PAXTON-HALL LAWYERS

November 2018

Not-for-profit bulletin

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State Revenue exemptions to tighten for Queensland charities

Background

1. The *Revenue and Other Legislation Authority Amendment Bill 2018* (Qld) (**Bill**) was recently passed by the Queensland Parliament. We discussed the original Bill and the concerns of the Queensland Law Society (**QLS**) in our October bulletin.

2. The amended laws will impact charities across Queensland which access State revenue exemptions courtesy of qualifying as a 'charitable institution', these exemptions include:

    (1) transfer duty exemption;

    (2) land tax exemption; and

    (3) payroll tax exemption.

3. The amended laws create a new requirement for charities to qualify as a 'charitable institution' under the *Taxation Administration Act 2001* (**TAA**). It is now required that the constitutions or governing documents of charities have express provisions regarding:

    (1) its income and property being used solely for promoting its objects;

    (2) no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to members; and

    (3) upon dissolution, its assets must be transferred to another charity.

4. These provisions were already required by the TAA. However, in 2015, the Court decided in *Queensland Chamber of Commerce*[1] that the provisions of the TAA did not require that these provisions need to be *expressly* stated (and therefore could be implied). The Bill seeks to reverse this decision and ensure these provisions are expressly stated in constitutions and governing documents.

Concerns raised by QLS

5. QLS raised concerns that included:

    (1) the transitional period of 6 months outlined in the Bill was insufficient for charities to amend their constitutions or governing documents;

    (2) some trusts may require judicial approval to amend their governing documents;

    (3) the Bill may require the exact wording used in the TAA would need to be used in a charity's constitution or governing documents for it to qualify as a 'charitable institution'; and

    (4) many Queensland charities would incur legal costs ensuring their constitutions and governing documents are suitable for qualification as a 'charitable institution'.

[1] Queensland Chamber of Commerce and Industry v Commissioner of State Revenue [2015] QSC 77

6. Despite the concerns of QLS, the Bill was passed on 30 October 2018 without amendment to the 'charitable institution' provisions.

Queensland Treasurer's speech

7. At the time the Bill was passed, the Queensland Treasurer referenced the concerns of QLS and stated:

    (1) no currently registered charitable institution will lose the benefit of these exemptions as a result of the amendments;

    (2) no charity that currently receives State tax exemptions will be taxed within the transitional period and the Office of State Revenue (**OSR**) will assist charities affected by these amendments to make their constitutions compliant;

    (3) an amendment will be moved to extend the transitional period from 6 months to 2 years to allow all charities additional time to amend their constitutions and work with the OSR to ensure eligibility requirements are met;

    (4) a number of public rulings will be issued by the Commissioner of State Revenue which will:

        (a) confirm that the Commissioner of State Revenue will not take action against an institution that fails to notify OSR that it has ceased to be entitled to be registered after the transitional period where it has not obtained a tax benefit;

        (b) confirm that charitable trusts that do not have members will not be required to expressly contain provisions in its constitution which apply to charities that have members; and

        (c) clarifies that charitable institutions will be able to qualify for registration even if their constitutions do not contain precisely the same wording as the provisions in the Act.

Conclusion

8. The statements from the Queensland Treasurer provides some comfort to charities in Queensland. The proposed public rulings by the Commissioner of State Revenue will help guide charities in this regard. However, the public rulings do not prevent the Court from reaching a different interpretation of the legislation.

9. Queensland charities that are concerned about the possibility of losing state tax exemptions should have their constitutions reviewed following the release of the public rulings by the Commissioner of State Revenue.

10. The amendment is yet another reason why very great care needs to be taken by a will maker who chooses to establish a charitable trust in their will.

Donor seeks Control over Gift[2]

Background

1. A Canadian case recently raised the issue of a donor's right of input into the direction taken by a non-profit organisation that was given their funds for a research program.

2. It is an instructive case for both donors and recipients about the nature of a gift relationship.

Facts

3. The Faas Foundation (**Foundation**) is a Canadian philanthropic organisation directed by its principal, Andrew Faas. The Centre for Addiction and Mental Health (**Centre**) is the largest mental health and addiction teaching hospital in Canada, also conducting world-class research.

4. The Foundation signed a Donor Investment Agreement (**DIA**) to donate $1million to the Centre toward the creation of a workplace mental health program over a 3-year period. The donation was to be paid in 3 equal instalments. The first of the 3 instalments were paid, but the other 2 instalments were not.

5. Mr Faas' involvement in the program was intended to be very limited, in line with the Centre's usual practice. The DIA did not give him any right of access to the Centre's internal information or work product, any right of oversight of the program, or any involvement in designing or putting the program into action. The DIA did provide for Centre to report to him on an annual basis, which it did.

6. The Foundation had a number of grievances with the Centre including not adopting Mr. Faas' particular view of the Mental Health Commission of Canada's National Standard for Psychological Health & Safety in the Workplace; whether the program should have been integrated into a collaborative program with institutions which had previously received donations from the Foundation and whether Faas was entitled to disclosure of employee salaries and other confidential internal accounting matters.

7. The Foundation was not satisfied with the direction of the program and asked for the first instalment to be repaid. This was not done as the money had already been spent by the Centre as specified in the DIA.

8. The Foundation sought the Court to issue an order directing the Public Guardian and Trustee to initiate an investigation into how the funds donated had been used.

Decision

9. The Court found that formal reports were given to the Foundation as required as well as shorter updates, informal contacts by email, telephone and in person.

10. The objectives of the first year appeared from the formal reports to have been met in all respects and indicated that the program was well-placed to meet all the objectives of its remaining 2 years of work.

11. The Court concluded that the issues were really not about the financial management of the donation, but rather about Faas' personal vision not being carried out.

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[2] Faas v CAMH, 2018 ONSC 3386 Ontario Superior Court of Justice, E.M. Morgan J, 6 June 2018

12. The relevant legislation that would have triggered the Public Guardian's involvement was not invoked in such circumstances as no actual mischief had been identified and no misuse of funds is apparent from the record.

13. Therefore, there were no grounds on which to order an investigation by the Public Guardian and Trustee. There was no evidence of mismanagement of funds by the Centre. Since the Court held that *"such an investigation would be costly, disruptive to an important health care institution, and would serve no identifiable public interest*", the application was dismissed, with costs.

Lessons to be learned

14. Once a pure gift (donation) is given without any legally binding conditions, there is only a moral obligation or wish as to its fulfillment. The Courts treat this as free of any binding legal or equitable obligation that can be enforced.

15. However, a gift or donation can be given on a condition. If the intention of the donor at the time of giving the gift is that if the condition is not fulfilled, then the donation is to be returned, then the Courts will enforce the return of the donation.

16. The DIA, in this case, appears not to have contained the terms of the donation that were the subject of the dispute and the result could have been very different if such terms were agreed at the time of the donation as a condition of the gift.

17. That is probably why the Foundation sought the intervention of the Public Guardian and Trustee to initiate an investigation into how the funds donated had been used, rather than enforcing the DIA.

18. An appeal has been lodged to this case so the upshot will be interesting to see.

Church go-karting decided to be a no go[3]

Background

1. This was an appeal against a primary decision which concerned a claim for damages for personal injury brought by a volunteer in respect of injuries sustained in a go-karting accident at an event organised by a church.

2. The primary decision found against the church as to liability and held that there had been no contributory negligence by the respondent.

3. On appeal, while differing in some respects on the issue of liability, the Court did not interfere with these findings.

Facts

4. A church held a conference aimed at male church members, to learn about spiritual growth, marital relationships and parenting. A go-kart event was held in conjunction with the conference.

5. Some female volunteers also attended, of whom the respondent was one. She had volunteered to take photos and video of the go-karting event. She also drove a go-kart on 2 occasions. On the second occasion, she lost control of the go-kart and crashed into a tree, sustaining serious leg injuries.

Decision

6. There was no dispute that the church owed a duty of care to the volunteer under the *Civil Liability Act 2002* (WA) **(CLA)**, nor as to the quantum of damages.

7. On appeal, there was dispute as to the nature of the breach of duty, as to the nature of the precautions that should have been taken by the church, as to causation and as to contributory negligence by the respondent.

8. The trial Judge had discussed the nature of the barriers erected around the church car park where the go-karting was held, which she held to be inadequate, and the risk inherent in the design of a go-kart (which has the brake pedal on the left and accelerator on the right).

9. In the Court of Appeal's view, the question was whether the church was negligent in proceeding with the go-karting activity at all. The Court of Appeal took the view that the go-karting activity should not have been held in any circumstances, given an adequate risk assessment. It would have been no burden not to hold it, saved a lot of effort on the part of the organiser (who was also held liable), and really served no social purpose in the context of a church conference.

10. The Court of Appeal said that there was no dispute that there was an agreed risk inherent in the go-karting activity (that an inexperienced driver might crash and suffer serious injury) and that it was a not insignificant risk which was foreseeable.

[3] *Apostolic Church Australia Limited v Dixon* [2018] WASCA 146 Supreme Court of Western Australia, Court of Appeal, Murphy, Beech JJA, Pritchard J, 21 August 2018

11. The Court of Appeal's position was that the actual breach, the 'fault' for the purposes of CLA, was the failure to conduct a reasonable risk assessment. The Court said that a reasonable risk assessment would have resulted in no go-kart activity being held. The Court found no contributory negligence by the respondent.

Lessons to be learned

12. If organisations are going to embark on inherently risky activities, they need to carefully consider the risks and plan to manage them to an acceptable level of risk. In risk management strategies, not conducting the risky activity is an option that needs to be considered, along with strategies to manage the risk or to outsource the risks to those who can adequately manage and finance risk (experts and insurance companies).

13. Further, they need to implement the risk management plan successfully.

14. It is now common place in America and England for urban churches to have risk management plans for violence towards persons on church premises by outsiders that may include a police or security presence, personal entry searches, emergency evacuation procedures and post crisis arrangements.

A charity's home is its castle and occupied[4]

Background

1. In Tasmania, a charity that **both** owns and occupies land exclusively for charitable purposes is exempt from local rates.

Facts

2. Southern Cross Care (Tasmania) Incorporated owned retirement villages in Tasmania and was levied rates on those properties.

3. Councils had argued and succeeded in lower Courts that retirement properties were subject to rates on the basis that once the charity had secured an occupant for a retirement village unit, it was no longer occupied by the charity. The charity, in order to receive the rates exemption, had to show that it **both** owns and occupies land exclusively for charitable purposes.

The Decision

4. The Tasmanian Court of Appeal decided that when a charity had an elderly person living in a home provided to him or her by a charity, then the charity was not incidentally, but essentially and directly, carrying out a charitable purpose, and that makes the occupation exclusively for charitable purposes.

5. The Court did not agree with the Council's argument that an occupier must be distinguished from an owner. The Council further argued that the section requires the determination of who the occupier of each and every relevant parcel of land is and then the determination of whether each occupation is exclusively for charitable purposes. If the occupier is not the charity then the exemption is not engaged, as occupation by an individual as a place of residence is not an "exclusively charitable purpose."

6. The appeal was allowed and Tasmanian Councils have been required to refund the rates.

Lessons to be learned

7. Each State's local government legislation is different and the finding may not extend to other jurisdictions.

8. State and local governments are taking increasingly harder measures against charities and close monitoring of such provisions are necessary by charities.

[4] Southern Cross Care (Tasmania) Incorporated v Paul [2018] TASFC 9; Supreme Court of Tasmania, Full Court, Blow CJ, Estcourt J, Geason J, 12 November 2018

Human Rights Bill

Background

1. In Queensland, some human rights (particularly civil and political rights) are part of the common law including the right to liberty and security of the person, the right to a fair trial, freedom of peaceful assembly, freedom of association, and freedom of expression. Other human rights are reflected in legislation: for example, the *Anti-Discrimination Act 1991* prohibits discrimination on the basis of numerous grounds including race, sex, age and impairment. Some rights, which are internationally recognised, are not dealt with by the law.

2. Queensland was the first Australian State to introduce a human rights protection bill in 1959 by Premier Frank Nicklin, but it lapsed with the 1960 election. The Fitzgerald Report led to the establishment of an Electoral and Administrative Review Commission, which also recommended that Queensland adopt a bill of rights, but this was never acted upon.

3. In 2015, Parliament directed the Legal Affairs and Community Safety Committee (**LACSC**) to inquire into the appropriateness and desirability of a *Human Rights Act* for Queensland which finally reported on 30 June 2016. The LACSC was unable to agree on whether it would be appropriate and desirable to have a *Human Rights Act* in Queensland. The current government members supported a *Human Rights Act* (similar to the Victorian Charter, but with a right to education included) and the non-government members opposed the introduction of a *Human Rights Act* for Queensland.

The Bill

4. On 31 October 2018, the Hon. Yvette D'Ath MP, Attorney-General and Minister for Justice, introduced the Human Rights Bill 2018, fulfilling an election commitment.

5. The Bill follows the model of the 2 other Australian jurisdictions being Victoria and the Australian Capital Territory (**ACT**).[5] This is a 'dialogue model' of human rights being a middle ground between differing models around the world. There are constitutional (or entrenched) models: as represented by the United States Constitution and the representative (or parliamentary) models: as represented by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Commonwealth Act involves an extension of existing parliamentary scrutiny mechanisms, with the establishment of a specific Human Rights Committee which has an explicit focus on international human rights.

6. The objectives of the Queensland Bill are to:

    (1) establish and consolidate statutory protections for certain human rights;

    (2) ensure that public functions are exercised in a way that is compatible with human rights;

    (3) promote a dialogue about the nature, meaning and scope of human rights; and

[5] The Charter of Human Rights and Responsibilities 2006 (Vic) (**Victorian Charter**) and the *Human Rights Act 2004* (ACT) (**ACT Human Rights Act**).

(4) rename and empower the Anti-Discrimination Commission Queensland as the Queensland Human Rights Commission to:

(a) provide a dispute resolution process for dealing with human rights complaints; and

(b) promote an understanding, acceptance and public discussion of human rights.

7. The Bill protects 23 human rights drawn primarily from the International Covenant on Civil and Political Rights, but also includes 2 rights drawn from the International Covenant on Economic, Social and Cultural Rights and one from the Universal Declaration of Human Rights, being:

- recognition and equality before the law;
- right to life;
- protection from torture and cruel, inhuman or degrading treatment;
- freedom from forced work;
- freedom of movement;
- freedom of thought, conscience, religion and belief;
- freedom of expression;
- peaceful assembly and freedom of association;
- taking part in public life;
- property rights;
- privacy and reputation;
- protection of families and children;
- cultural rights—generally;
- cultural rights—aboriginal people and Torres Strait Islanders;
- right to liberty and security of person;
- humane treatment when deprived of liberty;
- fair hearing;
- rights in criminal proceedings;
- children in the criminal process;
- right not to be tried or punished more than once;
- retrospective criminal laws;

- right to education; and
- right to health services.

8. The Bill will be an ordinary Act of Parliament. That is, it will maintain the existing relationship between the Courts, the Parliament and the executive (government).

Parliament

9. Parliament remains sovereign, and may, if it wishes, intentionally pass legislation that is not compatible with human rights in the Bill. It is anticipated that this will be a rare occurrence.

10. Parliament will scrutinise all legislative proposals—bills and subordinate legislation—for compatibility with human rights. Future bills will be accompanied by a statement of compatibility with human rights.

11. The Courts cannot invalidate legislation that is not compatible with human rights. However, the Bill provides that the Supreme Court may make a declaration of incompatibility, meaning that the Court is of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights.

12. The Bill requires Courts and tribunals to interpret all statutory provisions, to the extent possible consistent with their purpose, in a way that is compatible with human rights. If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must to the extent possible consistent with its purpose be interpreted in a way that is most compatible with human rights.

The Executive

13. In general, State Government departments, agencies and their staff must act and make decisions in a way that is compatible with human rights. The bill provides, with some exceptions, that it is unlawful for a public entity to act or make a decision in a way that is not compatible with human rights, or, in making a decision, to fail to give proper consideration to a human right relevant to the decision.

Private sector bodies exercising government functions

14. The Bill also includes in its definition of 'public entity' non-government organisations, private companies and government owned corporations, that are engaged in various ways in delivering services to the public on behalf of the government or another public entity.

15. Examples include a private company managing a prison, or a non-government organisation providing a public housing service and are known as a 'functional public entity'. The Bill also gives the example of a private school which is not to be considered a public entity 'merely because it performs functions of a public nature in educating students because it is not doing so for the state'.

16. For the purposes of the Bill, registered providers of supports or a registered NDIS provider under the *National Disability Insurance Scheme Act 2013* are specifically named as public entities when they are performing functions of a public nature in Queensland.

17. Other organisations, not specified above, will need to come within the definition of '*Public entity*', defined as:

    (1) an entity, (which includes a person or unincorporated body);

    (2) whose functions are of a public nature (see below for the definition); and

    (3) only when it is performing such functions for the State or another public entity (whether by contract or otherwise).

18. The term 'public nature' is further defined. The legislation specifies some services that will be regarded as being of a 'public nature":

    (1) emergency services;

    (2) public health services;

    (3) public disability services;

    (4) public education including universities and vocational education;

    (5) public transport; and

    (6) a housing service by a funded provider.

19. Further, the Bill provides a non-exhaustive list of matters to assist in deciding whether an organisation has functions of a public nature, being whether the function is:

    (1) conferred on the organisation by statute;

    (2) connected to or generally identified with the functions of government;

    (3) of a regulatory nature;

    (4) publicly funded to perform the function; or

    (5) that of a government owned corporation.

20. For whether they are non-profit organisations the critical factors will be funding from government and whether they are connected to or generally identified with the functions of government. It must be said that the definition is contested and Australian Courts have experienced difficulty in distinguishing public and private spheres. Most commentators are agreed that there is no clear test in the Bill or other areas of law from which a concept might be developed.

21. Cases from Victoria have found that a Medical Board, social housing provider, a private company managing recreation centres for a council, a non-profit that sub-leased a home from the Victorian Government for people with a disability are all involved in public nature functions.

22. For good measure, the Bill also makes staff members and executive officers of a public entity, also a public entity in their own right.

23. The Bill will not apply to all activities performed by a functional public entity, but only those of a 'public nature'.

Limitation

24. Human rights protected by the Bill are not absolute and may be balanced against the rights of others and public policy issues of significant importance.

25. When non-profit organisations that are caught by the provisions have to make a decision about a client, stakeholder or a member of the public's human rights, it will be important to follow a framework for deciding when and how a human right may be limited.

26. The Bill sets out the basic test for how a human right may be limited. It provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

27. Because the justification must be 'demonstrable', the onus is on the organisation seeking to limit a human right to demonstrate that the limit is justified in the circumstances. This may involve written evidence of the decision and its process.

28. The Bill sets out a number of factors that may be relevant in deciding whether a limit is reasonable and justifiable. The factors are not exhaustive and include:

    (1) the nature of the human right;

    (2) nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;

    (3) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;

    (4) whether there are any less restrictive and reasonably available ways to achieve the purpose;

    (5) the importance of the purpose of the limitation;

    (6) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; and

    (7) the balance between the matters mentioned. The more important the right and the greater the incursion on the right, the more important the purpose will need to be to justify the limitation.

29. Some organisations may decide to adopt these principles and processes generally whether they are caught by the Bill or not for reasons of consistency, ease of implementation by avoiding deciding whether the provisions apply in the particular instance and general equity.

Remedies

30. There is no stand-alone legal remedy for a contravention of this bill and there is no right to monetary damages on the basis of a breach of the Human Rights Bill alone.

31. Rather, a breach will create a new ground of unlawfulness—that is, a breach of the Human Rights Bill will be unlawful and can only be piggybacked on an existing right to claim for a remedy on another independent ground of unlawfulness. The remedy is

the one the person would have been entitled to anyway on the basis of the existing claim.

32. The government expects that litigation over a breach will not be the norm and instead a new agency, the Queensland Human Rights Commission (**QHRC**) will conduct dispute resolution and conciliation.

Queensland Human Rights Commission

33. The Bill will rename the Anti-Discrimination Commission Queensland as the OHRC.

34. It is anticipated that the current Anti-Discrimination Commissioner, Scott McDougall, will become the Human Rights Commissioner.

35. The QHRC will make information about human rights available to the community as well as conduct education; deal with human rights complaints; provide as requested reviews of the effects of Acts and the common law on human rights; reviewing public entities' policies, programs, procedures, practices and services in relation to their compatibility with human rights.

36. The Bill requires that the Act is reviewed twice, the first review will consider the operation of the Act up to 1 July 2023 and the second to 1 July 2027.

Next steps

37. The Bill was referred to the Legal Affairs and Community Safety Committee for detailed consideration and issued a call for public submissions by 26 November 2018.[6]

38. The committee is required to report by 4 February 2019.

39. The Minister has indicated that the provisions will fully commence on 1 January 2020, but the QHRC will be commissioned in mid-2019 to allow it to commence promotion of the Act and education.

Issues to consider

40. Organisations will be faced with the task of identifying when the Act may apply to activities that it is undertaking and alter their policies and practices accordingly. Identifying functions that have the requisite public nature may not be an easy task and the QHRC should provide some plain language guidance to non-profit organisations about the boundaries. Decision making in relation to human rights will first have to be identified and then a proper process adopted and documented supporting the decision. Some might consider extending the principles across the whole of their organisation to avoid inadvertent breach. It may also be generally advantageous to good decision making.

41. Court litigation history in Victoria has not been extensive with about 100 cases a year in total and often the Act is only mentioned in passing.

42. The Queensland bill closely follows the Victorian Act and their formal guidance may provide some insights into how various issues will be regarded in Queensland.

[6] http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/HumanRights2018

43. There has been some inconsistent application and uncertainty between Victorian and ACT Courts about the correct way to of interpreting statutes with a human rights lens and this uncertainty may continue under the proposed Queensland legislation.

Playing games and the ATO

Background

1. The ATO have embarked on a project to revise their public ruling on sporting club income tax exemption.[7]

2. A draft for comment will be released before 30 June 2019 and they are currently workshopping a discussion paper to inform the content of the forthcoming draft ruling.

3. Section 50-45 of the *Income Tax Assessment Act 1997* states that subject to special conditions a society, association or club established for the encouragement of a game or sport is exempt from income tax.

4. The discussion paper raises three issues for consideration being:

   (1) whether the *Word Investments* and *Hunger Projects* cases can apply to sporting clubs;

   (2) sufficiency of required non-profit clauses contained in private statutes; and

   (3) definition of game or sport to be reconsidered.

Application of Word and Hunger Projects

5. The ATO have consistently pushed back on an expansion of the Word and *Hunger Projects* principles to sport since those cases first appeared.[8]

6. It does appear that some private rulings have been approved by the Commissioner where an entity has been created solely to fundraise for a qualified sporting club and its athletes.[9]

7. The nub of the Commissioner's argument is that there is a difference between a charity which can only have a sole charitable purpose (fundraising being incidental to that charitable purpose) and a club that can have purposes other than its main sporting purpose and still qualify. However, the other non-sporting purposes must be merely ancillary, incidental or secondary to the sporting purpose.

8. The decisions of such contests appear perplexing. There are a series of cases which discuss these issues ending with a number of adverse decisions against the ATO in the 1990s. The ATO's litigation appetite since then has been wanting.[10]

9. The ACNC Review recommended that the ACNC Act be amended to provide that certain not-for-profits with annual revenue of $5 million or more must be registered under the ACNC Act to be exempt from income tax and access Commonwealth tax concessions. If implemented this would certainly include a number of sporting clubs. It will be interesting to see how the ACNC handles the inevitable muddle of principles that may arise with the public on purposes, activities and what is main or incidental between charities and sporting bodies.

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[7] Tax Ruling 97/22 Income Tax: exempt sporting clubs.
[8] Refer to the Commissioners Decision Impact Statements 26 May 2009.
[9] Refer Auth. No. 1051239622255
https://www.ato.gov.au/law/view/document?DocID=EV/1051239622255&PiT=99991231235958
[10] Re Tweed Heads Bowls Club v. F C of T 92 ATC 2087; St Marys Rugby League Club Limited v. FC of T 97 ATC 4528; Terranora Lakes Country Club Limited v. FC of T 93 ATC 4078.

Non-profit Clauses in Private Statutes

10. The current ruling allows the non-profit status of the sporting club to be evidenced either by reference to explicit clauses in its constitution or "if the law governing its activities prevents the club from making distributions to members."[11] An example of such a law might be an Act of Parliament establishing the organisation that specifically or impliedly prevents such distributions to members.

11. The current ruling goes further than this. In an absence of specific non-profit clauses, the ATO will conduct an assessment of the objects, policy statements, history, activities and proposed future directions to determine if the test is satisfied.

12. Where the situation relates to an entity not governed by any restricting statute, this seems to be a good statement of the law.[12]

13. However, it doesn't appear to take account of the situation where a restrictive statute is involved, as was the case in *Federal Commissioner of Taxation v. Co-Operative Bulk Handling Ltd* [2010] FCAFC 155. The majority concluded that, on the scheme as set out in the tax ruling, a combination of the terms of the articles and the governing statute precluded the possibility that any profit or gain would go to members individually, including on a wind up of the entity. It was thus open to the Court to conclude on the scheme as a matter of fact that any incidental gain or benefit which may be received by members is not received by virtue of the membership but only in common with all grain growers in WA.

Definition of Game or Sport

14. There has always been contention at the margins of the definition of "sport or game" about whether philately, numismatism, body building, car owner clubs and train modelling are games or sport. Some activities may or may not be sport such as dancing for entertainment verses competitive dancing or dancing for exercise and agility depending on the context.

15. The current ruling looks to dictionary meanings, cases, and the Australian Sports Commission definition as well as providing a list for guidance.

16. In the redraft, the ATO is seeking submissions about making the boundaries brighter to the general public.

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[11] Tax Ruling 97/22 at para 10 & 23.
[12] Refer *Repromed Pty Ltd v Lucas and Anor* (2000) 76 SASR 575