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WRIGLEYS SOLICITORS

SocialEconomy

A bulletin of information for charities, voluntary organisations and social enterprises.

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Charities...

Benevolent funds given the all clear

Benevolent funds gave a collective sigh of relief when the Upper Tribunal gave its decision in February on a reference by the Attorney General on the charitable status of benevolent funds in the light of the public benefit test in the Charities Act 2006.

Mr Justice Warren and Alison McKenna, two out of the three judges in the Independent Schools case, followed the structure which they had already laid down in that case to decide that benevolent funds associated with particular employers or individuals remained charitable.

The court, in giving its judgement, indicated that the test for public benefit for prevention and relief of poverty is different from that for charities to advance education. One can expect this line of reasoning to apply to different charitable purposes. The judgement gives helpful guidance to charities which seek to prevent poverty and not only relieve it.

Interestingly, the court levelled some criticism at the use of the procedure, indicating that by the time of the hearing it was only the Charity Commission which harboured doubts as to the status of such charities, implying that at that point the Commission might have thrown in the towel saving many charities the expense of continuing with the hearing. Perhaps one outcome of this judgement will be a reduced use of this procedure in future.

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Welcome to... The Charities Act 2011

The Charities Act 2011 came into effect on 14 March 2012. It replaces most (but not all) of the Charities Acts 1992, 1993 and 2006, and all of the Recreational Charities Act 1958. It is the Act of Parliament which now sets out how all charities in England and Wales are registered and regulated.

The 2011 Act is intended to make the law easier to understand by replacing four Acts of Parliament with one. It does not make any changes to the law, but it will require some relearning for those of you who were more familiar with sections in the earlier legislation.

Despite representations from us and others in the sector, it does not replace the sections in the Charities Acts about fundraising which have not taken effect yet, such as charitable collections in public places, nor does it replace the sections on fundraising in the 1992 Act.

The Charity Commission has offered the following guidance to charities: "Your charity doesn't have to do anything differently except refer to the Charities Act 2011 in documents, reports, accounts or statements produced on or after 14 March 2012 (even if they relate to an earlier financial period).

However, your documents will still be valid even if you accidentally refer to earlier Acts. You don't have to go back and change any documents you have already finalised before 14 March 2012."

> **"The 2011 Act is intended to make the law easier to understand by replacing four Acts of Parliament with one."**

New Gift Aid declarations: HMRC guidance

HMRC has revised the Gift Aid declaration form and produced new guidance. The new declaration form includes the following statement: "I confirm I have paid or will pay an amount of Income Tax and/or Capital Gains Tax for the current tax year (6 April to 5 April) that is at least equal to the amount of tax that all the charities and Community Amateur Sports Clubs (CASCs) that I donate to will reclaim on my gifts for the current tax year".

HMRC has also published its "New guidance on Gift Aid declarations: What charities need to do". This provides an update on their views on Gift Aid and should be read by anyone dealing with Gift Aid claims for a charity. The Gift Aid declaration does not need to incorporate all the information set out in HMRC's model declaration in the guidance if the charity provides that information to donors in a different way, for example if volunteers explain the Gift Aid rules verbally using a set script that includes the mandatory information.

Charities should look to incorporate any additional information required under the new guidance into their standard declarations as soon as possible and/or to amend their processes to ensure that their staff and volunteers are providing the correct information to donors.

HMRC will continue to accept Gift Aid claims on donations made using forms based on the wording in the old HMRC model declaration until 31 December 2012.

Where charities have existing 'enduring' declarations, they do not need to replace those with new ones based on the guidance, but if they are changing the declarations they should adopt the new format. HMRC suggests that charities could remind donors who have made enduring Gift Aid declarations of the rules on tax to cover, perhaps through their regular mailshots.

See www.hmrc.gov.uk/news/new-guid-giftaid.htm

Registering new charities

The registration process for registering new charities changed on 1 March 2012. The changes are mainly administrative, in that new charities are now required to send all relevant supporting papers at the time of the application. It is, unfortunately, a move towards the 'one strike and you are out' approach of Companies House and is a result of the funding cuts.

For more information, see: www.charitycommission.gov.uk/Start_up_a_charity/Guidance_on_registering/The_registration_process_index.aspx

Industrial and Provident Societies (IPS) – to register or not to register…?

As those of you involved in IPSs will know, whilst they used to be exempt from registration with the Charity Commission, the Charities Act 2006 provided for them to have to register if they do not have another principal regulator (although the timetable for bringing this section of the Act into force keeps slipping). This has meant some learning on the part of the Charity Commission, who have now published guidance on their views on IPSs and which IPSs will need to register.

There are different types of IPS. Some are set up as 'co-operatives' (and these cannot be charities), but others are set up as 'community benefit societies' (some of which can be charities – and many of which are registered with HMRC as such). Charitable IPSs are often set up for redevelopment, regeneration and housing projects.

The main issue of concern to the Charity Commission has been that some IPSs for the 'benefit of the community' receive tax benefits as charities but also have the power to pay interest on share capital. This is unusual for charities, where a distribution of profits is not generally permitted, and the Charity Commission considered initially that a power to distribute profits was "fundamentally incompatible with charitable status". After some consultation and discussion, the Commission are now satisfied that there are (limited) circumstances in which limited payments of interest may be made, which would not amount to a distribution of profits. So it is now accepted that a power of a 'community benefit society' to pay interest on shares is not incompatible with charitable status, provided that certain features relating to payments of interest are required by the society's rules.

Any change to the requirement to register with the Charity Commission is unlikely to be agreed before mid 2012 or implemented before 2013, but in the meantime, the debate continues, so watch this space!

See also:
www.charitycommission.gov.uk/Start_up_a_charity/Do_I_need_to_register/industrial_provident_societies.aspx

Data protection

A Scottish charity (Enable Scotland (Leading the Way)) has been held by the Information Commission's Office (ICO) to have breached the Data Protection Act after two unencrypted memory sticks and papers containing the personal details of up to 101 individuals were stolen from an employee's home.

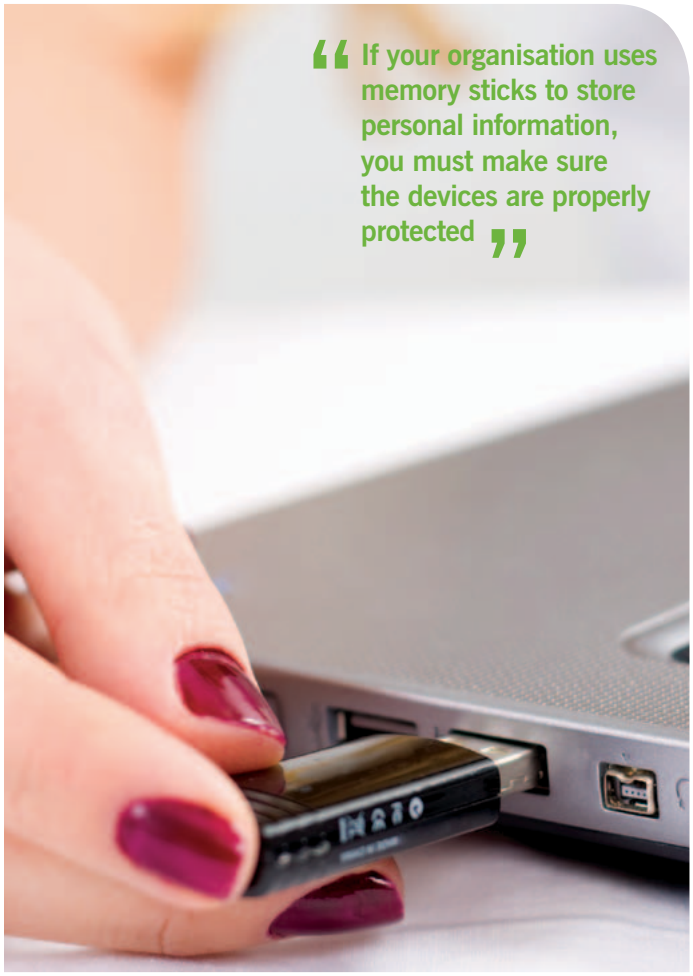
The information included peoples' names, addresses and dates of birth, as well as a limited amount of data relating to the individuals' health. The charity promptly reported the incident to the ICO in November 2011 and informed those individuals affected.

The ICO's investigation identified the following failings:

- the information should have been deleted from the memory sticks once it had been uploaded onto the charity's server.
- The charity had no specific guidance for home workers on keeping personal data secure, and
- portable media devices used to store sensitive personal information were not routinely encrypted.

Lessons to be learned:
If your organisation uses memory sticks to store personal information, you must make sure the devices are properly protected. Encrypting the data means that the information will remain safe even if the device is later lost or stolen. It is also important that employers provide home workers with guidance on how to keep any personal data taken outside of the office secure, as this is potentially when the information is most vulnerable.

The ICO has produced guidance for charities which explains how they can comply with the Data Protection Act.
www.ico.gov.uk/for_organisations/sector_guides/charity.aspx



Grant or payment for services

The case of Aberdeen Sports Village (ASV) once again makes a distinction between the receipt of a grant and the receipt of a payment for services, an area of difficulty for charities and not for profit organisations.

ASV was a joint venture between Aberdeen City Council (ACC) and Aberdeen University (AU). ASV was set up to support the Council in providing leisure facilities which would be used by the University students too. The new facilities were funded by payments to ASV by the Council and the University which were described as grants.

The VAT Tribunal considered whether the payments were properly grants or not. ASV argued it was deficit funding. The Tribunal considered that obligations to permit access by University students and some Aberdeen residents at discounted prices; priority to Council and University personnel when there was excess demand; the payment was obligatory under the joint venture agreement; the accounts showed the income as earned; the income did not decrease if the deficit on funding decreased; all suggested there was a supply of services.

ASV will now need to pay the VAT to the Council and the University. (SOC VAT Consultants **www.socvat.com** / Aberdeen Sports Village LT 2012 UKFTT 80 (TC))

Proposal for 'European Foundation' Statute

The Commission has presented a proposal for a Statute to create a single European legal form – the 'European Foundation'. A European Foundation would be fundamentally the same in all Member States and acquiring this status would be entirely voluntary - either by setting one up from scratch by converting a national foundation or by merging national foundations.

The proposal suggests European Foundations be granted the same tax treatment as that applicable to domestic public benefit purpose foundations. This would mean that donors and beneficiaries would be subject to the same treatment as if they were donating to, or receiving benefits from, a foundation established in their own Member State. It is hoped the statute would encourage cross-border activities and donations, whilst reducing the costs and uncertainty of carrying out activities and fundraising within the EU. The proposal has been passed to the EU's Council of Members and European Parliament for consideration, and in order to be adopted it will require unanimous agreement of the Member States and consent of the European Parliament.

Duties of local authority charity trustee

The Charity Commission's regulatory compliance report into Knotty Ash Special School Trust shows how councils can sometimes confuse their own and the charity's interests.

The council was sole trustee of Knotty Ash Special School Trust – a charity established to run a special school. For some years, the council had been proposing to transfer part of the land to another Liverpool charity, Liverpool Lighthouse as an eco-garden and was in discussion with the Commission about a scheme for that purpose.

The local media complained about the site's lack of use and Liverpool Lighthouse complained about the length of time it was taking the council to make the scheme. The Commission investigation found that a council employee had lived in a lodge on the land rent free for over 20 years, but no payment had been passed to the charity's funds. The intervention of the Commission led to a payment of £89,000 from the council into the charity's funds and the transfer by scheme of the land to Liverpool Lighthouse and into a new special school charity.

Employment...

Post-transfer dismissal to introduce new contracts was not automatically unfair

In Addison v Community Integrated Care (CIC) (Case Number 2507729/11) the issue for the employment tribunal was whether the sole or principal reason for the dismissal of the claimants was a transfer of an undertaking or a reason connected with such a transfer and, therefore, whether the dismissals were automatically unfair by virtue of Regulation 7 of TUPE.

The claimants worked for an organisation engaged in the provision of social care to vulnerable clients. This service was funded by way of a service contract with Cumbria County Council. The claimants' previous employment had been with West Cumbria NHS Trust when they were employed on NHS terms and conditions of employment. They transferred, under TUPE to CIC in 1996 and continued on their NHS terms and conditions. In January 2011, Cumbria County Council informed CIC that its costs to the County Council were too high and unless the service could be provided at a reduced cost, the County Council would have to put the service contract between them out to re-tender. CIC therefore considered a number of savings measures that could be made.

The single largest saving that could be made would be to move the claimants who were protected on NHS terms and conditions to the same conditions as their other 109 employees. Negotiations ensued but agreement could not be reached with the employees. To achieve the objective of putting the claimants on to new contracts they were dismissed from their existing contracts and, at the same time, offered continued employment on the new contracts. The claimants claimed unfair dismissal asserting that the sole or principal reason for the dismissal was the transfer itself or a reason connected with it.

The employment tribunal accepted that the transfer provided the background or context for the dismissals (in that had the claimants not been employed by CIC on the protected NHS terms and conditions of service they would probably not have been dismissed). But, according to the employment tribunal that was not the sole or principal reason for the transfer. Applying the decision of the EAT in Smith v Trustees of Brooklands College (EAT/0128/11) the "but for" test was not applicable. The question was what was the reason, which caused the employer to dismiss?

The tribunal found on the facts that the sole or principal reason for the dismissals was the employer's need to make financial savings in order to retain the Cumbria County Council contract. And although mere passage of time would not necessarily destroy the causal link between the transfer and the dismissal, in this case the employers need to make the financial savings amounted to a supervening event some 15 years after the transfer. It also had to consider the context of the employer putting in place other cost saving measures. It followed, therefore that the dismissal was not automatically unfair under Regulation 7 of TUPE.

Redundancy and restructuring - appointing "the best person for the job"

In Samsung Electronics v Monte D'Cruz (EAT/0039/11) the EAT held that when, after a reorganisation, a redundant employee is invited to apply for a newly created role the employer can appoint "the best person for the job", even if that involves a degree of subjectivity.

Samsung reorganised its print division. The claimant was one of three heads of department who were informed their roles would be abolished and merged into a new, single position of head of sales. The claimant unsuccessfully applied for this post. He was assessed on a presentation and scored against competencies normally used in the annual appraisal process. He then unsuccessfully applied for a more junior role, arising out of the restructure. An outside candidate was eventually appointed. The employment tribunal found the dismissal unfair because of inadequate consultation and because the criteria for selection for the new roles were too "subjective".

The EAT reversed the tribunal as to the quality of consultation, the tribunal had erred by substituting its own view for that of the employer. As to the arrangements regarding suitable alternative employment, a tribunal should certainly consider how far an interview process was objective. But although, said the EAT, "subjectivity" in redundancy cases was often seen as a "dirty word", where a post has disappeared and an employer was selecting from a new role, some subjectivity was inevitable. Tribunal should bear in mind views of the EAT in Morgan v Welsh Rugby Union [2011] IR4376 that "an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgement".

Charities and the Money Purchase Pensions deficit trap

Controversial changes, introduced by the DWP through the Pensions Act 2011, to the definition of 'money purchase benefits' means that some charities may now unexpectedly find themselves liable, for a shortfall in the schemes funding requirements.

These changes were introduced by the DWP in response to a recent court case, Houldsworth and another v Bridge Trustees Limited and another, a case that went all the way to the Supreme Court.

As a result of this new legislation, charities who joined a scheme believing that it was a money purchase scheme, in which the employees' benefits were based in part on the contribution they and their charitable employer put in, may now find that the scheme is reclassified as a defined benefit scheme (DB scheme). This may have a number of implications- one significant one being that the occupational pension scheme debt regulations would apply so that the charity may be liable for some or all of the deficit in the scheme. By way of background to this point, many DB schemes do not have sufficient assets to cover their liabilities. Any such shortfall (deficit) represents under-funding in the scheme. When an employer leaves a pension scheme, it may become liable for paying some or all of this deficit based on its share of the liabilities of the scheme and calculated as if the current and former employee members had annuities purchased from an insurance company.

There are only limited mechanisms to avoid paying this debt so charities that find themselves in a newly reclassified DB scheme are likely to become angered by the legal responsibility for an additional debt they may now face.

The Pensions Trust is one trust which has been affected by the introduction of this new legislation, and there have been calls for charities who are participating employers in its multi-employer scheme, the Pension Trust Growth Plan 3, to take legal action against it. Charities that believed that they were participating in the Plan on a money purchase basis now find that the fund falls outside the new definition of money purchase benefit and they are now liable for any deficit in the scheme's funding. The Growth Plan includes some of the largest charities in the UK, and, for them, any resulting debt liability is likely to be significant.

There is widely recognised concern that future charitable activities may be affected by the financial risk of participating in a DB scheme. Currently, charities with insufficient free assets to support their pension fund deficit may have to resort to using donations to fill the gap in funding leaving less for good causes. Furthermore, this may also impact on the attractiveness of charity mergers/restructuring where any intended corporate action may crystallise some or all of the scheme deficit so that less is available for the original charitable purpose.

It has, therefore, been argued that not for profit organisations should be treated differently for scheme debt requirements and this argument is likely to be strengthened by the effects of this new legislation. However, for the time being charities have to abide by the same complex rules and financial consequences as commercial organisations.

The Wrigleys specialist charities team work closely with our pensions team who have considerable experience in advising clients on the employer debt regime for multi-employer schemes.

This is a complex area to navigate and Wrigleys can offer you support should you require it. Please speak to your contact in the charities team, who would be happy to put you in touch with one of our pensions specialists.

Local Government...

Prayers for competence

We have referred to the Localism Act in previous editions of Social Economy and the powers which it provides in respect of a community's right to seek a designation of land as community land. This provides a community the first right of refusal to purchase on a sale of that land whether public or private.

The general power of competence, is a new local authority power to permit a local authority to do anything that individuals may do, echoing the wording of the Trustee Act 2000. It is intended that a similar power is given to parish councils. This power should hopefully remove doubt whether a local authority has the powers to undertake a particular act, such as form a charity or social enterprise without a specific authority for that purpose. The Government brought forward the date on which it came into force in order that councils had a power of competence to decide whether or not to hold prayers when council meetings begin.

Environment...

Are charities paying too much for energy?

A survey by Make it Cheaper suggests that almost half of all charities do not know they can get a VAT discount and are exempt from the climate change levy – a charge on businesses to pay for the reduction of carbon emissions. If charities qualify they will only need to pay 5 per cent VAT on much of their energy costs.

The energy used must be for non-business activities. Ancillary maintenance and repair services can qualify too. Non-business activities are those paid for by donations or grants. If there is a mixture of non-business and primary purpose business, the charity must provide the supplier with a certificate which states the percentage of the fuel and power supplied for non-business use. If 60 per cent or more of the fuel or power is for non-business use, the charity will qualify for the reduced rate of VAT on the whole supply. To get the reduced rate, the charities need to send a certificate to the energy supplier requesting the lower rate. A retrospective claim for up to 4 years can be made.
www.lmsc.org

> **"Almost half of all charities do not know they can get a VAT discount and are exempt from the climate change levy – a charge on businesses to pay for the reduction of carbon emissions."**

FC United Community Share Offer

FC United is unusual – it is a democratically owned football club run by its 2500 plus members.

Founded in 2005, it is a semi-professional club playing in the Northern Premier League. It has obligations to its fan communities and local communities built into its objects. The club averaged crowds of 2,000 a match in 2010/11 season and is clearly going places.

To support the club's further development it plans to build a stadium and community facility in Moston, North Manchester on land owned by the City Council and sought to raise £1.6m towards a £4.5m development through a community share offer launched on 1st November 2011. It announced in March that the offer had been successful. It will be interesting to watch how this business develops in future.
www.fc-utd.co.uk

FSA to enhance mutual registration service

The Financial Services Bill had provided the opportunity for HM Treasury to move the mutuals registration service to a co-location with Companies House, much in the same way as the CIC Regulator rather than an anomalous move to the Financial Conduct Authority.

HM Treasury have failed to take this long awaited step and it was left to Chris Leslie MP to propose this at the Committee Stage of the Bill in March.

Unfortunately, Mr Hoban for the Government appeared to have been briefed that the proposal was about financial mutuals which are probably less than one tenth of the mutuals on the mutuals societies register. Mr Hoban did however promise to raise with the FSA the issue of modernisation of the registry to bring the technology up to that of Companies House. This would be some progress. Nonetheless, do not expect any movement of the registry out of the financial world into the business world until perhaps ministry responsibility moves from HM Treasury to the Department of Business, and all forms of business are brought under one roof. Until then this multi-billion pound business world remains in the back waters of HM Treasury.

> **"Mr Hoban did however promise to raise with the FSA the issue of modernisation of the registry to bring the technology up to that of Companies House"**

What is a community?

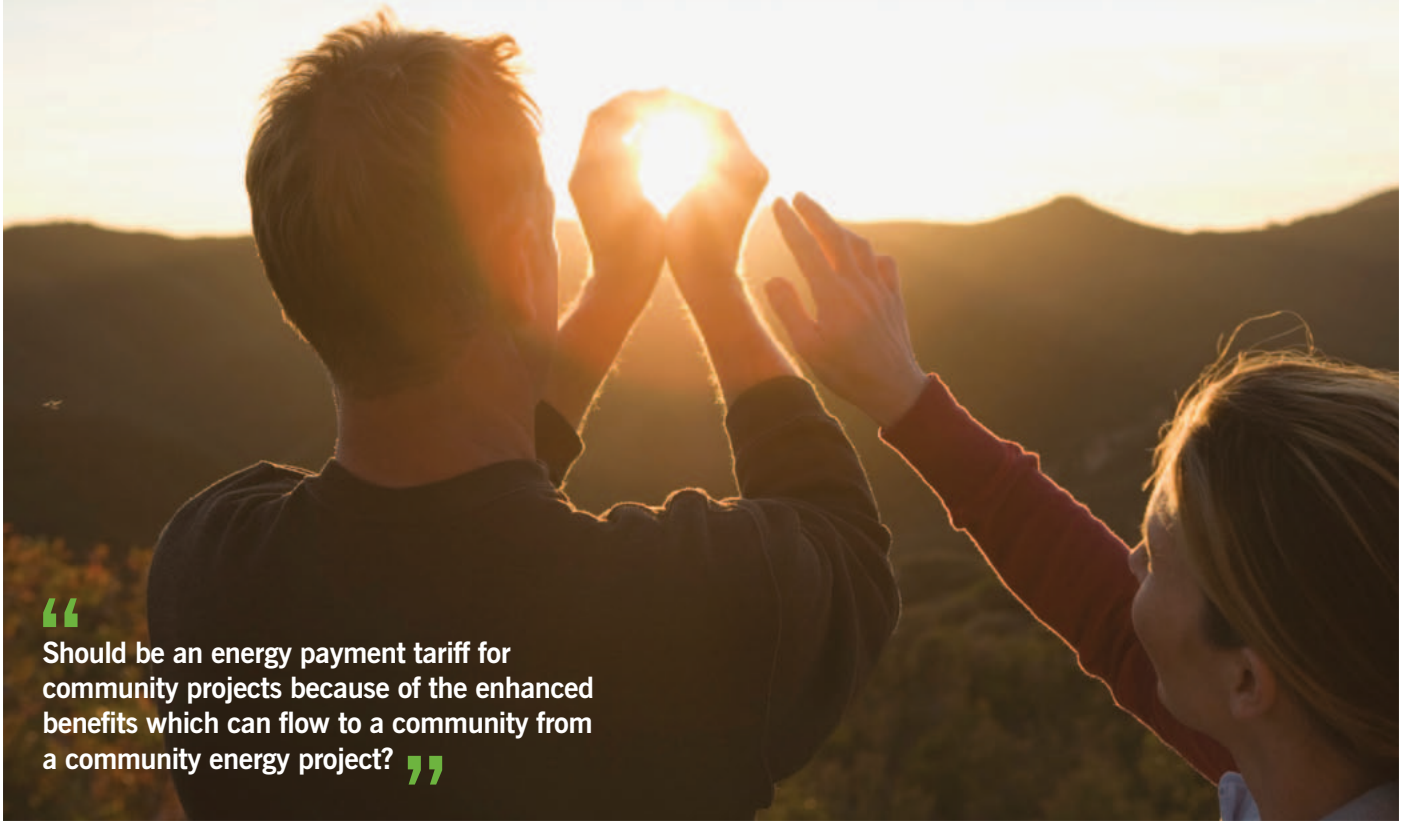
Answers to this question should be given to the Department of Energy and Climate Change by 26th April 2012.

The importance of this is the consideration by DECC on whether there should be an energy payment tariff for community projects because of the enhanced benefits which can flow to a community from a community energy project.

Reference is made to social housing providers, community energy organisations and small individual community groups. Reference is also made to the legal form of such organisations co-operative societies, community benefit societies, community interest companies and charities.

The consultation is about the administration of the FIT scheme generally and follows the flawed consultation on the solar/pv tariff which led to the halving of the solar/pv tariff. Perhaps the only good thing about the adjustment which has been made to the solar/pv tariff has been a new requirement to confirm a certain standard of energy efficiency in the dwelling into which solar/pv installation is made. It did not make sense for the consumer to contribute towards a higher tariff to generate energy when the generator was doing little to enhance their own energy efficiency.

The consultation document can be found at : **www.decc.gov.uk/en/content/cms/consultations/fits_rev_ph2b/fits_rev_ph2b.aspx**



"Should be an energy payment tariff for community projects because of the enhanced benefits which can flow to a community from a community energy project?"

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