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## Significant win for “charitable purpose” taxpayer in payroll tax dispute

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PwC's Tax Controversy team has successfully assisted the Telecommunications Industry Ombudsman in a recent Supreme Court of Victoria case regarding the breadth of the “charitable purpose” exemption for Victorian payroll tax purposes.

To achieve this significant outcome, PwC's Tax Controversy team worked with PwC's State tax specialists to mount a vigorous, factually-complex and novel case – the consequences of which will resonate across the Australian not-for-profit sector.

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### In brief

The Supreme Court of Victoria in *Telecommunications Industry Ombudsman Ltd v Commissioner of State Revenue* has held that wages paid by the Telecommunications Industry Ombudsman (TIO) are exempt from Victorian payroll tax pursuant to section 48(1) of the *Payroll Tax Act 2007* (VIC), due to the TIO being a “non-profit organisation having as its ... dominant purpose a charitable ... purpose”.

The TIO applied for an exemption from payroll tax and a refund of payroll tax paid between 7 December 2007 and 7 December 2012 on the basis that it was a non-profit organisation with a charitable purpose. The Commissioner of State Revenue (Commissioner) rejected the application.

The judgement is significant as it expands and clarifies a number of concepts underpinning the section 48(1) payroll tax exemption. Key points made by the Court include:

- The meaning of charitable purpose “moves with the times”. Accordingly, telecommunications (and similar) services may be “essential services” in the modern age;
- Courts should not adopt the narrow approach to determining a taxpayer's purposes (i.e. by reference only to the stated objectives in its Constitution);
- The mere existence of a corporate structure or a regulatory object does not affect the nature of a taxpayer's dominant purpose; and
- Administrative and other non-charitable functions may be regarded as charitable if they support a core and overarching charitable purpose.

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### In detail

#### The case

Established in 1993, the TIO's primary role is to provide a free and independent dispute resolution service for small business and residential consumers in relation to telephone or internet service providers. In

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determining whether the TIO satisfied the two limbed test in section 48(1), the considerations for the Supreme Court were:

- Is the TIO a “non-profit organisation having as its ... dominant purpose a charitable ... purpose”? and
- Are the wages are paid to persons “engaged exclusively in work of a ... charitable ... nature for the ... non-profit organisation”?

The Commissioner argued that TIO did not have a charitable purpose and that its functions were simply regulatory, which is not a charitable purpose. The Supreme Court rejected both arguments.

### ***Determining purpose***

Referring only to the TIO’s Constitution Memorandum and Articles of Association, the Commissioner argued that the purpose of the TIO is regulatory, being limited to operating and administering a statutory scheme for the investigation and determination of complaints.

The TIO argued that, rather than the Commissioner’s narrow and formalistic approach, a “holistic” understanding of purpose is required. This was based on authorities including *Digby J* in the *Law Institute of Victoria Case*. They argued that the correct approach should have regard to objects, history of formation and the activities it performs in practice. Relevantly, expert evidence for the taxpayer suggested that the objects of the TIO are both many and varied, and involve a range of activities including:

- Providing an independent avenue to resolve complaints by consumers against their telecommunications service providers: by providing this as a free service, the TIO reduces the significant power imbalance that exists between consumers and large corporate service providers, thus facilitating a more fair and principled process. It also lessens the case load for Courts and Tribunals, which reduces public expenditure and procedural delays;
- Improving industry standards by identifying systemic failings in the industry: this is beneficial to the community as it minimises the likelihood of negative experiences and potential disputes. This involves the TIO working closely with consumers, service providers and public policy institutions to understand challenges and encourage the implementation of solutions. The TIO achieves this by publishing guidelines to be adopted by service providers (e.g. the Financial Hardship guideline); and
- Reaching out to disadvantaged communities to provide information and support to users: such information is designed to support communities to engage with Australia’s telecommunications infrastructure while also understanding and managing the associated financial commitments. A key focus of the TIO in this regard has been to extend its services into indigenous communities, particularly in rural areas where there are significant economic, language and social barriers to access.

The Court ultimately accepted the TIO’s submission that “*dominant [refers to] that purpose which was the ruling, prevailing, or most influential purpose*”. Accordingly, the Court rejected the narrow approach presented by the Commissioner. Further, the Court held that the TIO should not be regarded as a regulatory body despite its statutory authority, drawing a distinction between the role of an industry ombudsman and industry regulator.

### ***Charitable purpose***

Whether a purpose is a “charitable purpose” in the sense required under section 48(1) requires consideration of “charitable” under the common law and with reference to its legal meaning given by the *Statute of Charitable Uses Act 1601* (the 1601 Act). Only the fourth head of charity, being “purposes beneficial to the community” was available to the TIO on the facts. Accordingly the TIO was required to satisfy the Court that its dominant purpose is to provide a benefit that is enjoyed by a sufficient portion of the community.

TIO’s claim was based, in part, on the pervasiveness of the modern telecommunications network (demonstrated by the millions of users within Australia) and the benefits associated with a more

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empowered and informed consuming public. It also referred to its numerous other objectives and activities, including improving industry standards and community out-reach programs. Despite there being no precedent for the TIO's particular service being regarded as a "charitable purpose" as defined in the common law, the Court held in favour of the TIO.

This decision reflects the Court's acknowledgement that the common law understanding of what is "public" and sufficiently beneficial is a dynamic prospect to be reconsidered in light of changing circumstances.

TIO also submitted that it should not lack a charitable purpose simply by virtue of being a body created under statute or having a corporate structure. The Court supported this view.

### ***Engaged exclusively in charitable work?***

Section 48(1) of the Payroll Tax Act clearly refers to wages paid to persons "engaged exclusively in work of a ... charitable ... nature."

Nevertheless, the Court accepted TIO's submissions and held that activities that are not inherently charitable in nature (such as administrative activities) may be imputed with a charitable character if they serve the greater charitable purpose.

### ***The takeaway***

This case is a reminder to all organisations and institutions that "charitable purpose" is a dynamic principle that should be reviewed from time to time in light of changing circumstances. It should be understood in a holistic sense, taking into account all relevant objectives and activities.

For this reason, taxpayers are well advised to regularly reassess their activities and the broader circumstances in which they operate in context of the relevant law. Payroll tax exemptions (among others) based on the "charitable purpose" principle actually may be more readily available than historically had been thought.

### ***Let's talk***

For a deeper discussion of how these issues might affect your business, please contact:

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