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THIRD dimension

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

To gift or not to gift: that is the question

MILLS OAKLEY

Risky Gifts: What charities need to consider before providing gifts or honorariums

BY Clement Ngai, Paralegal

There is little doubt that in many charities and not-for-profit organisations, volunteers play an integral role in day to day operations. Paid employees often go above and beyond what is required of them, making sacrifices with both their time and money in order to further the cause of the organisation. Naturally, a not-for-profit will often wish, or even feel an obligation, to provide a gift or honorarium (also referred to as ex-gratia payments or allowances) to certain volunteers, employees or other individuals for their service to the organisation. This includes common gestures such as providing a box of chocolates, or a bottle of wine to volunteers or committee members at the end of a year.

However, failing to consider the legal implications of providing gifts and honorariums to individuals may result in consequences for the organisation and its directors or committee members. This is particularly so in situations where the contemplated gifts and honorariums are of large, or extraordinary value.

The Australian Charities and Not-for-profits Commission (**ACNC**) has recently released new guidance

targeted at assisting charities wishing to provide gifts or honorariums to people in their organisations. In addition to the ACNC advice, charities should also consider any additional legal requirements imposed through taxation law, employment law, and rules relating to charitable trusts.

What's the big deal?

For charities registered with the ACNC, the obligation to continue to meet all the criteria for ongoing registration creates restrictions on the nature of gifts and honorariums that may be given to individuals within their organisations. Neglecting to consider the relevant restrictions when providing a gift or honorarium to an individual may place the charity at risk of breaching its obligations to the ACNC, which may subsequently lead to enforcement action being taken against the charity by the ACNC. The responsibility to consider what restrictions apply falls on the Responsible Persons of the charity, who may themselves be suspended or removed from the board or committee of the charity for breaching their obligations, and in serious cases, disqualified from being a responsible person of any charity.

Remaining a not-for-profit entity

In order to remain registered as a charity, ACNC Governance Standard 1 requires that charities must remain not-for-profit entities, and must not operate for the profit, personal gain or other benefit of particular people. Charities must also operate for their charitable purposes. The ACNC guidance describes how a gift or honorarium of significant value may result in a private benefit to someone, breaching the requirements to remain not-for-profit and creating inconsistency with the charity's charitable purposes.

Accountability to members

ACNC Governance Standard 2 requires registered charities to take reasonable steps to ensure that the registered entity is accountable to its members. The ACNC guidance states that 'a lack of transparency about gifts and honorariums – especially if they are of significant value', may mean that a charity is not being accountable to its members.

Acting in good faith in the charity's best interests

Under ACNC Governance Standard 5, registered charities have an obligation to act in good faith in the entity's best interest. The ACNC guidance states that 'failing to properly consider all factors before providing a gift or honorarium' could indicate a failure to satisfy the requirements of this obligation.

Responsible financial management

ACNC Governance Standard 5 requires the Responsible Persons of registered charities to ensure that the financial affairs of the charity are managed responsibly. The ACNC guidance states that 'excessive gifts or honorariums' could be an indicator of irresponsible management of financial affairs, particularly if the payments impair the charity's ability to carry out its charitable purpose.

Financial reporting

If your charity prepares financial statements, you may also need to disclose gifts or honorariums to certain individuals (such as Responsible Persons) in accordance with the Australian Accounting Standards Board Related Party Disclosures standard (AASB 124). For medium and large sized charities, charities are required to report whether they have made any related party transactions, and whether they have documented policies or processes about related party transactions. Gifts or honorariums to Responsible Persons of charities, or even close family members of a Responsible Person, could be regarded as related party transactions.

> **"Excessive gifts or honorariums could be an indicator of irresponsible management of financial affairs"**

What if my organisation is not a registered charity?

Although not-for-profit organisations such as community service associations, sporting clubs, trade unions and schools run by churches or religious bodies may not be registered charities, many of these organisations are income tax-exempt organisations. In order to retain their tax exemptions, these organisations are required to apply their income and assets solely for the purpose for which the organisation was established.

Operating similarly to the rules regulating registered charities, organisations with eligibility for certain categories of income tax exemptions under taxation law, are required to be established for purposes that are 'not carried on for the profit or gain of their individual members'. However, even where organisations are not prohibited under taxation law from operating for the profit or gain of their individual members, not-for-profit organisations usually have clauses within their constitutions or governing documents that require the assets and income of the organisation to be solely applied to further its objects, and prohibit any distribution of assets and income of the organisation to individual members.

Therefore, if a not-for-profit organisation is to provide a gift or honorarium of significant value to an individual in the organisation, this may result in a private benefit to someone that subsequently results in a breach of the organisation's governing documents, and in some cases, a breach of the conditions under which the organisation has been granted tax exemptions.

Organisations may also wish to consider whether gifts and honorariums provided voluntarily to individuals in the organisation, would be considered assessable income to that individual. This is particularly so in cases where the gift or honorarium is provided to the individual in recognition of, or incidental to, services performed by the person. Furthermore, there may be situations under employment law where providing honorariums to volunteers for their service, creates an employment relationship with the organisation, as opposed to a strict volunteer relationship.

Charitable trusts

Trustees of charitable trusts have strict obligations to ensure that charitable funds are not directed to an object not contemplated by the donor. In many cases, providing a gift or honorarium out of charitable trust funds may constitute acting in breach of trust. Although there are situations under which a court may authorise for gifts and honorariums to be made from funds held on charitable trust, any such payments require prior authorisation from the court, and this authority is not granted lightly.

Avoiding risk

Although the risk of legal implications from providing gifts or honorariums increases as the value of the gifts and honorariums increase, there are no numeric figures provided by either the ACNC, or in legislation, that determine the maximum acceptable value of any gift or honorarium. For all not-for-profit organisations, the board, committee, or Responsible Persons are responsible for determining what the acceptable value of any gift or honorarium is, with consideration of the organisation's financial position and its ability to carry out its charitable or constitutional purposes.

The ACNC has developed a list of 10 questions for charities to consider before providing a gift or honorarium. Consideration of these questions would be of assistance to any not-for-profit organisation in minimising risk when considering the legal implications of gifts and honorariums.

The ACNC further advises charities to consider developing a formal policy on gifts and honorariums, with guidelines that set out the circumstances in which they can be provided, and the approval process required for doing so.

10 Questions to consider before providing a gift or honorarium

The ACNC has provided a list of questions that Responsible Persons of a charity should consider before providing a gift or honorarium to an individual:

1. Do the charity's governing rules allow it to provide gifts or honorariums?
2. Who receives a gift or honorarium and why?
3. How should the charity determine the value of the gift or honorarium?
    - It may be through a discussion among the Responsible Persons or at the management level.
    - It may be by consulting with other similar charities.
4. Will the payment of a gift or honorarium affect any current funding arrangements?
    - Are there conditions on funding that specify funds must be used in a particular way?
5. What will supporters or the public think of the charity providing a gift or honorarium?
    - For example, it could pose a risk to the charity's reputation and its donations especially if the gift or honorarium is of significant value.
6. Is the gift or honorarium going to be a once-off occurrence?
    - If not, it might not be a true gift or honorarium, especially if recipients are expected to do something in return, or if it is made in exchange for services. There may be implications for this under employment and tax law.
7. Is the charity considering the gift or honorarium because its rules prevent it from offering remuneration?
    - If so, the charity may not be taking reasonable steps to ensure that its Responsible Persons are acting in good faith and in the charity's best interests, particularly if the person receiving the gift or honorarium is likely to be regarded as an employee or contractor.
8. Is the charity considering making a gift or honorarium to cover the out-of-pocket expenses incurred by individuals – for example, travel costs to attend a board meeting?
    - Consider reimbursing those individuals for the actual costs incurred instead, if allowed by the charity's governing rules.
9. Is the charity providing a gift or honorarium on a regular basis to recognise an individual for their services?
    - Consider if it is more appropriate to recognise them as an employee or contractor instead.
10. Is the charity providing a gift or honorarium to a Responsible Person?
    - If so, make sure there is a proper process for making a decision and determining a reasonable value.
    - How will the charity's Responsible Persons be accountable for and transparent about the gift or honorarium?
    - Will the charity consult with its members or put the decision to its members?
    - NOTE: A Responsible Person should not participate in any decision about a gift or honorarium to themselves.

Royal Commission into Aged Care Quality and Safety – The conclusion of the first round of public hearings

BY Luke Geary, Partner, Naomi Brodie, Associate, Georgia Haydon, Graduate and Edward Cope, Paralegal

In light of extensive media and parliamentary scrutiny, on 16 September 2018 the Federal Government announced that it would establish a Royal Commission into the aged care sector **(Commission)**.

Over recent years, there have been increasing reports of violence, abuse and neglect of those within the aged care system, and the Commission's inquiry will build on significant work that is being undertaken with respect to these issues.

Various past inquiries and sector leaders have identified that older Australians are particularly vulnerable to physical, psychological, financial and sexual abuse; though these are not the only issues facing the sector, with ever-changing and diverse demographics presenting new issues, such as language and access barriers to aged care services. A major challenge for the future revolves around the sustainable delivery of aged care services in rural and remote areas, where providers incur higher costs with lower financial returns.

In response to these issues, the Commission will conduct public hearings in all capital cities as well as

regional centres, and is due to produce an interim report by 31 October 2019 and a final report by 30 April 2020.

Thus far, the Commission has released practice guidelines, met with consumer groups and government stakeholders, commissioned research papers, and issued notices to providers requiring the production of documents. From the requests to providers, the most common complaints relate to elder abuse, medication mismanagement, over-use of psychotropic medications, food safety, poor response time to residents requiring assistance, inadequate wound management and record keeping.

The Hearings

The Commission opened with a preliminary hearing on 18 January 2019, which provided insight into topics that will be covered by the inquiry, the Commission's powers, the mode of the inquiry and its likely impact on organisations operating in the aged care industry. The first public hearings (**First Hearings**) were held between 11 February 2019 and 22 February 2019. The purpose of this round of hearings was to ventilate issues of key concern to organisations that have a deep interest or involvement in the aged care system, and to identify aspects of the system that will receive the attention of the Royal Commission over the next eight months.

Terms of reference

The Terms of Reference identify a broad range of issues that will be examined by the Commission, including:

- quality of aged care services, the causes of any systemic failures and any actions to be taken in response;
- the provision of care to persons living with disabilities in residential aged care;
- supporting the increasing number of Australians suffering dementia seeking access to the aged care system;
- the interface between health, aged care and disability;
- the future challenges and opportunities in delivering accessible and affordable aged care services in Australia, including in remote, rural and regional areas;
- what can be done within the Australian community to strengthen the aged care system;
- person-centred care – dignity, mental health, nutrition, choice, family involvement, medication management and end-of-life care;
- delivering aged care services in a sustainable way; and
- any other matters incidental to the above that the Commission 'considers relevant' to the inquiry.

Key Issues arising out of the First Hearings

The Commission heard evidence from consumer advocacy bodies, health care provider peak bodies, national aged care provider peak bodies, regulators, as well as care recipients and their families.

A particular focus of the evidence was in relation to the meaning of 'quality' and 'safety' within the aged care sector, and whether the current system meets consumer needs and community expectations. In considering those issues, the Commission heard evidence, broadly, in respect of the following:

- **Funding:** The common thread in the evidence was that more funding is needed to respond to the needs of those within the growing pool of people requiring access to aged care services. Two-thirds of government expenditure is directed towards the funding of residential aged care, despite the fact that two-thirds of people accessing aged care services use home care and support services.
- **Complex care needs:** There has been an increase in people with complex care needs (6 in 7 people in permanent residential aged care have at least one diagnosed mental health condition), with dementia being more prevalent and likely to become the leading cause of death for Australians in the 2020s. The Commission heard that 50% of residents in aged care facilities have dementia.
- **Staffing issues and barriers to retention of staff:** There has been a decrease in the number of registered nurses within residential aged care facilities, and an increase in the 'unregulated workforce' (i.e., carers/assistants-in-nursing), which is not governed by a regulatory board. In

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relation to the unregistered workforce, concerns have been raised about a prospective employer's ability to screen potential employees for past misconduct. Barriers to the retention of professionally trained staff within the aged care sector have been identified broadly as: lack of training and support, specifically in relation to properly attending to patients with complex care needs; increased workloads and the subsequent rise of 'casual neglect' of patients due to time pressures; and lower remuneration when compared to other health industries. Evidence confirmed the need for discussion around the implementation of minimum staffing levels.

- **Medication:** The inappropriate use of psychotropic medications to treat people with dementia (which increases a patient's risk of death, disability, falls and pneumonia) was canvassed. Patient care needs to be individualised to ensure that consent is being secured and the correct dosage is being provided. There is a need for better regulation and an appropriately trained workforce to combat this issue.
- **Data collection and integrated care models:** Miscommunication between hospitals, general practitioners (GPs) and residential care staff is prevalent and exacerbated by the fact that there is no core database for the sharing of patient medical information. The success of My Health Record will depend on how many people volunteer to participate, as well as the implementation of IT infrastructure and staff training within residential aged care facilities for the maintenance of such information.
- **Access to aged care:** Consumers currently face difficulties in accessing information in relation to aged care services, and are subjected to waiting periods of between 12 to 18 months before being able to access home care packages, during which time their assessed needs may have changed and their assigned aged care package may no longer be relevant to them.
- **Access to healthcare in residential aged care facilities:** These facilities are not standalone health services. There is often no funding for residents to receive access to dental care, mental health services, medical services and end of life care. Issues were raised about the lack of attendance by GPs at these facilities. Essentially, the system depends on the goodwill of GPs to perform a range of unremunerated administrative jobs for patients, in circumstances where, when an attendance by a GP is made, there are usually poor record keeping practices, no nurses, no consultation rooms, no handover or communication with the relevant facility.
- **Complaints mechanisms:** The Aged Care Quality and Safety Commission has been established and is developing a transparent complaints and inquiry system aimed at reducing the 'fear of reprisal' for complainants.
- **Consumers shaping the future of aged care:** The Government is implementing a mandatory National Aged Care Quality Indicator Program which will provide key information to consumers about a care facility's 'quality performance'. Providers will also be required to publish pricing information.
- **Alternative care models:** The Commission heard evidence of the success of 'home share models' being piloted in Belgium (i.e., matching students and older people in exchange for accommodation / services).

The Commission heard that Australia faces the challenge of fostering respect for the elderly as a nation; evidence was heard that there needs to be a halt on the judgment of people and their limitations and a shift towards the celebration of

the achievements of older Australians.

In his opening address, Senior Counsel Assisting the Commission, Mr Peter Gray QC, also made observations about the status of responses to the Commission's requests to providers for information and the course forward for those who have not responded to those requests. Mr Gray QC stated that the Commission will be following up with providers who have not yet responded to those requests to ensure that its requests for information have been received and will be given proper attention. If no response is received to that follow-up, the provider will be 'subject to careful scrutiny'. Responses were due on 8 February 2019.

Future hearings

Further hearings are being scheduled throughout 2019 and the Commission will provide additional information about the matters to be addressed during these hearings on its website as the arrangements are finalised. In his closing remarks on Friday, 22 February 2019, Dr Timothy McEvoy, Senior Counsel Assisting the Commission, indicated that the next round of hearings will begin in Adelaide on 18 March 2019, which will focus on home care and the community. The next block of hearings will begin in Sydney on 6 May 2019, and will focus on residential aged care, including quality and safety, and dementia.

Takeaways

If your organisation is operating in the aged care sector, you should consider implementing the following actions in light of the broad terms of reference and upcoming hearing schedule to ensure your organisation is best placed to respond to any requests from the Commission, including for information or to participate in future hearings (whether or not you have been contacted by the Commission to date):

1. Consider seeking legal advice to assist your organisation to understand and address the areas of risk and exposure your organisation may face during the course of the Royal Commission;
2. Ensure that you have sufficient resources to respond to requests for information, including the ability to identify and assess large amounts of relevant documents and information;
3. Consider establishing a 'response team' within your organisation, tasked with coordinating responses as may be required;
4. Evaluate your organisation's insurance position; and
5. Ensure that any responses your organisation provides to the Commission are forthcoming and transparent. The Commission has noted that organisations which fail to respond or adequately respond to the Commission's requests for information will 'draw attention to themselves and their systems' and that it will be gravely concerned if providers or government departments instruct employees to withhold information.

Recent Amendments to Queensland Tax Exemptions For Charitable Institutions

BY Alison Sadler, Lawyer

The Queensland Parliament recently passed the *Revenue and Other Legislation Amendment Act 2018* (Qld) (**Amendment Act**). This Amendment Act will have a substantial impact on Queensland charities, which have access to, or are applying for access to, state tax exemptions including transfer duty, land tax and payroll tax. These exemptions can be of significant value to charities.

This article will discuss the new requirements for Queensland charities, and some concerns arising from these new requirements.

What are the new requirements?

The Amendment Act has resulted in a new requirement under section 149C(5) of the *Taxation Administration Act 2001* (Qld) (**TAA**) for a charity to qualify as a 'charitable institution'. To meet the criteria of a 'charitable institution', a charity must now have express provisions in its governing document which state:

a. its income and property will be used solely for promoting its objects;

b. no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to members; and

c. on its dissolution, any assets remaining after satisfying all debts and liabilities must be transferred to another charitable institution.

In addition, the TAA has been amended to make it clear that a constitution may include a statute, deed or other instrument governing its activities or members.

Why were these amendments required?

The TAA did not specifically state that the restrictions must be ***expressly*** included in a charity's governing document. Further, the court decided in *Queensland Chamber of Commerce and Industry v Commissioner of State Revenue* [2015] QSC 77 that the provisions of the TAA did not require these restrictions to be expressly stated. This resulted in many charities being registered as charitable institutions, if the practical effect of their governing documents was that the restrictions were satisfied.

The intention of the Amendment Act is that the charitable institution requirements operate as intended and will provide administrative certainty for both the Office of State Revenue, and for charities.

To whom do these amendments apply?

The amendments will apply to both currently registered charities and charities seeking registration in the future. Some charities which are currently registered will need to amend their governing documents to expressly include the restrictions in section 149C of the TAA in order to continue to qualify for registration. These charities will have two years to amend their governing documents and to work with the Office of State Revenue to ensure they meet the eligibility requirements.

What are the concerns with the new requirements?

The Queensland Law Society put forward a lengthy submission to the Economics and Governance Committee, with a number of concerns regarding the draft bill, including:

a. trusts may require court involvement and approval to amend their governing documents;

b. it is unclear whether a charity's governing document must have the exact wording used in section 149C of the TAA; and

c. charities will incur significant legal costs to ensure their governing documents meet the requirements in section 149C of the TAA.

> **"To meet the criteria of a 'charitable institution', a charity must now have express provisions in its governing document."**

Nevertheless, this amendment is now operational. We expect that the Commissioner of State Revenue will introduce a number of public rulings which may address some of these concerns.

What are the consequences of not amending your charity's governing document?

At the time the Amendment Act was passed, the Queensland Treasurer released a statement that no currently registered charitable institution will lose the benefit of these exemptions as a result of the amendments. However, it is unclear if this will be the case after the end of the two year transitional period. Accordingly, if your charity does not amend its governing document within the two year transitional period it may be at risk of revocation of its charitable institution status, and its access to state tax exemptions. This could have a significant impact on the way your charity operates in Queensland.

Summary

In summary, an entity applying for registration as a charitable institution will need to ensure its governing document expressly contains the restrictions in section 149C of the TAA. Also, charities that are currently registered as charitable institutions should check their governing documents to ensure compliance.

Not-for-Profit Exemptions under the Foreign Influence Transparency Scheme

BY Amelia Cameron, Seasonal Clerk

The *Foreign Influence Transparency Scheme Act 2018* (Cth) (**Act**) commenced on 10 December 2018, following a number of amendments to the Foreign Influence Transparency Scheme Bill 2017 (**Bill**). The Bill in its original form was heavily criticised by the not-for-profit sector, with concerns about creating more compliance obligations for the 'good guys', rather than catching those persons disrupting Australia's democratic process.

The *Foreign Influence Transparency Scheme* (**Scheme**) as established by the Act, was introduced in response to growing fears surrounding an increase in covert foreign influence on activities in Australia. The legislation establishes a new registration system, providing greater visibility of the extent of foreign influence over the Australian Government and democratic process. Actors undertaking certain activities on behalf of foreign individuals or entities are required to register or face severe penalties, including imprisonment for up to five years.

The initial Bill would have included registration requirements for most charities that receive foreign funding. In submissions to the Government, the Australian Charities and Not-for-profits Commission (**ACNC**) argued the Bill placed an 'unnecessary regulatory burden on charities' that already report and are monitored under strict regulatory frameworks. Further, there was a danger that the added regulation may discourage advocacy work, as charities may be unable to meet the increased regulatory burden and would not want to risk the penalties for non-compliance. The amount that charities already spend on administration is significant and the Bill would have imposed even greater costs for the not for profit segment that receive overseas funding.

In response to submissions from various agencies, the Government amended the Act to exempt many charities and not-for-profits from having to register. A key element of the scheme is its intention to capture covert foreign influences, rather than preventing any and all foreign influence on the Australian Government. 'Foreign influence' refers to foreign countries trying to sway Australian Government decisions, such as official diplomatic negotiations, which are legitimate. However, when foreign states

operate outside these official interactions, by using a third-party, their attempt to impact decisions may be hidden, which could be detrimental to Australia's national interests. This is why greater transparency of foreign influences on Australia was required.

The new scheme involves registration and reporting obligations on individuals or organisations who partake in 'registrable activities' aimed at influencing politics or Government, on behalf of, or connected to 'foreign principals' such as a foreign organisation, company or government. There already exists a variety of exemptions, including some activities of a registered charity with the ACNC.

Who has to register?

Generally, a person (company or individual) must register under the Scheme when all of the following conditions set out in the Act are satisfied:

1. Involvement of a foreign principal defined in section 10 as:
   a. a foreign government;
   b. a foreign organisation; or
   c. a foreign government related entity or individual.
2. Under section 11, the person acts 'on behalf' of that foreign principal.
3. The undertakings on behalf of the foreign principal constitute a 'registrable activity' under Division 3, such as:
   a. parliamentary lobbying;
   b. political lobbying;
   c. communications activity;
   d. disbursement activity; or
   e. the engagement of specific persons such as a Cabinet minister on behalf of a foreign principal for certain activities.
4. The person undertakes the registrable activity for the purpose of 'political or government influence', such as an activity undertaken for the purpose of influencing a Government election process, Government decision-making, proceedings of a House of Parliament, or a process regarding a political party.

Exemptions

Division 4 of the Act outlines a number of circumstances where organisations are exempt from reporting and registering. While the 2018 amendments have reduced much of the red tape from the original Bill, not-for-profit organisations may still be required to register and report if the organisation is a foreign principal undertaking a registrable activity.

Some of the Division 4 exemptions are more relevant to not-for-profit organisations than others. In relation to the not-for-profit sector, the Act provides exemptions from reporting and registering if the organisation meets all of the following conditions:

1. Under section 27, the registrable activity is a religious activity undertaken in good faith.
2. Under section 29C, the organisation is a registered charity with the ACNC, the activity is undertaken for a charitable purpose, rather than a disbursement activity, and at the time of the activity, it is apparent to the public that the activity is on behalf of a foreign principal and the identity of that foreign principal.
3. Under section 29D, the organisation's purpose relates to the arts, the activity is in pursuit of the organisation's artistic purpose, rather than a disbursement activity and at the time of the activity, it is apparent to the public that the activity is on behalf of a foreign principal and the identity of that foreign principal.
4. Under section 25, the activity relates to the provision of legal advice.
5. Under section 29A, the activity is undertaken by an industry representative body in the way of representing its members.

Conclusion

The amendments go some way to addressing the not-for-profits sector's concerns with the 2017 Bill. However, not-for-profit organisations should be careful not to assume they are exempt simply because they are a registered charity with the ACNC. If the organisation does not fit into an exemption, if it is funded by foreign entities and is engaging in activities in the pursuit of influencing the Australian political or governmental sphere, it may be required to register. Professional legal advice should be sought if an organisation is unsure if they are captured by the Act.

Changes to lottery laws in New South Wales – *Community Gaming Bill 2018* (NSW)

BY John Vaughan-Williams, Lawyer

Not-for-profits rely on many different sources of income, and it has long been common for not-for-profits to fundraise using raffles, or other games of chance. In each Australian jurisdiction, there is specific legislation in place which governs lotteries, and it will often be the case that a raffle conducted by a not-for-profit is captured by the legislative definition of a 'lottery', giving rise to regulatory obligations.

In many circumstances, not-for-profits are required to obtain lottery permits or licences before conducting raffles. Having said this, in most jurisdictions there are exceptions from requiring permits for raffles where the value of prizes and/or ticket sales is below a specified amount. These exceptions tend to be inconsistent across states and territories.

Current regime

The statutory regime surrounding lotteries is arguably outdated. The relevant legislation in several jurisdictions was drafted many decades ago, and has not taken into account recent changes to the ways in which lotteries are conducted (in particular, online raffles). Some jurisdictions have recently been reviewing their legislative framework surrounding lotteries, including Western Australia, which introduced the *Gaming and Wagering Legislation Amendment Bill 2018* (WA) in Western Australia. New South Wales has recently taken similar action, passing the *Community Gaming Bill 2018* (NSW) (**Bill**) in October 2018. The Bill will replace the *Lotteries and Art Unions Act 1901* (NSW) (**1901 Act**), which has been in effect for more than 100 years.

The Bill's purpose

The Bill intends to harmonise New South Wales' regime with other jurisdictions, and to ensure that the legislation takes into account the current practices of not-for-profits, and does not place an undue regulatory burden on the sector. These changes follow the recent attempts taken by several jurisdictions to harmonise fundraising regulation, and to strike an appropriate balance between adequate regulation, and not causing undue red tape.

Clarification regarding online lotteries

The Bill brings about several changes from the regime under the 1901 Act.

A difficulty of all regulation of fundraising activities, whether through charitable fundraising, or the conduct of lotteries, is the impact of the Internet. It has long been a criticism of the regulation of both charitable collections and community lotteries that the legislation includes significant ambiguity regarding the treatment of activities conducted online. For example, if a raffle is conducted online by a not-for-profit in one state, which is then accessed by individuals in another state, the legislation could sometimes be interpreted as meaning that permits or licences are required in several jurisdictions. The Bill includes a clear provision in this regard, by stating that if a raffle is conducted outside of New South Wales and is authorised in the jurisdiction where it is conducted, then it will be deemed to be permitted in New South Wales. This clarifies the example provided above, as the not-for-profit would have no ambiguity as to whether it was required to obtain an authority in New South Wales to conduct an online lottery.

Streamlining with charitable fundraising regulation

As mentioned earlier, changes to the laws surrounding lotteries are contemporaneous with recent reform to fundraising law in Australia. At the same time as the Bill was passed through Parliament, the *Charitable Fundraising Amendment Bill 2018* (NSW) was also passed. By passing both at the same time, the legislature has attempted to use the Bill to streamline lottery regulation with charitable fundraising legislation, since many charities will be subject to both frameworks. Accordingly, whereas the 1901 Act allowed for the issuing of 'permits', the Bill now provides for the issuing of 'authorities', which is the terminology used in the *Charitable Fundraising Act 1991* (NSW) (**NSW Fundraising Act**) for New South Wales fundraising licences.

Structuring of the bill

Many of the important regulatory issues from the 1901 Act, such as provisions regarding misappropriation of funds, and the right of winners to claim prizes, are replicated in the Bill. However, a criticism of the 1901 Act was that it was structured in an onerous way, and the Bill is intended to be easier to navigate for the layperson.

In the 1901 Act, there were inconsistencies regarding issues which would be dealt with in the regulations, and in the 1901 Act. For example, the permit requirements for art unions were dealt with in the 1901 Act, whereas the permit requirements for other types of lotteries were dealt with in the regulations. The Bill attempts to set out the overarching regulatory principles, where the more minute details will be set out in the regulations.

The Bill provides that the regulations will set out all details regarding exemptions from the requirement to hold authorities for certain types of lotteries, including depending on the value of prizes and/or ticket sales. Therefore, the exact exemptions which will be in place are still to be determined as part of the drafting process, and charities will need to be mindful of this.

Fair Trading powers

Charitable and not-for-profit raffles used to be regulated by Liquor & Gaming NSW, and this role was transferred to NSW Fair Trading on 1 January 2018. In line with this change, the Bill streamlines NSW Fair Trading's investigatory powers with those under other legislation, such as the NSW Fundraising Act, the *Associations Incorporation Act 2009* (NSW), and the *Fair Trading Act 1987* (NSW).

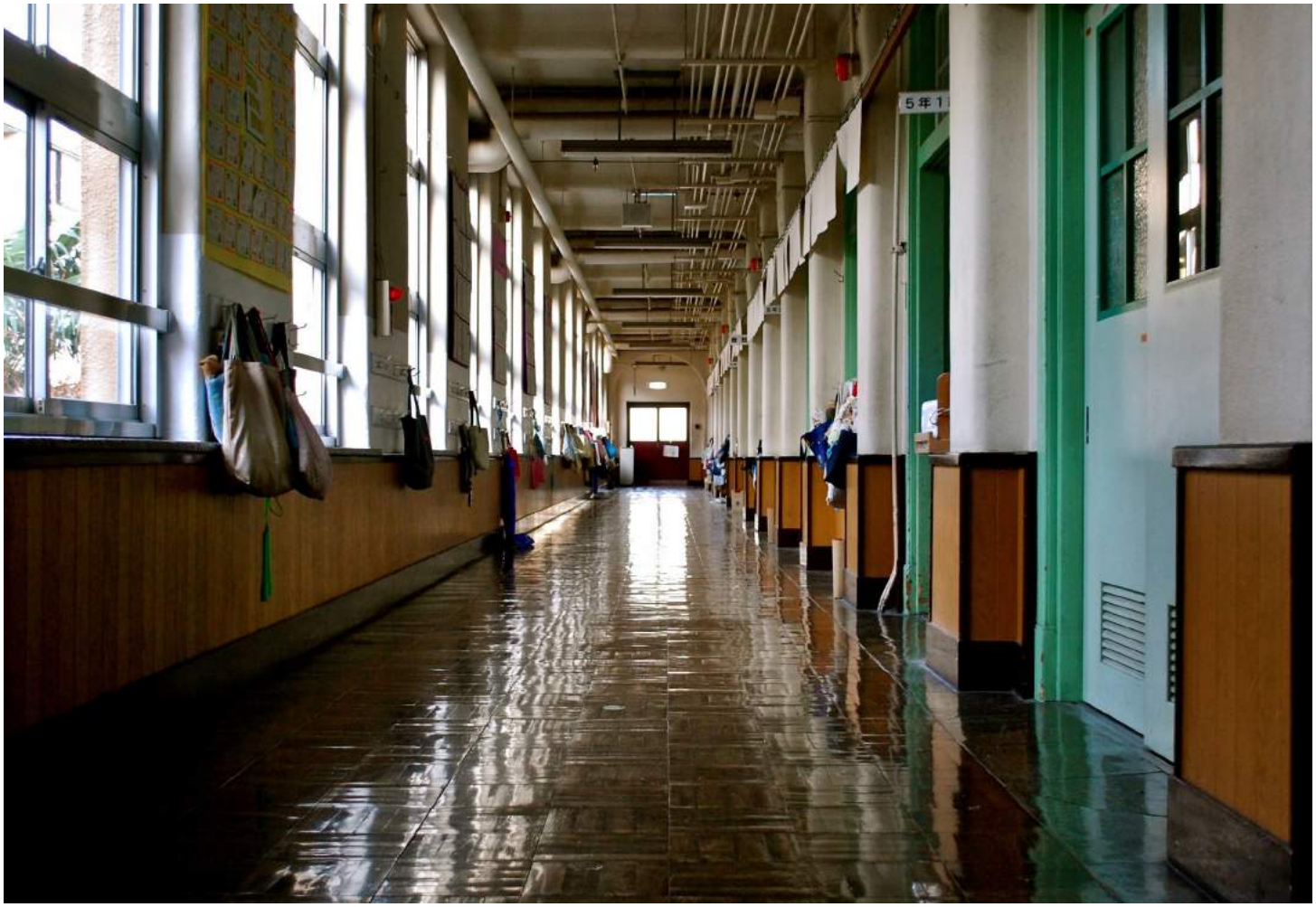
Although the Bill aims to reduce the regulatory burden on charities and not-for-profits, the Bill also provides NSW Fair Trading with strong investigatory powers in instances of suspected non-compliance. In particular, the Bill allows an authorised officer to enter any non-residential premises without a search warrant, in order to investigate alleged legislative contraventions. The authorised officer is permitted to inspect documents, take copies and photographs. Therefore, there will still be strong enforcement mechanisms under the Bill.

Current status

The draft regulations, and a regulatory impact statement regarding the Bill, are yet to be drafted. There is expected to be a transitional period, before the new regime commences sometime in 2019. Charities and not-for-profits should keep up-to-date as to when further developments occur, and ensure that they inform themselves as to whether they are required to obtain authorities to hold raffles.

Lessons to be learned from the Kimberley College Case

BY Julian Pipolo, Law Graduate



A not-for-profit organisation's constitution will invariably be its single most important document. The constitution formally outlines a not-for-profit's purpose as an entity, aids in determining the tax exemptions that will apply to it, and dictates the way in which it will be governed. As a result, considered and precise drafting of this governing document is crucial to a successful not-for-profit. This article will discuss the new requirements for Queensland charities, and some concerns arising from these new requirements.

However, it can often be forgotten that every organisation's constitution also has the effect of operating as a 'legal contract' for both directors and members. The constitution is not merely a guide. All acts committed by an organisation must strictly follow the provisions in its governing document. A minor procedural misstep can invalidate major company decisions, and can potentially bring an organisation to its knees.

The recent case of *Kimberley College Ltd v Davis [1]* (**Kimberley College Case**) is a stark reminder to not-for-profit organisations that they need to keep a close eye on their governing documents, sometimes quite literally.

[1] [2018] FCA 1102

The case is significant for two reasons:

a. it highlights the potential ramifications for a not-for-profit organisation that does not strictly follow the procedural elements in its constitution; and

b. it indicates to not-for-profit organisations under what circumstances the courts may be able to 'bail them out' if they have disregarded procedure.

1. Facts - The Kimberley College Case

Kimberley College is a not-for-profit public company limited by guarantee (**PCLG**) that was registered in 1997.

The College did not keep accurate or detailed records of the constitution that it adopted at any one time. Despite 'several purported versions' of its constitution, it was eventually accepted that a constitution was adopted around July 2001 (**2001 Constitution**) and another was later adopted on 28 November 2017 (**2017 Constitution**).

Between October 2014 and October 2017, four individuals were purportedly appointed to the Board as Directors. None of the four were members of the company (which was a prerequisite to being appointed to the Board, under the constitution) at the time of their appointments.

> **"If an organisation discovers a procedural mistake, it should seek orders as soon as possible – any delay increases the opportunity for 'substantial injustice.'"**

On 12 June 2018, these individuals received an email from a group of members asserting that all four were 'unqualified to hold office' as directors of the College for the following reasons:

a. they had breached the 2017 Constitution upon its adoption because, pursuant to that Constitution, 'no person may be a director unless that person is an ordinary member'; and

b. even if they had been admitted as members, their membership was invalid because their application forms were not signed properly in accordance with the 2017 Constitution.

Upon receiving this email, the directors took a proactive approach to dealing with the issue. They sought orders in the Federal Court of Australia (**Federal Court**) pursuant to the *Corporations Act 2001* (Cth) (**Act**) declaring that their appointments were not invalid by reason of any contravention of the College's constitution.

Ultimately, the Federal Court judge, Justice Greenwood, found the following deficiencies in the directors' appointments:

a. in failing to be members, the directors had breached both the 2001 Constitution and the 2017 Constitution;

b. even after the directors were supposedly admitted as members in March 2018, these admissions were invalid because:

   i. the application forms were not signed in accordance with the 2017 Constitution; and

   ii. there was never a formal resolution confirming their appointment as required in the 2017 Constitution.

Justice Greenwood therefore stated that the directors were never validly appointed under the provisions of any Kimberley College constitution.

2. The Court's Discretion and 'Irregularities'

Clearly these circumstances presented a daunting dilemma for the College. Justice Greenwood's confirmation called into question not only the validity of the individuals' appointments as directors, but also the validity of all decisions made during their supposed appointments. Further,

the College would have to deal with the potential immediate removal of four board members.

However, the law envisions this scenario whereby a procedural hiccup has a potentially seismic impact. Section 1322 of the Act grants the Federal Court the discretion to validate any act done despite a contravention of a provision of a corporation's constitution. The four directors in this case sought orders under this section.

In response, Justice Greenwood provides a succinct but extremely informative breakdown of how section 1322 can be enacted to overlook an organisation's 'procedural irregularities'.

2.1 Is 'honesty' required?

Section 1322(6) of the Act states that the Federal Court can only correct a contravention of a constitutional provision if satisfied that:

a. the relevant act, matter or thing was *essentially of a procedural nature;*
b. the person or persons concerned *acted honestly;* or
c. it is *just and equitable* that the order be made.

The Kimberley College Case confirmed that these conditions are to be read 'in the alternative'. In other words, only one of these conditions needs to be satisfied to justify an order being made.

Why is this significant? This interpretation confirms that, theoretically, the Federal Court may still validate a procedural breach even if those concerned did not act honestly.

While this was not the concern in the present case, this interpretation provides much greater scope for the Federal Court to potentially rectify a procedural breach and would prevent individuals from having to prove they made an 'honest mistake' in every instance.

2.2 The substantial injustice threshold

While honesty may not be a prerequisite to an order, this case clearly reinforces that an order can only be made to rectify a breach of constitutional procedure if ***no substantial injustice has been, or is likely to be, caused to any person.***

Justice Greenwood asked a key question:

> *'Would an order under section 1322 simply be confirming the state of affairs previously assumed to be valid and acted upon by the relevant parties?'*

It was ultimately found that this was in fact the case. The four individuals had always acted on the assumption they were validly appointed directors and they were recognised as directors by members in the minutes of annual general meetings. The individuals were only made aware of any issue when they were confronted by an assertion of invalidity in the email from members on 12 June 2018.

As any Federal Court order would only be confirming the current state of affairs, it was found there could be no suggestion of substantial injustice being suffered, and ultimately orders were made stating that the individuals' appointments were not invalid because of a breach of any Kimberley College constitution.

It is important to note that the Federal Court's discretion under section 1322 is absolute. While the group of members who challenged the four directors' validity actually consented to orders that the irregularities be 'overlooked', the Federal Court still had to be satisfied that it was proper to exercise its discretion in favour of the College.

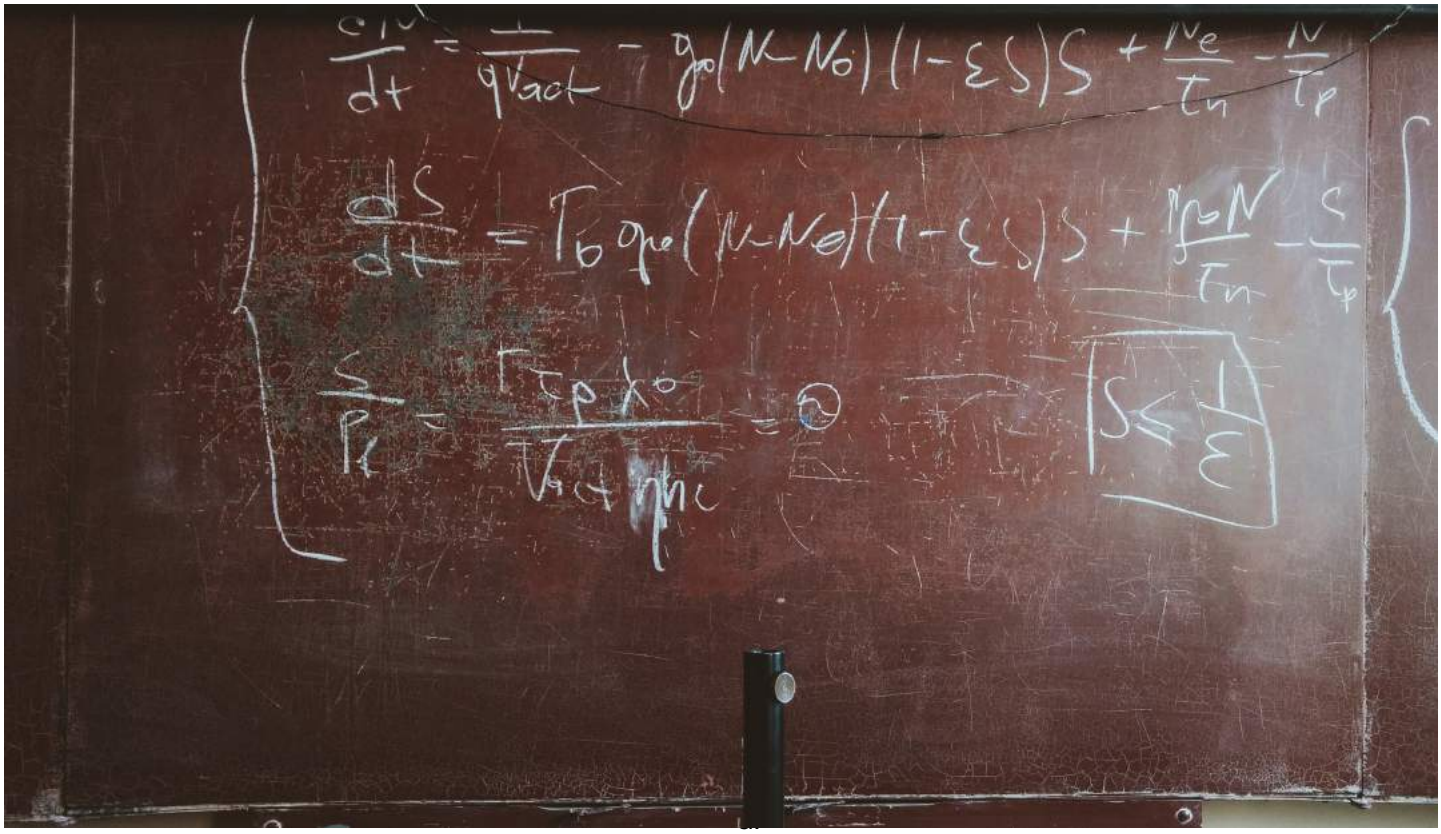
2.3 The public interest

In coming to this decision, Justice Greenwood notably quoted from *Weinstock v Beck [2]*, calling it the 'definitive construction' on section 1322:

> *'Section 1322... reflects a long-standing legislative recognition that mistakes will happen in corporate governance and that it is not in the public interest that the validity of decisions... be unduly vulnerable to innocent errors which may be corrected without substantial injustice to third parties.'*

This construction provides some solace for organisations as a reassurance from the Federal Court that it will not excessively punish companies where it can be avoided. It should also act as an encouragement to organisations to proactively come to the courts where a procedural breach is recognised – as was done by the directors in this case.

[2] (2013) 251 CLR 396



3. Take-away Points for NFPs

In light of the Kimberley College Case, not-for-profit organisations that are also PCLGs need to consider the following points in relation to the procedural elements of their constitutions:

a. breaching a seemingly minor procedural provision can have serious consequences for an organisation, and will require considerable time in court and money to rectify;

b. if the breach caused, or likely will cause, 'substantial injustice', the court will not make an order correcting the procedural mistake;

c. courts generally, though, will construe the discretion broadly and apply it pragmatically – they will rectify mistakes if they can; and

d. if an organisation discovers a procedural mistake, it should seek orders as soon as possible – any delay increases the opportunity for 'substantial injustice'.

Mills Oakley acted for the independent members of Kimberley College in these Federal Court proceedings, who first raised the procedural irregularities with the directors involved.

Meet the Mills Oakley Not-For-Profit team

Vera Visevic

Partner
E: vvisevic@millsoakley.com.au

Naomi Brodie

Associate
E: nbrodie@millsoakley.com.au

Alison Sadler

Lawyer
E: asadler@millsoakley.com.au

Julian Pipolo

Law Graduate
E: jpipolo@millsoakley.com.au

Clement Ngai

Paralegal
E: cngai@millsoakley.com.au

Luke Geary

Partner
E: lgeary@millsoakley.com.au

John Vaughan-Williams

Lawyer
E: jvwilliams@millsoakley.com.au

Georgia Haydon

Law Graduate
E: ghaydon@millsoakley.com.au

Lucy Chee

Paralegal
E: lchee@millsoakley.com.au

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Melbourne
Level 6, 530 Collins Street, Melbourne VIC 3000
PO Box 453, Collins St West, Melbourne VIC 8007
T: 61 3 9670 9111 F: 61 3 9605 0933
DX 558 Melbourne

Sydney
Level 7, 151 Clarence Street, Sydney NSW 2000
PO Box H316, Australia Square NSW 1215
T: 61 2 8289 5800 F: 61 2 9247 1315
DX 13025 Sydney Market Street

Canberra
Level 1, 121 Marcus Clarke Street, Canberra ACT 2601
GPO Box 724, Canberra ACT 2601
T: 61 2 6196 5200 F: 61 2 6196 5298
DX 5666 Canberra

Brisbane
Level 14, 145 Ann Street, Brisbane QLD 4000
PO Box 12608, George Street, Brisbane QLD 4003
T: 61 7 3228 0400 F: 61 7 3012 8777
DX 40160 Brisbane Uptown

Perth
Level 2, 225 St Georges Terrace, Perth WA 6000
PO Box 5784, St Georges Tce WA 6831
T: 61 3 9670 9111 F: 61 3 9605 0933
DX 95 Perth WA