ISSUE 15 SPRING 2016

THIRD dimension

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

Think your Organisation is Safe? Forget the Mafia - Tips and Guidance for Protecting your Organisation

MILLS OAKLEY

Asset Protection in a Commercial Environment

BY John Vaughan-Williams, Lawyer

Recent activity in the not-for-profit sector has made it clear that many organisations are beginning to operate in a more commercial manner.

With such changes occurring, not-for-profit organisations may wish to consider how to best protect their assets. Commercial ventures can, in some instances, create environments in which it is possible that customers or other third parties will sue, increasing the importance of asset-protection. Equally, the commercial activities run by not-for-profits can generate significant income, which is important to protect.

Separation of Operation and Assets

One of the foremost ways in which an organisation can protect its assets is by separating its structure into essentially two arms – an operational arm, and an asset-holding arm. The simplest way to do this tends to be by setting up a subsidiary organisation, or even several subsidiaries. Following the restructure, one of the entities in the corporate group can hold particular valuable (or even all) assets, and the other entity can run all of the operations.

If an organisation is to be sued, it almost invariably arises from its operations. If the organisational entity is sued, and the valuable assets are held by another asset-holding entity, it is less likely that the assets will be exposed in a litigation context. This is not always guaranteed, however, due to various legislative provisions. It is recommended that organisations seeking to restructure in order to protect their assets seek legal advice on how to best do so.

Types of Restructure

The seemingly most straightforward way of facilitating such a restructure is to keep all of the current assets in the existing entity, and to create a new entity (as a subsidiary) to which the operations will be transferred.

The benefit of this approach is that fewer items and assets need to be transferred, which can be logistically simpler. In this approach, some assets will still need to be transferred (or licensed) to the new subsidiary, such as intellectual property and employees, but this is not as complicated as needing to transfer across all assets.

Transfer of certain types of assets can attract significant taxation implications, such as stamp duty, capital gains tax, and possibly GST. Keeping the assets in the already established entity can help to mitigate this, by lessening what needs to be transferred (thereby potentially minimising any taxation liability). Before effecting a restructure, the taxation implications should be considered with reference to the types of assets being transferred, in which jurisdiction, and which laws will apply.

If an organisation does not currently hold significant assets, but plans to hold more in the future (such as real property), then the organisation may alternatively prefer to set up a new subsidiary to purchase assets, with the existing entity continuing to run the operations. Under this model, the new subsidiary can make its assets available to the current entity, through documented agreements such as leases or licences. The benefit of this approach is that fewer administrative changes will be required for the current operational entity. It will not, however, be appropriate if significant assets are already held in the corporate group.

Not-for-profit Status

When an organisation separates its assets and operations between two entities, once the new structure is set up it is almost inevitable that the two organisations will need to freely move assets between each other.

For instance, if the asset-holding entity holds the organisation's monies, it may need to distribute these funds to the operational entity to allow the organisation to be able to fund its activities. If one entity in the group is a charity, it will need other entities to also be charities in order to legally make distributions to them. Charitable status provides taxation benefits, in particular if one is a deductible gift recipient.

This raises the question of whether moving monies or assets between the entities in the group will affect either entity's charity status. Particularly relevant is that in such a structure, the parent will be a member of the subsidiary; charities are generally forbidden from making distributions to their members.

However, under taxation law, there is an exception for charities that make distributions to charitable body corporate members which have similar objects. In such a parent/subsidiary relationship, it is foreseeable that both will have similar (or even the same) objects, as they are both part of the same larger charitable group. This will allow them to legally make distributions between each other.

The 'Word Investments Case'

In a corporate group following an asset-protection restructure, the asset-holding entity will essentially only exist to make its assets available to the other entity in the group.

The High Court case of *Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55 (known as the Word Investments Case), considered the issue of whether an organisation that only fundraises for other charities, rather than directly conducting charitable activities itself, still has charitable objects and is eligible to have charitable registration.

This case stands as authority that such an organisation

can be registered as a charity. This extends to particular types of charities; for instance, an organisation can be a public benevolent institution if its purpose is to raise funds for other public benevolent institutions. The same is also true for health promotion charities.

The relevant consequence of this is that an asset-holding subsidiary can still be a charity if it has charitable objects and only applies its funds for those objects, even if it does not directly conduct charitable activities.

Potential Taxation Issues

As mentioned above, there can be significant taxes that apply in a restructure. However, there are exceptions that can apply, which require detailed consideration on the particular facts.

The exception to GST of a 'sale of a going concern' can apply to a transfer where the transferor gives (or makes available to) the transferee everything that is needed to run the business. This can be difficult to satisfy, as if anything required to run the business is not transferred, then it may not be a sale of a going concern.

There are also stamp duty concessions for certain charities. Charities should bear in mind that as stamp duty is a state tax, 'charity' is not defined the same as by the Australian Charities and Not-for-profits Commission. An organisation that is a registered charity may not be considered a charity (or sometimes even a not-for-profit) under the relevant state Duties Act. Only the transfer of certain types of assets gives rise to stamp duty, so this may not be an issue to begin with.

We recommend that an organisation which is seeking to restructure in order to protect its assets seeks legal advice on the various implications, such as protection in litigation, and also the taxation consequences.

The Political Advocacy of Charities - What Is Allowed And What Isn't

BY Andrew Egri, Lawyer

The 2016 Federal election again brought attention to the issue of political lobbying.

The Australian Charities and Not-for-profits Commission (**ACNC**) acknowledges the difficulty in applying this area of the law to all charities. In an attempt to assist charities navigate this complex area during the course of the election campaign, the ACNC publicised the need for charities to be wary of the public's perception that they are promoting a particular candidate or party.

Ahead of the election, the ACNC Commissioner said that "in the lead up to an election there are increased risks that, in the minds of the public, charity advocacy or campaigning can be associated with a particular party."

Traditionally, there has been a division between politics and charity. Over many years, the Courts found that gifts for objectives achievable only through legislative action are not charitable. Courts have denied charitable status to gifts to the Conservative Party, the Communist Party and for education in accordance with Labor Party policy.

The *Aid/Watch case* - background

However, the division between politics and charity underwent a significant shift as a result of a High Court decision in 2010. Aid/Watch Incorporated (**Aid/Watch**) is an organisation concerned with promoting the effectiveness of aid provided in foreign countries. Aid/Watch also campaigns for changes to the way in which aid is delivered through media releases and public events, which are designed to influence the relevant agencies to alter the way aid programs are administered. The Commissioner of Taxation revoked the charitable status of Aid/Watch on the grounds that its activities were primarily political in nature.

The High Court held that there is no general doctrine in Australia which excludes from charitable purposes "political objects". Without commenting on when a political object will exclude an organisation from being a charitable institution, the High Court overruled previous decisions that a charity with political purposes will never be a charitable trust or a charitable institution. In particular, the generation by lawful means of public debate about the efficiency of foreign aid directed toward the relief of poverty was a charitable purpose beneficial to the community.

Charities Act – the current approach

The *Charities Act 2013* (Cth) (**Act**) provides a definition of charitable purposes and reflects the position of the High Court in Aid/Watch regarding the political activities of charities.

Section 12(1)(l) of the Act includes "the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country" as a charitable purpose where that change is related to one or more of the other charitable purposes listed in section 12(1).

As well as providing a definition of "charity", the Act also outlines what purposes are not charitable. Reflecting the longstanding position in Australia, section 11 provides that the purpose of promoting or opposing a political party or a candidate for office is a "disqualifying purpose". As its name suggests, a "disqualifying purpose" is any purpose held by an organisation which disqualifies that organisation from being a charity (even if the other purposes are charitable).

In determining whether an organisation has a purpose to promote or oppose a candidate or political party, considerations include:

- whether the focus of the organisation is on promoting or opposing a particular candidate or a political party in general, rather than on their policies that are

relevant to the charitable purpose;

- the direct nature and extent of engagement and association with a candidate's or a party's campaigns or publications; and
- lack of balance in promoting or opposing the policies of another political party or candidate with similar policies relevant to the charitable purpose.

What is not allowed

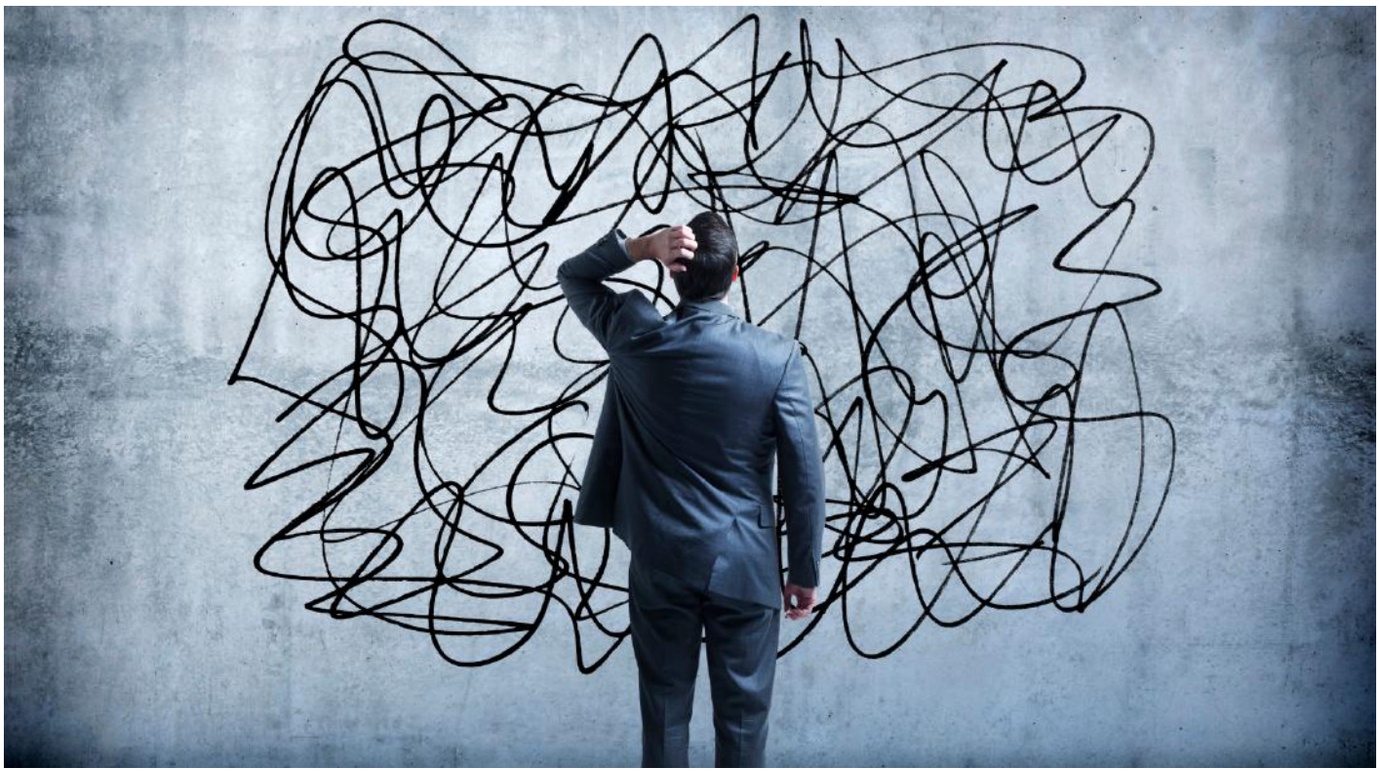
- Political parties are not charitable and a purpose of promoting or opposing a political party or a candidate for political office is not a charitable purpose.
- A charity must not have a purpose to engage in or promote activities that are contrary to public policy (which, in this context, means the rule of law, the constitutional system, the safety of the public or national security).
- Directly funding a political party is prohibited under the *Commonwealth Electoral Act 1918* (Cth). In addition, the electoral law contains rules about activities that could be seen as election-related campaigning by organisations, including charities. Party political activities could put charities in conflict with, or allow them to circumvent, the strict regulation of political parties, elections, and funding and disclosure requirements and limitations.

What is allowed

- The Act notes that a purpose of promoting or opposing a change to any matters established by law, policy or practice in the Commonwealth, a State or Territory or another country may be a charitable purpose in certain circumstances.
- The Act does not prevent organisations from distributing information, critiquing or comparing policies in order to further the achievement of their charitable purpose. Charities may engage with candidates or representatives of political parties to lobby, debate or seek explanation of their policies relevant to their purposes. They may also assess and critique their policies.

Changes to Trade Mark Fees

BY John Vaughan-Williams, Lawyer



IP Australia has recently unveiled significant differences to its previous fee structure, which became effective on 10 October 2016 across the different intellectual property rights that it administers. These rights include registration of trade marks, patents, designs and plant breeders' rights.

In the not-for-profit sector, trade mark registration is a particularly relevant matter, with charities and not-for-profits being increasingly reliant on their branding for support from the public. In particular, with many not-for-profits moving towards undertaking commercial activities in order to achieve their objects, branding and associated protections are crucial.

Trade Marks

There are sometimes misconceptions within the not-for-profit sector regarding protection of branding and intellectual property rights. A trade mark is a word, phrase, symbol or other visual representation which distinguishes one trader's goods and/or services from another trader's goods and/or services.

In the not-for-profit world, examples of trade marks could be an organisation's logo, a slogan, or even a name of a particular fundraising campaign.

IP Australia manages the publicly searchable register of trade marks in Australia, as well as the process of registration. The term 'trade mark' does not necessarily refer to one that is registered; an unregistered mark is still a type of trade mark.

The ™ symbol is used for **unregistered** trademarks; this symbol means that the user of the mark is asserting rights to it, but that it has not been officially registered. The ® symbol represents a registered mark – such a mark should always appear on the IP Australia trade mark register.

Trade mark registration and ownership also provides the ability to license the mark to another entity, which can be useful to organisations which commonly run ventures in partnership with other organisations. In some instances, licensing will be a franchising arrangement, to which particular laws will apply. Legal advice should be sought before licensing trade marks on a large scale.

Business Names and Domain Names

As mentioned above, there are some myths regarding the different types of protections available to trade marks. For instance, registration of a business name does not offer the ownership rights or protection that registration of a trade mark offers. A business name is a name under which an organisation trades, if it is different from its legal, entity name.

It is a legal requirement, under the *Business Names Registration Act 2011* (Cth), that an entity registers a name under which it carries on a business (as a business name) if the name is different from its legal, entity name. Carrying on a business is defined as the conduct of an activity or series of activities done in the form of a profession, trade, vocation or calling.

Registration of a business name will prevent other entities from either registering an entity (such as a company) under that name, or from registering that name as a business name. However, it does not provide ownership over that name, or exclusive use rights, in the same way as a trade mark. Business name registration will also generally not give rise to a cause of action against others who use the name.

Similarly, registration of a domain name does not provide ownership or exclusive use rights. It will only prevent others from registering the same domain name, but it generally does not provide wider protection than this. Registration of a trade mark is necessary to provide the greater security.

Trade Mark Application

There is no legal requirement to register a trade mark. In fact, some organisations may make a conscious choice not to register a trade mark in some instances, as they are not concerned with infringement. Infringement of a trade mark is essentially unauthorised use of it by another party. However, if infringement is a concern, then registration is the best way to allow for the infringement to be stopped in Court. It is not necessarily the case that the owner of an unregistered mark has no rights, but the rights are significantly more difficult to enforce than for the owner of a registered mark.

An application for trade mark registration occurs online, through a straightforward interface. At that stage, the applicant must choose the "classes" of goods and services in which it wishes to register its trade mark. This needs to be given close consideration, as selecting the wrong classes can later affect whether an infringement action is successful. Classes can either be selected from an existing IP Australia list, or the applicant can draft its own classes. If an applicant is uncertain regarding which classes to select, it is recommended to seek legal assistance from a lawyer who is experienced in selecting the correct classes in an infringement context.

Examination Process

Once an application is made for a trade mark, an analyst from IP Australia will consider, firstly, whether the trade mark is registrable at law in and of itself; and secondly, whether it is too similar to any other registered trade marks.

There are two different stages of approval – "acceptance", and then "registration". If acceptance is achieved, this means that the examiner recommends that, from its analysis, the trade mark should be registered. At this point, the trade mark is still not yet registered. From acceptance, there is then a two month window in which the public can lodge oppositions to the trade mark, through an online process. Grounds for opposition include that the trade mark is deceptively similar to another mark, or that registration of the mark occurred in bad faith.

Only if there are no objections during this period, or if all objections are overcome, can registration then be achieved. Once registered, the applicant is then able to enjoy all privileges and protections of being the owner of a registered mark.

Changes to Fee Structure

Before the fee changes, there was a split in fees between application and registration (if achieved). If the trade mark failed to be registered, the applicant would never have to pay the registration fee, but there was always a fee to be

paid at the point of application.

Under the new structure, there is only an application fee, but no registration fee. The application fee (under both the old and the new structure) was proportionally based on the number of classes for which the application was made. If the applicant drafts its own classes, rather than choosing from the IP Australia list, the fees are higher per class. Since the changes to the fees, each type of application fee has increased by $130.00 per class. The previous registration fee of $300.00 has now been removed.

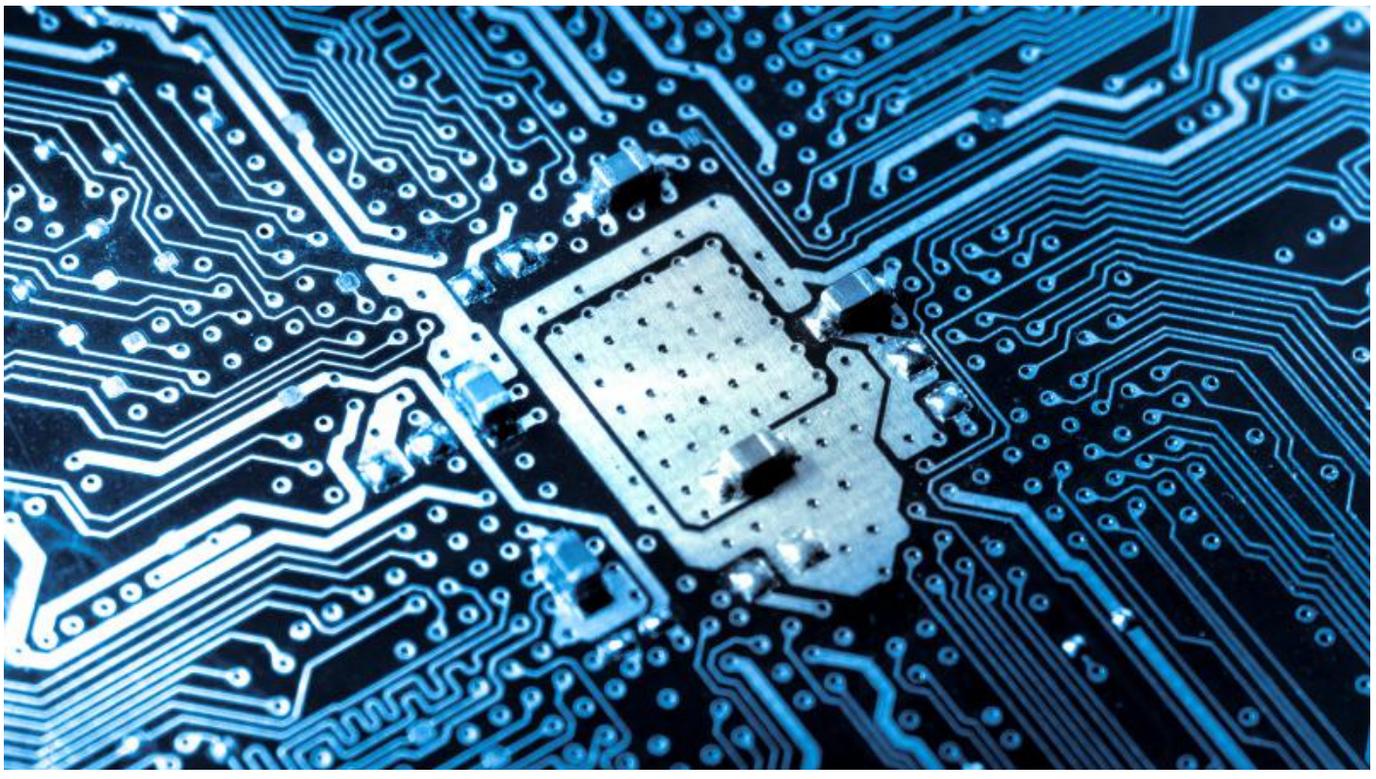
The consequence of this is that the cost applications for registration in the same number of classes will now be the same, regardless of whether registration is successful or not. The recent increases to fees apply per class, and the previous registration fee was a flat-fee (regardless of the number of classes). The result of this is that the cost of trade mark applications will now generally be greater than before.

Another significant change is the removal of fees to file an opposition to a trade mark removal. This helps to remove red tape, and also prevents the previous inherent advantage to a removal applicant. Previously, even if an opponent had a strong case against removal, the opponent may not have persisted with an opposition, due to the fees involved.

While trade mark registration is important when an organisation wishes to protect its brand, the increases in fees mean that a potential applicant should always consider the degree of likelihood of infringement, as well as whether an application is likely to be successful. For an assessment of whether a potential application is likely to be successful, it is recommended to seek legal advice.

Protecting Your Not-For-Profit Against Terrorism Financing

BY Prianca Moodley, Law Graduate



The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) has identified not-for-profit organisations (**NFPs**) as one of the most significant terrorism financing channels in Australia.

The consequences of being either knowingly or unknowingly involved in terrorism financing are significant, both in terms of the NFP's reputation and status, as well as the possibility of criminal penalties. As such, it is imperative that NFPs understand what constitutes terrorism financing, the risk factors, and how to manage such risk.

What constitutes terrorism financing?

In Australia, terrorism financing is any form of financial support of terrorism, or of those who plan, encourage or engage in terrorism. This financial support can include, but is not limited to, funding the direct costs of undertaking terrorist acts, and funding the maintenance of a terrorist network or organisation.

Under the *Criminal Code Act 1995* (Cth), offences relating to funding terrorism include:

(a) directly or indirectly making funds available to another person; or

(b) directly or indirectly collecting funds for, or on behalf of, another person and being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

An offence is committed even if:

(a) a terrorist attack does not occur;

(b) the funds will not be used to facilitate or engage in a specific terrorist act; or

(c) the funds will be used to facilitate more than one terrorist act.

The criminal penalties for such offences include imprisonment for life.

How are NFPs being exploited?

AUSTRAC has reported that NFPs may be exploited for the purposes of terrorism financing in a number of ways, which include:

(a) NFPs being used to disguise international fund transfers to high-risk regions;

(b) funds raised for overseas humanitarian aid being commingled with funds raised specifically to finance terrorism; and

(c) funds sent overseas by charities with legitimate intentions, being intercepted when they reach their destination country and siphoned off for use by terrorist groups.

What are the key risk factors for NFPs?

There are numerous risk factors arising by way of the nature, operations and status of NFPs, which make NFPs susceptible to being misused by individuals or other organisations for the purposes of terrorism financing.

1. NFPs often have the capacity to raise large sums of money, yet due to the public trust placed in these types of entities, NFPs face less strict regulation by government and less official internal scrutiny than that applied to the for-profit sector.

2. Many NFPs also have complex financial operations in which there may be numerous donors, investments in various currencies, informal fund transfers and high volumes of small and/or one off transactions. Income and expenditure are often less predictable than in the for-profit sector, and as such, are not always accounted for properly. These types of financial operations make suspicious transactions particularly difficult to identify.

3. The organisational structure of some NFPs also increases risk. For instance, some NFPs pass funds through intermediary organisations or individuals to deliver services in those areas most exposed to terrorism. A NFP organisation may also operate within a global framework, creating the opportunity for inconspicuous and often unreported financial transfers to regions in which there is no legitimate financial infrastructure, such as secure banks. Transactions of this kind are difficult to track and record.

How can NFPs protect themselves against risk?

Best practice dictates that NFPs undertake regular risk-based assessments and take responsive action to protect against the risks specific to their operations. There are, however, some initial precautions and risk management strategies that all NFPs should undertake.

Thorough due diligence processes must be undertaken to reduce the risk of terrorism financing. For registered charities, due diligence is also necessary in order to meet Governance Standard 1, which requires that a charity's funds be used in furtherance of its charitable purposes. Some initial due diligence steps which will help to protect NFPs against the risk of terrorism financing, and help registered charities meet Governance Standard 1, are listed below:

(a) monitor, evaluate and prepare reports on any and all projects or activities that are being funded by your NFP. This includes monitoring any other parties who may be funding the same project or activity;

(b) confirm the identity and good standing of those individuals who have ultimate control over the project or activity that your NFP's funds will be used for;

(c) if the party receiving funding is an organisation, confirm the jurisdiction in which the organisation is formed, any other names under which the organisation operates or has operated, and obtain copies of any available corporate documents, such as the organisation's governing document;

(d) draw up strict agreements between your NFP and those individuals or organisations who or which will receive the funding, regarding what the funds are to be used for and how any remaining funds will be used upon completion of the project; and

(e) regularly cross reference the names of all individuals and organisations being funded by your NFP against the:

(i) Department of Foreign Affairs and Trade's consolidated list of individuals and entities subject to financial sanctions by the United Nations and/or Australia; and

(ii) Attorney General's Department's list of terrorist organisations,

to ensure that funding is not being provided to known terrorists or terrorist organisations.

Promoting transparency and accountability to members will also help NFPs reduce the risk of terrorism financing and will support registered charities in meeting Governance Standard 2. Governance Standard 2 requires registered charities to take reasonable steps to be

accountable to their members and provide members with an opportunity to raise concerns over the charity's governance. Some basic practices which ought to be undertaken to promote transparency and accountability are as follows:

(a) produce and make available to members and relevant authorities, an annual report outlining your NFP's projects, activities and financial status;

(b) maintain detailed project budget records indicating how all funds have been spent;

(c) make available a list of all persons responsible for the control of your NFP's assets and financial transactions;

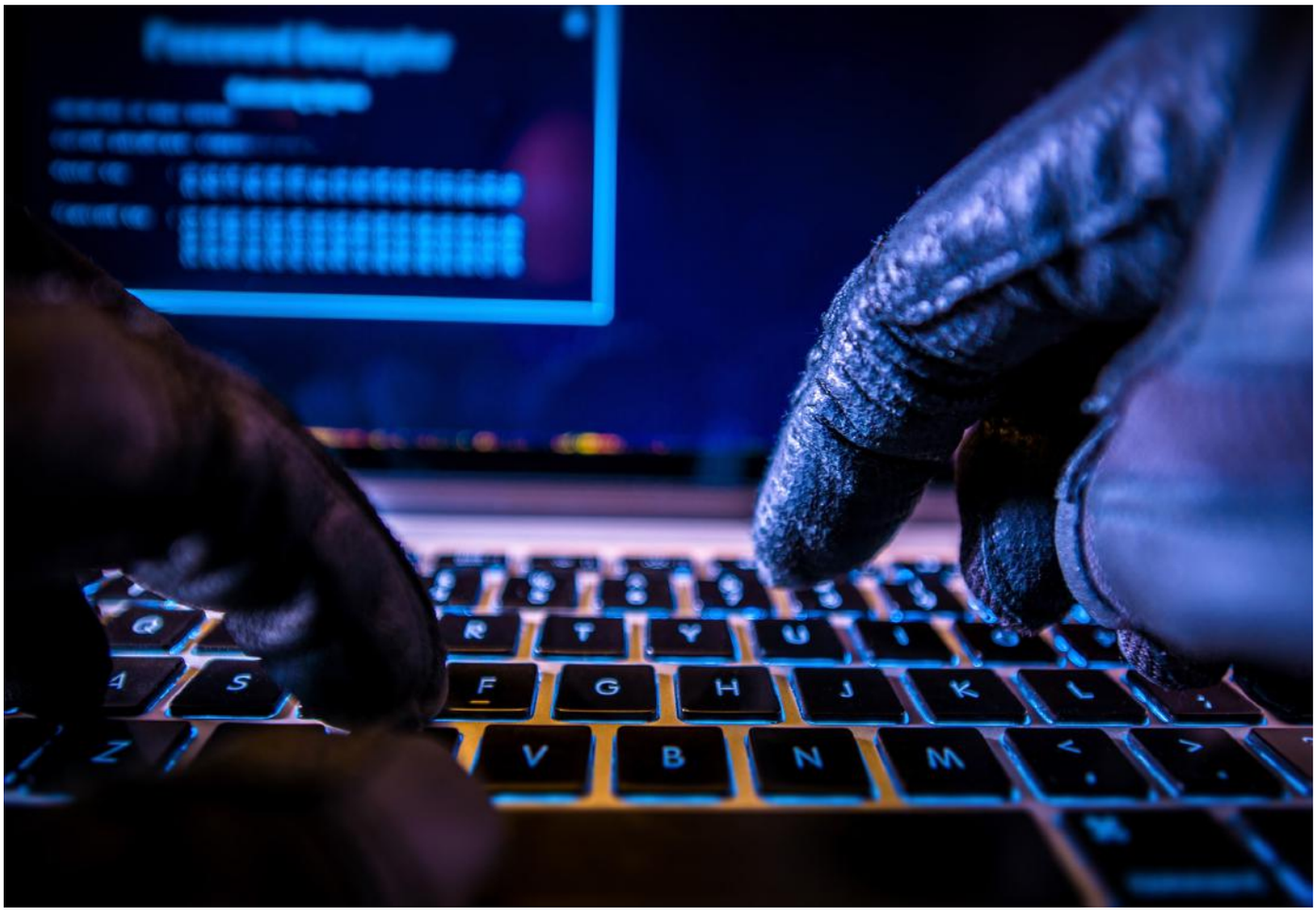
(d) develop internal control measures to ensure that no one person has independent control of assets;

(e) conduct independent financial auditing;

(f) keep all funds in secure bank accounts, using secure financial channels to transfer funds wherever possible; and

(g) for registered charities, ensure that your charity submits an Annual Information Statement to the ACNC which includes details of any overseas activities and/or any international financial transactions, as well as details of the beneficiaries that your charity directly or indirectly supports.

All NFPs, whether sending funds overseas or domestically, will be open to some level of risk of their funds being misused for the purposes of terrorism financing. It is crucial that organisations conduct risk assessments and undertake the abovementioned risk management steps, as a minimum standard, to protect against such risk.



Dispensing Justice Fairly – Is Your Disciplinary Policy Exposing Your Organisation?

BY James Thomson, Associate

The members of a not-for-profit or charitable organisation inevitably have one thing in common – they all support the objects of the organisation, and want to work towards bettering the organisation and its activities.

However, most organisations will eventually come across a member whom despite their best intentions (or perhaps not), are simply not acting in the best interests of the organisation. In those cases, it may be necessary to discipline or even eject that member from the organisation. To be prepared for these situations, it is important that your constitution deals with the discipline of members, and that you know the rights of those persons being disciplined.

Although less common among not-for-profits and charities, members who have been aggrieved by disciplinary action may have a right to apply to a Court to have the decision set aside. Such applications are costly for both the organisation and the member, and tend to result in some internal turmoil, as well as having the potential to be a public relations nightmare.

Put briefly, to lower the risk of such a dispute arising, you need to ensure that you are familiar with:

(a) the grounds upon which a member can be disciplined; and

(b) the rules of natural justice and procedural fairness as they apply to your disciplinary process.

1. On what grounds can a person be disciplined?

1.1. Understanding your disciplinary policy

It is uncommon for an organisation's disciplinary policy to state specific matters for which a member can be disciplined. More commonly, an organisation's disciplinary policy will state that a person may be disciplined if they "*act contrary to the interests of the organisation*" or "*engage in conduct unbecoming of a member*".

But what do phrases like this actually mean?

In the case of *Oei v The Australian Golf Club* [2016] NSWSC 846, the defendant's constitution allowed its Board to expel a member, if that member's conduct was

"unbecoming". That term was not, however, defined in the constitution.

The Court held that such terms should be given their ordinary meaning, and should be considered in the context of the organisation and its activities. In the above case, the plaintiff was accused of having breached the rules of golf by improperly moving his golf ball on two separate occasions.

The Court found that such conduct was clearly "unbecoming", in the context of the game of golf. Presumably this was partly because golfers rely on an honour system, expecting their fellow competitors to accurately record their shots, and to conduct themselves in accordance with the rules of the game generally.

Of course, a member's conduct may be "unbecoming" or "prejudicial" in other more obvious ways, such as:

(a) consistently failing to comply with the terms of the constitution, including the terms of any ancillary documents created under the constitution (e.g. a code of conduct, rules or by-laws);

(b) making misleading, deceptive or defamatory

statements about the organisation, its Board / Committee or other members;

(c) bullying, harassing or making threats to Board / committee members or other members;

(d) attending the organisation's premises and harassing staff or visitors, or causing a nuisance; and

(e) being consistently and habitually obstructive at general meetings.

Whatever the conduct, decisions such as *Oei v The Australia Golf Club* make it clear that a member's conduct must be viewed in the context of the organisation and its activities.

2. Your disciplinary policy

2.1 Where is our disciplinary policy?

As noted above, your constitution forms the basis upon which your organisation can discipline members.

Ideally, your constitution itself should set out the process for dealing with disciplinary matters. Your disciplinary procedures may, however, also be set out in by-laws, assuming your constitution expressly allows for the Board / Committee to adopt and amend by-laws.

Some organisations, such as professional associations, may also have a separate code of conduct that must be read in conjunction with disciplinary procedures. In this case, your constitution should expressly state that all members are bound by the code of conduct, as amended by the Board / Committee from time to time.

2.2 Requirements for Natural Justice

Case law developed by the Australian Courts over many years, requires a body making an administrative decision that might affect the rights, privileges, interests or legitimate expectations of a person, to afford that person natural justice. Because of the willingness of the Courts to extend the principles of natural justice beyond the decisions of government and public entities, charities and not-for-profits need to ensure that they understand the application of the principles as they apply to their disciplinary processes.

The term "natural justice" does not have a definitive or precise meaning in the law. However, one principle that is clearly enunciated by the case law, is that a person the subject of a decision must be afforded procedural fairness.

In particular, the decision making body must act without actual or apprehended bias, and must:

(a) ensure that the person the subject of the decision has been fully briefed of the allegations made against them, and the grounds upon which it is proposed to discipline them; and

(b) ensure that the person the subject of the decision has been given a reasonable opportunity to meet and respond to the allegations made against them.

Interestingly, it is generally not necessary for a decision making body to prove that a decision is fair, only that the procedure used to reach that decision was fair.

The recent case of *Christie v Agricultural Societies of NSW Limited* [2015] NSWSC 1118 involved a horse trainer who was disqualified from competing in competitions for a period of 12 months, after the horse he was riding in a competition was found to have been given banned supplements, in breach of the defendant's disciplinary policy. The plaintiff pleaded, and the Court accepted, that he had no knowledge of the giving of the supplements to the horse. One of the issues the Court was asked to determine, was whether the decision to disqualify the plaintiff was unreasonable in light of his lack of knowledge of the offence. The Court found that the decision could not be set aside on the basis that it was unreasonable, as the Court was not empowered to undertake a review of the merits of the decision. Rather, the Court found that the decision could only be set aside if it lacked any evident and intelligible justification. Because the disciplinary policy of the defendant did not require proof of knowledge of the offence, the Court found that it was open to the disciplinary committee to disqualify the plaintiff (the disqualification was, however, set aside for other reasons).

2.3 What should your disciplinary policy contain?

Your organisation's disciplinary policy should be drafted in such a way, that the process for disciplining a member is clearly set out.

You should ensure that your disciplinary policy includes, among other things, the following:

(a) A statement of who will constitute the disciplinary committee, or who has the right to appoint the disciplinary committee (e.g. the Board / Committee);

(b) The grounds upon which and by whom a disciplinary complaint can be brought against a member;

(c) An express power and discretion on behalf of the disciplinary committee to suspend or expel a member from membership;

(d) An express power and discretion on behalf of the disciplinary committee to reject a complaint where it is vexatious or trivial;

(e) The right of the member to receive adequate notice of the time, date and venue of the disciplinary hearing (this should be at least 14 days);

(f) The right of the person the subject of a complaint to receive detailed notice of the allegations made against them, and the grounds on which it is proposed to discipline the person (e.g. the relevant clause of the constitution, code of conduct or disciplinary by-law);

(g) The right of the person to provide written and oral submissions to the disciplinary committee; and

(h) That a person has a right to appeal the decision of the disciplinary committee and has a right to receive written notice of that right to appeal, and the timeframes within which an appeal must be lodged.

On occasion, the Courts have also specified that a person the subject of disciplinary proceedings may have a right to be legally represented at a hearing, especially where the potential outcome of that hearing is expulsion from membership. Although this is the case, it is acceptable to require that a member advise the disciplinary committee, if they intend to be legally represented.

2.4 What should our disciplinary policy not include?

Your policy should not allow for:

(a) the appeals body to comprise of any of the those persons who comprised the initial disciplinary committee; or

(b) any of the following persons to be part of the disciplinary committee or of any appeals body:

(i) any person making the complaint against the member;

(ii) the person investigating the complaint; or

(iii) any other person who has been directly or personally aggrieved by the person's alleged conduct.

2.5 Other Tips

When presiding over disciplinary matters, it is also advisable that disciplinary committees ensure the following:

(a) That the relevant member is provided with the materials or "evidence" which the disciplinary committee will be considering in making its decision;

(b) That the initial notice to the member advising of the disciplinary matter, states the recourse open to the disciplinary committee (e.g. suspension or ejection from membership); and

(c) That any "prosecutors" of the case against the member do not form part of the disciplinary or appeals committee.

Further, although disciplinary tribunals of charitable and not-for-profit organisations will not normally need to follow the rules of evidence (e.g. receiving sworn affidavits etc.), disciplinary committees should properly inform themselves of the facts and circumstances surrounding the complaint made against a member, and base their decision on that material accordingly. The decision, and the reasons upon which it is made, should be evident from the minutes taken at the disciplinary hearing.

3 Summary

When times are good, your organisation should review its disciplinary policies and constitutional provisions, in preparation for the bad times, when an issue with a member arises.

Ensuring you have proper procedures in place that comply with the rules of natural justice will reduce the risk that a member makes an application to the Court for setting aside of the decision of the disciplinary committee, a process which is expensive and often results in internal upheaval.

Meet the Mills Oakley Not-For-Profit team

Vera Visevic

Partner
E: vvisevic@millsoakley.com.au

James Thomson

Associate
E: jwthomson@millsoakley.com.au

John Vaughan-Williams

Lawyer
E: jvwilliams@millsoakley.com.au

Andrew Egri

Lawyer
E: aegri@millsoakley.com.au

Prianca Moodley

Law Graduate
E: pmoodley@millsoakley.com.au

Julia Hewitt

Paralegal
E: jhewitt@millsoakley.com.au

MILLS OAKLEY

Topics from previous issues

Issue 14, Winter 2016

- In Camera Meetings: Upholding Confidentiality or Fostering Secrecy?
- Changes to Ancillary Fund Guidelines
- Amendments to the legislation for incorporated associations in New South Wales, Western Australia, South Australia and Tasmania
- Volunteers & Your Organisation - Knowing your obligations

Issue 13, Summer 2016

- Making a Profit As A Not-For-Profit
- Social Enterprise: A Solution To Uncertain Times?
- Is Ignorance Bliss? An Examination Of The Duty Of Care And Diligence
- Directors' Rights: Moving Beyond The Call Of Duty

www.millsoakley.com.au

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 12, 400 George 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 9, 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