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A practical legal perspective for charities and not-for-profits

Highlights New laws on corporate responsibility - Modern Slavery Legislation 2 RSL NSW: What governance lessons can be learned? 5 National Redress Scheme for Institutional Child Sexual Abuse 8
Recent Case on New South Wales Charitable Stamp Duty Exemptions 10

Cracking down on Slavery

MILLS OAKLEY

New laws on corporate responsibility - Modern Slavery Legislation

BY Luke Geary, Partner

In 2017, the Australian Parliament launched an inquiry into domestic modern day slavery practices. Modern slavery is an umbrella term given to modern day occurrences of human trafficking, slavery and slavery like practices, for example, forced labour. The findings were published in a report titled '*Hidden in Plain Sight*' which unveiled widespread modern slavery within Australia, with an estimated 4,300 slaves in the country. The key recommendations of the report were for the establishment of an Independent Anti-Slavery Commissioner and to enact Modern Slavery Legislation in Australia.

The Report illustrated a notable prevalence of slavery within Australia. Primary examples of modern slavery in Australia are being committed on farms and in other high risk industries such as the hospitality and construction industries. Recent modern slavery matters in Western Australia involved 70 foreign workers in the agricultural industry who were underpaid and living in overcrowded housing, including sheds.

In another example, a leading supermarket group was found to be underpaying subcontracted cleaners as little as $7 - $14 per hour for work, which was clearly well below their legal entitlements. A Fair Work Ombudsman inquiry into the supermarket found that 90 percent of its Tasmanian stores were non-compliant with workplace laws.

Subcontracted employees are commonplace in Australia; the members are often referred to as the 'hidden workforce'. The hidden workforce are vulnerable, regularly underpaid and without regulation, which unsurprisingly leads to exploitation. As with the example given earlier, supermarket giants are often not the direct employer of cleaning staff, but rather cleaning staff are subcontracted to the supermarket. The supermarket ordeal illustrates that it is vitally important to introduce supply chain auditing to ensure that businesses are active in their own corporate responsibility and to ensure staff (including especially the staff of subcontractors) are being paid and treated in accordance with all relevant workplace laws.

Australia is among a cohort of other governments such as Britain and the Netherlands who have recognised the need for action-orientated laws to tackle modern slavery in domestic and global supply chains. In 2016, there were an estimated 11,700 slaves in Britain alone. In response, during 2015 the United Kingdom enacted the *Modern Slavery Act 2015* (UK) (**UK Modern Slavery Act**), which was the first of its kind in Europe. The UK Modern Slavery Act essentially obliges commercial organisations with an annual turnover of more than £36 million to audit their supply chain and prepare a modern slavery statement each financial year. Section 54 of the UK Modern Slavery Act requires the modern slavery statement to include steps that the organisation is taking to address modern slavery in their supply chain and must be published on the organisation's website. The UK government envisions that doing so will create public pressure to eradicate slavery found in supply chains.

Australia has provisions under the Commonwealth Criminal Code that attempt to regulate slavery. However, according to the Federal Government, out of 604 trafficking and slavery cases reported between 2011 - 2016, only 7 convictions were made. This illustrates how inefficient our current system is, given the estimated number of slaves throughout Australia. The Australian Modern Slavery Act will act to counteract this. Since the introduction of the UK Modern Slavery Act there has been a 63% increase of victims speaking out for help.

The Australian Government has set out on the path for a Commonwealth Modern Slavery Act, by the Modern Slavery Bill 2018 (**MSA**) introduced into Parliament on 21 June 2018 for consideration and debate.

"Australia is among a cohort of other governments such as Britain and the Netherlands who have recognised the need for action-oriented laws to tackle modern slavery in domestic and global supply chains."

The MSA is intended to confront slavery and slavery-like practices such as servitude, forced labour, debt bondage, organ trafficking, deceptive recruiting, as well as forced marriage and child brides. Key features of the MSA as drafted include:

- Application to a wide range of Australian, foreign, and Australian Government entities with an annual turnover of over $AUD100 million to ensure a far-reaching effect, impacting over 3,000 organisations nationally;
- Reporting on all modern slavery practices criminalised under Commonwealth law, including slavery, trafficking in persons, servitude, forced labour and forced marriage. Entities will also need to report on the worst forms of child labour;
- Mandatory reporting criteria, including reporting on business operations, supply chains, potential modern slavery risks in the entity's operations and supply chains, actions taken to rectify these risks and an assessment as to the effectiveness of such actions;
- A public, Commonwealth run website to publish all modern slavery statements so that they are publicly accessible (these statements must be published within six months from the end of the financial year).

The modern slavery statements will be required to be completed by the Board or responsible members of the relevant organisation. Those members are responsible for ensuring the accuracy of its content and must sign the statement. The Federal Government is making it abundantly clear that this issue is the responsibility of those responsible for the governance functions of an organisation.

Although the MSA does not impose a financial or other penalty for non-compliance, the reporting threshold will cover approximately 3,000 businesses throughout Australia. The requirements will create a robust approach to corporate responsibility and form a basis of transparency by requiring businesses to respond to modern slavery with increased levels of information which will be publicly available. Non-compliance with the reporting obligations or failure to improve workplace standards and practices may attract public and investor scrutiny.

In addition, NSW has become the first state parliament to pass a Modern Slavery Bill 2018 on 21 June 2018. The NSW law requires organisations with an annual turnover of $AUD50 million or more to produce a Modern Slavery Statement and contains financial penalties of up to 10,000 penalty units ($1.1m) for non-compliance. This legislation will commence on a date yet to be proclaimed.

Since commencing, the UK Modern Slavery Act has increased transparency with more than 6,300 statements by companies from a wide range of sectors now available on the UK Modern Slavery Registry, providing insight into business structures, operations and supply chains. The availability of so many statements demonstrates that the Act is driving action. The statements show that a large number of companies are taking steps to develop and improve policies, due diligence and risk assessment processes to identify and mitigate the risk of modern slavery. Mitigation action may also include staff training or revising supplier contracts.

Supply chains are inherently complex and difficult to track, especially in companies that source from international manufacturers and suppliers. Companies will need to navigate many suppliers and will need know what to ask their suppliers and how to identify risks within their supply chains. They will also need to remedy risks and produce a transparency statement. Entities not caught by the reporting threshold may still decide to opt in to the reporting requirements. Organisations may also find themselves, as part of another organisation's supply chain, being required to provide information to a reporting entity. Now is the time to consider and prepare for how these imminent reporting requirements may impact organisations' operations and compliance obligations.

"Supply chains are inherently complex and difficult to track, especially in companies that source from international manufacturers and suppliers."

RSL NSW: What governance lessons can be learned?

BY Andrew Egri, Associate

Earlier this year, the NSW State Government released the Report of the Inquiry under the *Charitable Fundraising Act 1991* (NSW) lead by former Supreme Court Patricia Bergin.

The report followed a year-long independent inquiry into the RSL NSW Branch, RSL Welfare and Benevolent Institution and RSL LifeCare. The report was scathing on the systematic governance failures across the three organisations. Among the many incidences of misconduct, the inquiry heard evidence that the former President of RSL NSW, Mr Donald Rowe, spent $465,376 on his RSL credit card between 2009 and 2014. Further, Mr Rowe allowed his son to stay, rent-free, in RSL owned accommodation in the Sydney CBD for seven years.

What happened?

The Bergin report totalled some 705 pages and extensively scrutinised the failures of each of the organisations. The report's key findings revealed, amongst other things, ongoing organisational failures of governance. Some of the key issues identified in the report are summarised below.

NSW RSL

During his term as President, Mr Rowe misused the funds of RSL NSW and improperly managed expenses. Mr Rowe's misuse of funds included using his corporate credit card to cover mortgage repayments and flights for family members.

When the State Council became aware of Mr Rowe's misuse of funds, it failed to properly investigate and did not report the allegations to the police. Instead, the State Council provided Mr Rowe with the option of resigning rather than undergoing an investigation. When Mr Rowe resigned, the State Council made misleading statements regarding the circumstances of the resignation by indicating that it was due to health reasons.

RSL LifeCare

The directors of RSL LifeCare approved and received substantial remuneration and allowances, breaching their obligations to the charity. Further, the charity's funds were being used to pay directors, staff and others to attend functions linked to the Liberal Party of Australia without consideration as to whether attendance was compatible with RSL LifeCare's charitable purposes. As a result, the report revealed RSL LifeCare's non-compliance with its charitable

fundraising authority under the *Charitable Fundraising Act 1991* (NSW).

Why did it happen and why was it only detected in 2014?

The inquiry revealed many instances of poor governance practices creating a culture in which bad behaviour became tolerated. The report found a "widespread belief that the President would do the right thing". In relation to the former President's misuse of funds, the report said that "no one appears to have recognised the absurdity of having the President approve his own expenses".

The report reveals some key themes in respect of matters which, if not appropriately addressed, can create a culture whereby bad behaviour (whether by governing body members or staff) is allowed to fester.

1. Failure to refresh

The report commented on the failure of the organisations to refresh the membership of the governing bodies. Rather, "the same group, Messrs Rowe, White, Perrin (and Ms Mulliner), managed, or more accurately mismanaged, the affairs of RSL NSW, using the same processes and systems that had been in place for many years".

However, the failure to refresh was not limited to the organisations' governing bodies. During the same decade, RSL NSW had the same legal adviser and the same auditors.

The report determined that the failure to refresh the roles of those in power contributed to the situation. When considering that Ms Mulliner had been at the financial helm of RSL NSW for the thirty-eight years prior to 2014, the report found that "the financial systems and records that were in place were quite inadequate and there was a complete lack of rigour at the Finance Department level when it came to checking the Presidential spending".

There is a clear benefit in establishing processes which allow for the measured and intentional transfer of power in an organisation. Governing bodies are encouraged to stagger the appointment of their members to allow for a gradual transition. The report also highlights the importance of reviewing the contribution of long-term accountants and other advisers, and whether it is in the organisation's interests to obtain a new and independent perspective.

2. Failure to ask questions

The poor governance of RSL NSW was allowed to fester due to a culture which discouraged the asking of tough or probing questions. In relation to the mismanagement of funds by the former President, the report found that "those who were courageous enough to ask quite proper questions about the level of the President's expenses were inappropriately rebuffed by the CEO with the rather glib retort that "a man's got to live".

> **"Governing body members who do not ask the tough questions put themselves at risk of failing to uphold their duty to act with care and diligence."**

The report found that a culture existed of "not questioning superiors and in this instance delayed the exposure of the problems that led to Mr Rowe's resignation. Had the culture been different and the concern about the level of spending been dealt with earlier when it was raised, at least some of the awful consequences of what has now happened may have been avoided or not been so engraved".

Governing body members who do not ask the tough questions put themselves at risk of failing to uphold their duty to act with care and diligence. The inquiry is a clear example of the problems that can be allowed to linger as a result

of a failure to challenge the status quo.

Responses to the report

The release of the report has led the organisations to take a number of steps to address the governance failures, including the following:

- RSL NSW has committed to 15 measures to demonstrate improved governance, transparency, and financial management;
- RSL LifeCare has committed to measures to demonstrate improved board governance:
  - > addressing issues relating to board remuneration and risk management; and
  - > adherence to its political advocacy policy; and
- both have taken on enforceable undertakings that cover a three-year period.

Undertakings

The organisations were also obliged to provide undertakings which require:

- RSL NSW to:
  - > ensure all state councillors complete a course with the AICD within six months of their appointment;
  - > maintain a conflicts of interest policy;
  - > maintain an externally-managed whisteblower hotline; and
  - > maintain expenses policies and procedures; and
- RSL LifeCare to comply with Governance Standards 1 and 5.

Summary

Much can be learned from the many failures of the RSL entities. In relation to the governance of not-for-profit organisations, we encourage them to:

- put in place processes which require gradual "turnover" of those in positions of power, such as those members of the organisation's governing body; and
- ask questions of the governing body and senior management as to its practices and policies, even when such questions may not be received positively.

Failure by the RSL entities to enact these steps allowed a culture to become embedded in the entities which allowed bad behaviour by those in senior positions to go unrectified for too long. Not-for-profit organisations are encouraged to remain vigilant in this regard, to protect against such a toxic culture taking hold.

National Redress Scheme for Institutional Child Sexual Abuse

BY Luke Geary, Partner

The Scheme

On 1 July 2018, the Australian Government's National Redress Scheme came into force in Australia. The Scheme provides support to survivors of institutionalised child sexual abuse. The Scheme is born from one of the key recommendations of the Royal Commission. It has been designed to afford an avenue for survivors who may not have had the option to see their matters through the courts. It is estimated that 60,000 child sexual abuse survivors will utilise the Scheme.

How it works

The Scheme offers three forms of redress, namely a maximum of $150,000 monetary payment, access to counselling and psychological services, and a direct personal response from the responsible institution, if requested.

State governments and non-government institutions need to opt into the Scheme. To date, all Australian states and territories have agreed to opt into the Scheme, with New South Wales and Victoria already registered as official participating institutions. Institutions such as churches, charities and other non-government institutions will also need to voluntarily opt into the Scheme, if they wish to allow any survivors of abuse in their institutions to have access to the Scheme. Those who experienced child sexual abuse in respect of institutions which have not agreed to opt in, will not be able to access the Scheme.

Applications under the Scheme can be lodged from 1 July 2018 to 30 June 2027.

Eligibility

To access the Scheme, survivors must be Australian citizens or permanent residents who experienced child sexual abuse in connection with a participating institution. This abuse must have occurred when the person was aged less than 18 years old and prior to 1 July 2018.

The difference between Redress and common law claims

The guiding principle of the Scheme is to provide a platform for responsibility and healing. As such, a redress claim is a lot different to the process that a survivor would undertake under common law, which would be litigated through the courts with the survivor being required to run a case to trial (and hence commit themselves to having to undergo examination-in-chief, cross-examination and various often gruelling medico-legal appointments). A conventional trial is often a highly re-traumatising process and clearly contrary to the fundamental principles of Redress, which is sought to be restorative in nature.

Most relevantly, there is a significant difference in the standard of proof between Redress and common law claims. In order to be eligible under the Scheme, the survivor must demonstrate that there was a reasonable likelihood that the participating institution is responsible for their introduction to the abuser. 'Reasonable likelihood' in the present context simply means that the chance of the abuse having occurred and the participating institution(s) being responsible for introducing the survivor and the abuser, is not far fetched or fanciful. This is obviously a much, much lower burden of proof than in civil courts for common law claims, which are determined on the balance of probabilities (which requires proof for facts that the chance of something occurring is more probable than not, i.e. >50% likelihood).

Theory of Redress

The Scheme is focused on respect, engagement, information and support for survivors in an effort to move forward from their experiences. Redress offers a more holistic response to child sexual abuse which is not solely focused on compensation. Whilst a monetary payment represents a tangible expression of regret for the damage caused, it can in no way make up for the trauma experienced. Redress is about acknowledging the harm caused, and supporting those who have experienced child sexual abuse in an effort to assist in finding healing. The Scheme dictates that appropriate redress for survivors may include a direct personal response, counselling and psychological care and monetary payments. The redress provided to survivors will vary case to case and will have regard to the nature and impact of the abuse and the cultural needs of the survivor.

The direct personal response involves the survivor generally re-engaging with the responsible institution. This re-engagement typically includes an apology from the institution, the opportunity to meet with senior institutional representatives and an acknowledgment of the abuse and its impact. The institutions also offer assurances of the steps taken, or steps to be taken, to protect against further abuse of children in that institution. It is important to note that a direct personal response is not a mandatory part of redress, and can be rejected at the discretion of the survivor.

Counselling and psychological care is assessed and provided by accredited practitioners. This support operates in conjunction with other forms or sources of treatment. In some instances counselling and psychological care can be provided to family members of survivors, where this is a necessary step in moving forward with the survivor's treatment.

The theory of a monetary payment received under the Scheme is not compensation, but provides tangible recognition of the impacts that the abuse had on the survivor. The payments are determined by factoring the severity of abuse, the impact of abuse and any other relevant additional elements. The maximum monetary payment offered under the Scheme is $150,000. However, the average payment to survivors is estimated at $76,000. These payments do not affect Commonwealth payments like veteran's pensions or Centrelink payments, and they are immune from bankruptcy law. Survivors who received monetary payments under other Redress schemes, or through civil litigation, may still be eligible to be assessed under this Scheme, depending on the extent of their past receipts.

The success of the Scheme will be dependent on how well it is able to facilitate swift, just and fair decisions, together with how well the direct personal response can be provided by relevant participating institutions. Many survivors are quite elderly and/or unwell, so hopefully Redress will provide this outcome for them and allow them to move forward in their lives.

Luke Geary, Partner, has participated in the design of the National Redress Scheme and acts for many faith-based and non-faith based institutions, in response to common law and redress claims. Luke has designed redress schemes for a number of such organisations and appeared regularly in the Royal Commission at both public and private roundtables and in hearings.

Recent Case on New South Wales Charitable Stamp Duty Exemptions

BY John Vaughan-Williams, Lawyer

Tax concessions and exemptions for charitable organisations in Australia can be complex at the best of times. However, this complexity is made worse when comparing state and territory based exemptions across jurisdictions, or even between different legislation within one jurisdiction.

For example, each state and territory's legislation for stamp duty includes an exemption for charities, but the definition of what is charitable varies across jurisdictions. In Victoria, the promotion of religion is recognised as a charitable purpose under the *Duties Act 2000* (Vic), but in New South Wales, it is generally not under the *Duties Act 1997* (NSW) (**NSW Duties Act**).

Added to this is the fact that there is often only very little, or outdated published law regarding state and territory tax exemptions for charities. For this reason, charities should pay close attention when new cases on state and territory exemptions arise, because they may involve a new interpretation, which could lead to a newly available exemption for the organisation.

This article will look at a recent Supreme Court of New South Wales case on the charitable exemption under the NSW Duties Act — *The Salvation Army (NSW) Property Trust v Chief Commissioner of State Revenue* [2018] NSWSC 128 (**Salvation Army Case**).

What is Stamp Duty?

Stamp duty is a tax on written instruments, such as contracts for the sale of land, transfers of motor vehicles, and transfer of some shares. Stamp duty varies greatly in each state and territory, and the differences range from the types of instruments taxed, to the exemptions and concessions available.

In New South Wales, stamp duty is payable on any transfer of ownership of "dutiable property". Dutiable property is defined in New South Wales to include, among other things, a sale or transfer of land in New South Wales, and this was the relevant type of transaction in the Salvation Army Case.

Exemptions and Concessions for Charities

In New South Wales, the charitable exemptions and concessions to duty on the transfer of dutiable property are found in section 275 of the NSW Duties Act.

There are two different types of exemptions contained in section 275 for charities:

a. Subsection 275(3)(a) (**Blanket Exemption**) – a blanket exemption to an approved "exempt charitable or benevolent body". That is, once an organisation is approved under this subsection, then any otherwise dutiable transaction it enters into is exempt from duty (without needing to separately apply each time a transaction is entered into); and

b. Subsection 275(3)(b) (**Transaction Exemption**) – a transaction-specific exemption to an organisation approved as being charitable or benevolent by the Chief Commissioner of State Revenue in New South Wales (**Commissioner**), so long as the transaction is also for a charitable or benevolent purpose (with it being necessary to separately apply each time a transaction is entered into).

The most significant benefit of obtaining the Blanket Exemption is that a transaction entered into by the exempt organisation does not need to be directly for its charitable purposes in order to be exempt (for example, it could be for the purpose of purchasing land which is to be leased for profit, with those profits being directed back to the organisation).

However, the types of purposes which are accepted by the Commissioner as satisfying the Blanket Exemption are much narrower than those which are accepted under the Transaction Exemption. In order to satisfy the Blanket Exemption, an organisation's resources must be, in accordance with its objects, used wholly or predominately for either the relief of poverty, or the advancement of education. Conversely, under the Transaction Exemption, further purposes are accepted as being charitable, including the relief of suffering and distress caused by old age, and the assistance of sections of the community with special needs.

Finally, as well as section 275, there is also an exemption under section 275A of the NSW Duties Act, which is similar to the Transaction Exemption, but can apply when a dutiable transaction for land is to be used only partially for a charitable purpose (**Partial Exemption**). The Partial Exemption can lead to the amount of duty being proportionately reduced, according

> **"There is often very little, or outdated, published law regarding state and territory tax exemptions for charities."**

to how much of the land is used for a charitable purpose. For example, if half of a particular parcel of land is to be used for disability care, and the other half is to be used for commercial offices for an unrelated purpose, then only 50% of the usual amount of duty may be payable.

In the Salvation Army Case, all three types of exemption were discussed.

Facts – Salvation Army Case

The applicant for a duties exemption (the plaintiff in the case) was a body corporate known as "The Salvation Army (New South Wales) Property Trust", incorporated under *The Salvation Army (New South Wales) Property Trust Act 1929* (NSW) (**Property Trust Act**).

The plaintiff had acquired a property in Redfern in 2014, to be used as its headquarters (**Property**). The plaintiff had applied for the acquisition of the Property to be fully exempt from duty (under either the Blanket Exemption, or the Transaction Exemption). However, both exemption applications were rejected by the Commissioner.

The Property was used as the plaintiff's headquarters, but at the time of the acquisition, it was also subject to two leases, to unrelated third parties. The leased portion of the Property made up approximately 35%. On this basis, the Commissioner had assessed the plaintiff as only being entitled to a 65% duty exemption, under the Partial Exemption. This meant that approximately $885,000.00 would be payable on the acquisition in duty.

The plaintiff had contended that:

a. it was entitled to a Blanket Exemption (meaning that the transaction would automatically be exempt from duty, despite the purpose of the transaction);

b. in the alternative, if the Blanket Exemption was unavailable, it was entitled to a Transaction Exemption; and

c. in the alternative that neither the Blanket Exemption nor the Transaction Exemption were available, that the Commissioner had incorrectly apportioned the Partial Exemption in its submissions.

"Charities should pay close attention when new cases on state and territory exemptions arise because they may involve a new interpretation which could lead to a newly available exemption for the organisation."

Blanket Exemption

The dispute regarding whether the plaintiff was entitled to a Blanket Exemption turned on a question of the entity which was entering into the transaction, and what the purposes of that entity were. Uncertainty arose in this regard due to the plaintiff's trustee role.

The Salvation Army is split into two geographical arms in Australia — the Salvation Army Australian Eastern Territory (which comprises NSW, the ACT and Queensland) (**Salvation Army AET**), and the Salvation Army Australian Southern Territory (which comprises Victoria, South Australia, Tasmania, Western Australia and the Northern Territory).

The two arms are administratively separate, including preparing separate audited accounts, and have separate ABNs.

Under the Property Trust Act, which established the plaintiff, the plaintiff was the trustee of two separate trusts — one called the general work trust, and one called the social work trust.

The Commissioner had determined that it was the general work trust which had acquired the Property. The relevant distinction between the two trusts was that the purposes of the general work trust included the promotion of religion, which, in the Commissioner's view, would preclude a Blanket Exemption.

Identifying Purchaser

Under the NSW Duties Act, in determining whether a Blanket Exemption applies, the relevant entity is:

a. the body corporate, society, institution or other organisation approved for the exemption; or

b. any person acting as a trustee for the body corporate, society, institution or other organisation approved for the exemption (**Trustee Category**).

The Supreme Court held that it was the Trustee Category which was relevant in this case. That is, the question for the Supreme Court to determine was for which "institution or other organisation" the plaintiff was acting as a trustee. This would determine the charitable objects which would be assessed in determining the Blanket Exemption application.

On these facts, due to the complex structure of the Salvation Army, and the fact that the plaintiff was created by statute, working out the entity on behalf of which it was acting was not a straightforward exercise.

The plaintiff contented that it was acting as the trustee for the Salvation Army AET in acquiring the Property, whereas the Commissioner contended that the plaintiff was acting as the trustee for the general work trust (both of which had different objects).

Institution

The Court held that in order to determine for whom the plaintiff was acting as a trustee, a relevant question was which trust could be deemed to be an "institution or organisation". If the trust could not be held as an institution or organisation then it would not fall under the Trustee Category in the NSW Duties Act.

Not all trusts will be considered an institution or an organisation, which means that acquisitions by charitable trusts (which do not also have a trustee which is charitable) may not always be exempt under the NSW Duties Act.

There has been much law over the years surrounding the meaning of the term "institution", with respect to several different statutes. Generally, in order to be an institution, an entity cannot be a mere fund.

For the purposes of the NSW Duties Act, one of the main considerations in determining whether a trust is an institution or an organisation is whether it is for a specific charitable object, which can be referenced back to a defined group, as opposed to being for more general charitable purposes. An example of a trust which may be considered an institution or an organisation is a trust for a specific school, as opposed to for the more general advancement of education.

The Court held in this case that the general work trust could not be appropriately described as an institution — rather, it facilitated a general class of charitable work, as opposed to identifiable charitable beneficiaries.

For this reason, the Court held that the Salvation Army AET is ultimately the institution for which the plaintiff acts as a trustee. The Court held that even in fulfilling the charitable objects of the general work trust, the plaintiff was, in reality, acting for the benefit or the purposes

of the Salvation Army AET, which it held was an identifiable entity.

Charitable or Benevolent Body

Once the Court had determined that the Salvation Army AET was the relevant entity for the purposes of the acquisition of the Property, the relevant question was then whether the Salvation Army AET was an "exempt charitable or benevolent body", meaning that its resources are used, in accordance with its objects, wholly or predominately either for the relief of poverty, or the advancement of education.

The Court held that it was clear that the Salvation Army AET's objects included the relief of poverty, and that approximately 75% of the Salvation Army AET's resources were used towards the relief of poverty.

The Court held that, in order to satisfy the word "predominately" in the NSW Duties Act, the relevant question was simply whether more than 50% of its resources were used for the purpose in question. This is significant, as the Court did not pay attention to how the remainder of the resources were used, nor whether they were ancillary or incidental to the approved purposes. In other areas of charity law (for example, for the purposes of certain Commonwealth tax concessions), non-charitable purposes may preclude charitable status, even if more than 50% of an organisation's resources are applied towards charitable objects.

"For the Time Being Approved"

Finally, the Court considered whether the words "for the time being approved" in the NSW Duties Act meant that the Blanket Exemption could not be applied to acquisition of the Property after the acquisition had occurred.

The Court held that the relevant time to consider was not when the liability for duty arises, but the time when the eligibility for the exemption is assessed. Therefore, the Blanket Exemption could be applied to the acquisition of the Property, despite the liability for the duty having already arisen.

Alternative Submissions

Since the plaintiff was successful in its primary submission (i.e. its submission regarding the Blanket Exemption), the Court was not required to consider the alternative submissions (relating to either the Transaction Exemption or the Partial Exemption).

Take-away Points

There are two main points to take away from this case, in considering whether an organisation may be eligible for a duties exemption in New South Wales.

Firstly, if land is acquired in the capacity of a trustee of a charitable trust, then the purchaser should carefully consider for whom the trustee is acting, and whether that beneficiary can be considered an "institution". As was shown in this case, this is not straightforward, and purchasers may need to consider applying for a private ruling before entering into a transaction.

Secondly, it was significant that the Court did not pay attention to whether the plaintiff's non-charitable purposes were ancillary or incidental to its charitable purposes. This may broaden the classes of organisation which are eligible for Blanket Exemptions — it means that so long as more than 50% of an organisation's resources are put towards objects which are considered charitable under the NSW Duties Act, it may be eligible for a Blanket Exemption, no matter how the other resources are applied.

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Topics from previous issues

Issue 19, Summer 2018

- Be Prepared: Whistleblowers Protection Bill Introduced to Parliament
- What next for the Australian Charities and Not-For-Profits Commission?
- What do changes to the Privacy Law mean for your organisation?
- Reporting requirements for Incorporated Associations
- Waubra Foundation v Commissioner of ACNC: Health Promotion Charities and appealing a Decision of the ACNC

Issue 18, Spring 2017

- Fair Work Commission decision to give casual workers the right to request permanent employment
- Commercial fundraisers - Have you considered your obligations?
- Fair's fair: the unfair contract terms regime
- Public Companies & Related Parties: Should our organisation be concerned?

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