Jackson McDonald

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Fees and charges do not affect the charitable status of not-for-profit aged care

Local Government Update

The State Administrative Tribunal has delivered another decision in favour of the charitable nature of not-for-profit aged-care and retirement villages, confirming that this applies even where entry fees and ongoing fees are charged that produce a surplus of income over expenses, provided the surplus is not utilised by way of private profit.

In ***Australian Flying Corps & Royal Australian Air Force Association (WA Division) Inc v City of Mandurah*** [2013] WASAT 89, the Applicant ("**RAAFA**") objected to rates notices issued by the City under the *Local Government Act 1995 (WA)* in relation to RAAFA's Erskine Grove retirement village. The objection was that the land was exempt from rates under section 6.26(2)(g) of the Act, because the land was used exclusively for charitable purposes. The Tribunal's decision was in relation to several preliminary issues agreed between the parties, the essence of which was whether the land could be found to be used exclusively for charitable purposes if residents, by way of entry fees and ongoing fees, contributed the whole of the costs associated with providing the services offered. Jackson McDonald represented RAAFA in the proceedings.

In ***Uniting Church Homes Inc v City of Stirling*** [2005] WASAT 191 and in ***Retirees WA Inc v City of Belmont*** [2010] WASAT 56, the Tribunal had dealt with some aspects of the various different financial models for the operation of aged-care and retirement villages, but the City argued that in those decisions the Tribunal had not had to squarely address the issue of fees and charges.

Deputy President Judge Sharp reviewed the Tribunal's previous decisions, as well as other decisions of the Supreme Court of Western Australia and other jurisdictions.

Who does this affect?

- Local Governments
- Not-for-profit aged-care providers

Article Highlights

- The charging of entry fees and ongoing fees, even if these produce a surplus of income over expenses, does not affect the charitable nature of not-for-profit aged-care and retirement villages for the purpose of exemption from rates under the *Local Government Act 1995 (WA)*.

The City's principal argument was that in order to be charitable as providing "relief of the aged", it was necessary that there be some form of financial bounty or subsidy in relation to the services provided. However, the Tribunal accepted our argument on behalf of RAAFA that the cases relied upon by the City (such as ***North Fremantle Municipality v Saw*** (1906) 8 WALR 164 and ***Inland Revenue Commissioners v Society of Widows & Orphans of Medical Men*** (1926) 136 LT 60) were cases dealing with the different charitable purpose of "relief of poverty". Financial bounty or subsidy is certainly required in order to be charitable by way of relief of poverty, but this is because the basic need being relieved in that situation is itself financial in nature. The Tribunal accepted that in the case of "relief of the aged" the needs being relieved are not financial in nature but primarily comprise matters such as isolation, loneliness, availability of medical care, fraternity and stability of accommodation.

The Tribunal concluded (at [55]) that:

> *What is absent from these requirements is a requirement that the relief be given at no cost or at a cost less than the value of the relief being provided. That may be the case where the word 'charity' is used in its ordinary or dictionary sense. In its legal sense, there is no authority to support an argument that this requirement exists where the charitable purpose is the relief of the needs of the aged. Those needs do not necessarily include relief from a shortage of funds. The needs of the aged wealthy, and the aged poor are, in most respects, the same.*

The Tribunal went on to answer the various preliminary questions by finding that even if the residents of Erskine Grove pay the costs associated with the provision of accommodation and other services provided by RAAFA for the relief of the aged, and even if, on a consistent basis, the amount paid produces a surplus of income over expense, that will not preclude a conclusion that the land is used exclusively for charitable purposes – provided of course that any surplus is dealt with in accordance with the requirements for not-for-profit organisations (as set out in RAAFA's Constitution) and not as private profit for the operator.

While not a final decision in relation to the proceedings by RAAFA, the decision confirms in principle that not-for-profit aged-care and retirement villages are exempt from rates under the *Local Government Act* because the land is used for a charitable purpose.

NB: The City of Mandurah has applied to the Court of Appeal of the Supreme Court of Western Australia for leave to appeal from the Tribunal's decision. A further update will be provided once the grounds of appeal are known.

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