

Back to Basics: “Not-for-profit or a Charity: What is the difference?”

*In the world of not-for-profits and charities, it can often be confusing as to what concessions are available, what aspects are required in order to become a charity and what the differences really are. **Dominic McCormack** considers what actually comprises a not-for-profit and what the differences are with a charitable organisation.*

In discussions with a client recently, a seemingly simple query was raised with me:

“What is the difference between a not-for-profit and a charity?
Aren't they just the same thing?”

Throw into this mix non-government organisations (NGOs) and this question highlights the fact that this area of law, which involves a broad and growing involvement of a cross-section of the general community, can be quite tricky and very easily misunderstood.

What is a not-for-profit?

When considering what organisations fall into the category of a not-for-profit, the easiest way is to consider organisations such as the following:

- Social clubs
- Sporting and recreational organisations
- Professional or trade groups

Such organisations can be formed by way of unincorporated and incorporated associations (which are the most common), co-operatives, companies registered under the *Corporations Act 2001* (Cth) or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), and trusts.

What makes these organisations ‘not-for-profit’ is the fact that they do not operate for the profit, personal gain or other benefit of particular people (for example, members, the people who run it or their friends or relatives). This does not mean, however, that committee members, directors or staff cannot be appropriately remunerated. In this regard, see my earlier articles which directly addressed the provision of appropriate remuneration within such organisations.

The benefit of being a not-for-profit is that you are able to access tax concessions, most notably an exemption on income tax. To be recognised by the Australian Charities and Not-for-profits Commission (ACNC) and gain access to such benefits, an organisation needs to show that it meets the relevant requirements. This is done formally by ensuring that the organisation’s Constitution or rule book has appropriate clauses within them, and then ensuring that these are followed. An example is below, with additional examples found at Annexure 1:

The not-for-profit clause¹

This clause sets out how the organisation’s assets and income are to be used and distributed.

¹See http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_is_NFP/ACNC/Reg/NFP.aspx?hkey=0c89fa5a-38dc-49af-b7aa-e8a6515fe8b1

'The assets and income of the organisation shall be applied solely to further its objects and no portion shall be distributed directly or indirectly to the members of the organisation except as genuine compensation for services rendered or expenses incurred on behalf of the organisation.'

Importantly, just because an organisation is described as a not-for-profit does not mean that it should not make a profit! To the contrary, all such organisations should be run diligently and with a view to making a profit. The key is that the profit can only be used for the purposes stated within the organisation's Constitution or rule book, and for no other. This is so even if the organisation is required to close or 'wind-up', with the governing documents needing to provide for the transfer, after the satisfaction of all debts and liabilities, of all assets that remain to another organisation with similar purposes.

What is a charity?

The Commonwealth Parliament passed the *Charities Act 2013* (Cth) (the Charities Act) and the *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth) (the Charities Consequential and Transitional Act) on 27 June 2013 and they came into effect on 1 January 2014. This was a major change as it replaced the common law definition of charity that dated back to 1601 and the *Statute of Charitable Uses Act 1601*, also called the *Statute of Elizabeth*.

The Charities Act now clearly sets out the legal meaning of "charity". The Charities Act states that to be recognised as a charity, an organisation must:

- be not-for-profit
- have only charitable purposes that are for the public benefit
- not have a disqualifying purpose
- not be an individual, a political party or a government entity.

As we have already dealt with the aspect of being a not-for-profit, I focus now on the aspects of charitable purpose and public benefit.

a) Charitable purpose

For an organisation to be identified and recognised as a charity rather than simply as a not-for-profit, all of the not-for-profit's purposes must be *charitable* in accordance with the Charities Act, except purposes that are 'incidental or ancillary to' (further or aid) the charitable purposes. The law recognises many kinds of purposes as charitable, and the Charities Act lists twelve (12) charitable purposes. Some of the most common are:

- advancing health
- advancing education
- advancing culture
- promoting or protecting human rights
- advancing the security or safety of Australia or the Australian public
- advancing the natural environment

(For more information, see the examples of charitable purposes as provided by the ACNC.²)

With reference to the discussion under '**What is a not-for-profit?**', some purposes may benefit the community but not actually fit the *legal* meaning of charitable purpose. For example, an organisation may not fit the legal meaning of charity if it is a:

² See http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/Step2/ACNC/Reg/Step2.aspx

- Social club – unless its main purpose is charitable such as to help people who are socially isolated or disadvantaged, and the club's social activities are the way it achieves this purpose
- Sporting and recreational organisation – unless its main purpose is charitable such as providing sporting activities for the people with disabilities or the elderly
- Professional or trade group – unless its main purpose is charitable, such as advancing education.³

b) Public benefit

So far, we have established what is required to be a not-for-profit which operates with charitable purposes. To be registered as a charity, a not-for-profit must also have charitable purposes that are 'for the public benefit'. It is considered to be so if the purpose would be of benefit to the public generally or a sufficient section of the public. A sufficient section of the community may be, for example, a local community, people with a particular disability, or elderly people.

There are many ways a charity's purpose can benefit the public. For example, it can provide emergency relief, transportation, services, education or assistance with ceremonies.

Importantly, from an Indigenous perspective the Charities Act makes it clear that organisations that receive, hold or manage benefits relating to native title or traditional Indigenous land rights are for the public benefit even though they may benefit people related to each other. This is crucial and a clear recognition that a large group of people in this context – for example, a clan group operating in accordance with kinship relations and utilising identifiable parcels of land – will often be related, which would normally exclude them due to the 'public benefit' test.

Benefits to a charitable organisation

Overall, the great benefit of operating an organisation as a charity as opposed to merely as a not-for-profit is in the tax advantages available. While those that are available to a not-for-profit continue to be available, it will include the ability to:

- apply for tax concessions as a charity from the Australian Taxation Office (such as income tax exemption or goods and services tax concessions); and
- receive a range of other concessions, benefits or exemptions available to charities under Commonwealth law.

In addition to these, extra tax benefits such as fringe benefits tax exemption or endorsement as a deductible gift recipient (DGR)) are available to a charity that can show it is a:

- charity with a purpose of the advancement of religion;
- public benevolent institution (PBI); or
- health promotion charity.

However, there are strict requirements that apply and, naturally, with such advantage comes great responsibility and a requirement for full reporting and the utmost transparency.

Non-government organisation

Finally, I turn briefly to the non-government organisation, more commonly known as an NGO. This is a non-profit organization that operates independently of any government, and is typically one whose purpose is to address a social or political issue with a greater focus than is currently occurring through the arm of government.

³http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Charitable_purpose.aspx?hkey=bc460287-f739-4ffb-81e6-976d258bccce

NGOs are often charities, and well-known examples include The Australian Red Cross, Save the Children Australia and The Fred Hollows Foundation. Australian NGOs such as these which seek to operate overseas must be accredited by the Department of Foreign Affairs and Trade to be eligible for funding under the Australian NGO Cooperation Program.

Conclusion

A 'not-for-profit' is an organisation that does not operate for the profit, personal gain or other benefit of particular people (for example, members, the people who run it or their friends or relatives). The benefit is that one is able to access tax concessions, most notably an exemption on income tax.

A charity is an organisation that must not only be a not-for-profit, but must *also* only have charitable purposes that are for the public benefit, not have a disqualifying purpose and not be an individual, a political party or a government entity. The great benefit of operating an organisation as a charity as opposed to merely as a not-for-profit is the ability to secure tax exemptions and concessions, and also (in the right circumstances) DGR status.

In choosing which framework to operate within, a careful assessment needs to be made as to one's objectives and the requirements of your organisation. Bear in mind that operating a charitable organisation requires great focus, time and diligence, and comes with oversight by the ACNC.

For advice as to what level you should operate at, the incorporation of a suitable structure or how to secure appropriate concessions, please contact Bowden McCormack on 08 8941 6355 or email the writer at dominic@bowden-mccormack.com.au.

Annexure 1⁴

The dissolution clause

This clause sets out what happens to the organisation's assets if it dissolves or winds up (closes down). To satisfy the ACNC requirements of being a charity, the clause must require the assets to go to another charity.

'In the event of the organisation being dissolved, all assets that remain after such dissolution and the satisfaction of all debts and liabilities shall be transferred to another organisation with similar purposes, which is charitable at law and which has rules prohibiting the distribution of its assets and income to its members.'

The DGR revocation clause

This clause is used if the organisation has applied for deductible gift recipient status.

'If the organisation is wound up or its endorsement as a deductible gift recipient is revoked (whichever occurs first), any surplus of the following assets shall be transferred to another organisation with similar objects, which is charitable at law, to which income tax deductible gifts can be made:

- a. gifts of money or property for the principal purpose of the organisation
- b. contributions made in relation to an eligible fundraising event held for the principal purpose of the organisation
- c. money received by the organisation because of such gifts and contributions.'

⁴http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_is_NFP/ACNC/Reg/NFP.aspx?key=0c89fa5a-38dc-49af-b7aa-e8a6515fe8b1