

Good governance for Trader Associations: lessons from VCAT

A recent case at VCAT between persons liable to pay a special rate and charge and a municipal council is worth consideration by Trader Association committees.

In the case *McInnes & Ors v Boroondara CC* [2013] VCAT 1153, dated 2 July 2013, the VCAT Deputy President noted:

“... a core concern of the applicants is their belief that [a Trader Association] has become dysfunctional.”

It was alleged that the Trader Association committee was merely an “agent of Council” rather than reflecting the needs of the Trader Association’s members. At the heart of these issues was an ambiguity in the Trader Association’s rules concerning membership and an apparently incomplete “Register of Members”.

Who we are

We are a Melbourne based boutique law firm with expertise in law relating to not-for-profit organisations and charities. Our firm aims to provide timely, technically excellent and cost effective advice to this unique sector.

We prepared this paper for the benefit of Trader Associations as many have a close collaboration with their local Councils. Local Councils sometimes strike a special rate and charge over properties in a Trader Association area; the funds derived are provided to Trader Associations under funding agreements to promote commerce in the area.

Overview of the VCAT case

The case involved several applicants brought together in the one hearing. The principal issue for the applicants was whether a Council had validly declared a special rate and charge under the *Local Government Act 1989* (Vic). The funds collected by the special rate and charge were to be given to a particular Trader Association to expend on promotion and enhancement of commerce in a mixed-use activity centre.

VCAT decided that the Council had validly determined to strike the special rate and charge (although for one particular property, the special rate amount was reduced).

VCAT did not make a decision concerning the allegations against the Trader Association. As the Deputy President noted, it is generally not VCAT’s role to review the operation of a Trader Association; instead VCAT’s role is to review the validity of a decision by a Council to declare a special rate. The Deputy President did however make some non-binding observations about governance of the Trader Association.

Was the Trader Association committee merely an “agent of Council”?

According to the case, the Trader Association’s rules stated that a person who had paid the special rate levied by Council was eligible for membership. However the Trader Association was unable to obtain from Council the names of persons who had paid the special rate due to restrictions on Council in providing personal information. Hence the Trader Association could not readily compile a “Register of Members”.

As the Trader Association was not easily able to verify its membership, an applicant suggested that:

“...the decisions of the [Trader Association] committee (including preparation of its business plan, discussions with the Council about the striking of the special rate and the area covered by the scheme, and in the application of the funds) are not necessarily representative of the [Trader Association] ‘membership’.”

However the VCAT Deputy President observed that the Trader Association:

- had attempted to contact potential members (by way of a letter sent under cover of a Council letter to persons in the special rate area)
- had rules that provide for “...a voluntary membership...” that serves to “...create a participatory body for those who wish to be involved.”
- “does have a mechanism (albeit not ideal)” to compile a Register of Members.

The Deputy President stated that the allegations concerning the Trader Association were “serious” but noted that the Trader Association was undertaking a review of its rules to address some of the issues.

In our opinion, the Deputy President’s observations suggest that a Trader Association will tend *not* to be perceived as a Council’s “agent” if a Trader Association is seen to encourage persons to become members. The Deputy President’s observations also suggest in our opinion that a Trader Association should engage in regular “housekeeping” to tidy up loose administrative processes, such as keeping an up to date Register of Members.

Some suggestions for Trader Association committees to consider

We are aware that Trader Associations do go to great lengths to encourage new members. However we suggest that Trader Associations also ensure an applicant for membership completes a membership application form. The application form should contain a statement that the applicant agrees to the association’s purposes and agrees to be bound by its rules.

The *Associations Incorporations Reform Act 2012* (Vic) (“the Reform Act”) governs incorporated Victorian trader associations and requires associations to keep an up to date Register of Members. The Register of Members must include:

- a member’s name and address
- the class of member (if there are different membership classes)
- the date the person became a member
- the date on which a person ceases to be a member.

We also suggest Trader Associations involve their members in business planning and that the Association committee consider putting a decision to enter a funding agreement to members in general meeting. These actions should help to encourage fair discussion and commitment from members about the need to seek a particular amount of funding from Council in the first place.

The Reform Act also mandates a “procedurally fair” internal grievance process for association members. An incorporated Victorian Trader Association must allow for different views and grievances to be expressed by members. A mediator can be appointed if a formal grievance process is commenced between a member and the Trader Association.

VCAT made clear in the case that it had limited jurisdiction to intervene in the alleged dysfunction of the Trader Association; accordingly an internal grievance process may have helped the applicants in this case to articulate their concerns directly to the Trader Association (and been less time consuming and costly than attempting to air their grievances at VCAT).

In summary our suggestions for Trader Associations to consider are:

- ensure prospective members complete an application form that states the applicant supports the purposes of the Trader Association and agrees to be bound by the Trader Association’s rules
- keep an up to date Register of Members
- involve Trader Association members in the decision making process leading up to a decision to request a Council to strike a special rate and charge
- encourage members to use the internal grievance process to allow fair hearing of grievances concerning operation of a Trader Association.

If you require legal advice or assistance on internal disputes, mediation of internal disputes, membership or constitutional amendments relating to your Trader Association’s particular circumstances, please contact Derek Mortimer at DF Mortimer & Associates.

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Disclaimer

The information presented in this paper is of a general nature only and does not constitute legal advice. Circumstances can vary depending on amongst other things, the substance of a Trader Association’s rules and procedures, and the substance of any funding agreement it has with a Council.

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