

Government has NFPs in its Sights



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Government has NFPs in its Sights

After many years of inaction in the sector, 2011 appears to be the year in which the Government has NFPs fairly and squarely in its sights.

It seems that the Government has been spurred on by its losses in the *Aid/Watch* case (refer to Balancing Act Issue 18 for commentary at <http://www.makdap.com.au/docs/charity/publication/Makinson%20&%20d'Apice%20Balancing%20Act%20-%20Issue%2018.pdf>) and the Word Investments case (at <http://www.makdap.com.au/docs/charity/publication/Bulletin%20-%204%20December%202008.pdf>).

The Government has apparently been motivated to address what it considers to be significant loopholes in the law which may compromise tax revenue.

It has also sought to clarify its position in light of those decisions to create greater certainty within the NFP sector.

In March 2010 the Government launched the national compact which was stated to establish the framework for a partnership between the Not-For-Profit sector and Government. In particular, it promised a reduction in red tape for NFPs. It is hard to see how many of the 2011 Government initiatives will go anywhere towards the reduction in red tape – perhaps with the possible and significant exception of the proposed “report once use often” accounting regime.

Some of the important developments in 2011 are:

Not-For-Profit Regulator

The Government issued a Consultation Paper in January 2011 and following consideration of the responses to the Consultation Paper,

the Treasurer announced the establishment of a national regulator to be known as the Australian Charities and Not-For-Profits Commission (**ACNC**) to operate with effect from 1 January 2012. For further information in relation to this refer to our Bulletin at <http://www.makdap.com.au/docs/Makinson%20&%20d'Apice%20Bulletin%20May%2020111.pdf>.

Since that time, the Government has been going full speed ahead to implement the decision. The Government has appointed an advisory board to assist in establishment of the ACNC and has also appointed a NFP Reform Implementation Task Force.

The establishment of the ACNC is now a *fait accompli* and we are hopeful that the “report once use often” accounting regime which is promised will assist NFPs. We will have to wait to see whether the other consequences of the establishment of the ACNC operate for the benefit of NFPs or add to the red tape.



The Government has now issued its final report on the Scoping Study for National Not-For-Profit Regulator which can be accessed at <http://www.treasury.gov.au/contentitem.asp?NavId=035&ContentID=2054>.

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“the Government has been spurred on by its losses”

Government has NFPs in its Sights

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Unrelated Business Income Tax (UBIT)

The budget announcement which is likely to have the largest impact on the activity of NFPs is the introduction from 1 July 2011 (in some cases) of income tax upon NFPs in respect of surpluses from their “unrelated commercial activities” which are not applied towards their altruistic purposes. For further information refer to our bulletin at: <http://www.makdap.com.au/docs/Makinson%20&%20d'Apice%20Bulletin%20May%2020111.pdf>.

This tax actually came into effect more than a month ago on 1 July 2011 for unrelated commercial activities that commenced after the budget speech. Even though it is now in place, we still don't know the rules.

The Assistant Treasurer issued a consultation paper seeking the sector's view and we are awaiting further advice from the Government as to how or whether this new tax (referred to as “UBIT”) comes into effect.

If it does, we anticipate the following issues that NFPs will need to address:

- assess the need to set up separate structures (perhaps separate companies) to carry on unrelated business activities;
- determine which of the NFPs activities are related and which are unrelated;
- categorise activities as to whether they are ‘active’ or ‘passive’ (as passive activities are unlikely to be subject to UBIT);
- there will be significant accounting, legal and staff costs resulting from the imposition of UBIT for all NFPs that are engaged in unrelated business activities to any extent.

We are concerned that the proposed UBIT will result in significant additional administration and cost to NFPs which will detract from funds available for their altruistic purposes.

We lodged a submission with the Assistant Treasurer which summarises our concerns which can be viewed at: <http://www.makdap.com.au/docs/charity/publication/Submission%20to%20Consultation%20Paper%20Better%20Targeting%20of%20Not-For-Profit%20Tax%20Concessions1.pdf>.

Addendum to Taxation Ruling TR2005-22

On 28 June 2011 a draft addendum was issued to Taxation Ruling TR2005-22 – *Income Tax and Fringe Benefits Tax Companies Controlled by Exempt Entities*. The draft addendum was issued to take into account the decision of the High Court in *Word Investments*.

The High Court found that *Word Investments* was a charitable institution because, having regard to factors such as the proper construction of its objects as set out in its Constitution, the circumstances of its foundation and the way in which it put into effect the company's objects and its activities, it was clear that its own purposes were charitable. It is our view that the draft addendum is an appropriate response to the decision in *Word Investments*.

“In Australia” special conditions for Tax Concession Entities

The Assistant Treasurer has released for public consultation an exposure draft of legislation that will restate the “*In Australia*” special conditions for tax concession entities. It seeks to ensure that:

- income tax exempt entities must be operated principally in Australia and for the broad benefit of the Australian community; and

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“Even though it is now in place, we still don't know the rules”

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- deductible gift recipients (DGRs) generally must be operated solely in Australia and for the broad benefit of the Australian community.

The exposure draft can be accessed at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2053>. The closing date for submissions is 12 August 2011.

In our view, this proposed legislative change is likely to present significant issues for a number of NFPs. Our concerns are:

- NFPs which are presently entitled to tax exemption as charity, education, science or religious funds or institutions, community service organisations, employee or employer associations (including trade unions), funds contributing to other funds, hospitals, sports and cultural organisations may lose their entitlement to tax exempt status if they do not strictly comply with the proposed new section 50-50;
- to maintain tax exempt status, an entity must operate principally in Australia and pursue its purposes principally in Australia. The exposure draft does not define principally except to say that it means "mainly or chiefly" and less than 50% is not considered "principally";
- if an NFP donates money to another entity which is not a tax exempt entity in Australia then it may lose its entitlement to tax exemption;
- the NFP must comply with **all** (our emphasis) the requirements in its governing rules. This may be particularly harsh in the event of a minor breach by an NFP of its governing rules. It would be important for NFPs to consider the content of their governing rules to ensure that they will not be impacted by this proposal. Many religious NFPs do not have "governing rules" and it is difficult to understand how this section can apply to those NFPs;

"Change is likely to present significant issues for a number of NFPs"

- to maintain exemptions, NFPs are required to use their assets and income **solely** (our emphasis) to pursue the purposes for which it was established. This is a harsh requirement as there is no apparent relief from this strict requirement;
- there is a definition of "not-for-profit entity" in the legislation which will apply not only to the *Income Tax Assessment Act* but also for FBT and GST legislation. The section does not allow an NFP entity to distribute its surplus or assets to its owners or members. In our view this definition will need to be amended to allow for such distributions where the owner or member is itself an NFP;
- a tax exempt entity which is entitled to the benefit of franking credits would need to be entitled for the whole of the year in question to obtain a refund of franking credits.
- The "In Australia" requirements will not apply to Overseas Aid Funds that are endorsed as DGRs. However, if an organisation is also engaged in other activities involving donations overseas, it may be subject to the limitations on donation outside Australia in respect of those other activities.

We urge NFPs to consider the impact of this proposed legislation on their activity and lodge a submission by the due date, ie 12 August 2011.

Public Ancillary Funds

On 14 July 2011 the Assistant Treasurer released for public consultation an exposure draft of legislation and draft guidelines providing a new regulatory framework for public ancillary funds.

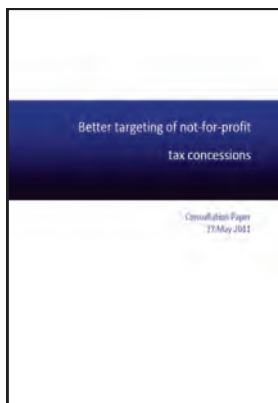
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The time frame for comment was extremely short and submissions in relation to the exposure draft were required by 1 August 2011 however, curiously, comments can be lodged concerning the draft guidelines up to 31 August 2011. Copies of the documents can be accessed at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2048>. It is apparent that the Government has resolved that it will establish binding guidelines on how public ancillary funds are operated which are similar to the guidelines established for private ancillary funds in 2009.

Some of the important aspects of the draft documents are:



- the Treasurer has power to make legislative guidelines about the establishment and maintenance of public ancillary funds (PAF);
- there will be a minimum level of annual distribution required from PAFs. The level proposed is 4% of the net assets of the PAF as at the end of its prior financial year or \$11,000.00 per annum whichever is greater;
- there will be a requirement for all trustees of new PAFs to be corporate trustees. There is a grand-fathering provision to allow for PAFs that exist prior to the commencement date (1 January 2012) to continue without a corporate trustee;
- PAFs will be required to lodge income tax returns each year. This is yet another example of increased red tape for the NFP sector;
- the Commissioner of Taxation will have significant powers to remove trustees of PAFs and to appoint new trustees and direct trustees as to how they must act.

“All these proposals will mean changes to the administration and structuring of almost all NFPs”

Definition of Charity

Finally (!), the Government is proposing a new definition of what constitutes a "charity". We refer you to our Bulletin of 11 May 2011 at <http://www.makdap.com.au/docs/Makinson%20&%20d'Apice%20Bulletin%20May%202011.pdf>.

The Government has indicated that it will release a consultation paper on this proposed definition shortly. It has foreshadowed that the definition will be based upon the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations* taking into account the findings in the *Aid/Watch* case.

All these proposals will mean changes to the administration and structuring of almost all NFPs. Hopefully, the imposition of further red tape can be minimised in the process but we have concerns that the additional administration involved by NFPs will mean that some of their income and assets that would otherwise be applied for their altruistic purpose will now be caught up in additional administration expense.

Should you require further information or assistance in relation to the drafting of submissions or how these changes may impact on your NFP please contact Mr Bill d'Apice of our office.



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Focus on Directors' Financial Expertise: the Centro Case

“A director is not an ornament, but an essential component of corporate governance”

Directors' duties of financial reporting have been made more stringent in the recent case of *Australian Securities & Investments Commission v Healey* [2011] FCA717, a decision of Justice Middleton in the Federal Court of Australia. In particular, the case concerned the approval by the directors of the consolidated financial statements of Centro Properties Limited, Centro Property Trust and Centro Retail Trust for the financial year ending on 30 June 2007, at a Board meeting attended by the directors on 6 September 2007.

Composition of the Board

Only one of the non-executive directors had accounting qualifications. The remainder certainly had exposure to areas such as finances, investment banking, property and corporate governance through their exposure in directorships held before or because of legal qualifications that they had, but by no means did they have an in-depth understanding of the accounting standards applicable at the time.

Length of Board Papers

One of the expert witnesses called by the non-executive directors commented on the volume of material typically involved in producing the annual financial statements at Centro. He contended that it could involve *“65 documents with 93 sets of complex financials at an average of 50 pages each which equates to over 3,000 pages in total”*. Evidence was given that the Board papers typically arrived a week before a meeting but in the case of one of the non-executive

directors would arrive approximately three to four days before the meeting.

Where did the directors slip up?

When the non-executive directors who were prosecuted in this case resolved at the Board meeting in September 2007 to approve the financial accounts for the year ending 30 June 2007, they failed to meet the requirements of the *Corporations Act 2001* and the relevant accounting standards in three respects:

- (a) they failed to notice the classification of some extremely large liabilities as non-current liabilities when they should have been categorised as current liabilities;
- (b) they failed to add to the notes within the financial statements some changes that occurred beyond the balance date of 30 June 2007, namely that guarantees had been signed by the entities, which, if called upon, would have meant that short term liabilities would not have been able to have been met based on current assets;



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Focus on Directors' Financial Expertise: the Centro Case

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(c) they relied upon a letter prepared by lawyers and accountants pursuant to section 295A of the Act which they would have realised was deficient in certain respects if they had turned their minds to the legislative provisions of the Act.

Naturally, the non-executive directors in question submitted in their defence that they had procedures in place whereby those at management level would see to it that the accounts were properly prepared and there was a process in place for recent changes to accounting standards to be taken into account when preparing the financial statements for the relevant financial year.

However, Justice Middleton said that it was not sufficient for directors to be able to say that they had applied due care and diligence to their duty of approving the financial statements by saying they had delegated the responsibility to management and advisers. The point was made that it is a specific requirement of the Act that the directors must approve the financial statements, indicating that directors

must apply an inquiring mind to the process of having financial statements approved at Board level.

Evidence was given that the fact of the short-term nature of the large liabilities and the guarantees by the entities were made plain to the directors in papers at Board meetings since March 2007, so it was not new information. The Court noted that none of the directors had turned their mind to the issue of the need to report changes that materially affected Centro's business beyond the balance date and that not all of the directors had considered the issue of current liabilities classifications and if they had, there was no clarity within their minds about how the classification was to be made.

The Court emphasised that the judgment does not require a level of perfection among directors nor does it require an in-depth knowledge of the accounting standards, but that if the directors had applied an inquiring mind to the categorisation of debts and the principles referred to in the financial statements at all then they would at least have

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Focus on Directors' Financial Expertise: the Centro Case

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made an inquiry in order to satisfy themselves that the financial statements were correct.

their knowledge of the workings of the business over a period of time to the fore when analysing financial statements.

“65 documents with 93 sets of complex financials at an average of 50 pages each which equates to over 3,000 pages in total”

Longevity

It is our view that this decision will most likely be challenged further in the Court system, but directors should be aware that until such time as a new judgment is handed down, the law applies these stringent requirements on directors, which are applicable whether you are a director of a public company limited by guarantee or a listed company.

Further, statements in the case are applicable in the common law to the extent that they summarise the level of astuteness that directors must apply. So in our view, the principles that would be applicable in circumstances where trustees are managing accounts and also to members of committees of incorporated associations.

In the case of the declaration in relation to Centro's financial statements from senior management prepared pursuant to section 295A of the Act, clearly the directors had simply relied on external advisers as to the accuracy of the letter. Justice Middleton made it clear that the law expects directors to satisfy themselves that such a letter is correct.

Principles to take forward

The judgment demonstrates that reliance cannot be placed lazily on external advisers or management to ensure correctness. The principle emphasised by Justice Middleton is best expressed in a quote that Justice Middleton cited by Justice Pollock in the case of *Francis v United Jersey Bank* [1981] 432A 2d 814:

“A director is not an ornament, but an essential component of corporate governance”.

A director must be an active member of the Board in the sense that he or she makes inquiries as to concepts that he or she does not understand or that may seem inconsistent with knowledge that he or she has as to status of the business' finances. Directors must bring all of



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UK Trends - Social Impact Bonds

A venture capitalist behind the establishment of the Big Society Bank, Sir Ronald Cohen, has advised the UK Parliament that social impact bonds will be worth *“tens of billions of pounds”* worldwide within the next two decades, according to the UK’s Third Sector magazine.

“Social impact bonds will be worth tens of billions of pounds”

Social impact bonds allow investors to fund charities to carry out early interventions in fields such as crime reduction and children’s services. If



charities successfully reduce the number of people needing Government support, the Government repays the investors at a profit.

At a presentation to the UK Public Administration Select Committee, Cohen advised the Committee that the Obama administration in the US had already committed about £60 million to pilot schemes.

Cohen is administering the first pilot scheme in the UK – a £5 million project to reduce re-offending at HM

Prison Peterborough. The funding for this has come entirely from philanthropic organisations but the bond would eventually attract investments from pension funds, insurance companies and private investors. He agreed that this form of bond might need further modification to make it attractive to commercial investors.

It will be interesting to see whether this initiative takes hold in the UK and whether it may be replicated in Australia.



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Watch this space for details!



Bequest Officers’ Workshop 2011 *Coming soon to Newcastle* *Venue to be confirmed*

This full day practical workshop is specifically tailored for bequest officers and fundraisers of charities and Not-For-Profit organisations.

Gain an understanding of the legal processes involved in estate administration, so you can ensure your organisation is not missing out on its bequest entitlements.

Receive practical tips from people with significant experience in fundraising and legal issues associated with bequests, estate law and charities law.

For enquiries, please call Angela Mak on 02 9233 9049.

Pitfalls of Online Fundraising

“individuals and NFP organisations collecting these funds may inadvertently contravene fundraising laws”

As more and more people become regular Internet users, an increasing number of web-savvy charities and Not-For-Profit organisations in Australia realise the potential of using the Internet to raise money for their particular cause. As the number of websites that raise funds online increase, an exponentially growing number of Internet users are donating through the websites of charities and Not-For-Profit organisations and through online fundraising websites. To give an example, donations through the online Australian fundraising website, GiveNow.com.au, have increased from less than \$600,000 in 2005 to 2006 to \$2.85 million in 2008 to 2009. In the United States of America the amount given online has risen from \$US300,000 in 1997 to \$US10.4 billion in 2007.

In Australia, fundraising is governed by laws determined by each State and Territory. Most States and Territories in Australia require individuals or organisations that intend to carry out fundraising activity to follow certain compliance rules and to have a valid fundraising licence. These licences are generally only valid in the State or Territory where the licence is issued.

When carrying out traditional methods of fundraising, such as door-to-door appeals, charities and Not-For-Profit organisations in their respective State or Territory can be relatively certain as to what legal requirements govern their fundraising activities, as such activities are usually carried out in that particular State or Territory. However, when donations are received through online sources from donors across Australia or overseas, individuals and Not-For-Profit organisations collecting these funds may inadvertently contravene fundraising laws of various States and Territories.



Existing Legal Frameworks

On page 10 is an overview of the existing laws relating to fundraising in Australia. The Northern Territory currently does not have legislation relating to fundraising activities other than lotteries.

Issues

States and Territories that have laws governing fundraising differ in many respects, including but not limited to the following differences:

- **Exempt Organisations:** Most States and Territories provide exemptions for certain organisations from having to obtain a fundraising licence, however, the kinds of exemption differs from one jurisdiction to another. For example, in NSW, certain religious organisations are exempt from having to obtain an authority to fundraise, whereas in the ACT, there are categories of exempt organisations, including schools, churches and organisations that raise less than \$15,000 a year.
- **Compliance Rules:** Each State and Territory with laws relating to fundraising have rules of compliance that organisations (including some exempt organisations) must observe. For example, Queensland legislation requires annual audits of registered charities and organisations that have been granted sanctions to fundraise, whereas in Western Australia, organisations holding a valid fundraising licence are required to submit an audited account of collected money at request of the Minister of Consumer and Employment Protection.
- **State Registers:** Most States and Territories require approved fundraisers to

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Pitfalls of Online Fundraising

Overview of fundraising legislation

State/Territory	Legislation	Licensing Body	Legal Requirements
New South Wales	<i>Charitable Fundraising Act 1991</i> (NSW)	NSW Office of Liquor, Gaming and Racing, Department of the Arts, Sport and Recreation	Entities that intend to raise funds in NSW for "charitable purposes" must make an application to the Licensing Body to obtain a licence known as an "authority to fundraise".
Australian Capital Territory	<i>Charitable Collections Act 2003</i> (ACT)	Office of Regulatory Services, ACT Department of Justice and Community Safety	Entities that intend to "conduct a collection" (as defined in the Act) in ACT must apply to the Licensing Body to obtain a fundraising licence.
Queensland	<i>Collections Act 1966</i> (Qld)	Department of Justice and Attorney-General, Queensland	Entities that intend to publicly fundraise in QLD must be either a registered charity or apply for a licence known as a "sanction" from the Licensing Body.
South Australia	<i>Collections for Charitable Purposes Act 1939</i> (SA) and the <i>Collections for Charitable Purposes Act 1939 – Code of Practice</i> .	Office of the Liquor and Gambling Commissioner	Entities that intend to collect or attempt to collect any money or goods or obtain or attempt to obtain money by the sale of any disc, badge, token, flower, or other device for any charitable purpose (as defined in the Act), must apply to the Licensing Body for a fundraising licence. While the current Code of Practice does not mention online fundraising, the draft Code of Practice dated November 2010 does provide guidelines in respect of online fundraising.
Tasmania	<i>Collections for Charities Act 2001</i> (Tas)	Consumer Affairs and Fair Trading	Entities that intend to solicit for "charitable purposes" must be granted an authority before doing so, unless the organisation is based in Tasmania or if the organisation is holding a valid fundraising licence from another State or Territory. The Act specifically provides for certain information that must be disclosed should solicitation for charitable purposes be conducted via electronic media.
Victoria	<i>Fundraising Act 1998</i> (Vic)	Consumer Affairs Victoria, Department of Justice	Entities that intend to solicit or receive money or benefit for a beneficiary or cause must register with the Licensing Body. There is no other requirement for an entity to have to otherwise obtain a licence to fundraise.
Western Australia	<i>Charitable Collections Act 1946</i> (WA)	Department of Consumer and Employment Protection	Entities that intend to collect money or goods for a charitable purpose must obtain a licence by applying to the Charitable Collections Advisory Committee who in turn will make a recommendation to the Minister for Consumer and Employment Protection for a licence to be issued.

Pitfalls of Online Fundraising

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submit their details to a public register that is usually available on the website of that State or Territory's Licensing Body. This is to allow members of the public to discover whether a particular organisation they may wish to donate to have been approved to fundraise in that State or Territory. However, some states, like South Australia, do not have such a register.

Other differences between fundraising laws of the States and Territories include whether an organisation wishing to fundraise is required to be incorporated or not and the differing penalties in regard to contravention of legislation (ranging from a \$100 fine in Western Australia to a fine of \$110,000 for contravention by a corporation in the ACT). While some legislation expressly acknowledges the validity of fundraising licences from other

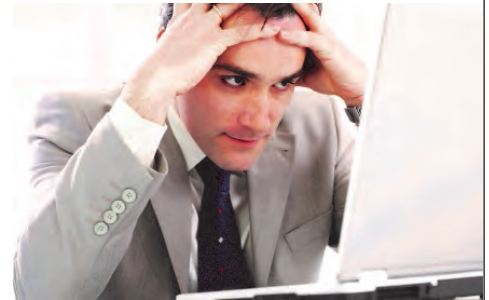
“It would undoubtedly involve committing some time and costs to ensure compliance is achieved”

Australian jurisdictions, overall there is little cohesion between the various fundraising laws in Australia at the present time.

What You Can Do

While many organisations may opt to not engage in fundraising online altogether, the reality is that the Internet is an increasingly powerful and convenient tool to inspire people to donate to a particular cause. It is recommended that to comply with the laws around Australia, the most prudent actions for organisations and individuals wishing to fundraise online to take include:

1. Apply to each State and Territory for a fundraising licence and/or register the entity's details onto the public fundraising register;
2. Be aware of the compliance rules of each State and Territory in relation to fundraising. There are online fact sheets available and telephone enquiry lines set up by Licensing Bodies governing fundraising of most States and Territories that can provide further information;
3. Ensure that the website where the online fundraising takes place has easily accessible disclosure information to the extent as required by the fundraising laws of the States and Territories, which includes information about the organisation, the cause for which funds are raised, how funds raised



will be managed, accounted for and distributed;

4. Ensure that the online fundraising website is secure if it is to receive sensitive information from donors, such as credit card details; and
5. Keep detailed accounting records of funds collected and information in relation to online fundraising activities.

It would undoubtedly involve committing some time and costs to ensure compliance is achieved in accordance with every State or Territory's laws. Until a more standardised regulatory system is instigated to administer fundraising in Australia it would be advisable that the extra steps are taken to validly appeal to all Australians using online fundraising.



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Preparing for a Harmonised System of Work Health and Safety Laws in Australia

The national model *Work Health and Safety Act (Model Act)* together with model regulations and codes of practice will come into effect in each jurisdiction in Australia on 1 January 2012.

With nine different occupational health and safety (OH&S) laws across Australia, the importance of harmonised OH&S laws has long been recognised as a crucial area of regulatory reform. In July 2008, the Council of Australian Government signed an Inter-Governmental Agreement which established the commitment of all states and territories to move towards one set of OH&S laws to deliver the same standard of health and safety in workplaces throughout Australia. Each state, territory and the Commonwealth is required to pass their own laws that mirror the Model Act and adopt them by December 2011.

On 1 June 2011 the NSW Parliament passed the *Work Health and Safety Bill 2011* which amended the current *Occupational Health and Safety Act 2000* (NSW) and mirrors some key parts of the Model Act in the lead up to the 1 January 2012 implementation.

What is new under the Model Act?

The key features of the Model Act include:

- The term “employee” has been replaced by a broader definition of “worker” which includes any person who works in any capacity in or as part of a business or undertaking, including contractors, sub-contractors and even volunteers.
- The ‘reverse onus of proof’ traditionally placed on employers will be removed by qualifying the duty of care of a PCBU by what is “reasonably practicable” rather than requiring them to prove that compliance was not reasonably practicable. The prosecution now bears the onus of proof.
- The deeming of liability for directors and managers of organisations for a breach of OH&S laws will be removed. “Officers” of a PCBU – as defined in the *Corporations Act 2001* (Cth) – will need to demonstrate that they have exercised all due diligence but will now only be liable for their own acts or omissions.
- A move away from relying on the traditional relationship of “employer” and “employee” to determine who owes a duty of care and who is entitled to protection from risks to their health and safety. Instead of an “employer”, the new primary duty holders will be broadened to all “persons conducting a business or undertaking” (PCBU).

“Organisations must start preparing for the 2012 implementation of the model OH&S laws in order to ensure compliance with the new legislation”



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Preparing for a Harmonised System of Work Health and Safety Laws in Australia

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- There has been a substantial increase in penalties for breaches of the new legislation. The maximum fine for a corporation will be \$3 million and for individuals a \$600,000 fine or 5 years in jail or both for the most severe breaches.
- The power that unions enjoyed to prosecute OH&S breaches has been removed. Only the regulators will be able to prosecute.

Who is a PCBU?

A 'person' conducting a business or undertaking is the legal entity, not the individual worker or officer. The concept applies whether the business or undertaking is operating for profit or Not-For-Profit.

A PCBU includes an employer, corporation, association, partnership, sole trader and – importantly for charities and Not-For-Profits – certain volunteer organisations. While a volunteer association comprised solely of volunteers and with no employees will not be a PCBU, a group of volunteers that employs any person to carry out work will be a PCBU. Thus, a charity or Not-For-Profit that employs anyone will not be excluded from the concept of PCBUs.

The Model Act makes it clear that a person engaged solely as a worker or an officer does not conduct a business or undertaking. Other exceptions to the concept of a PCBU include an elected member of a local authority and a householder who engages someone solely for their own private or domestic purposes on an ad hoc basis.

The legal concept of "a person conducting a business or undertaking" is novel in most jurisdictions in Australia but it is a concept

known in the ACT and Queensland in their existing OH&S legislation. The concept has been adopted to make it clear that those who carry out work for another must be provided with protection by those who may affect their health or safety. Under the new legislation, the PCBU has the primary duty of care for workplace health and safety.

What is the duty of a PCBU?

A PCBU will owe a health and safety duty if, in the course of conducting the business or undertaking, it:

- engages or causes to be engaged a worker to carry out work;
- directs or influences work carried out by a worker;
- has the management or control of the workplace in which work is done; or
- designs, manufactures, imports, supplies, installs, commissions or constructs plants, or structures or substances for use as or at a workplace.



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“It is important to understand who in your organisation has a duty of care under the new legislation”

Preparing for a Harmonised System of Work Health and Safety Laws in Australia

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A PCBU has a duty to ensure, “so far as is reasonably practicable”, that the health and safety of workers, customers and visitors is not put at risk from work carried out as part of the conduct of the business or undertaking. A PCBU is required to provide the highest level of protection that is reasonably able to be provided in the circumstances. This is a matter of considering the likelihood of the harm, its gravity, the possible risk controls and, lastly, the costs of those controls.

“Officers” will also have a positive personal obligation to ensure health and safety as far as reasonably practicable as well as a duty of care to exercise due diligence to ensure that a PCBU complies with the new legislation.

What do you need to do?

Organisations must start preparing for the 2012 implementation of the model OH&S laws in order to ensure compliance with the new legislation. As the detail of the model legislation is now largely known, organisations can take steps now to transition towards the new requirements.

It will be important for your organisation to:

- Be familiar with the new laws and regulations.
- Undertake a legal gap analysis to identify where current policies, procedures and practices do not meet the new requirements and revise your OH&S systems accordingly.
- Consider how the broader OH&S duty affects your organisation. The new obligations are a shared responsibility. It is important to understand who in your organisation has a duty of care under the new legislation. Who is a PCBU in your organisation? Who will have specific duties? Who will have a role as an “officer”?
- Review your organisation’s OH&S management arrangements. Who has the responsibility for ensuring that all reasonable steps are taken to provide workplace health and safety? These persons must be able to demonstrate “due diligence” in performing their obligations.
- Provide training to your PCBUs, officers, managers and supervisors on their obligations, including the strict requirements for the reporting of notifiable incidents and the procedures to be followed if



regulator representatives or union officials request entry into your workplace.

- Ensure that your workers are fully informed of their obligations.
- Review your policies and procedures to include the new consultation obligations. The Model Act places an emphasis on consultation with workers on OH&S matters and provision of necessary information, training and supervision. This will include determining whether your workers require a Health and Safety Representative (HSR) to facilitate consultation, as well as reviewing your contracts to ensure that contractors, sub-contractors and volunteers are covered.
- Monitor the progress of the new legislation and regulations in your state or territory for any local variances with which your organisation will need to comply.

Ultimately, understanding of, and compliance with, the new laws and regulations should now be a priority for action.



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Procedural Fairness in Disciplinary Decisions

All organisations are confronted with the need to make disciplinary decisions from time to time arising out of misconduct of an individual.

This article examines the steps which typically need to be taken by most organisations so as to provide procedural fairness to the person subject to such action. The principles of procedural fairness should be considered in making major disciplinary decisions due to alleged misconduct in broad areas including removal of a board member, termination of employment of a senior executive or expulsion of a child from a private school.

“merely having a disciplinary policy is not in itself enough. The policy must be carefully followed otherwise there is the risk of not only the decision being challenged but also the process which gave rise to it”

Receiving the Complaint

Almost all disciplinary processes begin with a complaint. The person receiving the complaint generally attempts to obtain preliminary information at the outset. If the complaint clearly has no substance, no further action is generally taken.

However, if the complaint appears to have substance, there are a number of procedural steps which should be taken at this point:

- The person initially receiving the complaint should report the matter to the appropriate head of the organisation (eg chief executive officer, chairman of the board, school principal).
- The head of that organisation should appoint someone to investigate the complaint. The investigator should be someone who is independent of the parties to the complaint and someone who has the necessary skills to obtain a thorough background to the matter and all necessary factual information. The investigator can be a trusted person from within the organisation and does not necessarily have to be a professional external investigator although this is sometimes desirable in particular circumstances.
- The investigator should obtain all relevant factual information from the complainant. In some cases this might involve documents to support the complaint.
- The investigator should interview relevant independent witnesses or other people who may be able to provide relevant



information in relation to the subject matter of the complaint.

- When all this information has been obtained, the investigator should pause and make a preliminary assessment of the merits of the complaint. If at that stage it is clear that the complaint has no substance then the investigator should inform the person who appointed them and recommend that the complaint has not been substantiated and that no further action be taken.
- However, in most cases, the situation will not be so clear cut, and the investigator will need to continue the investigation.

Dealing with the Respondent

Perhaps the most crucial task in dealing with disciplinary matters is the proper and fair dealing with the respondent to the complaint.

After having reached the stage of being satisfied that the complaint potentially has substance, the investigator must then appropriately and fairly deal with the respondent. Some of the procedural steps at this stage of the process include:

- The investigator should advise the respondent personally and in writing of the details and allegations that have been made and set a time and place for an interview to further discuss the complaint.
- The time for the interview should be as soon as practicable.
- The respondent should be informed of their right to bring a support person to the interview.

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Procedural Fairness in Disciplinary Decisions

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- The venue for the interview should be neutral.
- The respondent should be informed of their ability to rely on witnesses statements or call other people to support his/her position.
- In appropriate cases, it may be necessary to organise an interpreter or be mindful of particular cultural sensitivities.
- At the beginning of the interview, the respondent should be informed of the process that will be undertaken during the interview.
- Wherever possible, subject to issues of confidentiality, the respondent should be fully informed of the allegations which have been made in the complaint and given a copy setting out the elements of the complaint and the evidence which the investigator has obtained.
- The investigator should confirm that the respondent properly understands the nature and seriousness of the complaint.
- The investigator should then invite the respondent to respond to the complaint and put forward his/her version of events together with appropriate supporting evidence.
- Once the investigator has all relevant response material from the respondent, the investigator should inform both complainant and respondent that the matter will be referred to the decision maker for determination.

Making a Decision

Once all relevant information has been received from the complainant and respondent, the investigator should refer the matter to the independent decision maker who will often be the head or deputy head of the particular organisation. There are also a number of procedural steps which must be observed by the decision maker at this stage of the process:

- The decision maker must be unbiased, that is, not have a vested interest in the outcome of the disciplinary process (this can sometimes be difficult for the decision maker, particularly where there has been a long association with either the complainant or respondent).
- The decision maker must carefully look at the factual material obtained by the investigator via the

investigator's interviews with the complainant, respondent and their respective witnesses.

- In arriving at the decision, the decision maker must be persuaded as to the substance (or lack thereof) of the complaint on the "balance of probabilities". The criminal standard of "beyond reasonable doubt" does not apply.
- The decision maker must carefully consider what would be the appropriate outcome depending on the nature of the complaint and the evidence in support of it and against it. In this regard, it is important for the decision maker to carefully consider whether the proposed "punishment fits the crime".
- The decision maker must then communicate the decision to the respondent, preferably in writing.
- Where the disciplinary process involves serious consequences, such as removal from a board of governance, termination of employment or expulsion from a private school, reasons for the decision should generally be given in writing.
- Depending on the organisation's policies and the nature of the disciplinary action imposed, the respondent should be informed of whether a right of appeal exists. If it does, the decision maker should inform the respondent of the process in relation to an appeal.

Conclusion

Organisations in this sector must ensure that their disciplinary policies are based on principles of procedural fairness.

However, merely having a disciplinary policy is not in itself enough. The policy must be carefully followed otherwise there is the risk of not only the decision being challenged but also the process which gave rise to it.

As can be seen from the above commentary, there are a large number of procedural steps which should, in most cases, be followed in order to accord procedural fairness to the respondent of a disciplinary complaint. These steps should be considered as part of an organisation's risk management strategies and, as such, should be regularly reviewed by senior management.



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Substantial Changes in 2011 to Financial Reporting Requirements for NSW Incorporated Associations

Given the amendments in 2010 to the New South Wales *Associations Incorporation Act* and the subsequent Class Order 11/01 issued by NSW Fair Trading in May 2011, there are substantial changes impacting the financial reporting and audit requirements for NSW incorporated associations preparing annual financial reports for the year ended 30 June 2011.

Since 1 July 2010 all NSW incorporated associations operate under a two-tiered reporting system:

Tiered Entities	Tier Thresholds
Tier 1 Entity	Annual revenue greater than \$250,000 or current assets greater than \$500,000.
Tier 2 Entity	Annual revenue less than \$250,000 or current assets less than \$500,000

Tier 1

Associations are required to prepare annual financial statements in accordance with Australian Accounting Standards and these financial statements must be audited.

Tier 2

Associations are required to prepare an income and expenditure statement and a balance sheet that provides a true and fair view of the affairs of the association. No audit requirement applies.

Further relief was provided through Class Order 11/01. This provides exemption from the full rigour of financial reporting in accordance with Australian Accounting Standards for Tier 1 associations with a total revenue of less than \$2 million in any financial year. In such situations financial statements must apply the recognition, measurement and classification requirements of Australian Accounting Standards with the full application of a limited number of Standards.

These amendments are similar to recent tiered changes for companies limited by guarantee registered under the *Corporations Act 2001*.

This will see a number of associations, which previously prepared special purpose financial statements, now being obligated to prepare general purpose form financial statements. It will also see many more associations than previously being required to apply the measurement and recognition requirements of accounting standards.

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Substantial Changes in 2011 to Financial Reporting Requirements for NSW Incorporated Associations

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As a result of these changes the current financial reporting and related requirements for NSW incorporated associations are as follows:

NSW Association Tiers	Revenue	Financial Statements	Accounting Standards	Audit	Presented to Members	Lodged
Tier 1 (Gross receipts > \$250,000 or current assets > \$500,000)	> \$2m	Yes	Full application	Yes	Yes	Yes
	< \$2m	Yes	Limited application	Yes	Yes	Yes
Tier 2 (Gross receipts < \$250,000 or current assets < \$500,000)	Not applicable	Yes	No	No	Yes	No*

*Only a financial summary is required to be lodged.

In addressing these revised requirements incorporated associations should also familiarise themselves with the new reduced disclosure regime introduced by the Australian Accounting Standards Board in 2010. These changes are contained in the accounting standard AASB1053: 'Application of Tiers of Australian Accounting Standards'. This standard provides some benefit to entities preparing general purpose financial reports who are not publicly accountable.

While these developments are helpful for many smaller associations they are an added burden for some with the need to be familiar with a much broader range of Australian Accounting Standards than might previously have been the case. There are also likely to winners and losers at the margins of this tiering structure with a need to measure the criteria accurately so that it is clear where the particular association fits in.

Given the changes to the Act, the reporting and non-reporting entity aspects of Australian Accounting Standards and the new reduced disclosure regime, prior to associations preparing their accounts for 2011, it is important that they are familiar with these requirements.

If you would like to discuss your organisation's particular requirements please contact the writer.




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- Protecting the reputation of Not-For-Profit organisations
- Supreme Court of NSW appoints new Trustee for Testamentary Charitable Trust
- Full Federal Court confirms that a community bank can be tax exempt

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- Political Lobbying - the Aid/Watch Case
- DGR Endorsement for Declared Flood Zones
- Regulation of Public Ancillary Fund
- Streamlining Financial Reporting for NFPs
- Formation of a NFP Sector Reform Council
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Disclaimer: This publication is a non-comprehensive general outline of the law as at 5 August 2011. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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