

Clubs Australia – Submission

Treasury Laws Amendment (Mutual entities) Bill 2018

Clubs Australia welcomes the opportunity to comment on the exposure draft of *Treasury Laws Amendment (Mutual entities) Bill 2018* (the exposure draft).

Clubs Australia represents 6,413 not-for-profit clubs, which serve as social hubs for 13.2 million club memberships. All clubs are mutual organisations and many clubs rely on tax benefits from mutuality, which provides that a club's mutual dealings with its members are not subject to income tax.

Despite receiving some income tax relief through mutuality, clubs pay approximately \$2.64 billion in taxes per year to local, state and federal authorities. Taxes paid by clubs include gaming tax, payroll tax, stamp duties, GST and various local government rates and levies.¹

Clubs Australia does not support a legislated definition of *mutual entity* in the *Corporations Act 2001*. We are concerned that codifying a definition has the potential to displace the long-standing application of mutuality by the Australian Taxation Office (ATO) or interpretation by courts.

Despite not being codified, the ATO and courts' consistent application of mutuality has provided clubs with a high degree of clarity and certainty. This certainty instils clubs with the confidence to continue investing and growing their economic contribution to Australia.

Mutuality and clubs

The principles behind mutuality are still as relevant in 2018 as they were in 1918 when established by *The Bohemians Club v Acting Federal Commissioner of Taxation* (1918) 24 CLR 334.

Under mutuality, a registered club is not required to pay income tax on income it receives from members, whether this be through membership subscriptions or other mutual dealings.

The special tax treatment afforded to dealings with members is based on the proposition that a taxpayer cannot derive income from itself.

The application of mutuality arose and evolved through common law. To assist eligible entities, the ATO has prepared guidance in the form of *Mutuality and taxable income*. The ATO's guidance, in addition to several private rulings and determinations, enables clubs to understand and benefit from mutuality.

In addition to common law, s 59-35 of the *Income Tax Assessment Act 1997* (ITAA) ensures that mutual receipts have the appropriate non-taxable status.²

Despite s 59-35 of the ITAA, the types of entities and nature of dealings covered by mutuality remain subject to common law.

¹ 2015 National Clubs Census, *KPMG*.

² Section 59-35 also expands the beneficial tax treatment to certain amounts which would not otherwise constitute mutual receipts.

Clubs Australia's position

Clubs Australia agrees with the objectives set out in paragraph 1.5 of the draft explanatory memorandum; which states:

The recommendations in the Hammond Report are aimed at improving access to capital, removing uncertainties currently faced by the mutual sector, and reducing barriers to enable cooperatives and mutuals to invest, innovate, grow and compete.

While Clubs Australia broadly supports these objectives, we do not believe that the exposure draft achieves them.

Particularly, Clubs Australia questions the necessity of modifying the laws of mutuality where there is no identifiable problem. When s 59-35 was inserted into the ITAA by *Tax Laws Amendment (2005 Measures No. 6) Act 2006*, the principle of mutuality had recently been altered by the Federal Court of Australia's decision in *Coleambally Irrigation Mutual Co-Operative Ltd v Commissioner of Taxation* [2004] FCAFC 250. It was therefore necessary to codify aspects of mutuality to ensure that its traditional interpretation continued to apply. Since the legislative reforms of 2006, clubs have benefitted from over a decade of the ATO consistently applying mutuality.

Clubs Australia is concerned that, by modifying a functioning and well-understood principle, the Government risks altering its application and undermining confidence. Such an amendment would introduce, rather than remove, uncertainties.

For instance, an entity's legal structure does not affect its mutuality status. This is reflected in s 59-35 of the ITAA, which applies to *entities* and therefore covers the diversity of club legal structures, including companies limited by guarantee, co-operatives, incorporated associations and unincorporated associations. Accordingly, consistent with common law, the ITAA does not, of itself, affect how mutuality is applied to different entities.³

In contrast to the ITAA's broad application, s 51M of the exposure draft would only apply to companies registered under the Corporations Act. Since other entity types – such as co-operatives, incorporated associations and unincorporated associations – are governed by state and territory legislation, the definition of *mutual entity* in the Corporations Act cannot extend to these structures. Such an approach departs from the long-standing arrangement, whereby mutuality is applied uniformly across entity types.

Regardless of whether this specific concern eventuates, it exemplifies the potential for the exposure draft to introduce uncertainty and undermine confidence. This concern underscores Clubs Australia's broader position; that there is no necessity to amend the law of mutuality, and doing so risks undermining certainty and confidence.

If the Government decides to progress legislation which codifies a definition of *mutual entity* in the Corporations Act, Clubs Australia would appreciate confirmation that the legislation would not adversely affect non-company entities that currently benefit from mutuality.

Clubs Australia welcomes the opportunity to provide input on this matter and looks forward to further consultation. Should you wish to discuss this submission further, please contact Josh Landis, Executive Manager of Public Affairs on (02) 9268 3004, or by email at JLandis@clubsaustralia.com.au.

³ Mutual Entity is also defined under Division 326 of the *Income Tax Assessment Act 1936*; however, Division 326 applies to the taxation consequences of demutualisation of certain mutual entities.