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# THIRD dimension

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



# Fasten your seatbelts: legal turbulence ahead!

MILLS OAKLEY

# Be Prepared: Whistleblowers Protection Bill Introduced to Parliament

BY Tarang Immidi, Law Graduate

On 7 December 2017, the Government introduced the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (**Bill**) into the Senate. If enacted, the Bill will consolidate and broaden the existing private sector whistleblower protection under the *Corporations Act 2001* (Cth) (**Corporations Act**). While the Bill proposes to establish greater protections for whistleblowers, it imposes obligations on companies, without providing for an exception for charities and not-for-profits.

The introduction of the Bill is the result of the Government's announcement in the 2016-17 Budget to introduce strengthened whistleblower protections to come into effect by 1 July 2018.

The final version of the Bill is the product of consultation on an exposure draft released for public comment in October 2017, which followed the tabling of the Report by the Parliamentary Joint Committee on Corporations and Financial Services. This had contained a number of

recommendations, not all of which have been adopted by the Bill.

Nevertheless, the Bill is seen as the Government's response to concern regarding the treatment of a number of high profile whistleblowers in the financial sector in recent years, and imposes significant new regulatory obligations on most corporations. If the Bill becomes law in its current state, it will impose significant burdens on public companies and large proprietary companies, charities and not-for-profits that are public companies limited by guarantee (**PCLGs**). If enacted, the Bill is expected to come into effect on 1 July 2018.

The Bill proposes to:

1. amend the Corporations Act to create a whistleblower protection regime for the corporate, financial and credit sectors; and

2. amend the *Taxation Administration Act 1953* (Cth) (**Taxation Act**) to create a whistleblower protection regime for those who expose breaches of tax laws or misconduct in relation to tax affairs.

## Key Reforms

### Changes to the Corporations Act

The Corporations Act regime will implement four major changes to the current whistleblower provisions of the Corporations Act:

**(a) Expanded scope of the protections**

The scheme extends protections to whistleblowers (and their families) who make disclosures to the Australian Securities and Investments Commission (**ASIC**), the Australian Prudential Regulatory Authority, the Australian Federal Police, an auditor, or a director, secretary or senior manager of a company.

**(b) Expanded protection available to whistleblowers**

A compensation scheme is established in respect of harm or injury to a whistleblower. Additionally victimisation (being defined as actual or threatened detriment) is prohibited.

**(c) Penalisation of disclosure of whistleblowers' identity**

The regime makes it an offence to disclose the name or any identifying information of a whistleblower, including to a court or a tribunal, unless necessary to do so. Courts will also be made to anonymise the identity of whistleblowers.

**(d) Requirement for a whistleblower policy**

Under the reforms, all public companies (including PCLGs) and large proprietary companies must maintain and make available to all potential whistleblowers a whistleblower policy. It is made an offence to fail to do so.

### Changes to the Taxation Act

Similar to the extended protections contained in the proposed amendments to the Corporations Act, the proposed changes to the Taxation Act contains express protections for whistleblowers who disclose tax misconduct or tax avoidance to an auditor, tax agent, director, secretary or senior manager of the company or the Australian Taxation Office. The changes to the Taxation Act do not introduce a requirement for a whistleblower policy.

## What steps do charities and not-for-profits need to take?

The reforms will require all public companies and large proprietary companies, including charities and not-for-profits that are PCLGs, to create and circulate an internal whistleblower protection policy. This policy must detail:

(a) the statutory protections afforded to whistleblowers;

(b) the measures and procedures that the company will take to ensure the fair treatment of whistleblowers and employees who are the subject of disclosures; and

(c) any other matters prescribed by the regulations.

Companies that do not have an appropriate whistleblower policy in place by 1 January 2019 will face strict penalties of up to $12,600.

In addition to the requirement for a whistleblower policy, from 1 July 2018 all

entities subject to the whistleblower protection scheme must ensure that whistleblowers who make eligible disclosures are protected from retaliation and victimisation.

Charities and not-for-profits that are public companies must begin to design processes and systems that deal with protected disclosures in a way that is compliant with these reforms. It will not be sufficient for companies that are subject to the reforms to draft a compliant policy and circulate it. The clear intent of the legislation is to ensure that companies have compliant processes in place to ensure the protection of whistleblowers, and can respond quickly and appropriately when a whistleblowing situation arises.

Charities and not-for-profits must begin to plan for the implementation of such procedures and processes along with a compliant policy, particularly given the significant expense that may have to be incurred in designing and implementing processes and systems that are compliant with the reforms.

## A charitable exception?

The proposed scheme includes provision for ASIC to exempt classes of companies from the requirement to implement, maintain and circulate a whistleblower policy. Such an exception may be made subject to certain conditions and may be for only a limited period of time, or for an indefinite period.

It is not yet known what attitude ASIC might take in relation to establishing a blanket exception for charities and not-for-profits, or what kind of conditions it may choose to impose on any exceptions it makes. Charities and not-for-profits that are PCLGs must therefore take steps to be prepared for the introduction of the proposed protection regime.

While ASIC may well regulate to exempt charities and not-for-profits from requiring a whistleblower policy, PCLG charities and not-for-profits will still be bound by other protections required to be afforded to whistleblowers under the Corporations Act and the Taxation Act schemes. PCLG charities and not-for-profits will therefore serve themselves well to lend some thought to the development of procedures that will ensure compliance with the required protections, so as to avoid the strict pecuniary penalties that companies will face for breaching the proposed laws.

The nature of whistleblowing is such that it is inevitably unexpected. It will be exceedingly difficult to ensure compliance with the proposed reforms unless policies and procedures have been established in advance.

Our advice to charities and not-for-profits in respect of the proposed reforms is simple:

Be prepared!

# What next for the Australian Charities and Not-Fot-Profits Commission?

BY Andrew Egri, Lawyer

Treasury released the terms of reference and the panel for the five year statutory review of Australian Charities and Not-For-Profits Commission (**ACNC**) late last year.

The terms of reference said that "[t]he review should be informed by public submissions, by international experience, through round table discussions and by consultation on substantive issues identified before recommendations are made to government".

It is the ACNC's own submission, however, that has attracted the greatest attention and scrutiny.

## Sensible solutions

The submission by the ACNC made forty recommendations to be considered by the review panel. Many of the recommendations seek to address some of the teething problems arising over the last five years. For example, the ACNC proposes changes to resolve ambiguity surrounding charitable companies and their regulation under the *Corporations Act 2001* (Cth) and the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**).

Other recommendations look to improve the quality and transparency of charity information through the ACNC register. If enacted into law, the recommendations would see additional information contained on the register, such as the reasons for revocation of an organisation's charitable status.

These recommendations are supported by many who are active in the sector, and address many of the common frustrations.

## Much needed accountability or overreach?

One recommendation of the ACNC has many in the sector concerned as to its new direction

under the ACNC Commissioner, Dr Gary Johns.

The ACNC Act has recommended to the review panel that two additional objects be included in the ACNC Act.

The ACNC Act currently sets out the following three objects:

(a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector;

(b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and

(c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

The ACNC recommends that consideration be given to including the following two objects:

(a) to promote the effective use of resources of not-for-profit entities; and

(b) to enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.

The Commissioner says that the proposed objects reflect the regulator's powers in the United Kingdom and are designed to encourage the responsible and accountable use of charitable resources.

**"There has been a great deal of scrutiny recently about the effectiveness of charities and whether charities use their funds and resources to achieve the best results"**

**"These recommended objects are not designed to create restrictions or impose limitations on charities. They are not additional enforcement powers, but rather a mandate for the ACNC to support and promote effective and efficient use of resources."**

## Sector leaders weigh in

Some leaders in the sector, however, have questioned whether it should be the role of the ACNC to oversee the effective use of resources for not-for-profit entities. Traditionally, it is the role of the donors, members and other stakeholders to determine if a charity is using its resources effectively or not, and whether it is worthy of their support.

With the proposed objects attracting significant public attention, the ACNC's advisory panel made its own submission to the review panel.

The ACNC advisory panel supports and advises the Commissioner. Its members are appointed by the Minister and consists of experts in the not-for-profit sector, law, taxation or accounting, and office holders.

The advisory panel's submission notes that there has not been any widespread effort in the sector to amend the ACNC Act to resolve any perceived problems, and that such amendment may impose greater burdens on those in the sector.

The advisory panel also discussed the ACNC's role in regulating not-for-profit organisations in the future. "The original idea for the ACNC was to have it register, support sustainability, and reduce red tape for all not-for-profits, not just charities", advisory board chair Tony Stuart said.

"Recognising not-for-profit registration and oversight and fundraising regulation remain roles of state and territory law, the review of the Act offers, perhaps, the only opportunity in the foreseeable future for effort to be directed to seeking Federation agreement about the ACNC being the one stop shop for both charities and not-for-profit organisations."

A report on the review's findings and recommendations will be made to Government by the review panel by 31 May 2018.

# What do changes to the privacy law mean for your organisation?

BY John Vaughan-Williams, Lawyer


As we have previously reported in the Third Dimension, in October 2016 the Federal Parliament introduced the *Privacy Amendment (Notifiable Breaches) Bill 2016* (Cth) (**Bill**). The Bill proposed amendments to the *Privacy Act 1988* (Cth) (**Privacy Act**). These proposals then led to changes in the law, with passing of the *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth) (**Amendment Act**) on 13 February 2017.

The changes to the law, contained in the Amendment Act, have just come into effect as of 22 February 2018.

This article will set out the nature of these changes to the privacy law, and what they could mean for your organisation.

## Does your organisation need to comply with the Privacy Act?

The changes set out in the Amendment Act only apply the organisations which are subject to the Privacy Act.

Numerous not-for-profits are obliged to comply with the Privacy Act, generally due to them having an annual turnover of more than $3 million (although there are some other categories under which they may be bound). However, the Office of the Australian Information Commissioner (**OAIC**) also administers the "opt-in" register. This is a register of businesses and not-for-profits which have chosen to be bound by the Privacy Act, even though they are not required to by law.

Entering onto the register makes the Privacy Act binding on an organisation, just like other organisations which are automatically bound under the provisions of the Privacy Act. Therefore, organisations which are on the opt-in register are also affected by the Amendment Act.

The advantage of being on the opt-in register is that the register is available to the public, and therefore provides a public record of good privacy practice, potentially increasing consumer and member trust.

If your organisation is not otherwise bound to comply with the Privacy Act, but is concerned with its public perception with respect to privacy, then you may wish to consider entering onto the register.

## What is the effect of the changes to the Privacy Act?

The Amendment Act requires almost all organisations which are subject to the Privacy Act to report what are called "eligible data breaches".

Generally a data breach occurs when:

(a) an unauthorised person accesses information, held by an organisation, relating to a third party;

(b) an organisation discloses information which it holds, regarding a third party, to another person, and such disclosure is unauthorised; or

(c) information which an organisation holds regarding a third party is lost by the organisation which holds it.

For a not-for-profit, members are the most common type of "third party" about whom it will hold information. However, not-for-profits may also hold information on numerous other types of third parties, including donors, employees and contractors.

Not all data breaches are considered eligible

data breaches. Under the Amendment Act, an eligible data breach is a breach of an organisation's privacy which is likely to cause serious harm. If such a breach has occurred, then the organisation will need to report that breach to the OAIC, as well as any individuals who may be affected by the breach.

## How do you identify an eligible data breach?

If an organisation (which is subject to the Privacy Act) has experienced a data breach, then the first step is to identify whether that breach is likely to cause serious harm, and therefore comes under the definition of an "eligible data breach". If the breach does not fall within the definition, then the new reporting provisions of the Amendment Act will not apply.

The term "serious harm" is not defined in the Privacy Act, and the interpretation of the term is likely to become clearer over time, as the Privacy Act is enforced by the OAIC. In determining whether a breach is likely to cause serious harm (and, therefore, is an eligible breach), the organisation is required to take an objective approach, considering how the breach would be viewed by an unbiased, reasonable person.

Despite the term not being defined, the Amendment Act sets out a list of factors that an organisation must consider in determining the probability of serious harm. These factors include the following:

(a) the kind, and sensitivity, of the information subject to the breach;

(b) whether the information is protected by any security features, and whether those features can be easily overcome;

(c) the kinds of persons who have obtained the information, and whether they are likely to use the information to cause harm;

(d) how long was the period between when the breach occurred and when the organisation became aware of it; and

(e) the potential types of harm associated with the breach.

For serious harm to be 'likely', the chance of harm must be more probable than not, as opposed to simply being possible. If an organisation reasonably suspects that an eligible data breach has occurred, it is required to conduct an assessment within 30 days of the suspected breach, even if the assessment results in a finding that no breach has occurred. It is recommended that the organisation seeks legal advice if the occurs, particularly as there are exceptions which can apply.

Once an assessment is complete, the organisation should keep records of all findings and decisions that arise as part of the assessment process.

## What do you do if you identify an eligible data breach?

As a preliminary point, if an organisation identifies what would have been an eligible data breach, but rectifies the breach before any serious harm has occurred, then the breach will no longer be considered an eligible data breach. Therefore, the first step taken by an organisation should be to attempt to rectify the breach.

Otherwise, upon becoming aware of an eligible data breach, an organisation must make a notification statement to the Commissioner of the OAIC, and inform all individuals who were at risk of serious harm as to the contents of that statement.

The contents of the statement must include, among other things, details of the data breach, the kind of information covered by the breach, and what steps individuals should take to address the breach.

Failing to comply with the notification scheme will be a breach of the Privacy Act, for which the Commissioner of the OAIC may issue monetary penalties.

## Summary

Privacy law is particularly relevant to not-for-profits, which often hold personal and sensitive information about its members, as well as others. Organisations will need to update their internal processes, and have a plan in place for eligible data breaches which may occur in the future, in order to be able to respond quickly.

# Reporting requirements for Incorporated Associations

BY Vera Visevic, Partner

Despite the Australian Charities and Not-For-Profits Commission (ACNC) being a national regulator for charities across all Australian jurisdictions, charities structured as incorporated associations are subject to financial reporting requirements that vary from state to state. In many cases, these financial reporting requirements apply alongside the financial reporting requirements established by the ACNC. The resulting effect is that many charities are burdened with duplicative reporting requirements.

The ACNC has acknowledged the reduction on regulatory burden on the Australian not-for-profit sector as a key function of the ACNC.

Likewise, the past few years have seen changes in state legislation concerning incorporated associations, and in particular, the reporting requirements of incorporated associations registered as charities with the ACNC. In the meantime, transitional reporting arrangements have also been put into place by the ACNC, allowing incorporated associations to submit the same financial reports to both the ACNC and their state regulator.

The table below summarises the current reporting requirements of incorporated associations, and the effect of ACNC registration on reporting obligations to respective state regulators.

| Jurisdiction | Do we need to submit financial information to the state regulator? | Details of reporting requirements | Legislation |
|---|---|---|---|
| **New South Wales** | Yes<br><br>*The ACNC will, however, accept the same financial report provided to NSW Fair Trading, and this will meet the ACNC requirements for financial reporting.* | **All Incorporated Associations**<br>Incorporated associations in New South Wales are required to:<br>1. maintain financial records – s 50;<br>2. lodge a summary of financial affairs with NSW Fair Trading (*and financial statements for 'Tier 1' associations**) – ss 45, 49;<br>3. present financial statements at the AGM (*with an auditor's report for 'Tier 1'*) – ss 44, 48;<br>4. have an audit conducted by a Registered Company Auditor (*'Tier 1' only*) – s 43; and<br>5. prepare financial statements in accordance with the Australian Accounting Standards (*'Tier 1' only*) – ss 43(2)–(3).<br><br>** 'Tier 1' associations have gross receipts of greater than $250,000 or current assets of greater than $500,000.* | *Associations Incorporation Act 2009* (NSW)<br><br>**See also**<br>*Associations Incorporation Regulation 2010* (NSW) |
| **Victoria** | Yes<br><br>*The ACNC will, however, accept the same financial report provided to Consumer Affairs Victoria, and this will meet the ACNC requirements for financial reporting.* | **All Incorporated Associations**<br>Incorporated associations in Victoria are required to:<br>1. maintain financial records – s 89;<br>2. lodge an annual statement with Consumer Affairs Victoria *(must be reviewed by an independent accountant for 'Tier 2' associations* and by an independent auditor for Tier 3)* – ss 101–102;<br>3. present financial statements at the AGM – ss 94, 97, 100;<br>4. have an independent audit conducted by an independent accountant for 'Tier 2' associations and by an independent auditor for 'Tier 3' – ss 96, 99; and<br>5. prepare financial statements in accordance with the Australian Accounting Standards (*'Tier 2' and 'Tier 3' only*) – ss 95, 98.<br><br>** 'Tier 1' associations have total revenue of less than $250,000. 'Tier 2' associations have total revenue of between $250,000 and $1 million. 'Tier 3' associations have total revenue of greater than $1 million.* | *Associations Incorporation Reform Act 2012* (Vic)<br><br>**See also**<br>*Associations Incorporation Reform Regulations 2012* (Vic) |

| Jurisdiction | Do we need to submit financial information to the state regulator? | Details of reporting requirements | Legislation |
|---|---|---|---|
| **Queensland** | Yes<br><br>*The ACNC will, however, accept the same financial report provided to the Queensland Office of Fair Trading, and this will meet the ACNC requirements for financial reporting.* | **All Incorporated Associations**<br>Incorporated associations in Queensland are required to:<br>1. maintain financial records – reg 9;<br>2.lodge financial information with the Queensland Office of Fair Trading – ss 59–59B;<br>3.present financial statements at the AGM – ss 59–59B; and<br>4. have financial statements verified (*by the president or treasurer for 'Level 3' associations*, and by an auditor, certified accountant, or person approved by the OFT for 'Level 2'. An auditor or certified accountant must audit the financial statements for 'Level 1' associations)* – ss 59–59B.<br>** 'Level 1' associations have either total assets or revenue of more than $100,000. 'Level 2' associations have either total assets or revenue between $20,000 and $100,000. 'Level 3' associations have both total assets and revenue of less than $20,000 respectively.* | *Associations Incorporations Act 1981* (Qld)<br><br>**See also**<br>*Associations Incorporation Regulation 1999* (Qld) |
| **Australian Capital Territory** | Not if registered with ACNC | **Incorporated Associations (Registered with ACNC)**<br>Incorporated associations in the Australian Capital Territory, registered with the ACNC, only need to report to the ACNC.<br>**Incorporated Associations (Not registered with ACNC)**<br>ACT Incorporated Associations not registered with the ACNC are required to:<br>1. maintain financial records – s 71;<br>2. lodge financial information with Access Canberra – s 79;<br>3. present financial statements at the AGM – s 73;<br>4. have financial statements verified (*by any person who is not an officer of the association and has not prepared or helped to prepare the accounts, for 'Small' associations*; by a Registered Company Auditor or Chartered Accountant, for 'Medium' associations; and by a Registered Company Auditor for 'Large' associations*) – ss 74, 76, reg 12-13; and<br>5. ensure that the audit opinion states whether accounting standards have been complied with, and if not, whether they are a true and fair view of the matter – ss 76.<br>** 'Small' associations have gross receipts of less than $400,000. 'Medium' associations have gross receipts between $400,000 and $1 million. 'Large' associations have gross receipts greater than $1 million.* | *Associations Incorporation Act 1991* (ACT)<br><br>**See also**<br>*Associations Incorporation Regulation 1991* (ACT) |

| Jurisdiction | Do we need to submit financial information to the state regulator? | Details of reporting requirements | Legislation |
|---|---|---|---|
| **South Australia** | Not if registered with ACNC | **Incorporated Associations (Registered with ACNC)**<br>Incorporated associations in South Australia, registered with the ACNC, only need to report to the ACNC. All incorporated associations in SA are still however required to maintain financial records – s 39C.<br><br>**Non Charitable Incorporated Associations**<br>'Prescribed' incorporated associations* in South Australia, not registered with the ACNC, are required to:<br>1. maintain financial records – ss 35, 39C;<br>2. lodge financial information with the Corporate Affairs Commission (part of Consumer and Business Services) – ss 35, 48;<br>3. present financial statements at the AGM – s 35; and<br>4. have financial statements audited by a Registered Company Auditor, Chartered Accountant or other person approved by the Corporate Affairs Commission – s 35.<br>* *'Prescribed' associations have gross receipts greater than $500,000.* | *Associations Incorporation Act 1985* (SA)<br><br>**See also**<br>*Associations Incorporation Regulations 2008* (SA) |
| **Western Australia** | Not if registered with ACNC | **Incorporated Associations (Registered with ACNC)**<br>Incorporated associations in Western Australia, registered with the ACNC, only need to report to the ACNC. All incorporated associations in WA are still however required to maintain financial records and present financial statements at the AGM – ss 66, 70, 73, 76.<br>**Non Charitable Incorporated Associations**<br>'Tier 2' and 'Tier 3' incorporated associations in South Australia, not registered with the ACNC, are required to:<br>1. maintain financial records – s 66;<br>2. lodge financial information with Consumer Protection – ss 70, 73, 76;<br>3. present financial statements at the AGM – ss 70, 73, 76; and<br>4. prepare financial statements in accordance with the Australian Accounting Standards (*'Tier 2' and 'Tier 3' only*) – ss 71, 74.<br>* *'Tier 1' associations have total revenue of less than $250,000. 'Tier 2' associations have a total revenue of between $250,000 and $1 million. 'Tier 3' associations have total revenue of greater than $1 million.* | *Associations Incorporation Act 2015* (WA)<br><br>**See also**<br>*Associations Incorporation Regulations 2016* (WA) |

| Jurisdiction | Do we need to submit financial information to the state regulator? | Details of reporting requirements | Legislation |
|---|---|---|---|
| **Northern Territory** | Yes<br><br>*The ACNC will, however, accept the same financial report provided to Licensing NT, and this will meet the ACNC requirements for financial reporting.* | **All Incorporated Associations**<br>Incorporated associations in the Northern Territory are required to:<br>1. maintain financial records – s 41;<br>2. lodge summary of financial affairs with Licensing NT – s 45;<br>3. present financial statements at the AGM – ss 43–44;<br>4. have an independent audit conducted by an unrelated person (*for 'Tier 1 only'*, see s 46), a member of an accountant's body or person approved by the Commissioner of Consumer Affairs (*'Tier 2' only*), or a person certified for public practice by an accountant's body or person approved by the Commissioner (*'Tier 3' only*) – ss 46–48; and<br>5. ensure that the audit opinion states whether accounting standards have been complied with, and if not, whether they are a true and fair view of the matter (*'Tier 3' only*) – s 48; and ensure that audit opinions comply with auditing standards – reg 11.<br>* *'Tier 1' associations have annual gross receipts of less than $25,000 and gross assets of less than $50,000. 'Tier 2' associations have either gross receipts between $25,000 and $250,000, or gross assets between $50,000 and $500,000. 'Tier 3' associations have either gross receipts above $250,000, or gross assets above $500,000.* | *Associations Act* (NT)<br><br>**See also**<br>*Associations Regulation* (NT) |
| **Tasmania** | Not if registered with ACNC | **Incorporated Associations (Registered with ACNC)**<br>Incorporated associations in Tasmania, registered with the ACNC, only need to report to the ACNC – s 24B(1B). All incorporated associations in Tasmania are still however required to maintain financial records and have an audit conducted confirming the accuracy of the income and expenditure statement (exempt for associations with total revenue of less than $250,000) – ss 23A, 24.<br>**Incorporated Associations (Not registered with ACNC)**<br>Incorporated associations in Tasmania, not registered with the ACNC, are required to:<br>1. maintain financial records – s 23A;<br>2. lodge annual returns with Consumer, Building and Occupational Services – s 24; and<br>3. have an audit conducted confirming the accuracy of the income and expenditure statement (exempt for associations with total revenue of less than $250,000). | *Associations Incorporation Act 1964* (Tas)<br><br>**See also**<br>*Associations Incorporation Regulations 2007* (Tas) |

# Waubra Foundation v Commissioner of ACNC: Health Promotion Charities and Appealing a Decision of the ACNC

BY Tarang Immidi, Law Graduate

On 4 December 2017, in one of the first judicial interpretations of the *Australian Charities and Not-for-profits Commission Act 2013* (**ACNC Act**), the Administrative Appeals Tribunal (**AAT**) affirmed a decision of the Australian Charities and Not-for-profits Commission (**ACNC**) to revoke the Health Promotion Charity (**HPC**) status of the Waubra Foundation.

This case is significant for two reasons:

a) it provides the first interpretation of the definition of an HPC; and

b) it outlines the procedure for an appeal against a decision of the ACNC.

## Interpreting the Definition of an HPC

An HPC is defined as a charitable 'institution whose principal activity is to promote the prevention or the control of diseases in human beings'. In interpreting this definition, the AAT considered each separate element.

### 1. Institution

Whether the Waubra Foundation was an institution was not disputed by the ACNC. The AAT, therefore, did not examine this issue. It did, however, refer to a decision of the High Court of Australia which adopted the definition of an institution as being a body "called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle."

### 2. Principal Activity

The AAT found that identifying an institution's 'principal activity' involves assessing the activities actually carried out by the institution and assessing "holistically" the predominant activity carried on by the institution.

The AAT also noted the ACNC Commissioner's Interpretation Statement on HPCs which states that often, the principal activity may be determined by examining which activity takes up the majority of the institution's time or resources.

### 3. To Promote the Prevention or Control

The purpose of the principal activity of an HPC must be 'to promote the prevention or control of diseases in human beings'. The AAT found that this should be determined by reference to the purpose of the primary activity, and not the character of the activity itself.

The AAT relied on the Macquarie Dictionary to define "to promote", as being in this context "to further the development of."

The word "prevention" was defined as "keeping from occurring" or "hindering". "Control" was defined as "holding in check" or "curbing". The AAT found that the principal activity need not promote both the prevention and the control of diseases, but that either of the purposes of 'prevention' or 'control' will be valid.

Practically, the AAT accepted the ACNC Commissioner's Interpretation Statement on HPCs, which accepted that a broad range of activity is encompassed in the promotion of the prevention or control of disease.

### 4. Disease

The AAT adopted the definition of disease as being "a condition involving the disturbance of the normal functions of body or mind." This definition was considered to be consistent with other legislative definitions and definitions contained in relevant case law.

This broad definition encompasses conditions that may or may not be accepted by the medical and scientific communities. The AAT found that an institution may be an HPC if it proves that its activities promote the prevention or control of factors that could have indirect health effects which may cause or contribute to disease.

## Procedure for an Appeal against a Decision of the ACNC

As one of the first appeals against a decision of the ACNC, this case provides an important example of the process involved in appealing a decision of the ACNC. The ACNC Act provides that once the ACNC makes a decision, the entity against whom the decision was made has a right to object to the decision. This is done by a 'letter of objection' to the ACNC. The ACNC is then required to decide whether to allow the objection to the original decision wholly, or in part (**Objection Decision**) on the basis of what is submitted in the 'letter of objection'.

Importantly, it is only the Objection Decision that may be appealed to the AAT, and the parameters for review of the Objection Decision will be the grounds set out in the 'letter of objection'. This potentially provides very narrow grounds on which an Objection Decision of the ACNC may be overturned, and even where an Objection Decision is found to be incorrect, the AAT will not be able to make the original decision of the ACNC itself. This underscores the pivotal importance of the 'letter of objection' in the appeal process.

The practical effect of this process is that even where an organisation wins in the AAT, there is no guarantee that this will lead to a materially different outcome compared with the original decision by the ACNC.

## What does this mean for Health Promotion Charities?

This case provides greater certainty regarding the definition of an HPC. While existing HPCs should take comfort in the fact that the definition has been interpreted broadly, they should examine the elements of the definition set out above and ensure that their activities are compliant with the clarified definition.

**Organisations that are considering applying for endorsement as an HPC should also examine this decision to ensure they are compliant with the definition to ensure their application is successful.**

This case additionally provides realistic insights into the challenges charities might face in attempting to appeal a decision of the ACNC. The importance of the 'letter of objection' in defining the scope of review of decisions of the ACNC means that professional legal advice must be obtained early in the process of appealing a decision of the ACNC.

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## Topics from previous issues

### Issue 18, Spring 2017

- Fair Work Commission decision to give casual workers the right to request permanent employment
- Commercial fundraisers - Have you considered your obligations?
- Fair's fair: the unfair contract terms regime
- Public Companies & Related Parties: Should our organisation be concerned?

### Issue 17, Winter 2017

- Australian Financial Services Licences - does your charity need one, and is your charity otherwise compliant?
- Accounting Standard 1058 and the 'cost' of volunteer services
- Directors and management committees beware: isolvent trading
- For when things go wrong: directors and officers insurance and indemnities


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