



Building the Education Revolution

Issues for schools to consider when implementing projects

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Building the Education Revolution



On 3 February 2009 the Prime Minister announced funding of \$14.7 billion for long term investment to improve the quality of certain facilities within Australian schools, which has been dubbed the “Building the Education Revolution” (BER). This includes:

- *Primary Schools for the 21st Century* – \$12.4 billion long term investment to build or upgrade large scale infrastructure such as libraries and multi-purpose facilities in all primary schools, special schools and K-12 schools.
- *National School Pride Program* - \$1.3 billion investment to refurbish and renew existing infrastructure and undertake minor building works in every Australian school.
- *Science and Language Centres for 21st Century Schools* - \$1 billion long term investment to build around 500 new science and language laboratories in secondary schools.

By now, all school systems will be familiar with the details of the BER program and will be well under way in completing applications and getting themselves into a position to maximise their entitlement to government funding to improve their schools. As planning for the implementation of the program continues, some of the following issues might be considered by the school systems:

- Adoption of standard form building contracts so that the management of each project can be done more consistently.
- Whether to set up internal project management groups or retain external project managers.
- Securing preferred arrangements with builders and other construction trades to ensure that construction can be undertaken in a timely manner.
- Ensure proper definition of the scope of works to make sure that the projects are fully costed and therefore fully funded by the government.
- Be alert to the possibility of variations and allow for this by way of appropriate contingencies in construction budgets so that reasonable variations can be included in government funding.
- Ensure the ability of contractors to deliver the projects within the time frame established by the government to avoid the loss of funding for the project with the consequence of the system having to pay.
- Consider the management of cash flow issues between the receipt of payments

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under the program and payment out to third party contractors.

- Consider what statutory approvals are required. Many States have provided special legislation to fast track the approvals process for projects

under the BER. Whilst those fast tracking arrangements are temporary in most cases, schools should consider whether they present opportunities for the approval of projects which may not



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necessarily be undertaken through the BER program. ■

ATO areas of focus for the not-for-profit sector

One focus of the Australian Taxation Office's (ATO) compliance program for the 2008-09 year is not-for-profit organisations. Below are some of the specific areas of concern.

The ATO believes that not-for-profit organisations show a strong desire to get their tax affairs right, but often have a low level of knowledge about how the tax and superannuation systems operate.

The ATO's focus, therefore, is on correcting inadvertent errors and on a very small number of arrangements that seek to abuse the tax concessional status of charities and Deductible Gift Recipients (DGRs).

Pre-endorsement checks

Heightened attention is being directed by the ATO towards the review of endorsement applications for charities and DGRs, which may involve contacting organisations for more information.

Changes in activities after endorsement

The ATO expects to review the post-endorsement activities of organisations to determine if they remain eligible for tax concessions and/or DGR status. Attention will be directed towards the use of charities for private benefits, the involvement of charities in tax minimisation schemes,

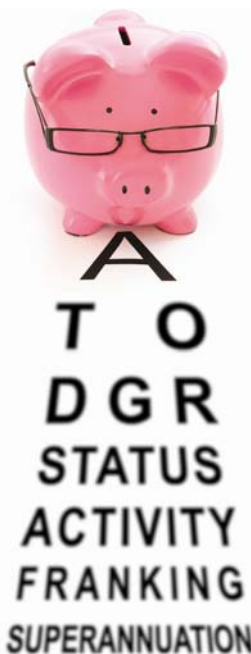
and charities that fail to meet their ongoing requirements.

Refunds of franking credits

The ATO is increasingly checking claims for the refund of franking credits, which may involve contacting claimants for additional information or undertaking more detailed reviews. In 2007-08, the ATO rejected \$3.9 million in applications for refunds of franking credits.

Superannuation obligations

The ATO is expanding their audit coverage of employers to ensure that they meet their superannuation obligations. Data matching and intelligence are increasingly being used to identify employers who are at high risk of not meeting their obligations to employees, leading to reviews and audits when risks are confirmed. In 2007-08, the ATO collected \$7.8 million in superannuation guarantee liabilities from not-for-profit organisations that had not paid sufficient superannuation for their employees. ■



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One size fits all?

“A single structure for all not-for-profit organisations would place inappropriate obligations upon the Church”

You have, no doubt, all heard about the Inquiry carried out last year by the Senate Standing Committee on Economics into disclosure regimes for charities and not-for-profit organisations. The Committee received written submissions from 183 individuals and organisations, and also conducted public hearings in numerous cities across Australia. The Committee published its report in response to the Inquiry on 4 December 2008. A full copy of this report is available at http://www.aph.gov.au/Senate/Committee/Economics_ctte/charities_08/report/index.htm.

It was anticipated that the Federal Government would issue a response to the report in March 2009. That deadline has come and gone, and as at the date of this issue of *Administry*, we are yet to receive any response from the Federal Government. We have unofficially heard, however, that the

Federal Government has drafted a response. We therefore hope that it will only be a short time before that response is made available to the public.

The report of December 2008 promulgated 15 recommendations. Having discussed all 15 recommendations in various fora with numerous charities and non-profit organisations, it is evident that one of the most contentious recommendations of the report is recommendation 7, which deals with the concept of a single legal entity.

How did this recommendation arise?

Chapter 7 of the report discusses the existing legal structures which are currently being adopted by not-for-profit organisations. The report recognises that there are currently innumerable legal structures available to the third sector,

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One size fits all?

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creating a legislative environment which is “*complex, inconsistent and confusing across Australia*”.¹

The report then proceeds to state that the two most common corporate legal structures are those of a public company limited by guarantee and incorporated association. The existence of “*religious organisations that may or may not be statutory corporations*” only receives a cursory mention.

The committee which prepared the report professes in the report that it is impossible to find one existing legal structure currently used by not-for-profit organisations that would be suitable for all organisations and, therefore, recommends that all not-for-profit organisations use the same legal structure to ensure more solid regulation in this sector. This would mean that all existing organisations, including religious organisations, would need to migrate to this new structure once it has been developed by the Federal Government.

The report then discusses whether or not this specialist legal structure should be compulsory for all not-for-profit organisations, or whether it should be merely voluntary. After studying the advantages and disadvantages of making a specialist legal structure compulsory for all organisations, the report reaches the conclusion that it should be mandatory.

The report recognises that the introduction of a specialist legal structure would require the States and Territories to refer their powers, at least with regard to incorporated

associations, to the Commonwealth Government. As many religious organisations are incorporated under State legislation, the referral of powers would also need to extend to those Acts of Parliament as well. Any referral of powers takes an inordinately long time. We anticipate that if the Federal Government was to support this particular recommendation, it would be many years before the recommendation could be fully implemented.

How could this work?

If the Federal Government was to support the introduction of a specialist legal structure, any such structure would have to encompass innumerable variations to make it suitable to the current heterogenous collection of organisations in this sector, taking into account their size, whether they are a charity or not-for-profit organisation, etc. Further, such a specialist legal structure would have to allow for various permutations to accommodate the creation of different disclosure regimes which would apply to



organisations in this sector. The Committee has itself recognised in the report that it is cognisant of not wishing to saddle small not-for-profit organisations with overly burdensome disclosure requirements.

One question is whether, after accommodating for these various variations and permutations, any such structure could still be described as being a **single** specialist legal structure. One only needs to consider the Acts of Parliament under which various Anglican dioceses and bodies corporate are incorporated, for example, the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW) and the *Anglican Church of Australia Trust Property Act 1917* (NSW), to see how difficult it would be to incorporate or allow for all of the various idiosyncrasies attached to both incorporating and operating Anglican dioceses and bodies corporate into a single specialist legal structure. How would any such ‘one size fits all’ legislation allow for the peculiarities which currently exist in the State legislation which applies to Anglican Church entities? Other Christian denominations, such as the Catholic Church, are faced with a similar issue.



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One size fits all?

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If all Church bodies become subject to legislation mandating a single, mandatory, specialist legal structure, Churches would have to comply with the various disclosure obligations created by that legislation, for example, making certain financial information publicly available. How appropriate would it be for Churches to be required to place such information in the public arena?

We have heard a couple of speakers in recent months state that it is their opinion that the Federal Government will adopt all 15 recommendations put forward by the report. It is our opinion that this is unlikely, but if it were to occur, especially in relation to recommendation 7, we believe that many Church organisations will vehemently oppose the introduction of this single structure for not-for-profit organisations. This is not only because of the various inappropriate obligations it would place upon Churches, for example, disclosing certain



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financial information, but also as it would be impossible for any such single specialist legal structure to accommodate all of the needs of the current heterogenous collection of organisations in the third sector, most especially, Churches. In our opinion, in this particular instance, one size does not and cannot fit all. ■

¹ Page 61 of the report.

Having trouble finding what you're searching for?

Makinson & d'Apice have made it easier for charities and not-for-profit organisations to navigate through the complex maze of regulatory and compliance issues governing this sector.

We've created the Charity & Not-For-Profit Resources Centre, a website which provides free access to a wide range of resources, ideas and contacts that are relevant to those managing not-for-profits.

We have also included a section with responses to frequently asked questions, along with articles and workshops that you may find useful. Visit us any time at ...

www.makdap.com.au/charity_home.cfm



Educational assets for educational purposes

Both Federally and in each State of Australia, Governments give financial assistance to non-government schools. The basis of this funding clearly differs from jurisdiction to jurisdiction.

In the commercial world, a trend was developing some years ago whereby companies or trusts, which distributed profits to shareholders or unit holders, developed legal structures whereby they might derive profit from the operation of non-government schools and child care centres. Essentially, this involved the establishment of different legal entities which might own land upon which a non-government school operated or which would provide services to non-government schools. In those cases, the new entities would derive profit from their relationship with the operating school.

Concern grew, particularly with State governments, that the financial assistance that was being provided by government was assisting “for profit” entities to increase their income for the benefit of shareholders or unit holders.

In response to this, a number of States introduced legislation removing financial assistance to non-government schools which operated for profit.

The most recent State to pass legislation along these lines was NSW by introducing section 21A of the *Education Act*. In introducing the legislation into the NSW Parliament, the then Minister for Education stated:



“Religious organisations perform many vital services in our community. Running schools is one of these. It is not our intention to disrupt the financial arrangements they have put in place to further their aims in their schools.”

The measures taken by the governments have been largely effective in deterring “for profit” operators, however it is necessary for non-government systems of schools to deal with the legacy of this legislation.

In NSW, the legislation effectively creates a presumption that payment to third parties by non-government schools could disentitle the school to financial assistance unless it fell within a limited number of exceptions. Relevant exceptions include payments to third parties at arm’s length at no more than reasonable market value for property, goods or services provided, or payments to related organisations that do not operate for profit.

The legislation in each jurisdiction is complex and needs to be carefully analysed and the circumstances that pertain in a particular jurisdiction need to be considered eg:

- Structurally, are different agencies, parishes, congregations etc “separate organisations” for the purpose of the legislation?
- If they are separate organisations, are they related organisations?
- How does one establish market value for transactions with non-related organisations?

The legal implications of the legislation are complex and need to be considered on a case by case basis. ■



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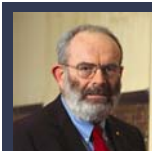
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Issue 3

Assisting in the administration of your ministry

May 2009

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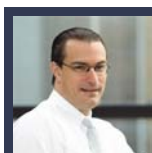
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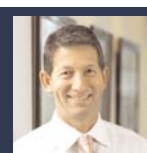
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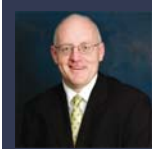


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Back issues

All issues of *Administry* are available online at www.makdap.com.au. Articles in the last two issues include:

Issue 2, February 2009

- Scholarship funds
- Deductions applicable to priests and ministers
- Subpoenas
- Minimising risk for schools under the Occupational Health and Safety Act
- Portable classrooms – changes to State Environmental Planning Policy

Issue 1, November 2008

- Tips for those considering building projects
- Where should we invest our surplus assets?
- Principal impacts of GST for Church organisations
- How much supervision in our schools is enough?

Please feel free to circulate this newsletter to others who may be interested. If you would like to receive future issues of *Administry* via email, please register at http://www.makdap.com.au/resources_registration.cfm.

Disclaimer: This publication is a non-comprehensive general outline of the law as at 27 May 2009. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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