

Current top legal issues for Christian charities

MISSIONS INTERLINK CONFERENCE

ROBERT MENZIES COLLEGE 20 JULY 2016

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Tax concession arrangements settling down with greater certainty about the future of the ACNC

ACNC set to stay at least to 5 year review

- 2016 Budget forward estimates cover current service provision
- Loss of influence of right wing faction
- ACNC getting on with the job of proving why it was needed
- Tax reforms getting attention

So what has changed over the past year?



Clarification of law re PBIs and 'In Australia' conditions having increasing impact

Two impediments to sending money overseas

- Tax Commissioner's interpretation of the law re PBIs (TR 2003/5)
 - 'directness' requirement and
 - 'In Australia' requirement
- PBI beneficiaries could not be overseas and the only way to send deductible money overseas was through the Overseas Aid Gift Deductible Scheme (**OAGDS**)
- Hunger Project corrected TR 2003/5 position re 'directness' there is no requirement that a PBI must itself directly give or provide the benevolent relief to its beneficiaries



What does this mean for MI members?

- A PBI may now be a DGR even if it intends to operate outside Australia without becoming an approved organisation under the Overseas Aid Gift Deduction Scheme (**OAGDS**)
- Charities such as MI members undertaking benevolent work overseas could consider
 - registration as PBI sub-type or
 - establishment of PBI sub-type entity
- Charities operating OAGDS funds could consider PBI sub-type registration to simplify overseas funded work
 - PBIs may carry out their benevolent relief work anywhere in the world
 - the activities of developing country relief funds under section 30-85 and developed country disaster relief funds under section 30-86 would be entirely covered by the activities that a PBI is permitted to undertake

In Australia special condition for MI members

To maintain income tax exemption through any tax year, an exempt entity (ie all MI members) must:

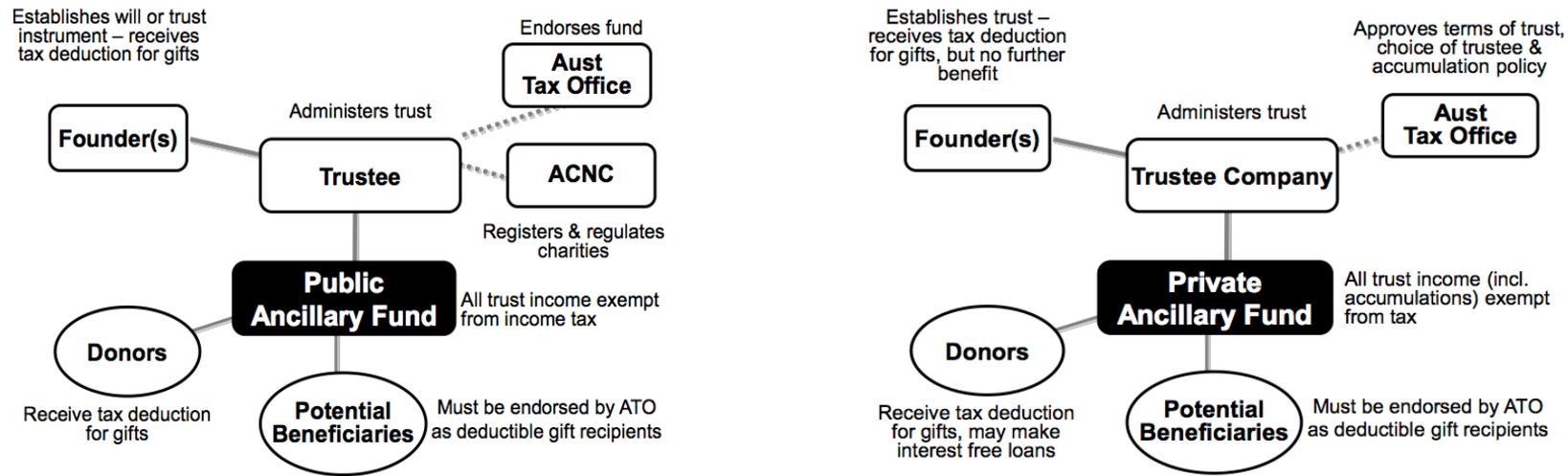
- be a prescribed institution that has a physical presence in Australia but which incurs its expenditure and pursues its objectives principally outside Australia (ITAA 1997 s 50.50(1)(d)) and
- comply with all the substantive requirements in its governing rules, (the governing rules condition) and
- apply its income and assets solely for the purpose for which the entity is established (the solely condition)

Missions Interlink is such a prescribed institution (ITAR 1997 reg 50.50.02



Australian Government
Australian Taxation Office

PuAF and PAF Guidelines amended



- Minimum distribution rate has been maintained - 5% for PAFs and 4% for PuAFS
- Tax Commissioner now has new powers to approve a lower distribution when specific circumstances warrant
- This is particularly designed to help those PAFs that receive bequests of sometimes illiquid and low yield assets



Prolegis
Lawyers

PuAF and PAF Guidelines amended

- Trustees no longer provide financial statements and auditor's report to both the Tax Commissioner and ACNC or notify both of changes to governing documents - the trustee only needs to notify, and provide documents to, the Commissioner of the ACNC
- Additional examples provide greater clarity about how PAFs can use assets and financial instruments such as loans, social impact bonds and guarantees to provide benefit to eligible charities which will encourage more impact investing
- PuAF Guidelines remind trustees that it is good practice to review the non-binding preferences of donors prior to making distributions from the fund to DGRs – must be a GIFT




Genesis
CHARITABLE FOUNDATION



PuAF and PAF Guidelines amended

- PAFs now have the flexibility to transfer their net assets to other ancillary funds ('portability' already available to PuAFs)
- Helpful for smaller PAFs with insufficient scale to warrant running an independent trust and for situations where there is no one to take over the administration of a PAF from the Founder/Trustee
- And reporting: a small PAF with combined revenue and assets of less than \$1 million can obtain a review of its financial report and compliance with the PAF Guidelines rather than a full audit [note this is not included in Model Trust Deed]
- This change effectively reduces compliance costs and audit fees for small PAFs



Sleepers – things to watch?

- Previously self-assessing charities – must be ACNC registered and endorsed
- Australian Consumer Law – application to charities?
- Basic Religious Charities – check you are still eligible



Discrimination in employment

- Discrimination laws
 - Extremely complex and vary across jurisdictions – prohibited grounds, areas of activity, scope of exemptions
- Common misconceptions: *'these laws do not apply'*
 - Some exceptions for 'religious bodies' – only churches can clearly rely on this exception, whether or not Christian welfare organisations can rely on this is more problematic
- Common misconception: *'discrimination is bad'*
 - Discrimination is good; a core skill of a good manager/steward is being able to discriminate. The risk is *'unlawful'* discrimination
- Some discrimination can be unlawful – check, get good advice and note that relevant laws materially vary between States/Territories in terms of what is declared unlawful and what exemptions may apply

Grounds of Unlawful Discrimination

Act	Race	Colour	Sex	Sexual Preference	Age	Physical or mental disability	Marital Status	Family or carer's responsibilities	Pregnancy	Religion	Political opinion	National extraction	Social origin
<i>Age Discrimination Act 2004 (Cth)</i>	✗	✗	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗
<i>Disability Discrimination Act 1992 (Cth)</i>	✗	✗	✗	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗
<i>Racial Discrimination Act 1975 (Cth)</i>	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	✓	✓
<i>Sex Discrimination Act 1984 (Cth)</i>	✗	✗	✓	✓	✗	✗	✓	✓	✓	✗	✗	✗	✗
<i>Anti-Discrimination Act 1977 (NSW)</i>	✓	✗	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗
<i>Equal Opportunity Act 2010 (Vic)</i>	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗
<i>Anti-Discrimination Act 1991 (Qld)</i>	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗
<i>Equal Opportunity Act 1984 (WA)</i>	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗
<i>Equal Opportunity Act 1984 (SA)</i>	✓	✗	✓	✓	✓	✓	✓	✗	✓	✗	✗	✗	✗
<i>Anti-Discrimination Act 1998 (Tas)</i>	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗
<i>Discrimination Act 1991 (ACT)</i>	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗
<i>Anti-Discrimination Act (NT)</i>	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗

Discrimination in employment

- If you do wish to discriminate (e.g. only employing persons who ascribe to a particular faith statement or lifestyle), you should seek advice on how best to manage risks, and do so, being aware of those risks.
- Key points:
 - this is not just about risk – be clear on your purpose, culture, ethos
 - articulate core values and beliefs: constitution, policy, faith statement
 - be frank and upfront
 - be consistent
- Don't be afraid to declare openly what your organisation stands for and what you expect of your people
- Hiring Managers must discriminate in order to get the best candidates for their organisations

Exemptions for religious bodies

- Discrimination on grounds of *religious belief or activity* is not unlawful in NSW or SA but is in other jurisdictions. Also HRC can inquire and report
- General exemptions for *religious bodies* in some anti-discrimination laws (e.g. SDA s.37: “any other act or practise of a *body established for religious purposes* **that** conforms to the doctrines ... of that religion; **or** is necessary to avoid injury to the religious sensitivities of adherents of that religion”
- To access this exemption must be a “body established for religious purposes” **AND** the act (e.g. not hiring) must conform to doctrines of that religion or be necessary to avoid injury to adherents of that religion
- Wesley Dalmar case 2010 NSW Supreme Court, Court of Appeal
- CYC v Cobaw case 2014 Victorian Supreme Court, Court of Appeal

Recruitment and discrimination

- Navigating anti-discrimination legislation can be like walking through a minefield
- Successful organisations:
 - articulate and promote their mission and values
 - define the inherent requirements of roles
 - embed their values into core processes and job descriptions
 - consistently apply their values
 - ensure they have good legal advice on relevant anti-discrimination laws
 - check external constraints (e.g. government funding contracts)

Charitable fundraising

- Regulation is different in each state/territory
- Check first if you are exempt (see ACNC website)
- eg Charitable Fundraising Act 1991 (NSW)
- s7 – religious bodies or organisations (cf Marriage Act) are exempt from the Act (except s48) **and** also those prescribed by regulation (eg NSW Charitable Fundraising Reg 2015 reg 6 list of prescribed organisations)

Charitable fundraising

- Reforms on their way?
- Watch this space
- SA – May 2016 SA Parliament passed act to exempt ACNC registered charities from holding a licence or reporting

Tax concessions for churches under threat?

Notwithstanding the airing the arguments get from time to time - in particular in response to Royal Commission on Institutional Responses to Child Abuse - it is unlikely that major parties will risk the political damage



Thank you

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