RECENT FEDERAL COURT DECISION HIGHLIGHTS THE USE OF AN INCOME TAX EXEMPT STRUCTURE TO FACILITATE FACE-TO-FACE BANKING AND OTHER SERVICES IN REMOTE COMMUNITIES

by Fiona Martin

USE OF INCOME TAX EXEMPT STRUCTURES BY TRADITIONAL LAND OWNERS

It is common practice for the traditional owners of land in Australia to establish charities as an income tax exempt structure to hold native title and/or handle some or all of the moneys received under resource agreements[1]. In order to qualify as charities (and therefore be exempt from income tax) these entities must be for one or more charitable purposes.[2] Furthermore, these charitable purposes must be the sole purposes of the entity.[3] There is no statutory definition of charitable purpose so in order to understand what such a purpose is we are guided by the common law. The landmark decision in this area established that charitable purposes can be categorised into four areas. These areas are the relief of poverty, advancement of education, religion and other purposes beneficial to the community.[4] Furthermore, such entities must have an overarching public benefit so that they are aimed at benefitting the public or a section of the public.[5] In view of the restriction of charities to these charitable purposes and other legal barriers posed by the use of charities they may not be the most appropriate entity to use for community development purposes by Indigenous Australians.[6]

This article analyses recent case law that deals with another type of income tax exempt entity. This entity is commonly referred to as a *community service provider* ('CSP') and has been used effectively to facilitate banking in a country town that did not have any face to face banking opportunities for its community. The use of the CSP to enable face to face banking not only provided a valuable service to the area but resulted in the exemption from income tax of the income stream generated by the entity. The author argues at the conclusion of this article that CSPs may be useful entities for Indigenous communities to deliver services that benefit the entire community and (if they generate income) are exempt from tax.

INCOME TAX EXEMPT ENTITY FOR COMMUNITY SERVICE PURPOSES

Section 50-10 of the *Income Tax Assessment Act 1997* (Cth) grants an exemption from income tax for any society, association or club established for community service purposes, other than political or lobbying purposes, and which is also not-for-profit.[7] In 1993, the Australian Taxation Office ('ATO') issued a determination setting out its view on what types of entities this exemption applies to.[8] In the determination the ATO states that it was the intention of the enactment of this section to create a category of exemption for community bodies whose activities are not accepted as being charitable but which still conduct activities of benefit to the community.[9] The ATO also advises that it is essential that the 'community service purposes' are altruistic.[10] Altruistic means that the aims are motivated by an unselfish concern for the benefit of others.[11]

In the determination the ATO advises that traditional service clubs such as Apex, Rotary, Lions, Zonta, Quota and community service organisations such as the Country Women's Associations are exempt under this provision. Other examples of organisations that the ATO considers fall within 'community service providers' include non-profit child care centres[12], age pensioner or senior citizens associations, play group associations and associations of Justices of the Peace. However, the ATO does not consider clubs that promote public speaking or debating, that provide a social forum for retired and semi-retired people or that offer a social forum for expatriates of a particular country as satisfying this category. The ATO also rejects bodies established to promote tourism, military service unit organisations and social clubs for newcomers to a particular residential area.

COMMUNITY BANKING CASE

There have been very few cases dealing with s 50-10. The most recent is the 2011 Full Federal Court decision of

Commissioner of Taxation v Wentworth District Capital Ltd.[13] In this case Wentworth District Capital Ltd ('WDCL') was a not-for-profit entity incorporated by members of the Wentworth community and located in the town of Wentworth a small town of approximately 1,400 people on the northern side of the border between New South Wales and Victoria. The only bank in the town closed in 1996 resulting in the closest bank branches being in Mildura about 30 kilometres away. The population of Wentworth was also ageing and there was evidence that many were not able to manage their banking using internet services or the local post office. WDCL entered into franchise arrangements with Bendigo Bank Ltd. Under these arrangements WDCL enabled Bendigo Bank to provide banking services in Wentworth through the Bank using WDCL's premises, staff and equipment. WDCL claimed that it was exempt from income tax under s 50-10 and the ATO disallowed this claim. The case turned on the questions of what is meant by the phrase 'established for community service purposes' and whether or not this applied to WDCL. There are two important aspects to the legislative provision that the case highlighted. First, the entity must be established for the relevant purpose and second the purpose must serve the community. The Full Federal Court confirmed the decision of Pellam J at first instance and held that the facilitation of face to face banking in a rural community that had no such banking facilities was the provision of a community service and that WDCL was established for this purpose It stated:

> In our view, WDCL was within the exemption – the main or dominant purpose for which it was *established* was a community service. Here, the community service purpose was the facilitation of face-to-face banking services which provided a substantial benefit to the community of Wentworth that was both real and tangible. Contrary to the Commissioner's submissions, there was no blurring of purpose and benefit and it was a "service". As the Commissioner submitted, "service" imports delivery of some practical help, benefit or advantage: *Victorian Women Lawyers' Association* at [163]. In the present case, WDCL provided practical help, benefit or advantage...[14]

The Court approved the reasoning of Perram J that the idea of services included 'activities, facilities or projects' of the relevant organisation that those activities had to benefit members of the community who needed them and that these needs could arise from social or economic circumstances such as living in a remote area.[15]

The Court concluded that the community service referred to in s 50-10 is a practical or tangible help, benefit or advantage conferred on the community or an identifiable section of it. The criterion of 'establishment for community service purposes' requires an analysis of what the entity is doing in the relevant income year both by reference to its constitution and also its activities[16]and the purpose must be the entity's main or dominant purpose.[17]

The Court also accepted Pellam J's statement of principles regarding the section that the kind of community service referred to in s 50-10 is a practical or tangible help, benefit or advantage conferred on the community or an identifiable section of the community, that where a charge for the service is made it should be subsidised and that the expression 'community service purposes' is broad and may extend to encompass any activity whose purpose has a reasonable connection to the delivery of a community service. Facilitation and promotion, therefore, are purposes that are squarely within s 50-10.[18]

EARLIER DECISIONS ON THE MEANING OF 'COMMUNITY SERVICE PURPOSES'

In the earlier case of *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation,*[19] French J stated that the concept of community service seemed to require delivery of some practical 'help, benefit or advantage'.[20] That criterion, his honour concluded, was not necessarily met by an organisation whose purpose was to change practices and attitudes in such a way as to facilitate the entry and advancement of women within the legal profession generally.[21] However as French J held that the Victorian Women Lawyers' Association was a charity and exempt from income tax on this basis he did not need to reach a concluded view on the s 50-10 issue.

In 1998 the Administrative Appeal Tribunal ('AAT') held that the National Council of Women of Tasmania was also exempt under this provision.[22] The organisation had the predominant purpose of co-ordinating community service work and providing information on women's issues. In coming to its conclusion in favour of the Council the AAT held that the words 'community service purposes' included the providing or carrying out of activities, facilities or projects for the benefit or welfare of the community, and also the promoting of such projects. The Council was very much the promoter of its member organisations' activities, facilities or projects, more than it was a provider. The projects were also however, very clearly for the benefit or welfare of the community. This case indicates, along with the obiter comments in the *Victorian Women Lawyers Case* that promotion of community service projects might also fall within the exemption provision.

POTENTIAL FOR REMOTE INDIGENOUS COMMUNITIES

I argue that the CSP is an entity that may have significant uses in Indigenous communities for providing community services in a manner that makes any income stream income tax exempt. For example, funds paid by mining companies to communities under resource agreements could be used to establish a not-for-profit entity that provide services such as a canteen for healthy food or facilities to encourage at risk youth to engage in sport. Fees at subsidised rates could be charged, with the fees going back into the entity and being used for the furtherance of its activities and, as a CSP these fees would be exempt from income tax. Further funding through for example sponsorships could also occur and these funds would also be exempt from income tax. The example of the facilitation of community banking is another such service which is lacking in many remote Australian communities and which has been demonstrated in the *Wentworth Case* as beneficial to a community. Provided the entity doesn't actually engage in banking (in other words it does not hold the banking licence, in the *Wentworth Case* this was held by Bendigo Bank) but is facilitating this service in an area that does not have banking facilities such a service provider would be income tax exempt on any service fees it received. Services fees might be payable from either the Indigenous entity receiving money under a resource agreement, or, as was the case in the *Wentworth Case*, the bank undertaking the provision of banking services. Other examples that might be relevant to remote communities include the establishment of schemes to provide low cost housing in remote areas, play groups, senior citizen associations and organisations to assist women who are the subject of domestic violence.[23]

It seems unlikely however, that the corporation established to hold native title for the native title claimant group under the *Native Title Act 1993* (Cth) could be a CSP. The holding and managing of native title is for the benefit of the claimant group, which is a closed and discrete group and not open to the community in general.

CONCLUSION

The *Wentworth Case* confirms that community services providers are a category of exemption for community bodies whose activities are not accepted as being charitable but which still conduct activities of benefit to the community. The entity must be established for the relevant purposes and these purposes must be altruistic. The decision establishes the view that the community service referred to in s 50-10 is a practical or tangible form of help, benefit or advantage conferred on the community or an identifiable section of it and that this purpose must be the entity's main or dominant purpose.[24] Furthermore, the phrase 'establishment for community service purposes' requires an analysis of both the entity's activities and its constituent documents in the relevant income year.[25]

The article identifies that there are a number of potential uses for such an entity including the facilitation of face-to-face banking in a remote area. It is hoped that legal advisors to Indigenous communities consider this type of vehicle when establishing community development corporate structures.

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1 Native Title Services Victoria Ltd, Submission to Department of Treasury 'Native Title, Economic Development and Tax' 30 November 2010.

2 *Income Tax Assessment Act 1997* (Cth) s 50-5.

3 *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645.

4 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

5 Ibid; In Australia relevant High Court decisions include *Commissioner of Taxation v Word Investments Limited* [2008[HCA 55; *Central Bayside General Practice Association Limited v Commissioner of State Revenue of the State of Victoria* (2006) 228 CLR 168. Other Australian decisions specifically relating to indigenous Australians include *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236, 251-252 (Mildren J). *Aboriginal Hostels Limited v Darwin City Council*(1985) 75 FLR 197.

6 See Fiona Martin, 'Prescribed Bodies Corporate under the *Native Title Act 1993* (Cth); Can they be Exempt from Income Tax as Charitable Trusts?' (2007) 30(3) *University of New South Wales Law Journal* 713-730; Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003. Ruling provides that family or contractual connections amongst beneficiaries mean that the entity fails the public benefit test. It also states that 'The number of people in the group may be relevant but is not determinative' [81].

7 Income Tax Assessment Act 1997 (Cth) s 50-70.

8 Australian Taxation Office, 'Income Tax: what is the Scope of the Exemption from Income Tax provided by Subparagraph 23(g)(v) of the Income Tax Assessment Act 1936?', TD 93/190, 30 September 1993. Section 23(g)(v) is the predecessor to s 50-10 Income Tax Assessment Act 1997(Cth).

9 Ibid [2].

10 Ibid [4].

11 Oxford Dictionary (2011, Oxford University Press).

12 Although non-profit child care centres were subsequently deemed exempt as charities under the *Extension of Charitable Purpose Act 2004* (Cth).

13 [2011] FCAFC 42.

14 Ibid [43].

15 Ibid [43].

16 Ibid [30]-[31].

17 Ibid [31], [45].

18 Ibid [33].

19 [2008] FCA 983.

20 [2008] FCA 983 [163]-[164].

21 [2008] FCA 983 [163]-[164].

22 *National Council of Women of Tasmania v Federal Commissioner of Taxation* 98 ATC 2124. Although this is an AAT case (and therefore of only persuasive merit on subsequent federal court cases) it is significant as there are so few decisions on s 50-10 and this appears to be the earliest case on the provision. The AAT is used extensively in taxation disputes and was established to replace the Taxation Board of Review.

23 This type of group was promoted by the Council in the *National Council of Women of Tasmania Case.*

24 [2011] FCAFC 42, [31], [45].

25 [2011] FCAFC 42, [30]-[31].

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