

**Response by Wynnum Manly Leagues
Club Ltd**

**to the Not-for-Profit Sector Tax
Concession Working Group Discussion
Paper**

17 December 2012

Table of Contents

Table of Contents	2
INTRODUCTION.....	3
The Club	3
Overview.....	3
A. RATIONALE FOR THIS SUBMISSION	5
B. SPORT AS A CHARITABLE PURPOSE	6
Current position	6
Expansion of the concept of charity	7
Encouragement of sport part of promoting health	8
England and Wales: encouragement of sport considered charitable	11
Application to Australia	11
C. INCOME TAX EXEMPTION.....	12
Exclusion from income tax exemption on the basis of member benefit is arbitrary	12
Exclusion from income tax exemption on grounds of trading is also arbitrary.....	15
Tax concessions for sporting clubs are a funding efficiency	16
D. DEDUCTIBLE GIFT RECIPIENT STATUS	17
Deductibility for sporting clubs	17
E. MUTUALITY.....	18
F. CONCLUSION	20

INTRODUCTION

Wynnum Manly Leagues Club Ltd ('WMLC') is pleased to make this submission to the Not-For-Profit Sector Tax Concession Working Group to assist it in its deliberations.

The Club

WMLC is the parent body of three affiliated clubs: Wynnum Manly Leagues Bowls Club, Wynnum Manly Leagues Club, and the Wynnum Manly Workers' Sports Club. WMLC is a public company limited by guarantee established and carried out for the purpose of encouraging sport. It does not, however, enjoy income tax exemption, as the Australian Taxation Office (ATO) has formed the view that it exists for the benefit of members.

WMLC and its predecessors have been organising and supporting amateur and semi-professional sporting activities in the Wynnum Manly area for over 30 years. Over time, the considerable expense involved in these activities and in maintaining WMLC's sporting facilities has prompted the Club to engage in catering and entertainment businesses to generate funds for its mission.

WMLC is making this submission because it believes that it and clubs like it, operating on a not-for-profit basis and making significant contributions to the community through the encouragement of sport, should be entitled to income tax exemption and deductible gift recipient (DGR) status. WMLC is of the opinion that income tax exemption in particular would be supported under the current law in Australia, following a number of key judicial decisions in recent years. The fact that a club provides benefits to its members as well as the public should not automatically disqualify an organisation pursuing a community-benefiting purpose from accessing tax concessions.

Overview

WMLC's primary submission is that, whether by extension of the definition of 'charity' or by amending the *Income Tax Assessment Act 1997* (ITAA 1997), organisations such as WMLC that advance amateur sport should be entitled to the same income tax concessions as charities. This includes income tax exemption, FBT concessions, and if DGR status is to be extended to charities generally, that concession also.

Drawing upon the UK model recently instituted in England and Wales, as well as more general principles, WMLC submits that the net of tax concessions must be expanded to include organisations which contribute to public benefit, but which are presently denied these concessions.

The law in this area must be clarified so that member benefits do not, in and of themselves, prevent sporting clubs from enjoying charitable status. This may already be the law in Australia, at least since *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* ('the Western Australian Chamber of Commerce case').¹ Nevertheless, the issue of member benefit as compared with public benefit is often difficult to resolve, and clearly stated principles would be of great assistance.

¹ *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* ('the Western Australian Chamber of Commerce case') [2012] WASAT 146 (18 July 2012).

As a further part of this first submission, WMLC will argue that the law must be clarified so that substantive trading by sporting clubs in sale of goods and products to members and others does not, in and of itself, prevent sporting clubs enjoying charitable status. This would be on the condition that the clubs' purpose in pursuing these activities is clearly for the advancement of sport or, if the current language is to continue, 'the encouragement of sport'.

This may also already be the law in Australia, since *Commissioner of Taxation (Cth) v Word Investments Ltd* ('*Word Investments*').² The propensity of the Australia Taxation Office to continue to rely on cases like *Cronulla-Sutherland Leagues Club Ltd v Federal Commissioner of Taxation*³ ('*Cronulla-Sutherland*') to restrict the application of the law in this area, rather than apply the law in a manner consistent with the reasoning of the High Court in *Word Investments*, has created difficulties which seem to require legislative resolution.

As part of this first submission, following the example in England and Wales, it is submitted that if deductibility for donations is to be extended to other charities, sporting clubs which satisfy the requirements to be considered charities should be included in this extension.

WMLC's second submission relates to mutuality. It is only to be applied if the first submission in relation to income tax exemption is not accepted.

² *Commissioner of Taxation (Cth) v Word Investments Ltd* (2008) 236 CLR 204.

³ *Cronulla-Sutherland Leagues Club Ltd v Federal Commissioner of Taxation* (1990) 23 FCR 82.

A. RATIONALE FOR THIS SUBMISSION

It is appropriate to begin WMLC's submission with a brief discussion of the issues raised at paragraphs 20 and 21 of *Fairer, simpler and more effective tax concessions for the not-for-profit sector* ('the Discussion Paper').

These paragraphs set out the reason for reviewing the income tax exemption for charities and not-for-profits. This is a concern that the exemption is not achieving 'effectiveness in achieving the maximum possible social good': that is, that some entities currently enjoying exemption perhaps do not deserve it as they do not provide sufficient public benefit to justify their tax concession.⁴

Not-for-profits, including charities, were excluded from both Australia's and New Zealand's first income tax Acts.⁵ Earlier income tax legislation in the UK was based on dividends and profits, rather than all and any income of a person or other legal entity in a year.⁶ The colonies adopted the same approach.⁷ When this revenue strategy became inadequate to the infrastructure demands, the taxable base of profits expanded to include land, and then all forms of direct income was introduced.⁸ All, however, preserved the original exclusion of not-for-profits as entities which, by definition, had no personal profits to tax.⁹

Later federal income tax Acts contracted the criteria for exemption, only for it to expand again throughout the 20th century, in response to changing popular conceptions of what 'benefited' the public.¹⁰ While these extensions have happened on an ad hoc basis, rather than as a result of comprehensive reforms, there remains a general logic behind the various categories: providing benefit to the community, and operating on a not-for-profit basis.

The Working Group suggests at paragraph 229 of the Paper that charitable status might be considered the best criterion for assessing eligibility for any tax concession. WMLC will argue later in this submission that sporting clubs like itself should be considered charitable, as is the case in England and Wales, Scotland, Northern Ireland and Singapore.¹¹

⁴ Not-for-profit Sector Reform Council (2012) *Fairer, simpler and more effective tax concessions for the not-for-profit sector* (Discussion Paper) [20]-[21].

⁵ Ann O'Connell 'Charitable Treatment? – A (Potted) History Of The Taxation of Charities In Australia', Conference Paper presented at July 2010 Tax History Conference, Centre for Tax Law, University of Cambridge, pp 2-4, 8.

⁶ O'Connell above n 5, p 2.

⁷ Ibid p 2.

⁸ Ibid pp 2-4.

⁹ Ibid.

¹⁰ Ibid pp 22-24.

¹¹ See *Charities Act 2011* (Eng & Wales) s 3(1)(g); *Charities and Trustee Investment (Scotland) Act 2005* s 7(2)(h); *Charities Act (Northern Ireland) 2008* s 2(2)(g); Commissioner of Charities, 'Charity Essentials' at Singapore Charity Portal, <https://www.charities.gov.sg/charity/index.do>.

If this proposal is not accepted, WMLC submits that the current rationale behind income tax exemption in Australia is sufficient to justify the inclusion of not-for-profit sporting clubs which exist to contribute to the community in the exemption regime. Charitable status is not required to access the current income tax exemption for the encouragement of sport under s 50-45 of the ITAA 1997.

The Discussion Paper suggests that exemption may be questionable where the ‘rationales identified in the introduction to [the] discussion paper’ do not apply.¹² These rationales are:¹³

- a worthy cause that deserves government assistance;
- delivering public benefit that government would otherwise be providing – and thus saving the government money; and
- operating on a not-for-profit basis in an income tax system predicated on entities which make a profit.

WMLC satisfies all three. The reasons for this will be explored in more detail below, but briefly, WMLC encourages physical activity, particularly in children and young people, in a social context of increasing chronic disease caused by unhealthy lifestyles. WMLC also funds and maintains three quality sporting grounds, alleviating the need for government funding. Lastly, WMLC spends its profits entirely on pursuing its mission: promoting sport in the local community.

Therefore, WMLC argues that not-for-profit sporting clubs should remain, and where excluded on a technicality, should become, eligible for income tax exemption. The same reasoning applies in the case of FBT concessions and other tax benefits.

In fact, WMLC submits that the time has come to recognise encouraging sport as a charitable purpose.

B. SPORT AS A CHARITABLE PURPOSE

WMLC submits that review of the tax concessions for not-for-profit entities cannot be divorced from a review of the nature of ‘charity’. We submit that it is time to revise the automatic exclusion from charitable status of organisations which exist for the advancement or encouragement of sport. It is no longer tenable to insist that sport be merely a method of advancing an independently charitable purpose, such as education or social welfare.

Current position

Under the current law, sport or recreation are only considered ‘charitable’ so far as they are linked to another, recognised charitable purpose, especially education or social welfare.¹⁴ The

¹² Not-for-profit Sector Reform Council above n 4, [22].

¹³ Ibid p 9.

exception to this is providing sporting facilities for the public, which is considered to fall within the fourth head of *Pemsel*:¹⁵ purposes beneficial to the community.¹⁶

'Mere sport', however, has not been considered to provide enough public benefit to come within this category. This dates from an English case decided in the late 1800s; *In re Nottage; Jones v Palmer* ('*In re Nottage*').¹⁷ In that case, which regarded yachting, the court expressed the concern that if charitable status was approved, it would open the 'floodgates' to approval of any sport. As Lord Justice Lindley pointed out, 'every healthy sport is good for the nation – cricket, football, fencing, yachting, or any other healthy exercise and recreation'.¹⁸ Lord Justice Lopes was therefore apprehensive that:

If we were to hold the gift before us to be charitable we should open a very wide door, for it would then be difficult to say that gifts for promoting bicycling, cricket, football, lawn-tennis, or any outdoor game, were not charitable, for they promote the health and bodily well-being of the community.¹⁹

In fact, it is for these very reasons set out by the Lords Justice in 1895 that encouragement or advancement of sport should now be considered charitable in its own right. This is because the concept of charity has developed over the 118 years since *In re Nottage* was decided, and due to the now fundamental role that sport plays in maintaining the physical, mental and social health of our society.

Expansion of the concept of charity

The class of purposes considered charitable at common law in Australia (and elsewhere in the common law world) has significantly expanded since *Pemsel* was decided. So, too, has the statutory scope of income tax exemptions. Among the more traditional purposes, the *Charities Act 2011* (England and Wales) includes the following as 'charitable':²⁰

- the advancement of citizenship or community development;
- the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- the advancement of environmental protection or improvement;
- the advancement of animal welfare; and
- the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services.

¹⁴ Charities Definition Inquiry (2001) *Report of the Inquiry into the Definition of Charities and Related Organisations*, June, available at <http://www.cdi.gov.au/html/report.htm>, pp 195-96; Gino Dal Pont (2000) *Charity Law in Australia and New Zealand*, Oxford University Press, pp 143, 195.

¹⁵ *Income Tax Special Purpose Commissioners v Pemsel* [1891] AC 531.

¹⁶ Dal Pont above n 14, p 195.

¹⁷ *In re Nottage; Jones v Palmer* [1895] 2 Ch 649.

¹⁸ *Ibid* p 655.

¹⁹ *Ibid* p 656.

²⁰ *Charities Act 2011* (Eng & Wales) s 3(1)(e), (h), (i), (k), (l).

Australia's own *Charities Definition Inquiry* recommended in 2001 that 'the encouragement of sport and recreation to advance health, education, social and community welfare, religion, culture or the environment be a charitable purpose.'²¹

WMLC submits that even this recommendation does not go far enough. Australian society has changed. Judges in the 19th century could not have contemplated the increasing role that human rights would come to play in the regulation of societies two hundred years later. The old conception of sport as a non-charitable purpose must also be reassessed in light of new circumstances. As expressed by Lord Wilberforce in 1967 in *Scottish Burial Reform and Cremation Society Ltd. v Glasgow Corporation*: '...the law of charity is a moving subject which may well have evolved even since 1891'.²² Since 1967, the world has moved again. WMLC endorses the view of noted charity law expert Gino Dal Pont:

...if the protection of animals is charitable in raising the moral tone of society, it is anomalous that activities that improve the physical health and fitness of society are not charitable. Such a view also flies in the face of governmental initiatives to encourage participation in amateur sport so [as] to improve community health.²³

WMLC submits that the new social circumstances of the 21st century should result in recognition of sport as a charitable purpose, as has occurred in the UK. In addition to the new purposes listed above, the *Charities Act 2011* also includes '(g) the advancement of amateur sport'.²⁴

Encouragement of sport part of promoting health

The reason for the UK's acceptance of sport as a charitable purpose was connected to sport's health benefits. Academics Ford and Lee state that 'if the spiritual and moral well-being of the community at large is accepted as charitable, as it is in a wide variety of forms, its physical well-being should likewise...'²⁵

Australia currently faces two public health epidemics: chronic disease caused by unhealthy lifestyles, and a staggering number of Australians suffering mental health problems. Evidence was given to the Administrative Appeals Tribunal (AAT) in the 2011 case *Bicycle Victoria Inc v Commissioner of Taxation ('Bicycle Victoria')*²⁶ by a number of medical experts. Deputy President Forgie concluded:

On the basis of their evidence...one of the greatest public health challenges facing Australia is obesity. Meeting the challenge is a task that is complex and cannot be solved simply by education or the provision of information or by a directive or prohibitionist approach. Cycling is a form of physical activity that can prevent, remediate and control diseases, including those

²¹ Charities Definition Inquiry above n 14, p 201.

²² [1968] AC 138 at p 154.

²³ Dal Pont above n 14, p 196.

²⁴ *Charities Act 2011* (Eng & Wales) s 3(1)(g).

²⁵ Harold Ford and W. A. Lee (1990) *Principles of the Law of Trusts* (2nd ed), The Law Book Company, pp 867-68.

²⁶ (2011) 127 ALD 553.

associated with obesity. Obesity is responsible for, or operates as a predictor for, many lifestyle diseases such as diabetes, osteoarthritis, cardiovascular disease, colorectal, breast, uterine and kidney cancer.²⁷

The first National Report Card on Mental Health and Suicide Prevention, released last month in November 2012, states that one in five Australians will experience mental illness in any given year.²⁸ Over a lifetime, however, this figure becomes almost half of all Australians, with 45% experiencing a mental disorder.²⁹ Mental illness also accounts for the greatest proportion of disability in Australia at 24%,³⁰ and is estimated to cost the country \$2.7 billion in employee productivity every year.³¹ Some suggest that the total cost to the economy is closer to \$20 billion each year.³²

Promoting engagement in physical exercise through sport promotes both physical health and mental health. Physical exercise has been found to alleviate the symptoms of anxiety and depression,³³ and when done in the context of a sporting club, provides the added benefit of social interaction and a sense of belonging to a community. Social networks are important as protective factors against mental health problems, and in reducing the severity of symptoms.³⁴ The Australian Bureau of Statistics found in 2007 that of those people who had contact with friends, 20% had a mental health disorder in that year, whereas for those who had no contact with friends, this nearly doubled to 38%.³⁵

It is widely understood that addressing health issues is better done at the prevention stage rather than once a problem has developed. The mounting burden on our health services and hospitals from chronic disease is already causing strain to government budgets, and is expected to escalate further as a result of the ageing Australian population. WMLC submits that it would be more cost-effective for government to act now to help prevent chronic diseases linked to lack of physical activity, by supporting sporting organisations, than to wait until health problems have already emerged before funding will be given.

²⁷ Ibid [181].

²⁸ National Mental Health Commission (2012) *A Contributing Life: the 2012 National Report Card on Mental Health and Suicide Prevention*, available at http://www.mentalhealthcommission.gov.au/media/39270/NMHC_ReportCard_Enhanced.pdf, p 14.

²⁹ Australian Bureau of Statistics (ABS) (2007) *National Survey of Mental Health and Wellbeing: Summary of Results*, available at [http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4326.0Main%20Features32007?opendocument&tabname=Summary&prodno=4326.0&issue=2007&num=&view=.](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4326.0Main%20Features32007?opendocument&tabname=Summary&prodno=4326.0&issue=2007&num=&view=)

³⁰ Stephen Begg, Theo Vos, Bridget Barker, Chris Stevenson, Lucy Stanley and Alan Lopez (2007) *The burden of disease and injury in Australia 2003*, Australian Institute of Health and Welfare, pp 3-4.

³¹ Jayashri Kulkarni (2010) *The Cost of Mental Illness*, Monash Alfred Psychiatry Research Centre, available at <http://www.maprc.org.au/news/cost-mental-illness>, p 1.

³² Australian Bureau of Statistics (ABS) (2009) *Australian Social Trends* p 13.

³³ See eg S Saxena, M Van Ommeren, K Tang and T Armstrong (2005) 'Mental health benefits of physical activity' *Journal of Mental Health* 14(5) 445-451; P Callaghan (2004) 'Exercise: a neglected intervention in mental health care?' *Journal of Psychiatric and Mental Health Nursing* 11 476-483.

³⁴ VicHealth (January 2005) *Social Inclusion as a determinant of mental health and wellbeing* (Research Summary).

³⁵ ABS above n 29.

If the Australian government is prepared to act on tobacco smoking as a cause of chronic disease by introducing world-first restrictions on the sale of tobacco products;³⁶ to introduce an 'alcopops' tax in the hope of curbing binge-drinking among the young;³⁷ and to introduce legislation improving dental benefits,³⁸ it should also be willing to provide tax-based subsidies for the encouragement of physical activity at a grassroots level. It is a basic policy design principle that bottom-up engagement is more effective than top-down imposition of behavioural standards.

The courts cannot shoehorn this necessary development into the strictures of the current law. Deputy President Forgie in *Bicycle Victoria* found that the appellant cycling organisation was a charitable institution, as it promoted physical fitness through cycling, and therefore health.³⁹ She could not, however, include the organisation in the category of health promotion charities, as it did not promote 'the prevention or the control of diseases'.⁴⁰ This meant that Bicycle Victoria was not eligible for DGR status.

The ATO's response to the case was to reaffirm the need for promoting sport to be aligned with achieving a 'real' charitable purpose – it could not be a charitable purpose unto itself:

The finding of the Tribunal that the applicant had a purpose of promoting cycling in all its forms and an overall purpose of promoting fitness, which is a charitable purpose, was open to the Tribunal on the facts.

The ATO will apply the decision to institutions that promote an activity that is sporting or recreational in nature, if the facts indicate that **the activity is a means by which a broader charitable purpose is achieved.**⁴¹ [emphasis added]

There are precedents for including sport in the concept of charity. In Canada, the Ontario Supreme Court has found that:

...promotion of amateur athletic sports under controlled conditions promotes health, and is akin to those cases which have decided that the promotion of health is a charitable purpose...participation in organized amateur sports is [also] in itself educational, both in the sense of training in discipline and maintenance of a health body...⁴²

³⁶ Mark Metherell 'Big tobacco loses High Court battle over plain packaging' *The Sydney Morning Herald*, August 15 2012.

³⁷ 'Rudd's alcopop tax in doubt as support wanes' *Brisbane Times* June 25 2008, available at <http://www.brisbanetimes.com.au/news/national/rudds-alcopop-tax-in-doubt-as-support-wanes/2008/06/25/1214073307860.html>; Josh Gordon and Dan Harrison 'Booze blitz: alcopop tax lifted by 70%' *The Age* April 27 2008.

³⁸ *Dental Benefits Amendment Bill 2012* (Cth).

³⁹ *Bicycle Victoria Inc v Commissioner of Taxation* (2011) 127 ALD 553 [194]-[195].

⁴⁰ *Ibid* [197]-[198].

⁴¹ Australian Taxation Office (ATO) *Decision Impact Statement: Bicycle Victoria v Commissioner of Taxation* (12 August 2011), available at <http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/2010/1721/00001>.

⁴² *Re Laidlaw Foundation* (1984) 13 DLR (4th) 491, per Justice Southey.

As briefly referred to above, the UK has actively progressed the law by including sport as a charitable purpose in legislation. It is to the UK example that we now turn.

England and Wales: encouragement of sport considered charitable

Historically, as in Australia, promotion of sporting activities was not considered charitable in the UK. In early 2003, the Charity Commission for England and Wales acknowledged that the law did not at that time 'regard the promotion of any particular sport, for its own sake, as charitable'.⁴³ Nonetheless, of its own volition, the Commission decided to extend the umbrella of charity to cover the advancement of sport in certain situations.⁴⁴ In April of 2003, the Commission released its Review of the Register, *RR11 - Charitable Status and Sport*. It stated:

...we have looked at the relationship between sport and charity in the light of modern social conditions. We have taken account of the enormous public interest in sport as a means of promoting health and the vital role that sport plays in improving the health of the nation. We have concluded that, within the law as it stands, we can properly recognise as charitable bodies that set out to encourage community participation in healthy sports.⁴⁵

This development was subsequently enshrined in legislation, with 'the advancement of amateur sport' being included in the list of charitable purposes set out in what is now the *Charities Act 2011* (England and Wales).⁴⁶ To be included as a charity on this ground, an organisation must meet the following two conditions:

- (i) The sport in question must be capable of improving physical health and fitness; and
- (ii) The club must have an open membership, that is, access to the club's facilities must be genuinely available to anyone who wishes to take advantage of them.⁴⁷

Application to Australia

This line of reasoning should now be applied in Australia. WMLC suggests that the model set out in Schedule 1 of the *Charities Act 2011* (England and Wales) is appropriate. The relevant parts of the Schedule are reproduced in full in Appendix A to this submission.

⁴³ Charity Commission for England and Wales, *Review of the Register of Charities: Charitable Status and Sport* (Review Paper No. 11, April 2003), available at <http://www.charitycommission.gov.uk/Publications/rr11.aspx>, p 2.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ See s 3(1)(g).

⁴⁷ Charity Commission for England and Wales above n 42, p 2.

C. INCOME TAX EXEMPTION

Even if WMLC's arguments in relation to charitable status for sporting clubs are rejected, organisations encouraging sport should still be considered eligible for income tax exemption as not-for-profits which provide significant benefit to the community. WMLC submits that the current exclusion of many sporting clubs from income tax exemption is at least partially the result of narrow application of the relevant law by the ATO, rather than lack of justification for the concession.

There is a need for the law on this issue to be clear. That can, and should, be achieved by amending the law. This could be done by following the model used in England and Wales, which considers advancement of amateur sport a charitable purpose.

Exclusion from income tax exemption on the basis of member benefit is arbitrary

Currently, sporting clubs like WMLC, which undertake commercial activities to fund their pursuit of their community purposes, are excluded from income tax exemption by the ATO. One of the reasons for this is that the ATO assesses these activities as 'providing benefit to members' and concludes that this member benefit is the primary purpose of the organisation, not encouraging sport. This fails to make a distinction between clubs which exist for the purpose of benefiting members, and clubs which exist for the encouragement of sport that have chosen to become financially self-sufficient.

Provision of sporting grounds and activities is an expensive exercise. For example, in the 2008-2009 financial year, WMLC spent over \$115 000 on upkeep of its grounds. There is an extensive literature on how sporting fields are to be funded in the USA, with many being funded by direct taxes.⁴⁸ In Australia, in order to obtain the necessary funds, clubs must choose between government grants, participant fees, fundraising and commercial enterprise as income sources. Relying on government grants is often unavoidable, particularly with large projects, but grants cannot offer stability or certainty for clubs' futures. Participant fees must be prohibitively expensive to collect an adequate amount of funds, which is ultimately self-defeating as many either cannot afford it or refuse to pay. Fundraising for large sums consumes a great deal of time and money of itself, and is not a sustainable solution either.

It is for these reasons that WMLC consciously chose to pursue a catering, entertainment and leisure business at its clubhouses. These activities fund the maintenance of WMLC's sporting facilities and provision of its myriad sporting programs: school holiday Sports Expos, vacation coaching clinics, rugby league competitions, bowling competitions, sponsorship of local sporting teams and much more. While this necessarily involves continuous investment in facilities and

⁴⁸ Logan Gans (2010) 'Take Me Out to the Ball Game, But Should the Crowd's Taxes Pay for It?' *Virginia Tax Review* 29(4).

significant sums in operating expenses, WMLC values the ability to have greater control over its funds and long-term viability.

Both members and non-members access the meal and entertainment services at WMLC's facilities on a fee-paying basis. In the past, there have been a number of cases, including *Cronulla-Sutherland*, which disallowed sporting clubs from accessing the income tax exemption because the court found that the clubs' primary purpose was providing social services to members, rather than encouraging sport.⁴⁹

Providing benefits to members is not sufficient reason of itself to find that a club cannot have a purpose of providing benefits to the public. The key is whether the 'true character of the object or purpose'⁵⁰ of the club is to encourage sport, or to be a social club for members' benefit, where 'the social activities...[are] ends in themselves'.⁵¹ In the most recent case on this issue, the *Western Australian Chamber of Commerce* case, Justice Chaney, the President of the Western Australia State Administrative Tribunal, explicitly stated that 'the fact that benefit may accrue to the members of an organisation does not necessarily mean that the organisation is not being carried on for a charitable purpose...'⁵²

In that case, the Chamber of Commerce and Industry of Western Australia sought exemption from payroll tax on the basis that it was a charitable body as defined in the relevant tax legislation.⁵³ The Commissioner of State Revenue disagreed, arguing that the main purpose of the Chamber was providing services to its members, rather than to the public generally.⁵⁴ Justice Chaney decided in favour of the Chamber of Commerce, finding that its significant business activities and services for paying members were engaged in to fund and further its purpose of promoting free trade and commerce.⁵⁵

His Honour remarked:

I accept that, in characterising the purpose of an organisation, it is necessary to pay close regard to the particular objects of the organisation, and to the activities which it carries on to achieve those objects. In considering the activities of an organisation, the relevant question is as to the ultimate purpose for which the activities are pursued...The fact that benefit may accrue to the members of an organisation does not necessarily mean that the organisation is not being carried on for a charitable purpose...The fact that an organisation derives profit from its operations does not, of itself, deprive the organisation of a status of a charitable institution.⁵⁶

⁴⁹ *Cronulla-Sutherland Leagues Club Ltd v Federal Commissioner of Taxation* (1990) 23 FCR 82.

⁵⁰ *Cronulla-Sutherland Leagues Club Ltd v Federal Commissioner of Taxation* (1990) 23 FCR 82 per Beaumont J at p 118.

⁵¹ *Terranora Lakes Country Club Ltd v Federal Commission of Taxation* (1993) 93 ATC 4078 per Hill J at p 304.

⁵² *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* [2012] WASAT 146 (18 July 2012), at [29].

⁵³ *Ibid* [1].

⁵⁴ *Ibid* [4], [25].

⁵⁵ *Ibid* [97]-[98].

⁵⁶ [2012] WASAT 146 [27], [29], [31].

Similarly, in *Word Investments*, the High Court found that Word Investments' entirely commercial activities did not disqualify it from charitable status, as its profits were applied purely to the charitable purposes of Wycliffe Bible Translators Australia.⁵⁷

WMLC submits that the most logical conclusion to be drawn from the *Western Australian Chamber of Commerce* case and *Word Investments* is that organisations run for the encouragement of sport cannot be excluded from the income tax exemption regime on the sole basis that they provide benefits, even where significant, to members. The correct approach is to assess the 'true character' of the organisation and whether these benefits are a means to an end, or the primary purpose of the organisation. The ATO, however, has issued an official statement that in its opinion, *Word Investments* did not mention member benefits, so it cannot apply to the issue of member benefit and sporting organisations: '...there is no evidence in the *Word* decision that benefits or services were provided to members of Word Investments Ltd. The *Word* decision does not disrupt the *Cronulla* or *South Sydney Juniors* decisions.'⁵⁸

While it is true that *Word Investments* did not concern an organisation with a member base, and so did not specifically address the issue of member benefit, *Cronulla-Sutherland* and other section 50-45 cases were expressly referenced as relevant in the reasons for decision.⁵⁹ Division 50 is to be interpreted as a whole, rather than as having been created as separate parts in isolation. The general principle expressed in *Word Investments* is relevant to income tax exemption for any charitable entity: even if that the non-charitable nature of an entity's main activities is not enough to disqualify the entity from charitable status, and thus income tax exemption, if the activities are pursued for a charitable purpose.

WMLC submits that this general principle is further relevant to not-for-profit entities seeking income tax exemption. This is because it is only the latest in a line of authority which has always held that ancillary purposes and business activities which are merely the means to achieving the genuinely not-for-profit or charitable purpose will not disqualify an entity from being considered charitable, income tax exempt and so on.⁶⁰

Given the unwillingness of the ATO to accept the distinction between means and purposes,, despite what WMLC submits is the law, WMLC proposes legislating a change to the *ITAA 1997* to specifically allow sporting clubs to access the income tax exemption even where they provide benefits to members. Assessment of eligibility under this provision could be done by the Australian Charities and Not-for-profits Commission (ACNC), which would assess the 'true

⁵⁷ *Commissioner of Taxation (Cth) v Word Investments Ltd* (2008) 236 CLR 204 per Gummow, Hayne, Heydon and Crennan JJ at [37]-[39].

⁵⁸ ATO (2011) *Income Tax Exemption and Sporting Clubs* (Guide for office-bearers of not-for-profit clubs) p 3.

⁵⁹ *Commissioner of Taxation (Cth) v Word Investments Ltd* (2008) 236 CLR 204 [34] footnote 69.

⁶⁰ See eg *Inland Revenue Commissioners v Yorkshire Agricultural Society* [1928] 1 KB 611; *Stratton v Simpson* (1970) 125 CLR 138; *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 371; *Commissioner of Taxation v Triton Foundation* (2005) 147 FCR 362; *Navy Health Ltd v Deputy Commissioner of Taxation* (2007) 163 FCR 1; *Cooperative Bulk Handling Ltd* (2010) 189 FCR 322.

character' of organisations promoting sport, just as it will now assess organisations claiming to have a charitable character.

This may prompt concerns of abuse of the tax concession by organisations which do not genuinely provide benefit to the public. WMLC's answer to this is that the common law already imposes limits on member benefits. Where organisations only assist members, rather than the public at large, or where a 'charitable' purpose is to be fulfilled only through provision of services to members or a very restricted class of individuals, with no benefit to the general public, this will not be enough to be considered 'charitable'.⁶¹ By extension, this could be used to prevent sporting organisations which do not genuinely provide public benefit from accessing tax benefits for not-for-profits. The legislation for England and Wales provides an ideal template in this regard.

Exclusion from income tax exemption on grounds of trading is also arbitrary

Closely related to the subject of member benefit is the issue of trading activities. WMLC and many other sporting clubs are a prime example of this: our services to members overlap considerably with our commercial trading activities with both members and the non-member public.

Many charities and not-for-profits in Australia engage in some level of trading activity, either with members, members and the public or the public only. Research by the Commonwealth Department of Family and Community Services in 2005 found that about 29% of not-for-profits operate businesses.⁶² The reasons for doing so are the same as those set out in the section above regarding member benefit; in essence, it is often the only realistic way to financially sustain the organisation.

It is unreasonable to refuse tax concessions to not-for-profits on the basis that the organisation makes a profit through commercial activities when those profits are applied in furtherance of a charitable and a community purpose. Concessional status should only be refused when an organisation's activities represent an end unto themselves.

We submit that this was in fact the position in law even before the *Word Investments* decision. As His Honour Justice Hill of the Federal Court said in the case of *Terranora Lakes Country Club Ltd v Federal Commissioner of Taxation*:

If the social activities have become an end in themselves, as was the case in *Cronulla Sutherland*, it will be necessary to see whether that end has become the predominant purpose for which the club is established ... However, in the present case, I have reached the conclusion that,

⁶¹ *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 at [68], cited by *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* [2012] WASAT 146 (18 July 2012), at [34].

⁶² Productivity Commission, *Contribution of the Not-for-profit Sector* p 240. UPDATE IF POSSIBLE

while the social activities (by which I include the gambling, entertainment, dining and accommodation activities) were very extensive and could clearly be seen as an end, or perhaps as ends in themselves, those activities were, I am satisfied, pursued as a means of financing the extensive sporting activities conducted by the club. Thus, I am of the view that, having regard to the activities of the club as conducted in the year of income, **the club was, in that year, one established for the purpose of the promotion of athletic sport and not one established for the purpose of carrying on a business,** or businesses of gambling, provision of entertainment, selling of time share units or the provision of food.⁶³ [emphasis added]

In any event, the High Court in *Word Investments* decided that an entirely commercial business, which applied its profits to charitable purposes under the first three heads of *Pemsel*, was to be considered charitable. The view that the High Court's reasoning in *Word Investments* is only applicable to charities, and not to any other entities is too narrow a view. It is true that the High Court limited charitable 'business' to the first three heads of *Pemsel*, but for the reasons outlined above in the previous section relating to member benefit, the general principle that commercial activity does not disqualify applies to not-for-profits as well as charities.

Furthermore, WMLC does not conduct a for-profit business in the manner of *Word Investments*. Its structure has been not-for-profit. WMLC and other clubs like it are prohibited by their own governance documents from doing anything with their profits other than using them for the wellbeing of the local community.

We refer to the comments made by Justice Sundberg in *Word Investments* at the Federal Court level, who was affirmed at each stage of appeal:

... I think it is clear from the above passages that the making of a profit through trade or business is not necessarily inconsistent with a charitable purpose and that the true question to be asked is the purpose of the making of the profit. If the purpose is commercial then the exclusive purpose of the organisation is not charitable; if the purpose is selfless then it may be.⁶⁴

Accordingly, WMLC submits that the current income tax regime would be improved if the tax legislation were amended to make clear the acceptable extent of the connection between profit and purpose. Clubs would still have to satisfy the current basic threshold for eligibility; that is, that they exist and pursue their activities for the encouragement of sport.

Tax concessions for sporting clubs are a funding efficiency

As was outlined earlier in this submission, WMLC operates three sporting venues in the Wynnum Manly area. This comprises two sporting ovals and a bowling green. The maintenance of costs involved in operating these facilities are considerable. This is why government grants to sporting bodies and government funding of large public stadiums is common in Australia: sporting venues are expensive. Yet, as acknowledged by the *Charities Definition Inquiry*, sport

⁶³ *Terranora Lakes Country Club Ltd v Federal Commission of Taxation* (1993) 93 ATC 4078 per Hill J at pp 304-305.

⁶⁴ *Federal Commissioner of Taxation v Word Investments Ltd* (2006) 64 ATR 483 [37].

is an essential part of the Australian psyche.⁶⁵ Witness, for example, the great public soul-searching engaged in following Australia's less than spectacular performance at the 2012 London Olympic Games.⁶⁶ The broader question, then, is not whether these facilities are provided, but how they are to be paid for. In the United States, where it is common for taxes to be levied specifically to fund stadium construction, there is an extensive literature over whether taxation for this purpose is appropriate, when not all citizens will use the resulting infrastructure.⁶⁷

Indirect support for these ventures through tax concessions is more cost-effective for government. The ability of the community sector to multiply government support is well known, and forms the basis of the government penchant for contracting out public services to NFPs.⁶⁸ Indirect support also cuts out the administration costs of collecting tax and then returning it to more or less the same bodies in the form of grants, which are time consuming for government to cost, award and monitor, and for community groups to apply for and report on.⁶⁹

Tax concessions, particularly deductibility, are also a more democratic way of solving the funding problem. Organisations can only 'save' as much income tax from exemption as they would otherwise be liable to pay. As the income of clubs like WMLC is largely dependent on the support of the local population for its commercial activities, and the number of people participating in its competitions and events, the higher our income, the more support we enjoy in our community. It is only reasonable that the level of tax savings, or if preferred, the level of tax expenditure borne by the taxpayer, is linked to the level of goodwill we hold with the public.

Allowing exemption and deductibility is a more democratic middle road than direct grants, as citizens can choose the extent of their support. This brings us to arguments for deductibility.

D. DEDUCTIBLE GIFT RECIPIENT STATUS

Deductibility for sporting clubs

If deductibility for donations is to be extended to other charities as proposed in the Discussion Paper at page 23, and as recommended by the Productivity Commission,⁷⁰ sporting clubs which satisfy the requirements to be considered charities should also be included.

⁶⁵ Charities Definition Inquiry above n 14, p 200.

⁶⁶ See eg Caroline Wilson 'Now that the race is run let the Olympics soul-searching begin' *The Sydney Morning Herald* August 11 2012. Ben Knight 'Australian Olympic performance sparks funding debate' 7:30, Australian Broadcasting Corporation 6 August 2012. Transcript available at <http://www.abc.net.au/7.30/content/2012/s3561895.htm>.

⁶⁷ Gans above n 48.

⁶⁸ Productivity Commission, *Contribution of the Not-for-profit Sector* (January 2010) Research Report pp 26, 280, 300, 302, 305.

⁶⁹ *Ibid* pp 291-93.

⁷⁰ *Ibid* Recommendation 7.3.

If WMLC's submissions in relation to charitable status for clubs which promote sport are accepted, this will extend DGR status to the majority of community sporting clubs. WMLC submits that this would encourage greater direct financial support from the community, as donors are more likely to contribute if their donation is tax-deductible. In turn, this will alleviate the need for WMLC to spend valuable time and money generating money for our sporting activities through our businesses.

Even if WMLC's submissions in relation to charitable status for sporting clubs are not accepted, programs supporting amateur school sport, like WMLC's school-based sports clinics, should receive deductibility. Promoting physical fitness is considered a charitable purpose, in that it promotes health.⁷¹

E. MUTUALITY

In the event that WMLC's submissions in relation to both income tax concessions and deductibility are not accepted, WMLC submits that the current mutuality principles should continue, at least for sporting clubs like WMLC, for the policy reasons set out under the heading of 'Income tax exemption' above.

The principle of mutuality has a long history in the common law and is conceptually sound. As Turnour, McGregor-Lowndes and Turnour point out in their 2011 paper, *Not for profit income tax exemption: is there a hole in the bucket, dear Henry?*,⁷² the concept of mutuality is the foundation for broader ideas about public benefit. Mutuality involves a small group of people gathering together to share their resources. A charity is a group of people who are seeking to benefit a broader section of the community, or the community as a whole. This communal sharing among all or many members of a community is the logical extension of the sharing between a small group that occurs in instances of mutuality. The critical difference is the motive behind the giving and sharing – self or other centred – and when it shifts from benefit to self to benefit for the community.

Consistent with the reasoning of Professor Rob Atkinson, we submit that the crucial threshold for this change is crossed when the organisation takes a not-for-profit form, or becomes a charitable trust. Atkinson draws a distinction between groups which benefit only their members on the one hand, and organisations with a level of altruism on the other:

The benefits provided by organisations on one side of the divide flow to their members in the form of ordinary consumer goods and services purchased at fair market value; the organisations on this side of the nonprofit range are mutual benefit nonprofits. I maintain that all other organisations that are truly nonprofit exhibit altruism in one form or another.⁷³

⁷¹ See eg *Bicycle Victoria*.

⁷² Myles McGregor-Lowndes, Matthew Turnour and Elizabeth Turnour (2011) 'Not-for-profit income tax exemption: is there a hole in the bucket, dear Henry?' *Australian Tax Forum* 26.

⁷³ Rob Atkinson, 'Altruism in Nonprofit Organisations' (1990) 31 *Boston College Law Review* 501, pp 509-10.

Atkinson points to the non-distribution constraints in NFPs as the critical factor. This is because the organisation's assets can no longer be applied for the profit of its members. Atkinson argued that any organisation exhibiting some kind of other-directed behaviour and benefit should be entitled to tax exemption.⁷⁴ WMLC submits, then, that sporting clubs with 'asset-locking' or non-distribution provisions should, at the least, be entitled to continue to enjoy mutuality benefits. This is a lesser concession than exemption from income tax, but is conceptually similar.

If this logic is not accepted, WMLC submits that mutuality should still be retained for purely pragmatic reasons, as it transfers a large amount of the cost burden of providing public sporting fields and recreation facilities from government to clubs in the community sector.

⁷⁴ Rob Atkinson, 'Nonprofit Symposium: Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses' (1997) 27 *Stetson Law Review* 395, p 423.

F. CONCLUSION

In conclusion, WMLC submits that there is a need to clarify the law so that member benefits and commercial activities do not, in and of themselves, prevent clubs like WMLC enjoying income tax exemption. WMLC also submits that the example of England and Wales and other jurisdictions in the UK, in extending the definition of charity to include amateur sport, is an excellent way to simplify this area of the law.

WMLC submits that deductibility should also be extended to clubs like WMLC, either in their own right, or as a part of an extension of the definition of charity and extension of deductibility to all charities. At the least, all children's sporting programs should be deductible.

Finally, WMLC submits that under no circumstances should the current mutuality arrangements be taken from NFP sporting clubs.

APPENDIX A: SCHEDULE 1, CHARITIES ACT 2011 (Eng & Wales)

2 Meaning of “charitable purpose”.

(1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—

- (a) falls within section 3(1), and
- (b) is for the public benefit (see section 4).

(2) Any reference in any enactment or document (in whatever terms) —

- (a) to charitable purposes, or
- (b) to institutions having purposes that are charitable under the law relating to charities in England and Wales,

is to be read in accordance with subsection (1).

(3) Subsection (2) does not apply where the context otherwise requires.

(4) This section is subject to section 11 (which makes special provision for Chapter 2 of this Part onwards).

3 Descriptions of purposes.

(1) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

- (a) the prevention or relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the advancement of health or the saving of lives;
- (e) the advancement of citizenship or community development;
- (f) the advancement of the arts, culture, heritage or science;
- (g) the advancement of amateur sport;
- (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- (i) the advancement of environmental protection or improvement;
- (j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (k) the advancement of animal welfare;
- (l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;
- (m) any other purposes —
 - (i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,
 - (ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or
 - (iii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

- (2) In subsection (1)—
- (a) in paragraph (c), “religion” includes—
 - (i) a religion which involves belief in more than one god, and
 - (ii) a religion which does not involve belief in a god,
 - (b) in paragraph (d), “the advancement of health” includes the prevention or relief of sickness, disease or human suffering,
 - (c) paragraph (e) includes —
 - (i) rural or urban regeneration, and
 - (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities,
 - (d) in paragraph (g), “sport” means sports or games which promote health by involving physical or mental skill or exertion,
 - (e) paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph, and
 - (f) in paragraph (l), “fire and rescue services” means services provided by fire and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004.
- (3) Where any of the terms used in any of paragraphs (a) to (l) of subsection (1), or in subsection (2), has a particular meaning under the law relating to charities in England and Wales, the term is to be taken as having the same meaning where it appears in that provision.
- (4) In subsection (1)(m)(i), “the old law” means the law relating to charities in England and Wales as in force immediately before 1 April 2008.

...

5 Recreational and similar trusts, etc.

- (1) It is charitable (and is to be treated as always having been charitable) to provide, or assist in the provision of, facilities for —
- (a) recreation, or
 - (b) other leisure-time occupation,
- if the facilities are provided in the interests of social welfare.
- (2) The requirement that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.
- (3) The basic conditions are —
- (a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended, and
 - (b) that —
 - (i) those persons have need of the facilities because of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or
 - (ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.
- (4) Subsection (1) applies in particular to —
- (a) the provision of facilities at village halls, community centres and women’s institutes, and
 - (b) the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.

But this is subject to the requirement that the facilities are provided in the interests of social welfare.

(5) Nothing in this section is to be treated as derogating from the public benefit requirement.

6 Registered sports clubs.

(1) A registered sports club established for charitable purposes is to be treated as not being so established, and accordingly cannot be a charity.

(2) In subsection (1), “registered sports club” means a registered club within the meaning of Chapter 9 of Part 13 of the Corporation Tax Act 2010 (community amateur sports clubs).

NOTE: While ‘registered sports clubs’ are not considered charities, they continue to enjoy a range of fiscal benefits including ‘Gift Aid’. The closest approximation to this in an Australian context is deductibility for donations.