

THIRD DIMENSION

A PRACTICAL LEGAL PERSPECTIVE FOR CHARITIES AND NOT-FOR-PROFITS

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State Revenue Regulator adopts more realistic view of relief of poverty

What a relief – clarity on the meaning of relief of poverty

BY Brittany Flower, Law Graduate



In New South Wales, transfer duty is payable on the transfer of ownership of dutiable property. The *Duties Act 1997* (NSW) (**Duties Act**) defines ‘dutiable property’ broadly, but it does include land, shares and units, and an option to purchase land.¹ A transfer of dutiable property attracts duty unless, according to section 275 of the Duties Act, an organisation is exempt as being a charitable or benevolent body.

The recent Supreme Court of NSW decision of *YWCA Australia v Chief Commissioner of State Revenue*² outlines the modern principles that courts will consider when determining whether an organisation is a charitable or benevolent body under section 275 of the Duties Act.

Facts of the case

The Young Women’s Christian Association (**YWCA**) was established in England in 1865. A branch of YWCA was formed in Sydney in 1880. YWCA expanded and by 2018, various State and Territory YWCA organisations had been established. In 2018, the various YWCA organisations decided to amalgamate their interests and establish Young Women’s Christian Association Australia (**YWCA Australia**).

YWCA Australia's object is the provision of benevolent relief to people experiencing poverty, homelessness, violence or disadvantage, undertaken through various state and territory YWCA bodies. The organisation was created in conjunction with a scheme of arrangement under section 411(4)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**). The scheme was aimed at simplifying YWCA's structure and addressing difficulties in the different State and Territory YWCA organisations competing for funding from the government.

“This case provides clarity on the key points that the court will consider when determining whether an organisation is a charitable or benevolent body. Specifically, the court will reflect on how resources are used to pursue the relief of poverty and/or education in Australia.”

In the 1920s, the NSW organisation, YWCA NSW, acquired the 'Y Hotel' on Liverpool Street in Sydney's CBD. In 2006, a second hotel was acquired in Redfern. Both hotels, now called the 'Song Hotel Sydney' and 'Song Hotel Redfern' respectively, operated as a commercial operation with profits used solely to support YWCA NSW's charitable activities.

On 22 May 2018, the amalgamation of the various State and Territory YWCA organisations was affected by the scheme of arrangement. The transfer of the 'Song Hotel Sydney' and the 'Song Hotel Redfern' to YWCA Australia occurred because of the order of the Federal Court.

YWCA Australia lodged an application for an exemption from duty on the transfer of the two Sydney Hotels as an 'exempt charitable or benevolent body' for the purposes of the Duties Act. The Chief Commissioner of State Revenue (NSW) (**Commissioner**) refused YWCA Australia's application for an exemption from duty. Instead, duty in the aggregate amount of \$3,326,195.48 at ad valorem rates was charged on the transfer of the two hotels to YWCA Australia.

YWCA Australia appealed the Commissioner's decision to the Supreme Court of NSW.

Question before the Court

The question before the Court was whether YWCA Australia was an 'exempt charitable or benevolent body' for the purposes of section 275(3)(a) of the Duties Act and, therefore, whether it was exempt from duty, according to section 275(1), on the transfer of dutiable property.

Exempt charitable or benevolent body

Considering YWCA's eligibility to be exempt for duty under section 275 of the Duties Act requires a look at subsection 275(3)(a). This subsection is a blanket exemption that is applied to an approved 'exempt charitable or benevolent body'. An 'exempt charitable or benevolent body' is defined in the Duties Act as:

- a. *"any body corporate, society, institution or other organisation for the time being approved by the Chief Commissioner for the purposes of this paragraph whose resources are, in accordance with its rules or objects, used wholly or predominantly for –*
 - i. *the relief of poverty in Australia, or*
 - ii. *the promotion of education in Australia, or*
- b. *any body corporate, society, institution or other organisation that, in the opinion of the Chief Commissioner, is of a charitable or benevolent nature, or has as its primary object the promotion of the interests of Aborigines"*³

In turn, the Court was required to determine whether YWCA Australia used its resources wholly or predominantly for the relief of poverty in Australia.

Are the resources used wholly or predominantly for the exempt purpose?

a. Predominantly

Organisations are entitled to claim exemption from duty where their activities are wholly or predominantly for the exempt purpose. To determine whether YWCA Australia's resources were used predominantly for their specified purpose, the Court considered the term 'predominantly'. The Court explained in *Salvation Army*⁴ that 'predominantly' means that the purpose must be 'the most dominant of the purposes of the institution or organisation'.⁵

The Court considered in *Salvation Army* that to satisfy the word "predominantly", the relevant question was whether more than 50% of its resources were used for the organisation's purpose.

Ward CJ observed that the requirement that resources be used predominantly for the specified purposes was satisfied in that case because “approximately 75% of the financial and personnel resources of the relevant organisations combined were expended on social work programs with the object of relieving poverty”.⁶ The Court did not pay attention to how the remainder of the resources were used; instead the Court focussed on the predominant use.

The case of *Word Investments*⁷ too considered whether a body was within a category entitling it to an endorsement. The Court examined not just the objects but also the activities of the body. The Court concluded that the focus was on how the objects were being pursued by their activities.⁸ YWCA Australia’s object was to provide benevolent relief to people experiencing poverty, homelessness, violence, or disadvantage, in particular women and children, and to achieve this relief by activities.

The Court’s Findings

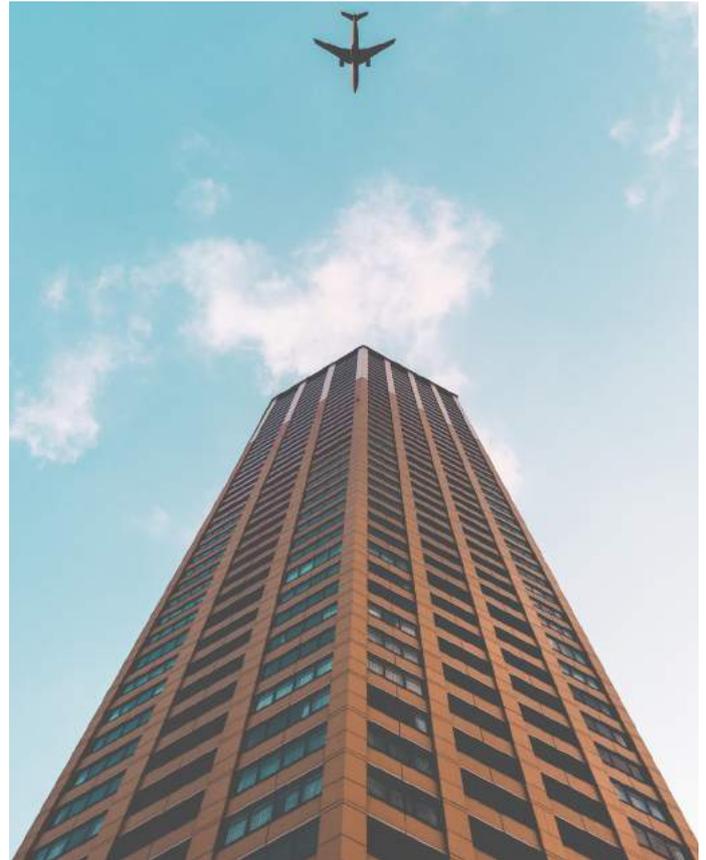
Considering both reasons above, the Court found that over 90% of the relevant financial expenditures of YWCA Australia were for the relief of poverty and/or the promotion of education. Thus, it held YWCA Australia used its resources predominantly for the exempt purpose.

b. Wholly or Predominantly

Secondly, the Court considered the terms ‘wholly or predominantly’ as using an evaluative standard. This standard considered whether YWCA Australia conducted its activities, as shown by the way it used its resources, wholly or predominantly for the exempt purpose. The Court referred to *Ryde Municipal Council v Macquarie University*⁹ which explained that “if the use which the charity makes of the land is ‘wholly ancillary to’, or ‘directly facilitates’, the carrying out of its charitable objects, that is sufficient to satisfy the requirements that the premise are used for charitable purposes.”

The Court’s Findings

The Court in YWCA similarly found that the two Sydney Hotels, and the land which they resided on, were used for a purpose that directly facilitated its charitable objects. In coming to this conclusion, the Court accepted that YWCA Australia has used the Song Hotels to generate revenue in furtherance of its objects. Ultimately, the Court was satisfied that the Song Hotels were conducted for the sole purpose of earning profit to be spent in pursuit of YWCA Australia’s purposes.



What is for the ‘relief of poverty in Australia’?

To determine the meaning of ‘relief of poverty in Australia’, the Court considered several cases to assess whether YWCA Australia was using its resources for the purpose of relief of poverty and/or education.

*Downing v Commissioner of Taxation*¹¹ considered “the word ‘poverty’ to refer to persons who, although they may not be in abject poverty, are subject to some degree of financial necessity”.¹² The Court in YWCA considered the charitable purposes to include “the relief of persons in necessitous circumstances” and in its context, to have a predominantly charitable character.

Similarly, in *Ballarat Trustees Executors and Agency*,¹³ Kitto J considered the meaning of “necessitous circumstances”. Kitto J said, “it was an expression that meant ‘having little or nothing to support oneself by; poor, needy; hard up’”. It was held that necessitous circumstances had to be understood as a degree of poverty and when “his [or her] financial resources are insufficient to enable him or her to obtain all that is necessary, not only for a bare existence, but for a modest standard of living in the Australian community.” Nader J in *Aboriginal Hostels Ltd v Darwin City Council*¹⁴ also considered that poverty was apparent when people are “in considerable need of special consideration and assistance”.¹⁵

The types of purposes which were accepted by the Commissioner as satisfying the exemption under section 275 were quite narrow. To satisfy the 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. The Court in YWCA found that it is unrealistic and inconsistent with the purpose of section 275 to treat crisis relief as outside the concept of the relief of poverty. People subject to some degree of financial necessity who are suffering problems linked to various societal issues, including drug and alcohol misuse and family violence, are within the scope of the relief of poverty. The Court considered the Commissioner's notion of poverty as narrow, and instead determined it to be complex, taking into consideration the various societal issues.

“To determine the meaning of ‘relief of poverty in Australia’, the Court considered several cases to assess whether YWCA Australia was using its resources for the purpose of relief of poverty and/or education.”



The Court's Findings

The Court held that YWCA's resources were used for the relief of poverty in Australia. The relief of poverty in Australia was considered in the context of contemporary conceptions of poverty.¹⁶ The Court considered the modern concept of the “relief of poverty in Australia” to encompass assistance given to persons who are “subject to some degree of financial necessity”.

YWCA Australia's programs were found to provide relief to women fleeing family violence who, at least temporarily, had nothing, having fled from their abusive partners, and that this was “for the relief of poverty”. The temporary assistance provided was to meet their immediate needs, which would otherwise not have been met. Similarly, the Court concluded that a program focused on providing housing solutions for people who are facing a real risk of homelessness is a program to ‘benefit persons whose lot needs improvement’ and was too one ‘for the relief of poverty’.

Take Away Points

This case provides clarity on the key points that the court will consider when determining whether an organisation is a charitable or benevolent body. Specifically, the court will reflect on how resources are used to pursue the relief of poverty and/or education in Australia. In this case, the Court concluded that the YWCA Australia's resources were predominantly used for the relief of poverty and/or the promotion of education. In reaching this conclusion, the Court considered the contemporary understanding of poverty and determined that poverty will be evident when someone is “subject to some degree of financial necessity”. This would extend to instances of domestic violence or drug and alcohol misuse.

¹ Duties Act 1997 (NSW) s 11.

² YWCA Australia v Chief Commissioner of State Revenue [2020] NSWSC 1798.

³ Duties Act 1997 (NSW) s 275(3)(a).

⁴ The Salvation Army (New South Wales) Property Trust v Chief Commissioner of State Revenue [2018] NSWSC 128.

⁵ Ibid 148.

⁶ Ibid 146-149.

⁷ Commissioner of Taxation v Word Investments Ltd [2008] HCA 55.

⁸ Ibid 26.

⁹ Ryde Municipal Council v Macquarie University [1978] HCA 58.

¹⁰ Ibid; Glasgow Corporation v Johnstone [1965] A.C. 622.

¹¹ Downing v Commissioner of Taxation (1971) 125 CLR 185.

¹² Ibid 193-194.

¹³ Ballarat Trustees Executors and Agency Co Ltd v Federal Commissioner of Taxation (1950) 80 CLR 350.

¹⁴ Aboriginal Hostels Ltd v Darwin City Council (1985) 22 NTR 1.

¹⁵ Ibid.

¹⁶ YWCA Australia v Chief Commissioner of State Revenue [2020] NSWSC 1798, 55.

Mills Oakley provides new free legal service for Australia's 'missing middle'

BY Lauren Stubbs, Associate Lawyer



Legal need in Australia far outstrips the resources of government funded services, leaving many Australians without access to legal services. To tackle this issue, Mills Oakley has launched a new free legal service: Everyday Justice.

Everyday Justice provides free legal services to the “missing middle” – people who require legal assistance but who are ineligible for assistance from Legal Aid or other government funded services, and who cannot afford a lawyer without incurring substantial financial hardship.

Everyday Justice has been established as a public company limited by guarantee and is in the process of seeking registration as a charity with the Australian Charities and Not-for-Profits Commission.

Meeting legal need in Australia

The Law Council of Australia, in its 2018 *Justice Project Final Report*, found that there is a critical shortfall in legal services available to the missing middle.¹ Unlike with education or healthcare, there is no universal system for people who require legal assistance in Australia, and securing funding for such services has proved challenging.

This often results in people needing to make tough choices when it comes to asserting their legal rights. Many people must represent themselves, which is often incredibly stressful, or are forced to give up their rights, which can have significant impacts on a person's safety, wellbeing and/or financial security.² If Australians cannot afford to assert or enforce their legal rights, the law becomes meaningless. Everyday Justice hopes to change this.

As Sir Anthony Mason, former Justice of the High Court of Australia, said: “a first-class court system and a first-class legal profession are of no avail to a person who cannot afford to access them.”³

How Everyday Justice will help

Everyday Justice hopes to alleviate the undue hardship faced by the missing middle by providing free legal services in the following areas:

- Employment;
- Tenancy;
- Credit and debt;
- Bankruptcy;
- Financial abuse;
- Fines and infringements;
- Human rights;
- Climate change law; and
- Other public interest matters.

These areas have been identified as in high demand amongst the missing middle, with demand continuing to increase in light of the COVID-19 crisis.

“If Australians cannot afford to assert or enforce their legal rights, the law becomes meaningless. Everyday Justice hopes to change this.”

Everyday Justice emphasises accessibility by providing nation-wide legal services online, over the phone and in person. This ensures vulnerable people, such as people with disabilities, older people and those in rural or remote communities, can still access legal services, irrespective of physical impediments.

The firm offers free 30-minute phone and video appointments for anyone who needs legal advice about the above issues. They can also provide more intensive free legal services, such as drafting documents and representing clients, subject to an eligibility test.

The decision to launch the firm has received significant support across the community and within the legal profession. Australian Pro Bono Centre CEO Gabriela Christian-Hare states “Mills Oakley is to be congratulated for establishing and investing in Everyday Justice as a vehicle through which vulnerable Australians can obtain pro bono legal support across a range of critical areas”.

The team at Everyday Justice

The Everyday Justice team will be staffed and supported by individuals with significant experience in the provision of pro bono legal services.

Mills Oakley Partner, Luke Geary, chairs the Board of Everyday Justice. Luke has a long history in the provision of pro bono legal services, being the founder of Australia's first ever Social Enterprise law firm, Salvos Legal and sister law firm, Salvos Legal Humanitarian. Luke has previously been named as one of the 25 most influential people in the Australian Social Sector, as well as having been Australia's Pro Bono Lawyer of the Year, and separately being honoured as an Anzac of the Year, for his contribution to the law.

The day-to-day operations are run by Managing Lawyer, Amy Burton, who was named Pro Bono Lawyer of the Year at the Lawyers Weekly Women in Law Awards. Amy also spent time learning about innovative not-for-profit law firm structures during her time as a General Sir John Monash Scholar at Georgetown University in Washington DC in 2019.

Mills Oakley Partner Vera Visevic, who is a renowned governance expert, also serves on the board as a director (and company secretary), together with legal innovator Terri Mottershead, who is also the Executive Director of the College of Law's Centre for Legal Innovation.

Many lawyers working at Mills Oakley have also signed up to do pro bono work for Everyday Justice, demonstrating the strong commitment from within the firm to give back to the community.



An opportunity for young lawyers

Everyday Justice is committed to the development of young lawyers, and to providing new graduates with a pathway to a career in social justice. The firm acknowledges that as a result of the COVID-19 crisis, the broader legal profession's graduate intake has been cut back, leaving many new graduates in a difficult position.

To address this, Everyday Justice has partnered with the College of Law to set up a national internship program for law graduates interested in pursuing careers, where they can make a valuable impact to people from vulnerable and disadvantaged communities. The program provides interns with intensive training, as well as practical legal experience, in order to ensure they develop the skills needed to pursue a career in social justice.

Contacting Everyday Justice

Everyday Justice can be contacted by:

- Completing the short Everyday Justice Intake Chat
- Emailing info@everydayjustice.com.au
- Calling 1800 161 196, Monday to Friday between 9am – 5pm (AEDT)

“Everyday Justice emphasises accessibility by providing nation-wide legal services online, over the phone and in person.”



Modern Slavery Legislation: Compliance, Reputations and Exploitation

BY Luke Geary, Partner and Georgia Davis, Associate



Slavery and slavery-like offences have been illegal under the criminal law in Australia for a long time. Now, a new law, the *Modern Slavery Act 2018 (Cth) (MSA)*, is compelling big businesses in Australia to consider Modern Slavery in a way that they've never been obligated to before. The main object of the MSA is to assist the business community in Australia to take proactive and effective actions to address Modern Slavery and specifically Modern Slavery practices occurring in the operations and supply chains of those organisations in Australia.

With the commencement of the MSA on 1 January 2019, any entity that carries on business in Australia with annual consolidated revenue of at least \$100 million is now a "reporting entity". Reporting entities must submit a statement annually to the Department of Home Affairs and Australian Border Force for publication that, among other details, describes the risks of Modern Slavery in their own business and supply chains, as well as clearly stating what they are doing to help combat it.

On 1 December 2020, the first tranche of Modern Slavery statements was published on the Australian Border Force's online register – marking a new era of transparency in this area. Much like the introduction of privacy laws or workplace health and safety laws some years ago, this is a new regulatory requirement for business that is here to stay, requiring ongoing attention and internal capabilities to provide that attention.

It is worth repeating the word "publication"; the statements are published on a public register and may be read by a wide cohort including the Australian Government, the media, customers, employees, investors, suppliers, business partners, business peers, civil society/members of the public and academics. The statements are published whether they are compliant with the legislation, or not.

There is also a public element to non-compliance. Whilst there are currently no financial penalties for non-compliance with the MSA (though under a similar NSW law, which is yet to commence, there may be fines of up to \$1.1m), the MSA provides for a "naming and shaming" regime.

Under the MSA, the Minister of the Department of Home Affairs may request that a reporting entity provide an explanation for its failure to comply, and/or require the entity to undertake specified remedial action, within a set time. Where the entity fails to adequately reply to any such request from the Minister, the Minister may publish the identity of the entity as well as details of their failure to comply with the Minister's request.

As such, legal compliance in this area is accompanied by the muscle and might of the reputational and commercial risks that non-compliance with this piece of legislation poses.

If your organisation were to reveal its approach to Modern Slavery as lacklustre, how will your stakeholders react? How does your organisation wish to present in the public forum that it is compliant with the MSA? Specifically, purpose driven organisations risk standing out as being substantially behind their peers, or even diverging from, or appearing inconsistent with, their core values or charitable purpose.

The commercial risk is different for every organisation. The 'for purpose' sector in Australia has built a reputation of integrity, and the trust that the community has in this sector is crucial in inspiring the confidence of donors and volunteers that play an essential role in furthering the mission of many organisations. The maintenance of this reputation is naturally, therefore, a key priority for many such organisations.



While some businesses will see this solely as a compliance issue, this legislation involves a serious human rights issue that is impacting the lives of vulnerable people all over the world. Modern Slavery is a term used to describe only the most serious forms of exploitation. It does not include practices like underpayment of workers, workplace health and safety failings and substandard working conditions, though these practices may develop into Modern Slavery over time. Modern Slavery includes practices like human trafficking, slavery, servitude, forced labour, debt bondage, forced marriage and the worst forms of child labour.

The United Nations and the Walk Free Foundation estimate that there are currently approximately 40 million victims of Modern Slavery globally. In July 2019, about half a year after the MSA came into effect, the Birmingham Crown Court in England heard the United Kingdom's largest human trafficking case.

Judge Mary Stacey, in sentencing, stated *"Any lingering complacency after the 2007 bicentenary celebrations of the abolition of the English Slave Trade Act was misplaced. The hard truth is that the practice continues, here in the UK, often hiding in plain sight"*, the prosecutor describing the exploitation as a scenario where *"human beings have become commodities"*. Modern Slavery has severe consequences for its victims and often disproportionately impacts women and girls.

“The United Nations and the Walk Free Foundation estimate that there are currently approximately 40 million victims of Modern Slavery globally.”

The nature and prevalence of Modern Slavery mean that there is a high risk that it could be present in any entity's operations and supply chains. The Department's guidance materials state that *"every entity has Modern Slavery risks in its operations and supply chains"*.¹ There is no requirement under the MSA that entities certify that their operations and supply chains are completely slavery-free. This piece of legislation rather aims to help businesses to understand that if you haven't looked for something, you probably haven't found anything, but that does not mean it does not exist.

Charitable organisations in Australia need to promptly consider whether their compliance with the MSA will be driven by legal risks alone, reputational risks and perception, or the ethics that are at the core of this piece of law – a desire to help eradicate the serious exploitation of individuals through Modern Slavery.

Mills Oakley Partner Luke Geary is one of Australia's leading specialists in Modern Slavery, having acted for many victims of Modern Slavery over more than 15 years, as well as supporting many large organisations in designing their responses to this new law. If your organisation would like assistance in this space, please do let us know, as we would be pleased to assist.

¹ Department of Home Affairs, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities* (Publication, 2019).

To be or not to be, that is the Question: Are the Assets of a Charitable Organisation held on Charitable Trust?

BY *Alison Sadler, Lawyer*



Background¹

Mr George Dombroski and his sister, Ms Pamela Dombroski, lived at a property in Balaclava, New South Wales, and owned various properties together in Mittagong. Mr Francis Mougel was a friend and carer of George and Pamela.

On 14 August 2001, Mr Dombroski and Mr Mougel established the Dombroski Foundation Ltd (**Foundation**) as a public company limited by guarantee and a registered charity.

The purpose of the Foundation was discussed between Mr Dombroski, Ms Dombroski and Mr Mougel prior to its establishment. It was agreed that the Foundation's purpose was to maintain and develop the properties which they owned, and to apply those properties for charitable purposes. Mr Dombroski and Ms Dombroski wanted the properties to remain accessible for the good of the community by:

- maintaining community gardens;
- providing access to an open range of artistic activities;
- providing spiritual and philosophical studies; and
- providing residence for visitors, thereby creating a "sanctuary".

Conversely, Mr Mougel submitted to the Court that Mr Dombroski wanted the Foundation to protect the properties from being developed for purposes other than for the good of the community. Mr Mougel also claimed that he and Mr Dombroski wanted the Foundation to have a social aspect and develop a humanitarian presence in the community.



After the establishment of the Foundation, Mr Dombroski donated several parcels of land to be used for the purposes of the Foundation. Mr Bohdan Bilinsky, Mr Dombroski's solicitor, asserted that it was always assumed in his discussions with Mr Dombroski that the Foundation held its assets subject to a charitable trust. Mr Dombroski's purpose in donating the land to the Foundation was so that the land would be used for the purposes set out in the objects clause of the Foundation's Constitution. Clause 2 of the constitution provides as follows:

"The objects for which the Foundation is established are:

- a. To provide facilities for research into, application of, education and promotion of a Healthy Lifestyle through various forms.*
- b. To develop sustainable agriculture through the use of organic, biodynamic and permaculture principles and techniques.*
- c. To create and maintain domestic and market gardens and orchards for the purpose of providing healthy and meaningful activities for persons in need of special care.*
- d. To provide work experience and activities for persons who are socially disadvantaged or in need of receipt of rehabilitation such as persons in crisis or subject to drug and alcohol addiction.*
- e. To co-operate with other social organisations and community support agencies in providing assistance and support to persons who are socially disadvantaged or in crisis.*
- f. To carry out research into alternative energies and ecologically sound technologies including research into an application of solar and wind energies, and to publish and promote the results of the research and generally to provide and encourage educational facilities in relation to such technologies.*
- g. To provide access to an open range of artistic, spiritual and philosophical studies to the community generally including studies such as philosophy, spirituality, astrology, poetry, study into various religions and study into past civilisations.*
- h. Promoting, cultivating and facilitating various forms and methods of artistic development for members of the community by providing materials, venues, workshops, tuition and exhibition into sculpture, music painting and colour therapy, art of movement, yoga and meditation.*
- i. To do all matters and things incidental to any of the above object or which may otherwise be required for the promotion, achievement or fulfilment of the objects of the Foundation."*

The Foundation established a property known as the "Harmony Village", located on one of the Dombroski's Mittagong properties. The Harmony Village offered counselling, self-development courses, lectures, artistic activities, gardening activities and temporary accommodation for people in crisis, including individuals with addiction and mental health issues.

The Foundation also hosted events for an organisation known as the “Christian Community”. However, the constitution of the Foundation did not reference religion as a charitable purpose.

The issue for the court to consider was whether the properties gifted by Mr Dombroski and Ms Dombroski were held pursuant to a charitable trust.

“The issue for the court to consider was whether the properties gifted by Mr Dombroski and Ms Dombroski were held pursuant to a charitable trust.”

Submissions

The Foundation submitted that:

- the Foundation was a charitable organisation;
- the property, including the real properties, gifted to the Foundation in the past was held on a charitable trust for the charitable purposes set out in clause 2 of the Foundation’s constitution; and
- income received and any other property derived by the Foundation during the course of using such gifts was trust property.

Both the Foundation and the Attorney General agreed that the original purposes of that charitable trust have ceased to provide a suitable and effective method of using the trust property within the meaning of section 9 of the *Charitable Trusts Act 1993* (NSW), and that the trust property should be applied cy-près (Cy-près means the Court will make orders to vary the provisions of a charitable trust because the original purposes of the trust cannot be fulfilled or can no longer be carried out).

Decision

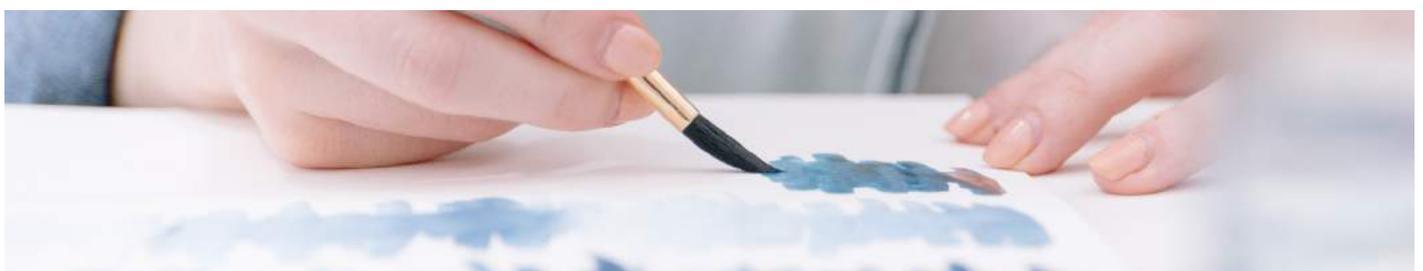
The Court determined:

- The Foundation was a charitable organisation, by referring to the principles set down in *Federal Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55, that is, a holistic enquiry to discern the organisation’s purpose, rather than a separate analysis of each specific activity undertaken by the organisation, was appropriate;
- That all the properties held by the Foundation was held by it on a charitable trust for its charitable purposes;
- A cy-près scheme under section 9 of the *Charitable Trusts Act 1993* (NSW) should be applied, as the original purposes of the trust had ceased to provide a suitable and effective method of using the Foundation’s properties, in whole or in part, having regard to the “spirit of the trust”; and
- The “spirit of the trust” was the advancement of education in philosophies and practices having the goal of a healthy lifestyle.

Takeaway Point

The Court held that if property is gifted to a charity, irrespective of the charity’s structure (i.e. incorporated association, public company limited by guarantee or trust), and even if made unconditionally, it is likely that the property will be treated as trust property. Unfortunately, this will mean that a Court order is likely to be required for the application of property for any purpose other than the specific purposes identified in the charity’s constitution.

¹ *Harmony - Dombroski Foundation Ltd v Attorney General in and for New South Wales* [2020] NSWSC 1276.



Changes to Anti-Money Laundering and Counter-Terrorism Financing Laws

BY John Vaughan-Williams, Associate



The *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 (Cth) (Bill)* was passed by the Australian Government and given royal assent on 17 December 2020, establishing a suite of reforms that will strengthen anti-money laundering and counter-terrorism measures in Australia.

The Bill achieves this through amending the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML/CTF Act)*.

What is the AML/CTF Act?

The AML/CTF Act establishes a regime to protect against money laundering and the financing of terrorism, by imposing a number of obligations concerning the use and transfer of money.

Australian Transaction Reports and Analysis Centre (**AUSTRAC**) is a government agency which monitors money laundering and terrorism financing in Australia, as well as having powers to implement the AML/CTF Act.

AUSTRAC regulates matters such as large cash transactions, as well as any other suspicious transactions, especially across borders.

Why have the changes been introduced?

Several reports have been conducted into the effectiveness of the AML/CTF Act, which recommended implementing some of the measures brought about through the Bill.

For example, in 2015, the Financial Action Task Force (**FATF**) assessed the effectiveness of Australia's anti-money laundering and counter-terrorism measures. Further, in 2016, a statutory review of the AML/CTF Act was conducted by the Australian Government.

In the FATF's report, it highlighted several gaps in Australia's due diligence requirements, and indicated that AUSTRAC information is only marginally used by law enforcement.

What are the changes?

There is a suite of changes that has been implemented through the Bill (several of which apply specifically to providers of financial services). In this article, we will focus on changes which are most likely to affect not-for-profits of all different kinds and sizes.



Change 1 – Information-Sharing Powers

Previously, the AML/CTF Act allocated certain agencies which were entitled to view and share information from AUSTRAC.

It was always the case under the AML/CTF Act that the AUSTRAC CEO could pass on AUSTRAC information to the Australian Charities and Not-for-Profits Commission.

However, effective as at six months from the date of assent (that is, 18 June 2021), the Bill introduces a much more general information-sharing power which allows the AUSTRAC CEO to authorise officials of Commonwealth, State or Territory agencies to access AUSTRAC information for their ordinary duties.

This means that various government agencies will be able to more easily access information regarding money laundering and terrorism financing, leading to a more robust and comprehensive system of regulation.

Change 2 – Definition of “AUSTRAC Information”

In a similar vein, the definition of “AUSTRAC information” – and, therefore, the types of information which can be disseminated by AUSTRAC – has been broadened through the Bill. The change is effective as at six months from the date of assent (that is, 18 June 2021).

Whereas the previous definition focused on information obtained under the AML/CTF Act, the new definition encapsulates information obtained by an AUSTRAC entrusted person:

- for the purposes of the AML/CTF Act;
- for the purposes of any other law of the Commonwealth, a State or a Territory; and
- from another government body.

This similarly helps to expand the types of information which can be transferred between agencies.

Change 3 – Cross-Border Transfer of Money

The Bill expands the regime concerning the transfer of large sums of money overseas. It has always been a requirement to report any cross-border transfers of physical currency in amounts greater than \$10,000.00.

The Bill now includes – as well as cash – bearer negotiable instruments, which includes cheques and any other type of promissory note (for example, traveller’s cheques). This change comes into effect on the first to occur of proclamation (which can be at any time), and 18 months after Royal Assent, which is 18 June 2022.

What do these changes mean for not-for-profits?

These changes continue a trend in greater regulation on the transfer of overseas funds following the introduction of the External Conduct Standards, contained within the *Australian Charities and Not-For-Profits Commission Regulation 2013* (Cth).

Subject to some minor exceptions, the External Conduct Standards require all charities to have demonstrable measures in place to ensure that they comply with the law when operating overseas. Relevantly to the Bill, External Conduct Standard 3 requires charities to monitor conduct overseas to minimise any risk of corruption, fraud, bribery or other financial impropriety.

Charities which have been registered following the introduction of the External Conduct Standards have been required to demonstrate their compliance framework to the Australian Charities and Not-for-profits Commission (ACNC) as part of the application process.

However, many existing charities may never have reviewed their compliance with the External Conduct Standards, and risk losing their charity status and tax concessions if they are ever investigated by the ACNC and are unable to demonstrate their compliance. In particular, the greater information-sharing measures implemented by the Bill will expand the information to which the ACNC has access and will increase scrutiny on the methods that charities can use to bring funds overseas.

All charities should review whether they are currently compliant with the legal obligations when conducting overseas activities, especially when it comes to their use and transfer of funds.

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Topics from previous issues

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- Tailored Bequest Programs: The Key to Recover
- Recent amendments to *Associations Incorporation Act 1981* (Qld)
- Loophole Closed for Funeral Funds
- Related Party Transactions for Charitable Public Companies
- Sacrilegious Sanctions: How the Commonwealth Government will be able to strip institutions of their charity status where they fail to join the National Redress Scheme

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