



Submission by

Ipswich Jets Rugby League Football Club

Magpies Sporting Club

Northern Suburbs 'Devils' Rugby League Club

Norths Leagues and Services Club

Queensland Lions Football Club

to the Not-for-profit Sector Tax Concession Working Group Secretariat

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In response to the Discussion Paper

Fairer, simpler and more effective tax concessions for the not-for-profit sector

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About the Contributors

The Contributors to this submission are all sporting clubs engaged in various activities intended to advance amateur sport.

Ipswich Jets Rugby League Football Club Inc ('Jets') is located in Ipswich, Queensland and operates for the purpose of fundraising for and developing the local Jets Rugby League club, which enters teams in various levels of competition ranging from its junior rugby league program through to the Intrust Super Cup. Jets provides its facilities for use of its members and free of charge to the local community.

Magpies Sporting Club Ltd ('Magpies') is located in the suburb of Glenella, in Mackay, Queensland. Magpies operates for the purpose of fundraising for and holding and maintaining property for 11 local sporting clubs. Magpies also provides administrative services for Magpies Rugby League Football Club Inc. Magpies provides its facilities for the use of its members and affiliates.

Northern Suburbs 'Devils' Rugby League Football Club ('Devils') is located in Nundah on the north side of Brisbane. Devils enters rugby league teams in various levels of competition ranging from its junior rugby league programs to the Intrust Super Cup. Devils provides playing fields and amenities as well as a clubhouse for the use of players.

Norths Leagues and Services Club Ltd ('Norths') is located in Kallangur, on the north side of Brisbane. Norths amalgamates the Northern Suburbs Leagues Club Ltd and the former Kallangur RSL. Norths operates for the purpose of fundraising for Devils and is concerned with the advancement of Rugby League football.

Queensland Lions Football Club Ltd ('Lions') is located at Richlands in Brisbane, and has operated as an amateur soccer club for over 20 years. In 2012, Lions has entered teams in most of the established levels of local competition, ranging from its junior soccer programs all the way through to the Premier League (one tier below the Hyundai A-League).

Introduction

This is a collaborative submission, prepared jointly by Ipswich Jets Leagues Club Ltd, Mackay Magpies Sporting Club Ltd, Norths Devils Rugby League Football Club, Norths Leagues and Services Club Ltd and Queensland Lions Football Club Ltd ('the Clubs'). The stories of how and why the Clubs operate and the positive role that the Clubs play in their communities are told throughout the submission. The purpose of these stories is not to boast of the contribution of these particular clubs, but to illustrate the unique and essential role that sporting clubs like ours play in Australian society. They are increasingly called upon to maintain and develop the social and physical health of the Australian community. Amateur sporting clubs are different from other clubs, and should be treated differently for tax purposes.

If amateur sports clubs are to be treated differently for tax purposes, the reasons for change must be set out in a systematic way. The present position, involving the principle of mutuality, is the starting point for discussions of club taxation. The Clubs all have a mutual fund and wish, at the least, to retain this with in reform or change to the law. The usefulness of the concept of mutuality, its development and its importance to the Clubs, is discussed before answering questions 50 to 54 from the Discussion Paper. Exemption from income tax is considered next. Reasons for exemption are explored in the context of amateur sport; the final section of the paper sets out reasons why deductibility should be extended to donors to amateur sport.

In summary, it is submitted that Clubs:

1. That exist for the purpose of advancement amateur sport or for the encouragement of sport; and
2. With constituent documents preventing the club from making any distribution, whether in money, property or otherwise, to its members;¹

should:

1. *At the least, retain the right to utilise the 'mutuality principle' to tax advantage even if the operation of that principle is restricted so that it does not extend to all other clubs.*
2. *Enjoy income tax exemption, whether or not:*
 - a. They are classified as charities; or
 - b. Persons who are members also benefit from the pursuit of the purpose of advancement or the encouragement of sport; or
 - c. There is substantial commercial activity undertaken by the club.
3. *Enjoy deductibility for donations where a purpose achieved through the advancement of sport is the promotion of health, on the basis that the clubs are akin to health promotion charities.*

¹ Based on ITAA 1997 s 59-35

Part 1: The use of the Mutuality Principle

The principle of mutuality is a product of the Anglo-Australian conception of 'ordinary income'. It has stood the test of time due to its sheer practical value. In fact, so far as the Clubs are concerned, it is one of the most important principles in its application to their operations. Below, we outline examples of the practical importance of mutuality to the Clubs. It will be observed that, despite the different approach taken by each of the Clubs in pursuing their objects, the principle of central importance to each club is the establishment, preservation and development of a central pool of resources to protect and secure the contribution of each club toward the advancement and encouragement of sport. Once the legal effect and development of the principle are outlined, the practical utility of mutuality be and the benefit in preserving mutuality for NFP clubs and associations. Australia should not be a world leader in disturbing the principle.

Development of Mutuality in Australia

Mutual funds are elastic pools of shared resources that expand and contract as they are applied to a club's purposes. As such, they are not 'ordinary income'. There has been some discussion in the case law classifying property within a mutual fund as capital.² There is, though, no CGT event which aligns with the winding up of a mutual fund. In the case of a not-for-profit (NFP) mutual, there can be no capital gain, as members are not entitled to the direction of surplus funds upon winding up of the fund. The surplus is rightfully exempt from taxation, as it continues to be applied for a purpose similar to that for which it was originally contributed.

This was thought to be the state of the law of mutuality prior to the case of *Coleambally Irrigation Mutual Co-operative Ltd v Federal Commissioner for Taxation* ('*Coleambally*').³ *Coleambally* changed the legal position in relation to mutuality, and statutory amendment in the form of ITAA 1997 s.59-35 was necessary to restore the traditional understanding.

s.59-35 reflects the arguments led by Brett Walker SC for *Coleambally*. It is well accepted that one of the fundamental rights of title is the right of disposal. By contributing to an NFP mutual fund, a contributor still participates by voluntarily consenting to the application of the funds. The effect of s.59-35 on the common law can therefore be sensibly explained as confirming that the disposal of the contributor's portion of the surplus is a voluntary act by the contributor in exercise of title.

This voluntary contribution, when made for the benefit of the community provides more than simply a justification for continuation of the mutuality principle; it also provides a basis for income tax exemption. Turnour, McGregor-Lowndes and Turnour explain it in the following way:

The doctrine of mutuality begins from the premise that an organisation cannot gain income from itself. Receipts from members are simply pooled funds and, currently, are not treated as tax expenditure by the Australian Taxation Expenditure Statements. This concept has international approbation, being outside the Schanz-Haig-Simons

² *Bohemians Club v Acting Commissioner of Taxation* [1918] HCA 16,

³ [2004] FCAC 250.

framework. We argue that, if an organisation derives its income from the community (whether by gifts or sales) and it applies its income to the benefit of that community not to individuals, then by parity of reasoning and extension of the mutuality principle the income should be exempt because members of the society are pooling their resources for their mutual benefit. On this basis, there is no income to tax and therefore no concession and no revenue forgone.⁴

The preservation of the principle of mutuality for NFPs need not be understood as a significant departure from the general principles of exemption. This was recently reaffirmed by the Federal Parliament by its enactment of s.59-35 of the ITAA 1997. In fact, mutuality provides a logical step towards the idea of exemption for NFPs. We conclude, then, that exemption of mutual income from income tax should continue, at least for NFPs, and particularly for clubs for the advancement or encouragement of sport. There is a sound theoretical platform for this and it should be respected. We turn next to the practical consequences of changes.

Importance of Mutuality to the Clubs

Having made a case for the preservation of the mutuality principle for NFP clubs and associations on the basis of principle, we now consider why mutuality is so important for the function of sports clubs in particular.

Each of the clubs making this submission has a different approach but the same ultimate purpose. The High Court of Australia in *Federal Commissioner of Taxation v Word Investments*⁵ ('*Word Investments*') confirmed that the overall purpose of an organisation is determined by reference to purpose and not merely by recourse to its activities. It is an holistic inquiry where the mere fact that the principal or even the sole activity is commercial does not mean that an entity cannot exist for a charitable purpose. By parity of reasoning, commercial activities do not mean that an organisation cannot be pursuing a sporting purpose. In fact, the High Court in *Word Investments* specifically referred to cases on the 'encouragement of sport', so the conclusion that the reasoning applies beyond charities is self evident.

Whilst the activities of each of the clubs differ, the central feature common to all is that they are built on a pool of shared resources contributed specifically for a shared purpose: the encouragement and advancement of amateur sport. As each club is constituted as an NFP, irrespective of the activities engaged in, it is guaranteed that resources cannot ultimately be directed to benefit members.

The Magpies, Jets and Norths clubs each promote and facilitate sport in a way akin to the *Word Investments* arrangement. Each club functions as a mutual, and consolidates its shared pool of resources through various social activities, gaming and hospitality. Each club then directs surpluses – usually several hundred thousands of dollars each year – to sporting clubs which are dependent on those funds to deliver amateur sport. Jets and Norths exist exclusively to raise funds for their affiliated sporting clubs. Magpies not only raises

⁴ Turnour, M, Macgregor-Lowndes, M, and Turnour, E. *Not for Profit Income Tax Exemption: is there a hole in the bucket, dear Henry?* (2011) 26 Australian Tax Forum 601, 609 (references removed).

⁵ [2008] HCA 55.

funds, but also holds, manages and maintains property and facilities for the use of its affiliates.

Magpies, Jets and Norths are formed from a social membership; however, membership is conditional on a commitment to participate in, facilitate or otherwise support the objective of the advancement of amateur sport. Members make contributions to the club with the expectation that the funds will be used to either fund or otherwise advance amateur sport.

The Devils club is an affiliate of Norths. Devils fields teams in varying levels of semi-professional, amateur and junior competitions and mainly directs its activities towards managing and promoting its teams and development programs. Whilst Devils runs its own licensed clubhouse and social activities (centered on its teams), it relies heavily on funding and grants from Norths. The main reason for its reliance on grants from Norths is the significant overheads required to provide sporting facilities and field amateur sporting teams. Members simply cannot carry the costs. This is particularly the case for amateur sport, usually centered on children and young adults, where families may have multiple children involved in sporting activities simultaneously.

Lions runs all of its activities within the one organisation. Lions divides its members between those who play soccer for the club (sporting members) and those who have an interest in soccer and wish to see soccer advanced (social members). The ratio of sporting to social members is roughly 1:10. Lions provides and maintains at significant expense two properties which are used for soccer, including the necessary amenities. Lions also runs and facilitates teams, fixtures and competitions. In order to ensure that participation by amateur and junior players is affordable, the soccer program in and of itself relies on subsidies of over \$310,000.00 from Lions' other activities. Without these subsidies, Lions would be faced with the choice of demanding unbearable fees from its sporting members or running its programs at a loss. Like the other clubs, the mutuality principle is of significance to Lions because it provides an avenue for like-minded people to pool resources for the advancement of its sporting activities. Lions runs its own hospitality, social and gaming activities as part of the mutual fund, for the purpose of maintaining the surplus of its asset pool to cover the shortfall from its soccer operations.

The mutuality principle is used by the Clubs to ensure the viability of the sporting activities which they are each committed to advancing. It provides a method by which like-minded people can contribute property to a fund for a specific purpose, and increase its capital to secure that provision.

Answers to Discussion Questions on Mutuality

- Q 50 Should the gaming, catering, entertainment and hospitality activities of NFP clubs and societies be subject to a concessional rate of tax, for income greater than a relatively high threshold, instead of being exempt?
- Q 51 What would be a suitable threshold and rate of tax if such activities were to be subject to tax?

Basing the tax treatment of an entity solely on its activities is contrary to principle, policy and law. As has been outlined above in the case studies provided, the gaming, catering, entertainment and hospitality activities of the five Clubs are undertaken for the purpose of establishing and strengthening the Clubs' ability to contribute to the encouragement, promotion or facilitation of amateur sport.

NFP clubs cannot distribute surplus funds back to members – the funds must be directed to the cause of the club. The correct approach is to consider why a club may be engaging in these activities and working to increase the fund. The development of a mutual fund differs from the profit-making activities of a for-profit business precisely because the funds cannot be directed to any private benefit.

In contrast, the imposition of any kind of threshold is inherently and unhelpfully arbitrary. The Henry Review and the Productivity Commission both concluded that competitive neutrality is not a real issue in the area of not-for-profit tax concessions other than possibly in respect of Fringe Benefits Tax.⁶ Competitive neutrality concerns cannot, therefore, provide the rationale for removing access to mutuality provisions.

The tax treatment of an NFP entity should be determined primarily by its purpose. Activities within a mutual fund should retain their mutual character. Activities conducted for an exempt purpose should remain exempt. The manner in which the funds are raised is irrelevant; it is the purpose to which they are put that is determinative.

Q 52 Should the mutuality principle be extended to all NFP member based organisations?

The Clubs submit that organisations that exist to advance amateur sport are a recognisably separate class that should, at the least, maintain their current status, and furthermore, should be eligible for all the concessions made available to charities. Given the organisational usefulness of mutuality and the inherent security it provides for assets contributed to NFPs, the Clubs submit that the mutuality principle could extend to all member-based NFPs.

Q 53 Should the mutuality principle be legislated to provide that all income from dealings between entities and their members is assessable?

It will be evident from the discussion above that the Clubs are opposed to any basis for taxing clubs like the Clubs or other amateur sporting clubs. If this option is to be considered in relation to clubs pursuing other purposes amateur sporting clubs must be carved out and the mutuality principle continue to be applied to them.

Q 54 Should a balancing adjustment be allowed for mutual clubs and societies to allow for mutual gains or mutual losses?

⁶ Productivity Commission *Contribution of the Not-for-profit Sector Report* (2010); Australia's Future Tax System Review (2010).

For the Clubs authoring this submission, the purpose of growing their mutual funds is to enable them to apply funds towards sporting purposes. By minimising the costs of engagement in sport and by directing funds towards the activities of sporting teams, the Clubs are directing significant amounts of resources towards a public purpose every year.

It is already recognised that a NFP mutual fund cannot be directed towards the private benefit of members. The NFP limitations in the Clubs' constitutions ensure the distribution of funds to amateur sport. The question of mutual gains or losses would only apply if tax was payable on mutual income. For reasons set out tax should not be payable on 'mutual income' for clubs like the five Clubs making this submission.

Part 2: Tax Exemption for the Advancement of Amateur Sport

In this section, we make the case for continuation of the tax exempt status of sports clubs and submit that organisations which advance amateur sport should be entitled to exemption. We explain the utility of the holistic approach to determining the purpose of a sporting club, rather than merely looking to activities. By seeking to understand why a club may elect to engage in activities such as hospitality or gaming, the purpose is discerned. It is submitted that clubs will invariably engage in such further activities precisely for the purpose of securing their ongoing ability to provide high levels of support to their primary purpose – the advancement or encouragement of sport.

Background of Exempt Status

The case for including the advancement of all amateur sport as a tax exempt purpose continues to grow in the modern context. This case can be built partly upon the policy reasons for continuing to give NFP mutuals access to exemption for mutual income, and otherwise on the profound benefits which the community enjoys from a proliferation of exempt NFP sporting clubs. The way that the Australian Taxation Office (ATO) has construed s.50-45 of the ITAA 1997 has meant that many amateur sports clubs have been denied exemption even though they would seem to qualify on a broader construction of the statute.

We offer the following three overarching reasons to exempt all amateur sports clubs from tax:

1. NFP sports clubs must operate for, and apply their property to, the **ultimate purpose** of advancing and encouraging amateur sport (over and above any benefit to members that might be incidental to carrying out the purpose);
2. The advancement and encouragement of amateur sport is a **charitable purpose** in various jurisdictions, including England and Wales; and
3. The operation of a sports club typically promotes **community spirit** and the building of **social capital**.

These reasons may appear at first glance to represent high moral ideals, but in the case of the Clubs making this submission, each of these points is a practical reality.

1. Ultimate Purpose

The ultimate purpose for which clubs operate is to be identified by referring to their purpose, not primarily their activities. The purpose shared by each of the clubs making this submission is the encouragement of amateur sport. This is inferred from the nature of each club, and it is required by each of the Clubs' constitutive documents. Each club is an NFP, and therefore cannot return a surplus to its contributors, but rather must direct the surplus to an entity which operates for a similar purpose on winding up. Once funds or assets have been contributed to an NFP amateur sports club, the money remains set aside for that purpose.⁷

⁷ See *The Laws of Australia* 15.13.64 referring to *Christ's Hospital v Grainger* (1849) 1 Mac & G 460; 41 ER 1343), *Perpetuities and Accumulations Act 1985* (ACT), s 15(3); *Perpetuities Act 1984* (NSW), s 14(4);

The fact that the Clubs' activities are principally directed towards fundraising does not mean that their purpose is anything other than the advancement of sport. This principle was accepted by the High Court of Australia in *Word Investments* (citing the English Court of Appeal in *Inland Revenue Commissioners v Helen Slater Charitable Trust Ltd*) in the context of charitable trusts:

'...where the trusts on which the funds are held envisage the accomplishment of the charitable purpose by a payment to some other organisation, I cannot for my part see why such a payment is not an application of the funds... I entertain no doubt whatever that, as a general proposition, funds which are donated by charity 'A', pursuant to its trust deed or constitution, to charity 'B' are funds which are 'applied' by charity 'A' for charitable purposes.'⁸

This reasoning in the context of charities applies equally in the context of NFPs, including amateur sports clubs. Clubs that raise funds and pass them to other sporting clubs are behaving similarly to charities that do likewise. As with member benefits, the incidental benefit of members does not vitiate the sporting purpose.

The comments of Lord Atkin in *Commissioners of Inland Revenue v Yorkshire Agricultural Society* are relevant in this context:

If the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the society being established for charitable purposes only.⁹

Members benefit in sporting clubs, but in a similar incidental way.

The Clubs strongly advocate the continuation of the holistic 'purpose test', particularly as they are aware that the Australian Tax Office ('ATO') has followed *Re Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation ('Cronulla')*¹⁰ in determining the tax treatment of many sports clubs throughout Australia. The Clubs submit that such an approach will lead to all of the Clubs and many clubs like them being recognised as akin to charities. Like charities, their social activities are ultimately for the purpose of raising funds for delivering public benefit, rather than providing private gains to members. Consequently such sporting clubs should properly be treated as exempt from income tax.

Rather than viewing each sports club as a private entity seeking to secure private gains on its own behalf, NFP sporting clubs like the clubs making this submission should be viewed as diffuse reserves of public funds that are each being put to use in a manner which best suits their local community and its need for sporting facilities.

Perpetuities Act 1994 (NT), s 16(4); *Property Law Act 1974* (Qld), s 219(2); *Perpetuities and Accumulations Act 1992* (Tas), s 16(5); *Perpetuities and Accumulations Act 1968* (Vic), s 16(2); *Property Law Act 1969* (WA), s 111(2).

⁸ [2008] HCA 55, [37] (per Gummow, Hayne, Heydon and Crennan JJ).

⁹ [1928] 1 KB 611, 631

¹⁰ [1990] FCA 90.

2. Public Support for Charity Status

The advancement of amateur sport ought to be regarded as a charitable purpose which attracts exemption from income tax. 'It is undeniable that the Australian population generally exhibits considerable enthusiasm for sport'.¹¹ In fact, sport is integral to the psyche of Australians; being sporting is a mark of being Australian – it crosses cultural lines.

There is evidence of strong community support for the acceptance of the advancement and encouragement of sport as a charitable purpose and this intent is reflected, it would seem in legislation. The explanatory memorandum to the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) makes it clear that 'the advancement of amateur sport' has been anticipated as a possible inclusion into the definition of charitable purpose. In the Act at section 100-20, the example is given of the ACNC removing a person from the office of director but their continuing as club captain. The note provides:

Note: Suspension or removal of an individual as a responsible entity does not necessarily affect the rights or duties of the individual in other capacities.

For example, under the governing rules of an incorporated sporting club an individual may be a director of the club (and therefore a responsible entity) because he or she is the club captain. Removal of the individual as a responsible entity may not in itself remove the individual from the office of club captain.

At present, the Australian Charities and Not-for-Profits Commission ('ACNC') only supervises charities, so this suggests that the government anticipates adding sporting clubs to the list of charities. This view is fortified by the Explanatory Memorandum to that Act, which identifies the 'provision of sport' as one way in which contribution is made to 'community wellbeing'.¹² The clubs acknowledge the possibility that the ACNC may regulate sports clubs as NFPs at a future time, but the construction submitted here seems the more likely construction.

A strong signal of public support is participation. Lions, for example, had over 20,000 sporting and social members in the 2012 reporting period who formed around the common objective of advancing and encouraging amateur soccer. Many of Lions' members live locally to the club and renew their membership annually. Magpies has even more stringent requirements for any member who does not play for a sporting team. Magpies attracted a membership of over 10,500 (including over 1,000 members of affiliate sports teams) in the 2012 reporting period. This is in a region which is less densely populated than Lions' local community. These membership numbers suggest strong public support and broad community support not just for the clubs, but more importantly for the advancement of amateur sport.

The Federal Government's anti-siphoning list also demonstrates the strength of public support for the advancement and encouragement of sport. The 2010 'Keep Sport Free' campaign attracted 127,854 signatures to its petition to the Federal Government to preserve free-to-air viewing of certain sporting events determined to be of the public interest.¹³ This resulted in the publication of the *Broadcasting Services (Events) Notice 2010*, which preserves the free-to-air licensing of sporting events which, in the Minister's opinion

¹¹ *Charities Definition Inquiry 2001*, 200.

¹² Explanatory Memorandum to *Australian Charities and a Not for Profits Commission Act 2012*, 265.

¹³ <http://www.keepsportfree.com.au/> (accessed 9 December 2012).

'should... be available free to the general public'.¹⁴ It is accepted by the Federal Government that sport is a significant part of Australia's culture and is worthy of pursuit and protection.

Government support is better provided, at least in the context of amateur sport, by consensus rather than grants. The Canadian legislature sought to encourage the development of amateur sport by providing direct grants to amateur sport. This methodology ultimately proved inefficient because it is difficult for government to decide which amateur sports should be the recipient.¹⁵ The idea still demonstrates public support for advancing and encouraging amateur sport, but income tax deductibility is to be preferred, as it allows people to choose which sports they will support through their gifts. The Clubs submit then, that a program of exemption and deductibility is a more efficient and efficacious means of achieving the desired goal of supporting amateur sport rather than grants. This would accord, in part, with the England and Wales model which endows organisations operating for the purpose of advancing amateur sport with charitable status, which brings with it the equivalent of deductibility through the gift aid process.¹⁶

To summarise, it is evident that both locally and abroad sport holds strong cultural and significance for the Australian public. There is considerable community support for utilising public resources for sport's advancement and encouragement. This, considered in addition to the health benefits discussed in Part 3, demonstrates that the purpose of advancing and encouraging amateur sport provides benefit to the community and satisfies the test for charity in its broadest conceptual sense. This is so even though, at present, it is not listed as a charitable purpose in Australia.

3. Community Spirit and Social Capital

Beyond facilitating sport, sports clubs frequently serve as a focal point for community and civic engagement. The grass roots nature of sports clubs in a community tends to generate an affinity between the sports club and the local community which builds community spirit in a context where it is breaking down. Lonely people go to local sporting clubs and make friends. This makes all the difference to a community, and those individuals, as the now famous research of Robert Putnam published as *'Bowling Alone'* demonstrated. In that book Putnam tells the story of two people who met and started bowling together at a Bowling Club. They became friends; one donated a kidney to the other and in so doing saved his life.¹⁷ Putnam's thesis is that if people do not participate in sporting and other community activities (like bowling), they do not form the extended networks they need to help them when a crisis (like the need for a kidney) arises.¹⁸

The notion of Community Spirit is problematized by the overall impossibility of quantifying this contribution to Australian society and is often overlooked on that basis. This does not mean it can be ignored. Notice must be taken of this vital component of a functional community and critical role local amateur sports clubs play in fostering that social capital.

¹⁴ *Broadcasting Services (Events) Notice (No. 1) 2010* (Cth), n.4.

¹⁵ Eckert, S. *High Performance Sport versus Participatory Sport and Physical Activity: an Examination of Canadian Government Priorities in Bill C-12, the Physical Activity and Sport Act*, p 13.

¹⁶ *Charities Act 2011* (England & Wales), s.3(1)(g)

¹⁷ Robert D Putnam, *Bowling Alone - The Collapse and Revival of American Community* (1st ed, 2001) 100.

¹⁸ See also Anthony Giddens 'Arnold Goodman Charity Lecture' (Speech delivered at the 16th Arnold Goodman Lecture, London, 15th June 1999).

Though community spirit and social capital cannot be directly measured, the Clubs contribute to the development of social capital in at least the following ways:

- All of the Clubs specifically advance and encourage sport as a unifying idea and activities that people can congregate around and participate in together;
- Lions provides free social membership to the parents of its junior players to encourage greater involvement in both junior sport and the greater community of members;
- The Clubs all provide facilities which the local community is able to make use of. Jets provides the use of its facilities for community purposes free of charge;
- Norths originally formed around both the Northern Suburbs Rugby League Club and the Kallangur Services Club and provides a broad opportunity for a duality of social engagement across the two interests;
- Magpies provides facilities for and facilitates the interaction of a large number of different sporting clubs across different disciplines; and
- Devils arrange functions and social events for its players and their guests and relatives outside of the usual practice and match times.

Sporting clubs provide excellent opportunities for people in today's society to get together as a community. Putnam points out that in terms of social capital development, a proliferation of not-for-profit organisations does not necessarily equate with accretion of social capital. It is the sporting clubs, the choirs, the churches and the other community groups that bring people together that build social cohesion and develop social inclusion. Mailing list lobby groups may have large memberships, but contribute little to the development of an inclusive healthy Australian Society.¹⁹ In an increasingly lonely nation, amateur sporting clubs are becoming integral to our social cohesion and our social inclusion. To use the words attributed to track athlete Jessie Owens, "friendships born on the field of athletic strife are the real gold of competition. Awards become corroded, friends gather no dust."

The difference between types of clubs should be central to tax concession planning which must recognise, it is submitted, that amateur sporting clubs are significant contributors of social capital, to the benefit of the whole community.

Answers to Discussion Questions on Exemption

Q 1 What criteria should be used to determine whether an entity is entitled to an income tax exemption?
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The Discussion Paper outlines the expansion of the categories of charity over time. It is noteworthy that each of the categories of exempt organisation tend to reflect the various categories of need experienced by the community. The extension of charitable purpose to include the advancement of amateur sport would bring this purpose within the class of exemption whether or not members incidentally benefited.

¹⁹ Robert D Putnam, *Bowling Alone - The Collapse and Revival of American Community* (1st ed, 2001) 49, 51.

If that approach was not adopted, then amendments should be made to s.50-45 so that the Clubs and others like them are exempt. The condition that an entity must operate on a not-for-profit basis, and the other present special conditions which relate to s.50-45, might need to be amended so that the present limitations imposed by the ATO do not apply.

Q 2 Are the current categories of income tax exempt entity appropriate? If not, what entities should cease to be exempt or what additional entities should be exempt?

The Discussion Paper identifies at paragraph 227 the concept of public benefit and the centrality of charity. Provided the concept of charity is expanded as it has been in the UK to include advancement of amateur sport, it is an eminently useful idea. There may be purposes presently listed in Division 50 that are not appropriate for income tax exemption but it is not the purpose of this submission to deny others – only to ensure that the purpose of advancement of amateur sport as pursued at least by the Clubs is included in the category of exempt purposes.

Q 3 Should additional special conditions apply to income tax exemptions? For example, should the public benefit test be extended to entities other than charities, or should exemption for some types of NFP be subject to different conditions than at present?

It will be evident from the submission so far that there is not necessarily an objection to clubs such as the five making this submission meeting the public benefit requirement of charities. That members are to benefit also, this should be treated in a manner akin to advancement of education, and presumption of public benefit should apply on a basis similar to the way the presumption operates with advancement of education as a charitable purpose.

At present, the construction of s.50-45 is conducive to the 'purpose' test. It should remain that way without the imposition of any further special conditions beyond perhaps a public benefit test akin to education if the definition of charity is expanded to include advancement of sport.

Q 7 Should the ATO endorsement framework be extended to include NFP entities other than charities seeking tax exemption?

There should be no additional requirements beyond proving the body is for the advancement of sport, and is an NFP. As far as practicable, the whole of the assessment process for exemption should pass from the ATO to the ACNC. The conflict of interest issues with the ATO assessing exemptions are well documented and the sooner the ATO is out of the not-for-profit exemption assessment process the better. It is not appropriate to have two regulators for the sector.

Part 3: Deductibility for Community Health and Wholeness

In this section, we set out a case for the extension of income tax deductibility to all clubs that exist for the advancement of sport. Some of the arguments have been foreshadowed but in summary this section will argue that if health promotion is worthy of deductibility, and it is, so too are organisations that advance amateur sport.

Public Health Issues

In recent times, public concern has grown about the increasing incidence of obesity in Australia. For example, take the following report in *The Australian*:

‘According to outraged reports last week, Australia is the fattest country in the world Research courtesy of the Baker Heart and Diabetes Institute suggests an estimated 9 million adults are wobbling about on the verge of a cardiac arrest. The Australian Institute of Health and Welfare confirms 12 million Australians are overweight or obese.’²⁰

Several controversial calls for political intervention have achieved significant media attention recently, including calls for the imposition of a ‘Fat Tax’.²¹ The debate has developed to the point where there is a suggestion that a child’s weight should be displayed on his or her school report card.²² There is even a proposal to offer \$3,000.00 concessions to people who install an exercise application on their smartphone.²³ There is a proposal that Weight Watchers courses should be claimed on Medicare.²⁴ In 2011, Deputy President Forgie of the Administrative Appeals Tribunal observed:

‘One of the greatest public health challenges facing Australia is 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.’²⁵

Health - and particularly obesity - is a very significant community concern in Australia at present.

Sporting clubs provide an essential contribution to public health by promoting engagement in physical exercise. It is a matter of public knowledge that physical activity promotes health and fitness, but studies also show that physical activity lowers levels of depression and other debilitating illnesses.²⁶ For these reasons, among others, the 2001 Charities Definition Inquiry recommended ‘the encouragement of sport and recreation to advance health,

²⁰ Cassandra Wilkinson ‘Meddling to do a fat lot of good’ *The Australian* December 17, 2012.

²¹ Williams, J. ‘Call for a Fat Tax to Encourage Health’ *Sydney Morning Herald* (2012) Available at <http://www.smh.com.au/national/health/call-for-fat-tax-to-encourage-health-20120516-1yrh3.html>

²² Harrison, D. ‘F for Fat: Obesity on Report Cards?’ *The Age* (2012) Available at <http://www.theage.com.au/national/f-for-fat-obesity-on-report-cards-20121206-2ayd2.html>

²³ Peddie, C. ‘Tax Rebate worth up to \$3,000 could be an incentive to keep healthy’ *The Telegraph* (2012) Available at <http://www.dailytelegraph.com.au/news/national/tax-rebate-worth-up-to-3000-could-be-an-incentive-to-keep-healthy/story-fndo2izk-1226531586205>

²⁴ Dunlevy, S and Conelly, C. ‘Dieticians Reject Weight Watches Medicare Proposal’ www.news.com.au (2012) Available at <http://www.news.com.au/lifestyle/health-fitness/dieticians-reject-weight-watchers-medicare-proposal/story-fneuz9ev-1226532498304>

²⁵ *Bicycle Victoria Inc v Commissioner of Taxation* [2011] AATA 444, [181].

²⁶ Young, S. *How to Increase Serotonin in the Human Brain without Drugs* (2007) 32(6) *J Psychiatry Neurosci*. 394.

education, social and community welfare, religion, culture or the environment be a charitable purpose.¹²⁷

It said, 'encouraging sport to promote the health of participants would be charitable under the proposed head of charity 'the advancement of health'.²⁸

Amateur sporting clubs can actively encourage these health benefits in a way that is likely to reach communities in possibly a more effective manner than any other alternative. This is one area where the not-for-profit sector might be much better than government at achieving the desired social policy objective of a healthier population.

'Sin Taxes'

Sin taxes do not work. For hundreds of years, governments have imposed 'sin taxes' to act as disincentives for public health reasons.²⁹ In Denmark, a 'fat tax' was introduced only to be repealed a year later because it was found not to work.³⁰ In Australia, there are two prominent present-day examples of such 'sin taxes', and whilst the evidence is not conclusive there is no compelling evidence of success. These are the so-called 'Alcopops Tax' introduced in 2007 and the 2010 increase in tobacco excise. These are now discussed below.

1. Alcopops

The Australian Medical Association ('AMA') has claimed that the 'Alcopops Tax' has been successful in its aims of reducing teenage binge drinking.³¹ However in the same statement, the spokesperson for the AMA noted that 'the stated preference of young people for RTDs [ready to drink] did not change' between the 2005 and 2008 Australian Secondary School Alcohol and Drug Surveys ('ASSAD').³² Indeed, the 2011 ASSAD demonstrated that overall, pre-mixed drinks still rated as the second preference of high school children (39.4%, with 39.9% preferring spirits),³³ though showing an overall decrease in alcohol use by high school children. It is unclear how from this data the conclusion can be drawn that the tax has worked when it seems evident that some other factor is causing a general decline in overall alcohol use by high school children. Indeed, the relevant studies are epidemiological – the data cannot logically support the conclusion that the Tax has caused the decline in alcohol use. Given the high preference for pre-mixed drinks among high school children, it seems more reasonable to suggest that the tax has not had the desired effect of reducing the desirability of pre-mixed drinks, but something else seems to be causing an overall decline in the trend of teenage drinking.

²⁷ Above n 11, 195.

²⁸ Above n 11.

²⁹ Creighton, R. *Fat Taxes* (2010) 31(1) *Journal of Legal Medicine* 123, 124.

³⁰ ABC News. *Denmark to Scrap World's First Fat Tax*. (2011) Available at <http://www.abc.net.au/news/2012-11-11/denmark-to-scrap-worlds-first-fat-tax/4365176>

³¹ Daube M. *Alcopops – has the Tax Worked?* (Australian Medical Association, 2011). Available at <https://ama.com.au/media/alcopops-has-tax-worked>.

³² Drug and Alcohol Office Surveillance Reports No. 2

³³ Bulletin: Alcohol and Other Drugs. (Government of Western Australia Drug and Alcohol Office., 2011).

It is also noteworthy that, according to the NSW Bureau of Crime Statistics and Research, the liquor market has seen significant increase in retail theft between April 2008 and March 2011 – recording a 48.25% increase in incidents of theft.³⁴

2. Tobacco Excise

In 2010 the Federal Government increased the tobacco excise by 25%, claiming that the increase would reduce the incidence of smoking and smoking-related illness.³⁵ In September 2012, the Federal Government announced that the tobacco excise had only generated \$5.45b compared to the government's forecasts of \$5.79b.³⁶ However, if one refers to Budget projections from 2006-7, it will be noted that revenue forecasts for 2011 were \$5.43b.³⁷ One could argue that this demonstrates some reduction in consumption, given the significant increase in the excise. However, this argument fails to regard lost revenue from the increase in illegal exports which has occurred since the imposition of the increase. According to Customs data, 68 million smuggled cigarettes were intercepted in the 2009-10 financial year. In 2010-11 this figure rose to 82 million, and in 2011-12 Customs intercepted 122 million smuggled cigarettes, resulting in \$128 million in evaded duty (not considering avoided excise).³⁸ The introduction of the *Customs Amendment (Smuggled Tobacco) Bill 2012* (Cth) signals the evident concern of the Government over the increase in illegal activity since the increase in the tobacco excise was imposed.

From these two case studies we can draw the inference that the imposition of 'sin taxes' has not had a direct or discernible impact on disapproved behavior, and in fact correlates with an increase in other social problems and particularly criminal behavior. It is unsurprising that the use of taxation to stigmatise bad behaviour simply does not work.

This discussion is of particular significance to recent calls to impose a 'Fat Tax' on foods with a high calorie yield. The evidence outlined above supports the proposition that there is either limited or no merit in using direct taxation to control health related behavior. In the *Bicycle Victoria* case cited above, Deputy President Forgie observed that 'meeting the [obesity] 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'.³⁹

In addition, one 'Fat Tax' imposed in New York posed a real threat to employment and economic welfare.⁴⁰

³⁴ Mohamad, H. *Background Paper: Retail Crime*. (NSW Department of Attorney General and Justice, 2011).

³⁵ Commonwealth Department of Health and Ageing (20 May 2010) 'Increasing tobacco excise to reduce smoking rates', available at <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/factsheet-prevention-01#.UND6929lkfQ>; Matthew Thomas (2010) 'Tobacco excise increase' in *Budget Review 2010-2011* (Parliamentary Library Research Paper no. 17 2009-2010) pp 188-191, available at <http://www.apf.gov.au/binaries/library/pubs/rp/2009-10/10rp17.pdf>.

³⁶ Herald Sun. *Tobacco Tax Revenue falls by \$341m*. (2012) Available at <http://www.heraldsun.com.au/news/national/tobacco-tax-revenue-falls-by-341m/story-fndo48ca-1226480197863>

³⁷ Tobacco in Australia. *Revenue from Tobacco Taxes in Australia*. Available at <http://www.tobaccoinaustralia.org.au/chapter-13-taxation/13-6-revenue-from-tobacco-taxes-in-australia>

³⁸ Australian Customs and Border Protection Service. *Tobacco Smuggling*. (2012) Available at http://www.customs.gov.au/aboutus/annualreports/2012/part03/1_5_tobacco_smuggling.html

³⁹ *Bicycle Victoria*, above n 25.

⁴⁰ Creighton, above n 29, 134.

The Clubs submit that there is a far better way to promote public health than resorting to inefficient taxes. It is to encourage amateur sport through income tax deductibility.

Encouragement from the Ground Up

If the policy goal is the prevention of obesity, it seems sensible to encourage people to engage in activities that will improve their health. A problem with encouraging people to engage in amateur sports, as discussed above, is the cost. Leaving aside the fee associated with joining a club and playing for the club, a newcomer adult wishing to play amateur soccer can expect to incur the following outlays:

1. Shoes - \$80.00 - \$240.00 (depending on various orthotic needs);
2. Clothing - \$80.00 - \$150.00; and
3. Mouthguard (if required) - \$40.00 - \$120.00 (depending on dental needs).

Change the sport to Rugby League, and one can add the following:

4. Headgear - \$70.00 - \$150.00; and
5. Torso protection - approx. \$100.00.

As a rough guide, most manufacturers recommend that a pair of football shoes should last no more than two seasons. However practical experience shows that a pair of football boots will last one season. These expenses are best recognised as periodical outlays. It was mentioned above that without the subsidisation provided or received by the Clubs the fees for playing sport prohibit many Australians from engaging in sporting activities. When these costs are added, it is reasonable to observe that many lower income families simply cannot afford amateur sport. The problem is compounded as we consider costs for children which must be borne by parents or guardians. Consider the situation of a family with two or three children who all wish to play soccer or rugby league. One can expect between double to three times the amount of outlays each season.

It has already been mentioned that amateur sports clubs are localised sites of community engagement with knowledge of and affinity with their local community. More importantly, clubs are aware of the needs of their members. Given a specific reserve of funds which is to be directed exclusively to getting people engaged in support, sporting clubs could become what Frieberg might classify as enabled by a regulatory framework to empower individual engagement.⁴¹ Such a reward structure could improve the capacity of sporting clubs to develop community engagement and build social capital at the organisational level, whilst also addressing the limitations on government resources in providing an adequate response.⁴²

The Canadian model of centralised grant-making was abandoned due to inefficiency. Other coercive means of discouraging unhealthy behaviour tend to generate more problems than they solve. The analysis leads logically through to the conclusion that deductible gift recipient (DGR) status should be extended to amateur sports clubs for the following reasons:

1. The advancement of amateur sport ought to be recognised as a charitable purpose;

⁴¹ Frieberg, A. *The Tools of Regulation*. (The Federation Press: Leichardt, 2010), 97.

⁴² *Ibid*, 102.

2. This charitable purpose is deserving of direct public funding; but
3. Providing such funding by way of deductibility is more efficient than levying taxes and redistributing the funds; and
4. The donated funds will be applied directly to the community's need for amateur sport, and therefore will be subject to lower transaction costs.

Finally, extending deductibility to sports clubs assists the consolidation of each clubs' resource base towards the overall goal of promoting sport which decreases the reliance of the clubs on other commercial activities to assure the provision of services.

Answers to Discussion Questions on Deductibility

Q 11 Should all charities be DGRs? Should some entities that are charities (for example, those for the advancement of religion, charitable child care services, and primary and secondary education) be excluded?

This submission is focussed on the advancement of amateur sport and reasons why it should be a purpose that enjoys DGR status. The five clubs making this submission do not comment on the entitlement or otherwise of other entities to DGR status.

Charities or entities which exist for the promotion of amateur sport should be granted DGR status in order to accept donations from outside membership for the advancement of the public benefit provided by amateur sport.

Q 13 Would DGR endorsement at the entity level with restrictions based on activity address the behavioural distortions in Australia's DGR framework? Could unintended consequences follow from this approach?

The Clubs are not aware of 'behavioural distortions' so cannot make comment on that issue.

They submit that ideally DGR status should be extended to them as clubs at the entity level. The Clubs would not object, though, to particular activities receiving DGR status, as this is not an uncommon approach under Australian tax law at present. The obvious activities to attract DGR status would be sports programs involving some level of physical exertion. Perhaps, following the model of deductibility for religious education in schools, a threshold could be set initially for deductibility for advancement of amateur sport amongst children.

Q 14 If DGR status is extended to all endorsed charities, should this reform be implemented in stages (for example, over a period of years) in line with the PC's recommendations, or should it be implemented in some other way?

Obesity is a significant and growing problem for Australia. Action is required immediately. Therefore the extension of DGR status to charities or entities which exist for the advancement of amateur sport ought to be implemented as a matter of priority.

The Clubs make no comment on stages for implementation of other purposes to the category of DGR.

A Concluding Comment

The underlying policy objective of tax concessions is to fund community benefiting purposes. Few purposes are more beneficial to the community than amateur sport. The provision of facilities for amateur sport, particularly playing fields, is expensive. The Clubs and thousands like them are presently achieving their community benefiting objectives, but are constrained by the current tax arrangements. The Clubs submit that extending exemption and deductibility to amateur sporting clubs is arguably one of the most constructive ways government can support the not-for-profit sector in the role it plays in the development of Australian society.