

THIRD *dimension*

A practical legal perspective for charities and not-for-profits

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**Booting out Directors/
Committee Members and other
useful guidance and legislation
summaries for charities and
not-for-profits**



How to Legally Remove a Director/Committee Member

BY Isabelle Whelan, Lawyer



There are many reasons why you may consider removing a Director/Committee Member from your Board/Committee. In practice, however, removing a Director/Committee Member from the Board/Committee can be difficult and there are certain procedural steps that must be followed to ensure the process is fair and proper. You must follow these steps so that the Director/Committee Member does not challenge their removal.



Steps to remove a Director - The *Corporations Act* provides that a public company may by ordinary resolution remove a Director before their period of office ends.

We will firstly consider the procedure for the removal of a Director of a Company. We will then consider the procedure for the removal of a Committee Member of an Association.

A. Procedure to remove a Director of a Company

What does 'removing a Director' mean?

Removing a Director means that a person will no longer be a Director and will not be able to enjoy the benefits of being a Director. They will also stop having to perform and observe their Director's duties.

What does the law say?

Section 203D of *Corporations Act 2001 (Clth)* (Act) provides that a public company may by ordinary resolution remove a director before their period of office ends. This is a statutory right, conferred upon the company acting in general meeting. It applies despite anything in the company's constitution or any agreement between the company and the Director. However, a Director's contract of service may entitle him or her to compensation if he or she is removed from office prematurely.

Situations where a Director can be removed

The only manner in which a Director can be removed from office is if the Director:

- (i) is no longer eligible to be a Director (e.g. the Constitution requires a Director to be a member and the Director ceases to be a member);
- (ii) is removed due to a breach of the Act;
- (iii) is removed by the members pursuant to the Act; or
- (iv) one of the events noted in the Constitution occurs (this is dependent on the clauses in the Constitution).

We will focus on the procedure relevant to point (iii), which is the removal of a Director by resolution in a general meeting.

Please note it is illegal for a board to remove a Director.

Procedure to remove a Company Director

(a) Notice of intention

The members have to issue the company with notice of intention to move the resolution to remove the Director. The company must be given at least two (2) months notice before the meeting is held. This timeframe can be shortened, as explained below.

The law does not specify how many members need to issue the notice. A suggestion would be:

- (i) members with at least 5% of the votes that may be cast at the general meeting; or
- (ii) at least 100 members who are entitled to vote at the meeting.

(b) Notice requirements

Following receipt of the notice by the company, the company has to convene the meeting. The company can hold the meeting in less than two (2) months, so long as the notice for the meeting is issued after the company receives the notice from the members.

The company needs to give at least 21 days notice of a meeting of the members of a public company at which a resolution will be moved to:

- (i) remove a Director under section 203D; and
- (ii) appoint a Director in place of a Director removed (although this is optional).

The company must provide the Director with a copy of the notice as soon as practicable after it is received.

(c) Do you need a reason to remove a Director?

Generally there is no requirement to provide reasons to remove a Director of a public company under section 203D of the Act, as a Director's position is at the behest of the members. Further, it does not appear that a removal of a board member has to be justified or be the result of certain causes or events.

There have been circumstances where the Courts have regarded the removal of a Director as oppressive or unjust within section 232 of the Act, although this can be avoided by following the correct procedure to remove a Director.

(d) Director's rights

The Director is then permitted to:

- put their case to the members by speaking to the motion at the meeting; and
- give the company a written statement, stating their case, for circulation to the members:
 - o if time permits, the company must circulate a copy of this written statement to everyone to whom the notice of the meeting is sent. Otherwise, the statement must be distributed to members attending the meeting and be read out at the meeting before the resolution is voted on;
 - o the Director's statement does not have to be circulated by either method if it is more than 1,000 words long or considered defamatory.

At the meeting, it only has to be an ordinary resolution to remove the Director.

(e) Following the removal of the Director

The vacancy resulting from the removal of a Director by resolution in the fashion set out above, if not filled at the meeting (the members can appoint someone else to fill the vacancy by ordinary resolution), may be filled as a casual vacancy if this is permitted by the company's Constitution.

(f) Procedural Irregularities

Generally, an irregularity in the procedure set out above does not invalidate the removal of the Director, unless the Court is of the opinion that the irregularity causes 'substantial injustice' that cannot be remedied and declares the procedure to be invalid.

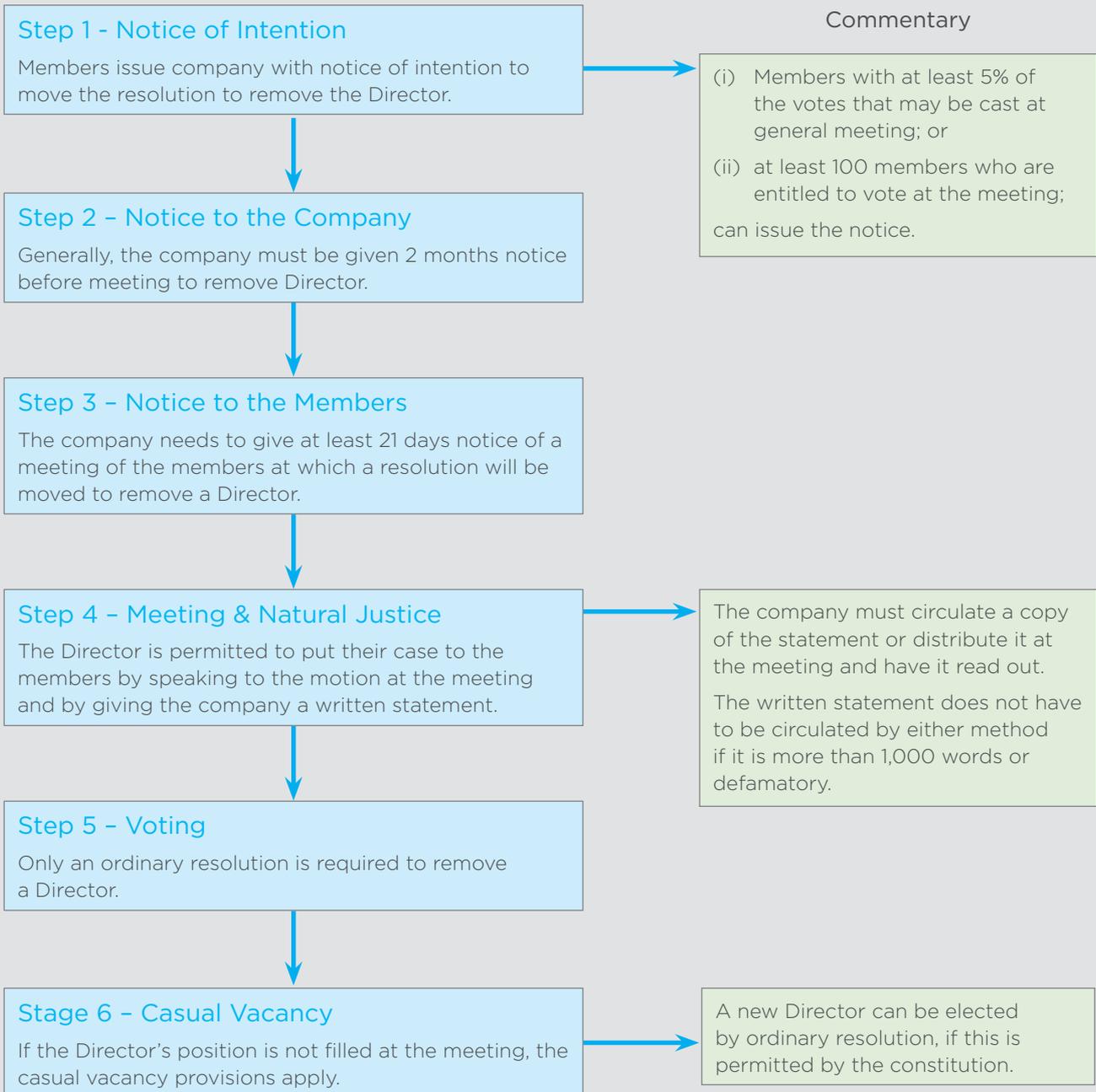
(g) Consequences of Contravention of section 203D

Contravention of section 203D is an offence punishable by a fine of five penalty units, which is equivalent to \$550.

An offence based on section 203D is an offence of strict liability. This means that there is no defence to this offence.



Procedure to Remove a Company Director



B. Procedure to remove an Association Committee Member

You need to check your organisation's rules to find out the procedure (if any) for removing the Committee Member. It is not compulsory for incorporated associations to have rules for the removal of a committee member, but if your rules are silent on this issue, the model rules provision will automatically apply.¹

If your organisation uses the model rules, the procedure will generally be as follows:

1. There will need to be a general meeting of the members of the association to remove the Committee Member. It can be a 'special' general meeting or an annual general meeting. Usually, a general meeting to remove a committee member would be a special general meeting.
2. The members of the organisation will need to vote on a proposed 'resolution' to remove the Committee Member.
3. Your organisation's rules may have specific 'natural justice' requirements to give the Committee Member a chance to put their side of the story to the members. If your organisation uses the model

rules, the Committee Member who is the subject of a proposed resolution for removal may generally:

- a. make written submissions regarding why they think they should keep their position as a member of the committee;
 - b. give this document to the secretary or president; and
 - c. request that it be provided to the members of the organisation.
4. The secretary may then provide a copy to each member, or if this does not happen, the Committee Member may require that it be read out at the meeting.²

Please refer to the schedule on the following pages which identifies the applicable legislation for each State.

Remember that the removal of a Director/Committee Member from the Board/Committee is different from removing them from the organisation entirely. If the Director/Committee Member is also a Member of the organisation, their removal from the Board/Committee will generally not affect their status as a Member of the organisation.



¹ <http://www.pilch.org.au/Assets/Files/Removing%20a%20committee%20member%20from%20the%20committee.pdf>.

² <http://www.pilch.org.au/Assets/Files/Removing%20a%20committee%20member%20from%20the%20committee.pdf>

Legislation for Removing a Director/Committee Member

BY Isabelle Whelan, Lawyer

We've created this table to help you quickly locate the relevant legislation for removing a Director/Committee Member in your State/Territory.

As you will see, there are slight variations in the procedure in each jurisdiction. Although generally, the notion of 'natural justice' remains consistent across all States/Territories.



Legislation for Removing a Director/Committee Member			
Type of Entity	State and Territory Legislation for Incorporated Associations		
Incorporated Association	ACT	Section 64(1)	of the <i>Associations Incorporation Act</i> 2009 states that an Association may, by resolution, remove a Committee Member.
		Section 50	of the Act states that the rules of 'natural justice' must be complied with.
		Rule 17	of the model rules in Schedule 1 of the <i>Associations Incorporation Regulation</i> 1991 states that subject to section 50 of the Act, an association in general meeting may by resolution remove a Committee Member.
		Rule 23	states the Committee may "whenever it considers appropriate" call a general meeting of the Association. A general meeting may also be called by "not less than 5% of the total number of members" of the Association.
	NSW	Sections 35(c) and (g)	of the <i>Associations Incorporation Act</i> 2009 state that a Committee Member may be removed by resolution of a general meeting. The Committee Member may also be removed in such other circumstances as the constitution of the Association provides.
		Rule 19	of the model rules in Schedule 1 of the <i>Associations Incorporation Regulation</i> 2010 states that the Association in general meeting may by resolution remove a Committee Member. The Committee Member can give the secretary or president a written statement (not exceeding a reasonable length) and request that it be circulated to the members of the Association. The written statement may be circulated or read out at the meeting at which the resolution is considered.

Legislation for Removing a Director/Committee Member

Type of Entity	State and Territory Legislation for Incorporated Associations		
	NT	Sections 27(4) (e) and 27(5)	of the <i>Associations Incorporation Act 2003</i> state that a Committee Member can be removed by resolution of the members in accordance with its constitution. A Committee Member can also be removed if they are required to hold another office specified in the constitution and they cease to satisfy that requirement.
		Section 39	of the Act relates to the application of natural justice in adjudication of disputes.
		Rules 32 and 45	of the model rules of the <i>Associations Incorporation Act 2004</i> state that the Association may remove any Committee Member, through a special general meeting. Half the number of members constituting a quorum for a general meeting may request a special general meeting.
	SA	Neither the <i>Associations Incorporation Act 1985</i> nor the <i>Associations Incorporation Regulation 2008</i> addresses the process of removing a Committee Member. Further, the Consumer and Business Services model rules do not address the removal process of a Committee Member. ³ The process for removing a Committee Member should be set out in the rules of the Association. Section 40 of the Act, however, relates to the application of natural justice in the adjudication of disputes.	
	QLD	Section 64(1)	of the <i>Associations Incorporation Act 1987</i> states that a Committee Member may be removed from office as prescribed by the rules.
		Rule 20(3)	of the model rules in Schedule 4 of the <i>Associations Incorporation Regulation 1999</i> states that a Committee Member may be removed from office at a general meeting by ordinary resolution.
		Rules 20(4) and 20(5)	state that before a vote of members is taken about removing the Committee Member from office, the Committee Member must be given a full and fair opportunity to show cause why he or she should not be removed from office. Once the vote is cast to remove the Committee Member from office, a Committee Member has no right of appeal.





Legislation for Removing a Director/Committee Member

Type of Entity	State and Territory Legislation for Incorporated Associations		
	VIC	Sections 78(1) and 78(2)(b)	of the <i>Associations Incorporation Act</i> 2012 state that a Committee Member may be removed from office by special resolution, in accordance with the rules of the Association.
		Rules 55(3) and 39(a)	of the model rules in Schedule 4 of the <i>Associations Incorporation Regulation</i> 2012 state that a general meeting of the Association may by special resolution remove a Committee Member from office.
		Rules 31 and 32	state that the Committee can convene a special general meeting “whenever it thinks fit”, and the Committee must convene a special general meeting if 10% or more of the members of the Association request one.
	TAS	Section 14	of the <i>Associations Incorporation Act</i> 1964 states that the Association has power to remove a Committee Member.
		Rule 12	of the model rules of the <i>Associations Incorporation Regulation</i> 2007 states that the Committee may convene a special general meeting “at any time”. A special general meeting may be called by “at least 10 members” of the Association.
	WA	<p>Neither the <i>Associations Incorporation Act</i> 1987 nor the <i>Associations Incorporation Regulation</i> 1988 addresses the process of removing a Committee Member. The process for removing a Committee Member should be set out in the rules of the Association.</p> <p>An Association may generally remove a Committee Member by means of a resolution in a general meeting or a special general meeting. If a Committee Member is to be removed, the chairperson must inform the Committee Member of the motion to have the member removed and the reasons for the removal.</p> <p>The Committee Member must be given the opportunity to submit a written response, giving reasons why he or she should not be removed. The response is sent to all the members of the Association or is read at the general meeting. The resolution is put to the meeting and voted on.⁴</p>	
	Commonwealth Legislation for Companies		
Public Company Limited by Guarantee	All States/Territories	Section 203 of the <i>Corporations Act</i> 2001 (Clth) relates to the resignation, retirement or removal of directors. Section 203D refers to the removal of a director of a public company.	

³ http://www.cbs.sa.gov.au/assets/files/02_association_rules.pdf

⁴ http://www.commerce.wa.gov.au/associationsguide/PDF/Publications/Inc_Guide.pdf

Are you only as good as your brand? Reputation protection in a competitive world

BY Damian Ward, Partner

A matter of ever-increasing interest and importance in the not-for-profit and charity sector is the rise of branding.

In an ultra-competitive fundraising environment, creating, profiling, maintaining and protecting a brand that creates a positive sense of how and why you do what you do is essential.

Earning and enhancing a reputation for integrity and credibility is key. The relative sophistication and style of your branding can be an essential element in this regard.

Whilst there are many aspects to establishing a strong brand including word of mouth, strong associations and affiliations, media and social profile and managing deftly the online space, the name and logo you may use are also important.

Whilst an organisation's brand means much more than its name and logo, these are important components in creating a niche and establishing yourself.

Registering Trade Marks is traditionally the most time and cost effective means by which brand protection takes place.

In this process specialists assist in preparing and lodging with IP Australia Trade Mark applications. After an administrative process takes place, you hopefully receive registration of the Trade Mark.

This gives you an effective monopoly on the use, utilisation and exploitation of that mark. If anyone seeks to use a mark or branding that is substantially identical or deceptively similar to the registered mark, you have rights under the *Trade Marks Act* 1995 (Clth) to stop them in Court.

This may include an application for an injunction, which is in the nature of a Court order to prohibit them from using the mark. A court may also award damages for any loss you suffer as a result. Ordinarily, an injunction is the remedy that the party seeks.

You do not have to register a Trade Mark to earn some degree of protection in the law. However, it is harder to stop someone seeking to spring board off your hard and well earned reputation. Your rights are much less clear. The main complication is you will need to establish that



you are known within a particular sector as the entity which holds that branding. This is easier said than done. It often involves a historical trawl through your records to establish how long a period of time you have been branded in the way you have.

Further, the protections under the *Trade Marks Act* is wider than may be available at general law, and allows you to more forcefully and effectively protect your brand.

Aspects of branding that may be trade marked are names, logos, symbols and other identifiers.

If protecting your brand is important to you, taking this inexpensive step generally provides the best protection you can get.

If you have any questions in relation to the registration of Trade Marks or the steps involved in protecting your brand, contact:

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Legal Definition of a Government Entity

BY Clementine Baker, Lawyer



The Charities (Definition of Government Entity) Instrument 2013 (Instrument) commenced on 20 December 2013.

The purpose of the Instrument is to clarify which Government entities will be excluded from the definition of charity in section 4(2) of the *Charities Act 2013 (Clth) (Act)*. A core element of the definition of charity is that a Government entity cannot be a charity.

The Instrument reflects the concepts underlying the Act's definition. It provides that an entity is a Government entity if:

- (a) it is a local Government body (within the meaning of the *Income Tax Assessment Act 1997*); or
- (b) an entity that has the privileges and immunities of the Crown; or
- (c) an entity where an individual occupying a position within the entity holds an office of profit under the Crown; or
- (d) an entity that, in pursuing its objectives, is not independent of the Crown, having regard to:
 - (i) the degree of control the Crown can exercise over the entity's governance and operations;
 - (ii) whether the entity was established with the objective of fulfilling a function or responsibility of the Crown; and
 - (iii) any other relevant matter.

The *Charities (Definition of Government Entity) Instrument Explanatory Statement* provides some further guidance on the classification of entities as either Government entities or non Government entities. The key components of the Explanatory Statement are as follows:

(a) Local governing body

An entity that is a local governing body established under a State or Territory law will be prescribed as a Government entity.

(b) An entity that has all the privileges and immunities of the Crown

In determining whether an entity has the privileges and immunities of the Crown, consideration may be given to the establishing statute, its governing rules or the character and functions of the entity.

There are ten bodies politic in Australia that enjoy the ‘privileges and immunities of the Crown’. They are the Commonwealth, the six States, the Northern Territory, the Australian Capital Territory and the Territory of Norfolk Island. In each of these jurisdictions, the privileges and immunities of the Crown extend to the Cabinet, the Ministry, the public service and some statutory bodies.

(c) Individuals occupy an office of profit under the Crown

In determining whether individuals who occupy a position within the entity hold an office of profit under the Crown, consideration must be given to the nature of the employee/office holder and the type of work undertaken by the individual in the performance of their duties. If the Crown itself has the power of appointment and dismissal over the individual, this would indicate Crown control, and that the office is one under the Crown.

(d) Non-independent in pursuing objectives

Where an entity is not clearly a Government entity, then consideration must be given to the degree of Government control and the functions of the entity. Control may be expressed:

- (i) under statute;
- (ii) in the entity’s governing rules;
- (iii) through membership or at board level; or
- (iv) through the ability of a Minister to control activities, finances or operations.

If the function of a charity in independently carrying out its own purpose has the effect of helping to achieve Government policy, this is, in itself, unlikely to constitute Government control.

It has been well established that an entity substantially funded by Government may still be independent if its governance, its objectives, and its activities and functions undertaken in carrying out its purposes are discharged independent of Government.

Many charities undertake activities or deliver services on behalf of the Government under a contract or grant arrangement. This relationship does not mean that the entity is carrying out its activities to purely achieve a Government policy for or on behalf of the Government.

In addition, the Act does in fact recognise that Government entities do carry out works which are no less charitable simply because the entity is a Government entity. Section 13 of the Act provides that, for the purpose of determining whether a fund has a charitable purpose, any entity to which that fund contributes which is a Government entity should not be treated as being a Government entity. Section 13 provides that:

- (1) This section applies to a purpose that a fund (the contributing fund) has, if:
 - (a) the purpose includes the purpose of providing money, property or benefits:
 - (i) to a Government entity; or
 - (ii) for the establishment of a Government entity; and
 - (b) the Government entity would be a charity were it not a Government entity.
- (2) For the purpose of determining whether the purpose that the contributing fund has is a charitable purpose, treat the Government entity as not being a Government entity.

This is a very clear statement from Government that as long as the entity itself (i.e. the fund) is not a Government entity, it does not matter if the recipient of any funds or benefit is Government, so long as that entity would be charitable if not for its Government entity status.

“If the function of a charity in independently carrying out its own purpose has the effect of helping to achieve Government policy, this is, in itself, unlikely to constitute Government control.”

Indigenous Charities:

Guidance on how to have your Indigenous organisation registered with the ACNC

BY Isabelle Whelan, Lawyer



In December 2013 the ACNC released the Commissioner's Interpretation Statement (CIS) on Indigenous charities. The purpose of this CIS is to provide guidance to ACNC staff on how charity law applies to Indigenous charities, including the recognition of Indigenous disadvantage, applying the public benefit test and the effect of the new *Charities Act 2013* (Clth) (**Charities Act**).

Following is a summary of five main points from the CIS:

1. An organisation with the purpose of addressing Indigenous disadvantage is accepted as coming within the first head of charity: relief of poverty or impotence;
2. Where the organisation is addressing the relief of poverty as Indigenous disadvantage, there is no need to meet the public benefit test;
3. Where the organisation is addressing the relief of impotence as Indigenous disadvantage, there is a presumption of meeting the public benefit test;
4. After the commencement of the new Charities Act, the recognition of Indigenous disadvantage will continue; and

5. It is not necessary for the charity to use the term 'poverty' or the language of 'Indigenous disadvantage' where that purpose is clear.

We will consider each of these in turn as we examine the law prior to the new Charities Act, and the law under the new Charities Act, which commenced on 1 January 2013.

A. Recognition of Indigenous Disadvantage

There is widespread public acknowledgement of Indigenous disadvantage in Australia by Governments, Parliament, the courts and international organisations. The disadvantage suffered by most Indigenous people is caused by, or linked to, 'poverty'.

(i) Common Law – the law prior to the Charities Act

At common law there are four heads of charity. The first head of charity is for the relief of poverty, the needs of the aged, impotent and poor.

It is necessary to distinguish whether the disadvantage fits within the 'relief of poverty' or the 'impotence' components of the first traditional head of charity, as this determines whether the public benefit test needs to be applied. This applies to all charities – where the charitable purpose is addressing poverty, there is no need for the organisation to meet the public benefit test.

The 'relief of poverty' has been accepted by the courts as not equating 'to destitution or even on the borderline of destitution'. Instead it connotes the notion of 'going short' – an inability 'to obtain all that is necessary, not only for bare existence, but for a modest standard of living', or to achieve the status of being 'self-supporting'. Other types of disadvantage fit within the category of 'impotence'.

The term 'impotence' is considered to now include '... beyond sickness and disability, the underprivileged, the vulnerable, the dependent and those without family.'

(ii) The law under the new Charities Act

The new Charities Act contains a list of 12 charitable purposes. To be eligible for registration by the ACNC, it is necessary to now address at least one of these purposes.

The traditional first head of charity for the relief of 'poverty', the needs of the aged and impotent is reflected in the new purposes of 'advancing health' and 'advancing social public welfare' in section 12(1) of the new Charities Act.

Section 14 of the new Charities Act elaborates that the purpose of 'advancing health' includes the purpose of preventing sickness, disease or human suffering. There is a presumption of public benefit for this charitable purpose under section 7(a) of the new Charities Act.

Section 15 of the new Charities Act elaborates that the purpose of 'advancing social or public welfare' includes relieving the poverty, distress or disadvantage of individuals or families, caring for and supporting the aged or individuals with disabilities.

B. The Public Benefit Test

The public benefit test lies at the core of the legal concept of charity. A charity must direct its benefit to the general public or a sufficient section of the general public. Generally, the public benefit test is considered to exclude a group of beneficiaries related by descent or blood, or that is a closed group.

The law under the new Charities Act

Section 8 of the new Charities Act states that a charity with 'the purpose of relieving the necessitous circumstances for people in Australia' does not need to meet the public benefit requirement in section 6(1)(b) of the new Charities Act.

An Indigenous organisation will satisfy the public benefit test if its members/beneficiaries are described in terms of family relationship or descent from named apical ancestors associated with a particular geographical area.

The relationship between Indigenous people, an area of land and their traditional laws and customs has been recognised in Australian law and described as a 'native title claim group' as described in section 62(2) of the *Native Title Act 1993* (Clth) or 'traditional owner group'. These 'native title claim groups' or 'traditional owner' members/beneficiaries will be accepted as benefitting a sufficient section of the public as required by the public benefit test.

Section 9 of the new Charities Act contains specific provisions for organisations whose purpose is for the benefit of Indigenous people who are related.

Therefore, whether an Indigenous 'native title claim group' can meet the public benefit test should be considered on a different basis from the common law authorities, which were considering a charitable trust for the descendants of an individual or individuals in a western family.

Section 9 of the new Charities Act contains specific provisions for organisations whose purpose is for the benefit of Indigenous people who are related

Abolition of the ACNC

BY Isabelle Whelan, Lawyer

On 29 January 2014 Minister Kevin Andrews announced that the newly established Australian and Charities and Not-for-profits Commission (ACNC) will be abolished. The ACNC will continue until at least July 2014. After this time, there will be a return to the Government agencies which previously regulated the sector, including the Australian Tax Office.

Consequently, there will be substantial changes to the regulatory scheme for the not-for-profit sector including: the establishment of the National Centre of Excellence, the resurrection of the Community Business Partnership, new financial reporting requirements and taxation reforms.

The National Centre for Excellence will replace the ACNC. It will be established to support the not-for-profit sector

rather than regulate it. The purpose of the Centre will purportedly be to reduce the reporting burden on the sector by establishing universal financial and reporting standards. The Centre is to carry out the following functions:

- provide educational support services to the sector;
- provide training support services to the sector;
- undertake research; and
- facilitate communication between the sector and Government.

A further change will be the establishment of the Community Business Partnership, which will bring together leaders from the business and community sectors to promote a culture of philanthropy and giving within Australian society.

For now, the future of the new *Charities Act 2013* (Clth) is unclear.



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