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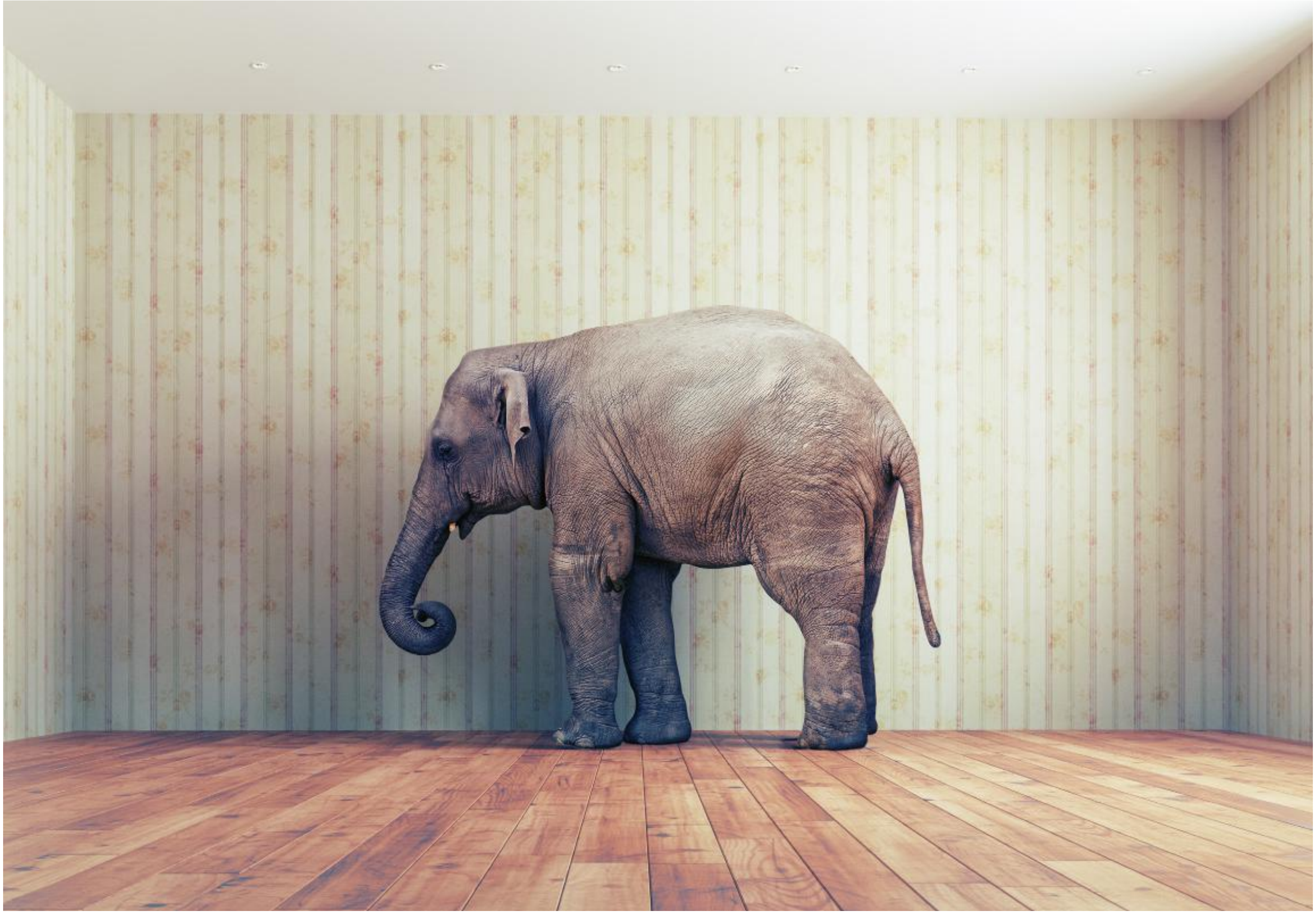
THIRD dimension

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



The Elephant in the Room: Directors' Fees

MILLS OAKLEY

NFPs paying their Board members – things to consider

BY Andrew Egri, *Lawyer*

If you are compensated for your services as a board member of a not-for-profit organisation with gratitude, rather than monetary payment, you are not alone.

The 2016 Remuneration Survey, commissioned by the Australian Institute of Company Directors, confirms that the vast majority of boards of not-for-profit organisations are unpaid.

Specifically, the survey found that of the 732 responses from board members of not-for-profit organisations, 63% are unpaid and with the remainder receiving fees.

The median annual amount received by a board member of a not-for-profit organisation was $20,000. The top 10% of paid board members received more than $48,000 annually. Not surprisingly, those who are board members of larger organisations are more likely to receive a larger amount. Board members of not-for-profit organisations with assets of more than $100 million received on average $39,281 per annum.

Those who chair the board of their not-for-profit organisation receive a premium over the non-chair board member. Accordingly, the median chair received $40,000 per annum, while the top 10% of paid chairs received in excess of $75,000 per annum.

Of those unpaid board members, 16% said that remuneration had been discussed by their boards in the last year. If your board is considering whether remuneration is appropriate, it is prudent to consider not only the potential benefits, but also any implications for the board and its members.

Reasons to remunerate the board

Many not-for-profit organisations consider paying their board members in order to:

- compensate for the responsibility and/or time involved; and
- attract more skilled board members.

However, boards will need to be mindful that remuneration may not be positively received by stakeholders and could discourage donors. If the decision is made to remunerate board members, it will need to be explained to stakeholders along with the anticipated benefits.

Things to consider

Boards that are considering remuneration should be aware of, and consider the various implications, both positive and negative of paying board members, which may include:

1. the liability of board members;
2. the company name; and
3. legal restrictions.

1. Liability of board members

There are legal advantages in not paying board members in relation to their exposure to personal liability. While a board member can be personally liable for the not-for-profit organisation's breach of certain laws, in many cases there are exemptions made to those who volunteer. For example, boards should consider the implications in respect of the following areas of law:

- **Work Health and Safety Laws**

The national model work health and safety laws set out the responsibilities of board members and, in respect of certain offences, hold them personally liable. However, the laws give immunity from prosecution to volunteer officers (but not paid officers).

- **Civil Liability Laws**

The civil liability laws in each State and Territory provide to board members of not-for-profit organisations varying degrees of protection from personal liability if they are a volunteer on the board. Boards should consider whether remuneration would cause their members to forego their immunity.

2. Company name

Section 150 of the *Corporations Act 2001* (Cth) permits a company to not use the word "limited" in its name if:

(a) it is registered with the Australian Charities and Not-for-profits Commission as a charity; and

(b) its constitution:

  i. prohibits the company paying fees to its board members; and

  ii. requires the board to approve all other payments the company makes to board members.[1]

A charitable public company limited by guarantee that wishes to remunerate its board members must include the word "limited" in its name.

3. Legal restrictions

- Some government contracts and funding agreements impose restrictions on board remuneration. Such agreements should be carefully reviewed prior to a decision being made.
- The *Charitable Fundraising Act 1991* (NSW) applies to those organisations which conduct fundraising appeals in New South Wales. Section 48 of the Act requires those organisations to apply for ministerial approval before remunerating its board members.

Members of the Australian Institute of Company Directors can obtain the 2016 Remuneration Survey at *www.companydirectors.com.au.*

[1] Section 151 provides that those exemptions granted to companies prior to the establishment to the ACNC continue, meaning that those companies may continue to omit "limited".

Financial reserves: too much, too little or just right?

BY Andrew Egri, Lawyer

Directors of not-for-profit organisations are well aware that the organisation's reserves play an important role in its financial stability. Reserves allow an organisation to meet its ongoing financial commitments and continue to provide services.

There are obvious issues that arise from an organisation not having sufficient reserves. However, for those income tax exempt entities that are fortunate to enjoy substantial reserves, they must act carefully to ensure that those reserves do not give rise to unintended problems.

1. Too much of a good thing?

Accumulating a high level of reserves without a clear explanation or justification may adversely affect the public's perception of an organisation, and risk its income tax exemption. An organisation can accumulate income and still be income tax exempt, however there are restrictions to the accumulation of income which occurs for no identified purpose.

There are a wide range of scenarios which might result in an organisation holding substantial reserves. For example, an organisation may have sold property or experienced unexpected levels of profitability over a number of years.

Section 50-50(2) of the *Income Tax Assessment Act 1997* (Cth) imposes special conditions that income tax exempt entities must satisfy to remain income tax exempt:

- the entity must comply with all the substantive requirements of its governing rules (**governing rules condition**); and
- the entity must apply its income and assets solely for the purpose for which the entity is established (**income and assets condition**).

2. Income and assets condition

The ATO clarified, in Taxation Ruling 2015/1, how an organisation may satisfy the income and assets condition:

> *31. The income of an entity may still be 'applied' for the purpose for which the entity is established if some of the entity's income (whether it be gross income or net income) is accumulated, provided the accumulation is consistent with the purpose for which the entity is established. An entity may use some of its income to acquire assets which, in future, will produce income for its purpose or purposes, and may accumulate some of its income for later distribution.*
>
> *32. To satisfy the income and assets condition, an entity that accumulates most of its income over a number of years will need to show on a year by year basis that the accumulation is consistent with the purpose for which the entity is established.*

A organisation can generally accumulate funds for either or both of the following:

- future projects, programs, services or asset acquisition (**Project Fund**); or
- as a reserve in the event of future unfavourable or unexpected circumstances (**Contingency Fund**).

3. Project Fund

The income and assets condition allows an income tax exempt organisation to accumulate funds for the purpose of specific future projects, programs, services, asset acquisitions etc., which are in fulfilment of the organisation's objects. So long as it has recorded:

- the nature of the future project, program, service, asset acquisition etc.;
- the estimated cost of the future project, service, program, asset acquisition etc.; and
- how the accumulation of funds over future periods of time will allow it to fund the estimated cost;

the accumulation of funds is permitted and will not jeopardise the organisation's income tax exemption.

Once the organisation starts becoming vague about any of the above, the risk of not complying with the Taxation Ruling (and thereby losing its income tax exemption) increases.

4. Contingency Fund

It is good practice for any organisation, particularly a not-for-profit organisation, to set aside a reasonable quantum of funds in reserve as a Contingency Fund to protect it in the event of future unfavourable or unexpected circumstances.

The ATO has not prescribed what level is considered "safe" to accumulate for this purpose. Specifically, there is no set limit on how much money an income tax exempt organisation can place in reserve, and no rule setting out how long it is able to keep money in reserve.

While the ACNC recently released a fact sheet addressing the financial stability and sustainability of charities, it also did not prescribe an appropriate level of reserves. Rather, the ACNC holds the charity's governing body as being responsible for ensuring that the charity maintains an appropriate level of reserves.

5. Recommendations for Boards

5.1 Project fund

As mentioned above, an organisation can accumulate funds for future projects, programs, services and asset acquisition as long as the arrangements are recorded.

If they have not already done so, we recommend that the members of the organisation's governing body put their minds to documenting how the project fund is calculated. The composition of the project fund should be broken down into amounts to be applied for specific projects, programs, services or asset acquisition. For example, an organisation may decide to sponsor a new program, which will cost $300,000 per year for 5 years, and so the governing body determines to set aside $1,500,000 in the project fund to cover that cost.

5.2 Contingency fund

Given that:

- ATO and the ACNC have not specified what is an appropriately sized Contingency Fund; and
- each not-for-profit organisation is different, with different sources of income, and each facing different contingency events, meaning that what will be an appropriate amount retained in a Contingency Fund will vary from organisation to organisation;

we recommend that the governing body determine for itself what is an appropriate amount to hold in respect of the organisation's contingency fund.

The governing body should be prepared to explain in as much detail as possible, the grounds on which it determined the amount to be retained in the contingency fund. Specifically, any assumptions made by the governing body in determining the size of the contingency fund should be clearly set out. Some examples of factors which the governing body might consider in determining an appropriate amount are:

- the organisation is nearing the end of a substantial funding agreement and needs to set aside funds in the event that the agreement is not renewed;
- the organisation has been experiencing a steady decline in membership over a number of years and the Board has determined that funds will be needed to cover future expenses should the decline continue;
- the organisation is holding an event and the governing body has determined that funds will be needed to cover related expenses should registration numbers be lower than expected.

Some organisations choose to develop and approve a "reserves policy". Such policy usually specifies the purpose of amassing and maintaining reserves and sets out the calculation of target amounts. For example, an organisation's policy may provide that the level of reserves should cover at least three months and no more than six months of general operating expenditure.

5.3 Annual review

Irrespective of whether an organisation has approved a "reserves policy", in order for it to maintain its income tax exemption, it will need to review its approach to the size and nature of its reserves at least once per year to comply with paragraph 32 of the Taxation Ruling.

We recommend that the governing body confirm the amounts to be retained and its rationale for determining those amounts by:

- passing a resolution that confirms the amount to be retained by the organisation in reserve, as well as the basis on which the governing body considers that amount to be reasonable; and
- ensuring the financial reports of the organisation note the basis on which the amounts retained in both funds were determined by the governing body.

Why All Charities Should Revisit Conflicts of Interest

BY John Vaughan-Williams, Lawyer

If your organisation is registered with the ACNC as a charity, then it is required to comply with the ACNC's five Governance Standards, contained in the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth).

Some of the governance standards pertain to individual directors' conduct and suitability, whereas others relate to the conduct of the charity as a whole. Failing to comply with the governance standards can lead to a range of penalties, for both a charity and its directors, one of the most severe being deregistration of a charity.

Application to Companies

If your charity is a public company limited by guarantee, your organisation is subject to the *Corporations Act 2001* (Cth) (**Corporations Act**). However, several provisions of the Corporations Act are "switched off" for charities, meaning that they are not binding on charities.

Included in the provisions that are switched off are most of the provisions on directors' duties. The intention of the governance standards is to replace directors' duties, and to offer similar regulation in a way that is more tailored to the charitable sector.

Application to Associations

The governance standards came into effect on 1 July 2013, but there has been a transitional exception to this requirement for incorporated associations which are charities, which will end on 1 July 2017.

The transitional exception is that, if a charity is an incorporated association, and:

(a) the appropriate associations legislation sets out duties for its responsible persons; and

(b) the charity (and its responsible persons) comply with such duties,

then that charity will be taken to comply with governance standard 5 (duties of responsible persons), even if the responsibilities in the associations legislation imposes less stringent requirements than the governance standards.

This means that if an association has relied on this exception to date, it should ensure that it becomes familiar with the governance standards, which will equally apply to incorporated associations as of 1 July 2017.

From 1 July 2017 onwards, an association will be required to comply with both governance standard five and the relevant associations legislation. The governance standards are drafted with the intention that it is not impossible to fulfil the requirements of both the governance standards and the relevant associations legislation.

Conflicts of Interest

There is much law surrounding the handling of conflicts of interest for companies, with the primary statutory source of law being the Corporations Act, in particular section 195 – restrictions on voting (which is not switched off for charities). The directors' duties also relate to conflicts of interest in a broader sense, in that failing to properly disclose a conflict of interest may also be a breach of directors' duties.

Some State associations legislation contain provisions pertaining to conflicts of interest, but these provisions vary across jurisdictions, and are usually not as thorough as the provisions of the Corporations Act or the governance standards.

The governance standards also impose requirements on charities regarding conflicts of interest, and it is therefore important that charities are on top of how conflicts of interest will be treated uniquely under the governance standards.

Generally, a conflict of interest is an interest of a director with a third party which prevents that director from exercising his or her fiduciary duty to act in the best interests of the organisation. The conflicting interest does not necessarily need to be monetary, and could include personal and/or family relationships, as well as involvement on other boards.

With respect to directors, the governance standard that closely relates to conflicts of interest is governance standard 5 – duties of responsible persons (which includes directors, and other individuals who have a position of responsibility over the charity as a whole).

There are several duties of responsible persons contained in governance standard 5, but the ones most relevant to conflicts of interest are the following:

(a) act honestly in the best interests of the charity and for its purposes;

(b) not misuse the position of a responsible person;

(c) not misuse information obtained in performing duties; and

(d) disclose any actual or perceived conflict of interest.

There are two primary differences between the requirements of the Corporations Act and the requirements of the governances standards, which charities should ensure they understand.

Perceived Conflicts of Interest

The relevant provisions of the Corporations Act relate to actual material personal interests, and do not specifically mention perceived conflicts of interest. This could have the effect of broadening the application of the governance standards when compared with the Corporations Act.

This means that even if a director's interest in a third party does not actually create a conflict with his or her fiduciary duties, the director may still be required to disclose the interest to the board or committee if it could be reasonably perceived by the public to create a conflict.

Duties of Board as a Whole

Under the Corporations Act, the provisions regarding conflicts of interest primarily relate to the conflicted director, although there are also implicit requirements on the other directors under the provisions dealing with the directors' duties.

However, governance standard 5 is framed in a way that explicitly requires the board or committee to make sure that its responsible persons uphold their duties. This places a somewhat higher responsibility on responsible persons regarding the management of conflicts of interest.

Recommendations

In order to ensure that the board satisfies its obligations surrounding conflicted directors, there are several steps that can be taken, from both a procedural and an operational perspective.

Procedurally, all charities should put in place a conflicts of interest policy. The policy should set out in more detail what is deemed by the charity to be an actual or perceived conflict of interest, including reasonable examples. The policy should also clearly spell out how the charity will handle conflicts of interest which are not properly disclosed.

While having a policy in place will not necessarily cover the charity against any and all claims, it will help the charity to demonstrate that it has taken steps to require its responsible persons to comply with the governance standards. The policy should also be regularly reviewed to ensure that it is up-to-date.

If a charity finds out that a conflict of interest was not properly disclosed, it is important for the purposes of governance standard five that the charity takes steps to address it, whether or not this is contained in a policy.

The ACNC does not sets out any particular steps that should be taken, but minimum steps could be to document the conflict in board minutes as soon as the board or committee becomes aware of the conflict, and to warn the responsible person in question. If the board or committee decides that a resolution should not have been passed due to an undisclosed conflict, then the board or committee should take steps (if possible) to reverse the impact of that resolution.

Summary

It is not always clear cut, for the purposes of any law, whether or not a conflict of interest has occurred. The governance standards have only been in effect since 2013, and there is little published case law on them. This means that it can be even more uncertain at times as to what steps a charity should take regarding conflicts of interest to ensure compliance with governance standard 5.

If you are unsure whether a conflict of interest has occurred, and whether your charity has dealt with it properly, we recommend seeking legal advice.

Social Impact Bonds: Can your organisation harness its power?

BY James Thomson, *Associate*

Anyone involved with the not-for-profit sector knows the increasing difficulties that charities face in creating sustainable sources of income. For many charities, gone are the days when they could rely solely on donations and government grants as their principal sources of income.

Nowadays, many charities are turning to commercialisation and investment in order to meet their financial demands, which has given rise to a new form of investment commonly known as Social Impact Investment. This area is, however, not without its challenges. Not-for-profits are subject to strict regulations in respect of the distribution of their income that do not apply to for-profits, making attracting investors comparatively more difficult. Further, the legislative framework that regulates financial investment in Australia, has not caught up with the Social Impact Investment trend.

One facet of Social Impact Investment, is a type of security known as Social Impact Bonds (or, Social Benefit Bonds).

So what are Social Impact Bonds, and what challenges will charities face in utilising this investment tool?

1. What are Social Impact Bonds?

In some ways, Social Impact Bonds are like any other form of investment. That is, investors invest money up-front, in the hope and expectation that there will be a beneficial return in the future. However, in addition to this financial motivation, Social Impact Bonds have an altruistic motivation, in that the funds invested by investors are used to improve social or environmental issues. The key difference between Social Impact Bonds and other financial investment products, is the way in which the returns to investors are determined.

Let's take the example of a typical "start up" for-profit company. A small pool of investors are offered securities in the company, in return for providing start up capital to launch the company's operations. In circumstances where the company's products and/or services are commercially viable and a profit is made, the investors will then see a return on their investment. Where the company makes no money or a loss, the investors are unlikely to see any return on their investment. The focus of this model, is on generating profits.

So how does a Social Impact Bond differ? A Social Impact Bond essentially involves a payment for results contract. Although the structure of each transaction will differ, broadly speaking, a Social Impact Bond involves the following:

(a) Benevolent Project - A Service Provider proposes to undertake a project which addresses a pressing social or environmental issue (generally referred to as an intervention);

(b) Agreed Outcomes - The Service Provider and government agree on agreed outcomes, formalised in a Service Agreement (or similar arrangement). Those agreed outcomes are designed to not only provide positive social or environmental outcomes, but also to reduce the costs of government associated with the subject matter of the project;

(c) Investment - Investors are invited to contribute funds towards the project;

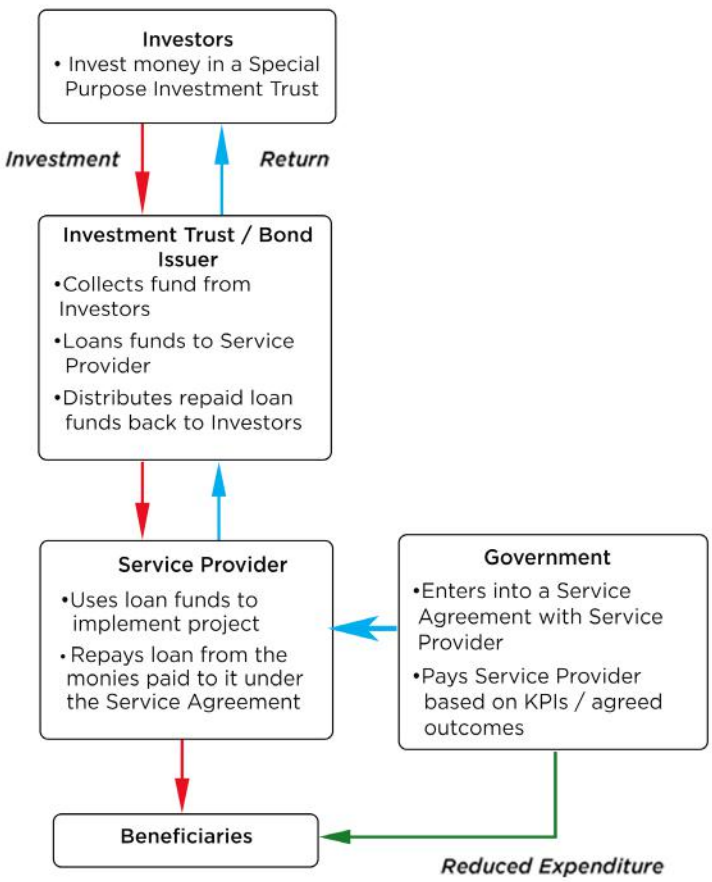
(d) Return - Assuming the agreed outcomes are reached, the investors will receive a repayment of their principal investment plus a financial return, which is paid from the monies which the government would have otherwise spent if the project or intervention was not undertaken.

In other words, a Social Impact Bond is results focused, rather than profit focused.

As with a government grant, the Service Provider will be required to enter into a Service Agreement with the government. However, the key difference between those models, is that the Service Provider will typically not receive any funding up front from the government, that funding being provided instead by the investors. Any payments received from the government are made in arrears, once the agreed outcomes have materialised.

2. What does it look like?

Although these transactions can potentially be structured in a number of ways, below is an example of how such an arrangement can operate.



3. What are the potential benefits?

Social Impact Bonds are an innovative way to fund social and environmental projects, and have the potential to give charities access to the amount of capital that traditionally they would not be able to access through conventional financial products and markets. Although Social Impact Bonds will not be suitable for every transaction, the model offered by them has the potential to inspire the type of creativity and entrepreneurship that was traditionally only seen in the for-profit sector.

From a societal point of view, Social Impact Bonds have the potential to address social and environmental issues that might otherwise struggle to compete for funding from government grants, or other sources of funding. Of course, an added bonus is that investors can potentially see returns on their initial investment.

4. So, what is the catch?

An arrangement such as that outlined in section 2 of this article, involves the coming together of a number of parties. Like any legal structure, the arrangements between those parties must be negotiated and documented. These negotiations and formalities take time and money, as professional advisers will inevitably need to be involved owing to the complexity of the arrangements.

Further, in Australia, the *Corporations Act 2001* (Cth) creates a financial and securities regulation framework which necessarily puts in place onerous disclosure obligations on entities offering certain financial products or securities. Social Impact Bond issuers may be able to rely on exemptions created by the legislation, such as the "sophisticated investor" and "professional investor" exemptions. However, this has the unfortunate implication of limiting the audience to which an offer of Social Impact Bonds can be made.

The legislation has, unfortunately, not yet caught up with the Social Impact Investment trend, and there is some uncertainty as to how the exemptions created by the legislation apply to certain investors, such as Private Ancillary Funds.

On 28 January 2017, the Australian Government released a discussion paper titled Social Impact Investing. That paper identifies a range of ways in which the Australian Government might be able to facilitate and promote the use of Social Impact Investment. Part of that discussion paper deals with the possibility of legislative reform, to reduce the regulatory barriers around Social Impact Investment and to clarify the position under the disclosure exemptions.

5. Summary

Social Impact Bonds are a reasonably new and innovative platform that is available to address funding shortages around Australia's most pressing societal and environmental issues. While the financial regulatory system in Australia has not yet caught up entirely with the Social Impact Investment trend, there are promising indications from the Australian Government that it is willing to look at reforming the regulatory system, in order to reduce the barriers and uncertainty surrounding investment in the sector.

[1] http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2017/Social-impact-investing

Was That Information Private? Proposed Changes to the Privacy Act

BY Prianca Moodley, *Law Graduate*

In October 2016, the *Privacy Amendment (Notifiable Breaches) Bill 2016* (**Bill**) was introduced to the Federal Parliament. This is the third bill of its type to propose amendments to the *Privacy Act 1988* (Cth) (**Act**) in response to the Australian Law Reform Commission's recommendation that certain data breaches should activate mandatory reporting obligations.

The Bill proposes to introduce a mandatory data breach notification scheme which will create additional notification obligations for entities that are, in accordance with the Act, subject to the Australian Privacy Principles (**APPs**), credit reporting bodies, credit providers and/or tax file recipients.

The introduction of this Bill gives rise to an opportunity for not-for-profits (**NFPs**) to review their obligations under the Act and consider the implications of changes in handling private information. In doing so, NFPs must ask the following questions:

1. Is our NFP subject to the *Privacy Act 1988* (Cth) and the APPs?

The Act specifies that all APP entities must comply with the APPs and defines APP entities to include bodies corporate, partnerships, incorporated associations, unincorporated associations and trusts. This broad definition will capture most NFPs, including companies limited by guarantee.

In accordance with the Act, your organisation will be subject to the APPs if it meets any one or more of the following conditions:

(a) has an annual turnover of more than $3 million;

(b) provides a health service to a person;

(c) is a contracted service provider under a Commonwealth contract;

(d) exchanges an individual's personal information with others for the purpose of obtaining a benefit or service; and/or

(e) is related to (e.g. parent or subsidiary company) a body corporate that meets any of the above criteria.

2. What information is covered by privacy laws?

The Act does not apply to all information that a NFP may possess. Principally, the Act regulates personal information. Personal information, in accordance with the Act, is information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether or not that information is true and/or recorded in material form. Such information generally includes an individual's name, address, date of birth and contact information.

Specific types of personal information will also fall within additional categories of regulated information, namely, sensitive or health information. Such information generally includes information relating to a person's sexuality, religion, race, health status and medical information. It is important to note that information falling within these categories may give rise to specific and additional obligations which are not discussed in this article.

3. Do any exemptions apply?

A number of exemptions are created by the Act. Those exemptions most relevant in the NFP context are outlined below. Generally, the APPs will not apply in relation to:

(a) personal information which is publicly available;

(b) personal information directly related to a current or former employee's employment records;

(c) the transfer of certain information between related bodies corporate; and

(d) conduct which is a direct or indirect requirement of a government contract.

Additional exemptions may apply to organisations involved in particular journalistic and media based activities.

4. What are our obligations?

If a NFP is subject to the APPs and no exemption applies, the NFP, in accordance with the APPs, must, among other things:

(a) manage personal information openly and transparently. This includes having an accessible and clearly expressed privacy policy;

(b) where possible, allow individuals to remain anonymous or use a pseudonym;

(c) take reasonable steps to ensure the personal information it collects is accurate, up to date and complete;

(d) where it is lawful and reasonable, destroy unsolicited personal information which comes into its possession and which it determines it could not have collected itself and is not contained in a Commonwealth record;

(e) take reasonable steps to ensure that any overseas recipient of personal information adheres to the APPs;

(f) take reasonable steps to protect personal information; and

(g) allow an individual access to their personal information as held by the NFP.

Additionally, the NFP generally must not:

(a) collect personal information that is not reasonably necessary for the entity's functions;

(b) collect sensitive personal information (e.g. information regarding race and religion) that is not reasonably necessary for the entity's functions and without consent;

(c) disclose or use personal information for a purpose for which it was not collected, including direct marketing; and

(d) adopt a government identifier (e.g. Medicare number) as an identifier of its own.

5. How will the Bill affect NFPs?

If passed, the Bill will become a Commonwealth Act pursuant to which those NFPs already subject to the APPs must notify the Australian Information Commissioner and any affected individuals, if there has been an eligible data breach.

In accordance with the Bill in its current form, an eligible data breach occurs where a reasonable person would conclude that there is a likely risk of serious harm to any of the affected individuals as a result of:

(a) unauthorised access to or unauthorised disclosure of personal information; or

(b) personal information being lost in circumstances likely to give rise to unauthorised access to or unauthorised disclosure of personal information.

Irrespective of whether the Bill is passed or not, the introduction of the Bill should serve as a reminder to NFPs that care must be taken to secure private information and mitigate data security risks. While data breaches have the potential to cause a NFP reputational damage, even more significant reputational damage may result if the NFP is not seen to have taken all reasonable steps to prevent the breach, as well as report it and reduce the likely harm for any affected individuals.

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