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THIRD dimension

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

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Australian Financial Services Licences – Does Your Charity Need One, and is your Charity Otherwise Compliant?

BY John Vaughan-Williams, Lawyer

In what is an increasingly commercial environment for charities, many organisations are now engaging in commercial activities in order to fund their charitable purposes. These commercial activities can include social enterprises, ethical investment, and commercial fundraising.

Against this changing background of the sector, charities should consider whether any of their commercial activities are regulated, in particular, whether any provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**) apply.

Financial Products

It may surprise many people that some commercial activities of charities would, on their face, be considered to be "financial products" under the Corporations Act. Generally, an organisation which offers a financial product will need to obtain an Australian Financial Services Licence (**AFSL**), unless an exemption applies.

In particular, some of the activities conducted by charities are considered to be either "debentures" or "managed investment schemes", both of which are types of financial products.

Examples of activities run by charities which would be considered to be financial products are:

a) the solicitation of secured loans, which are paid back with interest (considered to be debentures); and

b) allowing numerous investors to purchase smaller "loan notes" in a charity, which are paid back with interest (considered to be debentures and possibly a managed investment scheme).

These types of arrangements are most common in organisations which purchase real property for their charitable purposes. These arrangements allow investors to support a charitable cause, while still obtaining a return on their capital.

Debentures and Managed Investment Schemes

Apart from licensing requirements, there are also several provisions of the Corporations Act which apply specifically to the issuing of debentures and the running of managed investment schemes. These requirements are all onerous.

The Corporations Act requires complex disclosure documents to be prepared for these arrangements. In some instances, such managed investment schemes are required to be registered, which then engenders a framework of governance requirements, such as requirements surrounding governing documents and meetings of the scheme.

Australian Financial Services Licences

The process of obtaining an AFSL is not easy, and organisations which obtain an AFSL need to then act in accordance with a complex compliance framework. Not only is the application process difficult, but some charities may not even be able to satisfy the requirements to obtain an AFSL, due to the requirements regarding the experience of responsible persons.

While some organisations may have the infrastructure and resources to obtain and maintain an AFSL, for other charities, it simply may not be achievable.

Charitable Investment Fundraisers

Charities which issue debentures or run managed investment schemes are referred to in the law as "charitable investment fundraisers". Since the Australian Charities and Not-for-profits Commission (**ACNC**) was established in 2012, an organisation must be registered with the ACNC to be considered a charitable investment fundraiser.

The impact and extent of charitable investment fundraisers in Australia is clear. In a consultation paper issued by ASIC, it was estimated that charitable investment fundraisers hold investments of over $7 billion. Some individual charitable investment fundraisers were estimated to alone hold hundreds of millions of dollars in investment funds.

Exemptions for Charitable Investment Fundraisers

Perhaps in recognition of the extent of charitable investment fundraisers, as well as the burdensome nature of the regulation of financial products, there have been certain exemptions to the relevant Corporations Act provisions in place for charities for several years.

The now-repealed Australian Securities and Investments Commission (**ASIC**) class order 02/184 – charitable investment schemes fundraising – issued in 2002, included the following exemptions for charitable investment fundraisers, if certain requirements were met:

a) exemptions from the application of the debenture, managed investment scheme and fundraising provisions of the Corporations Act; and

b) exemption from the requirement to hold an AFSL, if the only financial products issued were debentures and/or managed investment schemes.

In order to benefit from these exemptions, the requirements for charities included applying to ASIC, preparing an "identification statement" (a much less onerous disclosure statement than for regulated investment schemes), and making clear to investors that the product is not fully regulated by ASIC.

Changes to the Law

In order to align the Corporations Act regulation of charitable investment fundraisers with other government regulators, such as the Australian Prudential Regulation Authority, the legal framework regarding financial products offered by charities is changing.

These changes are significant for the charitable sector, because they may result in some charities now requiring an AFSL when they did not previously. Some of the changes to the law have already occurred, whereas others are occurring over the next year.

ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813 (**New Instrument**) is the instrument which has brought about these changes to the law.

ASIC, in late 2016, issued the updated Regulatory Guide 87 – Charitable schemes and school enrolment deposits – which sets out a summary of the application of this area of law to charities, as well as outlining what changes are occurring in the future.

Retained Exemptions

The New Instrument has retained the exemptions for charitable investment fundraisers from:

a) registering their managed investment scheme (thereby not needing to follow the provisions of the Corporations Act which apply only to registered schemes); and

b) following the disclosure provisions of the Corporations Act regarding debentures.

Changes

1. Identification Statements

As previously mentioned, charities are required to lodge with ASIC an "identification statement", which is approved by ASIC, to benefit from the exemptions to regulation of debentures and managed investment schemes.

This requirement is maintained under the New Instrument. However, the New Instrument has increased the amount of information that must be included in the identification statement, for ASIC's purposes. Charities with pre-existing identification statements have been able to rely on them until 31 March 2017, at which point they were required to lodge new identification statements, compliant with the New Instrument.

All charities which are currently relying on exemptions, without having lodged an identification statement which is compliant with the New Instrument, should seek legal advice.

2. Change regarding Short-term Investments

The first legal change created by the New Instrument is that charitable investment fundraisers are no longer permitted to issue at-call or short-term investments. A short-term investment is one which must be repaid within 31 days.

This change is already in effect, beginning from 1 January

2017. However, the next change featured within the New Instrument, regarding AFSLs, is more significant.

3. Primary Change – AFSL Requirements

Arguably the most important change brought about by the New Instrument relates to the requirement for some charitable investment fundraisers to obtain an AFSL. This change does not come into effect until 1 January 2018.

From 1 January 2018, a charitable investment fundraiser will only be exempt from obtaining an AFSL if it is considered a "wholesale charitable investment fundraiser".

Wholesale or Retail?

The terms "wholesale" and "retail" are used in the Corporations Act to differentiate between different types of clients, and carry the same meaning within the New Instrument.

The main definition of a wholesale client is one who has:

a) net assets of at least $2.5 million; and

b) has had gross income of at least $250,000 over the last two years,

and has provided a certificate from an accountant verifying at least one of these two criteria. A client who does not satisfy the definition of a wholesale client is a retail client.

Wholesale Charitable Investment Fundraiser

A wholesale charitable investment fundraiser is one which does not offer its financial products to non-associated retail clients.

The New Instrument sets out a number of definitions of who is associated with a charitable investment fundraiser, with some examples including:

a) a person or body who constituted or controls the charity;

b) another organisation controlled by the charity, and any employees of it; and

c) another charity with similar charitable purposes.

Impact of New Instrument

This change regarding AFSLs for charitable investment fundraisers could have a significant impact on the sector, for previously exempt organisations. While some charitable investment fundraisers are large, acquiring investments totalling millions of dollars, other charities may be acquiring investments which are much smaller.

These smaller organisations now may require AFSLs in order to run their investment fundraisers. In particular, an AFSL will be required to offer any investment to a non-associated retail client; there does not need to be permanence to the offers.

All charitable investment fundraisers should seriously consider whether they satisfy the AFSL exemption under the New Instrument, particularly if they have been previously relying on the exemption. If charities are uncertain about this, then they should seek professional advice.

To benefit from any of the exemptions for charities regarding debentures, managed investment schemes and AFSLs, charities need to have lodged an identification statement, which is compliant with the New Instrument, with ASIC. Charities should also seek legal advice if they are uncertain how to draft or what to include in an identification statement.

Accounting Standard 1058 and the ‘Cost’ of Volunteer Services

BY Marcelle Chester, Law Graduate

Under the new Australian Accounting Standards Board (**AASB**) income reporting standard, AASB 1058 Income of Not-For-Profit Entities (**AASB 1058**), not-for-profits (**NFPs**) may be required to report volunteer services as income.

Why is there a New Accounting Standard?

The current reporting requirements under AASB 1004 Contributions have been criticised for failing to accurately reflect the economic reality of NFP transactions that are not contracts. The AASB intends to clarify and simplify NFP reporting requirements in AASB 1058.

Currently, your organisation is required to recognise revenue on ‘day one’. Under AASB 1058, if receipt of an asset comes with performance obligations, you do not have to recognise the revenue until the obligations have been performed and you have incurred the expenses associated with that performance. This will allow NFPs to better communicate their financial position to donors and avoid inflated surpluses or deficits in reports.

What Does AASB 1058 Cover?

AASB 1058 supersedes all current income recognition requirements relating to private sector NFPs, and the majority of income recognition requirements relating to public sector NFPs.

‘Income’ in AASB 1058 addresses income arising from acquisition of assets for consideration that is significantly less than the fair value of the asset when that difference is principally to enable the entity to further its objectives.

AASB 1058 applies to those differences that result in increases in equity, other than those relating to contributions by owners or those accounted for under another standard.

When does AASB 1058 Apply?

AASB 1058 applies when you:

a) receive volunteer services; or

b) enter into transactions where consideration to acquire an asset is significantly less than the fair value principally to enable the entity to further its objectives.

AASB 1058 applies to annual reporting periods on or after 1 January 2019. Earlier application is permitted, provided entities also apply AASB 15 *Revenue from Contracts with Customers* to the same period.

Other transactions caught in the scope of AASB 1058 are transactions where the consideration provided to acquire an asset, is significantly less than the fair value of that asset, or no consideration is provided, and the difference is principally to enable the entity to further its objectives. Potential scenarios include: below market leases (peppercorn leases), organisations receiving cash (or another financial asset) to construct or acquire a nonfinancial asset (e.g. building) for its own use, donated inventories, endowments and bequests.

How do we Recognise and Measure Income?

On initial recognition of an asset, you are required to recognise any related contributions by owners, increases in liabilities, decreases in assets and revenue. These are referred to as ‘related amounts’ in AASB 1058.

Income is determined as the difference between the consideration for an asset and the asset’s fair value, after recognising any other related amounts. NFPs should recognise the excess of the fair value of the volunteer service or asset over the recognised related amounts as income immediately in profit or loss.

Volunteer Services

Local government, government departments, general government sectors (GGSs) and whole governments are required to recognise volunteer services if:

a) they would have been purchased if not provided voluntarily; and

b) the fair value of those services can be measured reliably.

Other NFPs may elect to recognise volunteer services received if their fair value can be measured reliably, irrespective of whether you would have purchased those services if not donated.

Under the new standard, private sector NFPs can decide whether to recognise volunteer services as income, but public sector NFPs must recognise volunteer services that fulfil the criteria. This is an existing obligation for public sector NFPs under the current standard. Private sector NFPs should consider whether reporting volunteer services in this way is suitable for their organisations.

The AASB notes some volunteer services, such as professional services, might have readily observable market prices. In these cases, getting a reliable measure of fair value would be relatively straightforward. You are not, however, required to perform an exhaustive search for volunteer services that might meet the recognition criteria in AASB 1058.

The AASB suggest volunteer services that would have been purchased if they were not donated should be readily identifiable from the entity's operational requirements.

What are our Disclosure Requirements?

The objective of the new disclosure requirements is to enable users of your financial statement to understand the effects of 'income' on the financial position, financial performance and cash flows of your organisation.

AASB 1058 provides your organisation discretion as to the level of detail necessary to satisfy the disclosure requirements. An appropriate level of detail should be included so as to make necessary disclosures but not obscure useful information.

AASB 1058 encourages organisations to report their income in relevant categories including:

a) grants, bequests and donations of cash, other financial assets and goods;

b) recognised volunteer services; and

c) for government departments and other public sector entities, appropriation amounts recognised as income, by class of appropriation.

Further, NFPs are encouraged to disclose qualitative information, by major class of transaction, about the nature of the NFPs' dependence arising from all volunteer services and inventories held but not recognised as assets during the period.

NFPs are encouraged to disclose information about externally imposed restrictions that limit or direct the purpose for which resources controlled by the NFP may be used. Disclosures may be made about the judgements used, whether funds are restricted and/or any of the following:

a) assets to be used for specified purposes;

b) components of equity divided into restricted and unrestricted amounts; and

c) total comprehensive income divided into restricted and unrestricted amounts – either on the face of the statement of profit or loss and other comprehensive income or in the notes.

What Now?

Under AASB 1058, your organisation's reporting requirements may have changed or your organisation may be able to better report its income.

You may need to consider some of the following:

a) preparation for the new standard and review of current accounting policies;

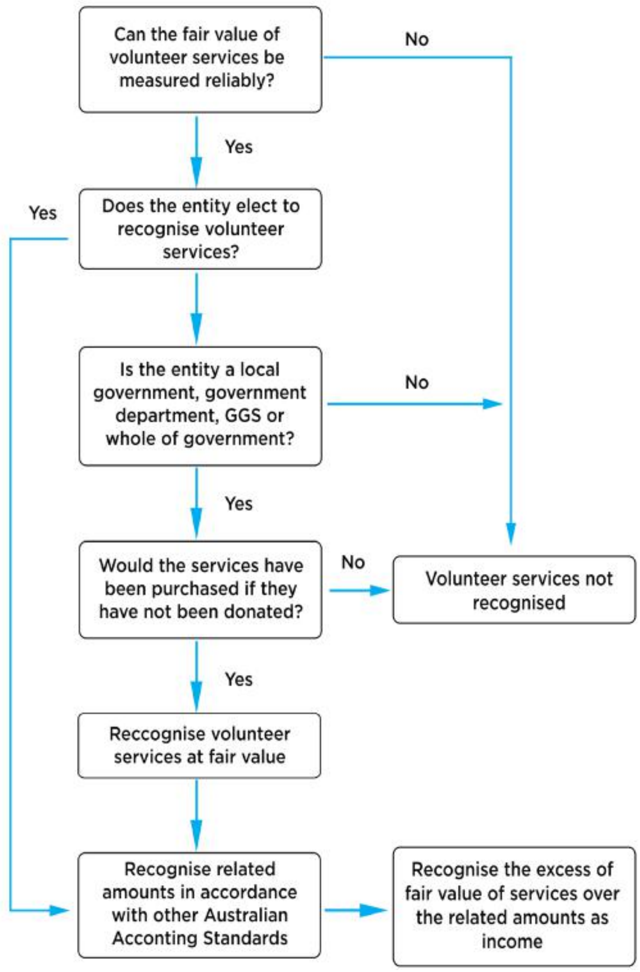
b) the impact on reporting your organisation's financial position to stakeholders;

c) a review of significant income streams;

d) when changes will be put in place;

e) the provision of proper guidance to your board and audit committees; and

f) who is responsible for implementing these changes.



Directors and Management Committees Beware: Insolvent Trading

BY Marcelle Chester, Law Graduate

Australia has some of the most severe and wide-reaching provisions prohibiting insolvent trading. It is essential that organisations are aware of the indicators and consequences of insolvent trading, and implement processes to protect the organisations and their officers from harm.

How to Determine if your Organisation is Solvent

To determine whether an organisation is insolvent, an organisation's financial position should be considered as a whole. Organisations should employ a forward-looking cash-flow test, that is, can the organisation pay all its debts as and when they become due and payable?

Insolvency is not simply determined by whether an organisation's assets exceed its liabilities. Organisations are able to take into account their ability to sell assets or borrow money. Organisations should note the difference between a 'temporary lack of liquidity' (the organisation may be solvent) and 'endemic shortage of working capital' (the organisation is likely insolvent).

You should be wary of the following common indicators of insolvency:

a) continuing losses;

b) unreliable forecasts and financials;

c) aged creditors;

d) debt recovery proceedings;

e) cash on delivery terms with suppliers;

f) poor liquidity ratios;

g) dishonoured and post-dated cheques;

h) special arrangements with some creditors;

i) inability to raise equity or access finance; and

j) deferred or overdue tax liabilities.

If your organisation is experiencing any of the above factors, you should take immediate action.

Companies

When is a company insolvent?

> *"A person is solvent if, and only if, the person is able to pay all the person's debts as and when they become due and payable."* Section 95A of the *Corporations Act 2001* (Cth) (**the Act**)

When is a debt incurred?

A debt arises when a company becomes liable to pay a liquidated sum. A debt is distinct from a right to liquidated damages and can include contingent liabilities such as guarantees. The Courts will consider each case on its own facts, therefore determining when a company incurs a debt will depend on its own facts and circumstances.

Directors' duty to avoid insolvent trading

Directors of companies are bound by a duty to avoid insolvent trading under the Act, the Australian Charities and Not-for-profits *Commission Act 2012* (Cth) (**the ACNC Act**) and the common law. Unlike other directors' duties under the Act, the duty to avoid insolvent trading and the penalties for a breach of this duty in the Act have not been switched off for companies registered as charities.

> Directors' primary duty is always to act in the best interests of the company, however Directors' considerations will shift if their company is approaching insolvency.

Directors of companies can be held personally liable for insolvent trading:

a) Section 588G of the Act imposes a civil liability on a Director where:
   - i. the company incurs a debt;
   - ii. the person is a Director at the time;
   - iii. the company is insolvent at the time or becomes insolvent as a result of incurring the debt/s;
   - iv. there are reasonable grounds for suspecting such insolvency; and
   - v. the person fails to prevent the company from incurring the debt where the person is, or a reasonable person would be, aware of such grounds.

b) Section 588G(3) of the Act imposes a criminal liability on a Director where:
   - i. the company incurs a debt;
   - ii. the person is a Director at the time;
   - iii. the company is insolvent at the time or becomes insolvent as a result of incurring the debt/s;
   - iv. there is suspicion of such insolvency; and
   - v. the person dishonestly fails to prevent the company incurring the debt.

It is important to note that Directors can still be found liable even if the Director has acted honestly. Further, a Director's liability is not absolved if a company's position improves during the insolvent trading period.

Am I liable?

The following individuals can be found liable for insolvent trading:

a) appointed Directors;

b) de facto Directors (not properly appointed, but who act in the position of a Director);

c) shadow Directors (person or company in accordance with whose instructions the Directors are accustomed to act as Directors of the company); and

d) a holding company (can be liable for insolvent trading by a subsidiary).

What defences are available?

In the case of a Director facing liability for insolvent trading, the following defences are available:

a) Director had reasonable expectation of continued solvency (s 588H(2) of the Act);

b) Director reasonably relied on another person to provide information and on the basis of that information, had an expectation of continued solvency (s 588H(3) of the Act);

c) non-participation in the management of the company due to illness (s 588H(4) of the Act);

d) Director took all reasonable steps to prevent debt being incurred (s 588H(5) of the Act); and

e) relief from liability granted by the Court (ss 1317S and 1318 of the Act).

Do Directors of companies owe duties to creditors?

Directors have various duties under the Act and common law. Generally, these duties are to act in good faith, not to improperly use their position or information, act with care and due diligence and in the best interests of the company.

Directors' primary duty is always to act in the best interests of the company, however Directors' considerations will shift if their company is approaching insolvency.

When a company is solvent, a Director's duty will be primarily to act in the best interests of the company, although if a company is moving towards insolvency, a Director must have regard to creditors, including employees. There are few cases that have considered this in practice.

Incorporated Associations

Management Committee Duties

Management committee members are bound by duties under the relevant state or territory incorporated associations legislation, Standard 5 of the ACNC Governance Standards under the ACNC Act for charities and the common law. These duties include the duty to act in good faith, not to act for an improper purpose, act with care and diligence, act in the organisation's best interests and avoid conflicts of interests. Namely, the duty to act with care and diligence requires management committee members to inform themselves of the organisation's financial position and avoid insolvent trading.

Am I liable?

There has been uncertainty about the application of insolvency provisions to incorporated associations and whether management committee members could be found personally liable for debts incurred while insolvent. The Supreme Court of Queensland found in *Robson & Ors v Commissioner of Taxation* [2015] QSC 76 (**Robson case**) that the insolvent trading provisions in the Act which allows liquidators to recover property from Directors does not apply to incorporated associations. The Robson case examined the application of the insolvent trading provisions in the Act to Queensland's incorporated associations legislation and Justice Jackson noted in his decision that simple amendments to the Queensland legislation could reverse this position.

There is, however, scope for management committee members to be found personally liable for insolvent trading. It seems as though the legislature intended for the insolvent trading provisions in the Act to apply to incorporated associations as well as companies.

What defences are available?

In the case of a management committee member facing liability for insolvent trading, the following defences are available:

a) the debt was incurred without the committee member's authority or consent;

b) at the time the debt was incurred the committee member did not have reasonable grounds:

   i. to believe that the association was insolvent; or

   ii. to expect that if the association incurred the debt, it would become insolvent.

In the face of insolvency, what can we do?

a) Keep detailed records and ensure continued awareness of the organisation's financial position;

b) ensure that the Board or management committee holds regular meetings and obtains all relevant information;

c) seek expert advice including from lawyers and financial advisors;

d) ask questions and regularly form views as to the organisation's solvency;

e) take positive steps to investigate financial difficulties and assess available options;

f) increase checks and balances around debt incurrence including adding new protocols;

g) put off debt incurrence, particularly large debts where possible; and

h) ensure that the Board or management committee is continuously working on a plan to restore the organisation to solvency.

For When Things Go Wrong: Directors and Officers Insurance and Indemnities

BY Andrew Egri, Lawyer

It is clear that officers of not-for-profit organisations contribute a great deal to their cause, often at a personal cost. In addition to their investment of time and energy, officers are also authorised and expected to take risks on behalf of their organisation.

It is good governance to protect those who are exposed, as officers, to risk on the organisation's behalf. Indeed, many officers will insist upon comprehensive protection by their organisation.

Organisations can bear much of the financial burden should their officers be threatened with legal action through the use of:

a) indemnities contained in the organisation's constitution;

b) Deeds of Indemnity, Access and Insurance; and

c) directors and officers insurance (**D&O Insurance**).

1. Indemnities in Constitution

Officers are often indemnified under their organisation's constitution in respect of personal liability. The constitution may also provide for D&O Insurance. However, officers should review those provisions carefully, as in some cases, the constitution may simply provide that the organisation may, rather than does, indemnify officers. Careful review will also reveal how broad an indemnity is provided.

Officers, however, should be mindful of the limits to the effectiveness of an indemnity in a constitution. Those limitations include that:

a) the constitution can be amended by members, without the consent of the officer;

b) the constitution is arguably only enforceable by current, and not former, officers; and

c) the indemnity provisions in the constitution may be out of date or lack sufficient scope.

2. Deed of Indemnity, Access and Insurance

To provide them with greater protection, officers should require that their organisation enter into a Deed of Indemnity, Access and Insurance with them. The deed sets out the basis for the organisation to indemnify the officers for personal liabilities and associated legal costs which result from their role as an officer.

A Deed of Indemnity, Access and Insurance operates in a comparable manner to the organisation's constitution. It has, however, a number of advantages, including that it:

1. requires any amendment to be agreed only between the organisation and officer;
2. may be enforced by both current and former officers; and
3. may also provide the officer with access to documents and D&O Insurance, during and after the period they hold office.

2.1 Specific limitations and obligations

2.1.1 Public Companies Limited by Guarantee

Under the *Corporations Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth), a company is prohibited from indemnifying an officer for liabilities:

a) owed to the company, for example a breach of duty owed to the company;

b) for certain specified penalty orders and compensation orders;

c) arising out of fraudulent, dishonest or criminal behaviour, or conduct involving lack of good faith; and

d) for legal costs to the above matters, where the officer does not successfully defend the claim.

These limitations are a major reason why D&O Insurance is necessary. Without sufficient coverage, officers are exposed in respect of the liabilities listed above.

2.1.2 Incorporated Associations

Victorian associations are required, under section 87 of the *Associations Incorporation Reform Act 2012* (Vic), to indemnify their officers from liability for activities they undertake in good faith on behalf of those associations.

While associations incorporated in other States and Territories are not under the same obligation, in many cases it will still be appropriate to enter into a deed. However, a small association may determine that the risk is not at a level that requires the protection of a deed in addition to the indemnity contained in its constitution.

2.2 Issues to consider when preparing Deed of Indemnity, Access and Insurance

Not all indemnities are the same and organisations as well as their directors should at least consider the following issues:

a) The deed should be primary. That is, that the indemnity can be called upon without first needing to determine whether a claim may be made under the D&O Insurance policy.

b) The degree to which the organisation maintains control over the conduct of legal action brought against an officer.

c) Whether the indemnity is subject to a monetary cap. The indemnity contained in a deed usually provides the officer with unlimited coverage.

d) The length of the period covered. It is common for a deed to respond to liabilities incurred by officers regardless of when a claim is made.

e) Officers should give attention to any provision in a deed which reserves the right for the organisation to revoke the indemnity or to amend it without the consent of the officer.

f) It is important that the constitution and the deed are consistent, to avoid disputes over the different provisions in the two documents.

g) Whether the officer is given the specific right to select his or her own legal representation, irrespective of cost, when they defend a claim made against them.

3. Insurance

D&O Insurance is an important part of the protection afforded to officers as it addresses the gap in coverage given the various prohibitions on indemnities.

D&O Insurance commonly has three ‘sides’ of coverage:

a) Side A provides the indemnity for officers;

b) Side B provides reimbursement to the organisation for its indemnity of officers; and

c) Side C provides cover to the organisation directly for securities transactions.

3.1 Specific limitations

A company is prohibited from paying an insurance premium for an officer’s:

a) wilful breach of a duty to the organisation;

b) improper use of his or her position to gain a personal advantage or cause detriment to the organisation; or

c) improper use of information to gain a personal advantage or cause detriment to the organisation.

3.2 Issues to consider when selecting D&O Insurance

D&O Insurance policies can differ substantially among providers. When comparing policies, consider the following issues:

a) When the legal fees will be paid and whether the officer is entitled to select their own legal representation. Some policies reimburse defence costs once the claim is resolved while others advance costs as the proceedings progress.

b) Whether the policy contains an “insured v insured” exclusion, which excludes claims brought by one insured against the other. This exclusion was intended to prevent the manufacturing of claims where officers in breach of a duty to their organisation may resolve to sue themselves in order to get damages for which the organisation is insured. However, some policies instead contain a “consensual claims” exclusion, which excludes any claim which is brought with the assistance of participation of the insured against whom it is brought.

c) The degree to which the coverage offered by the policy is restricted by other exclusions, such as professional services, or personal injury or profit.

d) Whether the policy contains a severability clause which provides that the fraud of a single officer will not adversely impact the cover available to other innocent officers.

4. Summary

In summary, officers need to ensure that they are adequately protected under a variety of mechanisms. Often, this will include a deed of indemnity, access and insurance. Further, not all indemnities are the same and officers should carefully review their coverage and seek legal advice if clarification is required.

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Topics from previous issues

Issue 16, Summer 2016

- NFPs paying their Board members - things to consider
- Financial reserves: too much, too little or just right?
- Why All Charities Should Revisit Conflicts of Interest
- Social Impact Bonds: Can your organisation harness its power?
- Was That Information Private? Proposed Changes to the Privacy Act

Issue 15, Spring 2016

- Asset Protection in a Commercial Environment
- The Political Advocacy of Charities - What is Allowed and What Isn't
- Changes to Trade Mark Fees
- Protecting Your Not-for-Profit Against Terrorism Financing
- Dispensing Justice Fairly - Is Your Disciplinary Policy Exploding Your Organisation

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