provide more details regarding this matter in its next edition available later this year.

TAX DEDUCTIBLE GIVING - 2007

Recent statistics available from ATO about tax-deductible giving reveals some interesting details for WA including: -

Highest average giving	-	Yallingup.
Highest total claims by Postcode	-	Claremont.
Highest average gifts by occupations	-	Judges.
Highest percentage gift as proportion of income	-	Clergy.

Perhaps Yallingup is the only surprise!

Of greater interest is that:-

- Total giving increased by 21.1% on the 2006 year; and
- Average giving increased by \$440 per head; and
- Giving far exceeds the CPI Index.

Noel Harding

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