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THIRD dimension

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

Dawn of the virtual members' meeting: ensuring legal compliance

MILLS OAKLEY

Convening Your First Electronic Members' Meeting

BY Alison Sadler, Lawyer

Many not-for-profits (**NFP**s) and charities are looking to maximise member participation and minimise the time and cost involved in holding a members' meeting. This has resulted in the use of technology— to run effective and efficient members' meetings — becoming increasingly popular for NFPs and charities.

This article will discuss the legal and practical requirements for a company holding an electronic meeting.

What are the legal requirements?

Section 249S of the *Corporations Act 2001* (Cth) (**Act**) provides that a company may hold a meeting of its members at two or more venues using any technology that gives the members, as a whole, a reasonable opportunity to participate. A company's constitution does not need to contemplate electronic meetings for this provision to apply.

Practically, section 249S means a company would still need to hold a physical meeting, but members could access this meeting using technology, such as Skype. Any form of technology could be used by the company to convene an electronic meeting, provided that all members have a reasonable opportunity to participate in the meeting. A reasonable opportunity to participate means that each member is able to communicate with the chair and be heard by other members attending the meeting, including those at other venues.

What are some of the practical requirements?

The Explanatory Memorandum to the Company Law Review Bill 1997 (**Explanatory Memorandum**) states that, if a company convenes an electronic meeting, it will need to take account of the following factors:

a. the ability of the chair to conduct and control the proceedings;

b. the number of persons attending the meeting;

c. the nature of the business of the meeting, such as whether it involves a visual presentation;

d. the voting processes available (for example, it will be necessary to have procedures in place to count members' votes from all venues); and

e. whether persons at the meeting can communicate with the chair.

How does a company meet its quorum for an electronic meeting?

A quorum is the minimum number of persons required to be present at a meeting in order for the business of its meeting to be validly carried out. Where a company's constitution does not set out quorum requirements, and the replaceable rules apply, two members present will constitute a quorum, and the members must be present at all times during the meeting. However, a constitution may provide for a different quorum.

The Explanatory Memorandum states that, where a meeting is being held at more than one venue using technology, persons present at each of those venues may be counted towards the quorum. This means that the members who participate in the meeting using technology will count towards the quorum. Proxies will also count towards the quorum for the meeting, provided that the constitution allows for proxies. Under the Act, if the organisation is a public company, but not a registered charity, a mandatory rule applies to the organisation allowing members to appoint a proxy.

How does voting work at an electronic meeting?

Counting members' votes at an electronic meeting is a common problem. The Act provides that if the member is not physically present, then the member must complete a proxy form for their vote to be counted. So when holding a virtual meeting, we recommend that members who would like to vote on resolutions do so by proxy in accordance with the company's constitution. This will also ensure that the NFP or charity does not encounter any technical difficulties when counting member votes via Skype or any other form of technology.

> **"A reasonable opportunity to participate means that each member is able to communicate with the chair and be heard by other members attending the meeting, including those at other venues."**

Alternatively, a NFP or charity could rely on direct voting at an electronic meeting. Direct voting is a method used by organisations to allow members to vote online prior to the meeting. To use direct voting at an electronic meeting, the constitution must contain a clause which explains how direct voting will occur at meetings.

What happens if the technology fails?

If the technology fails part way through the meeting, the meeting, or that part of the meeting affected by the failure, will be valid, unless:

a. a member does not have a reasonable opportunity to participate (see discussion above); or

b. a court declares the meeting invalid on the grounds that a substantial injustice has been, or may be, caused which cannot be remedied by another court order.

Summary

In summary, if your NFP or charity is governed by the *Corporations Act 2001* (Cth) then you can convene an electronic meeting provided that the members have a reasonable opportunity to participate. Before convening an electronic meeting, it is important to consider a number of practical considerations, such as the number of members, quorum requirements, and voting requirements.

"Any reform is better than nothing": The regulation of charitable fundraising in Australia

BY Gabriella Janu, Law Graduate

The Select Committee on Charity Fundraising in the 21st Century (**Committee**) released a report on the regulation of charitable fundraising in Australia, and the options for reform, on 14 February 2019 (**Report**). The Report joins a long line of inquiries discussing and reviewing charitable fundraising regulation in Australia over a number of years, notably, a Productivity Commission report in 2010, an Australian Charities and Not-for-profits Commission (**ACNC**) report in 2013, and an Australian Government independent review of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) in 2017.

Although the Committee did not recommend a specific regulatory model to replace the current charity fundraising framework, it generally agreed with the perspective of inquiry participants that any reform was better than maintaining the status quo.

The Committee's findings

The Committee uncovered the "near-universal opinion" that the current system of regulation is inadequate. It is inconsistent, confusing, complex, expensive, and does not lend itself to modern online fundraising practices. By way of background, the current fundraising regulatory model is primarily subject to state and territory regulation. Each jurisdiction, other than the Northern Territory, has legislation regulating charitable fundraising, which can

vary significantly in the requirements for registration and ongoing reporting. For example, the definition of 'charitable purpose' differs in each jurisdiction. So, if you are seeking to fundraise in more than one jurisdiction, you not only need to apply for licences separately in each jurisdiction, but you need to satisfy a different legal test each time.

Participants to the inquiry proposed that the current system of regulation be replaced by a truly national and harmonised scheme, that is simple and modern, meaningfully reduces red tape, applies to all charities and not-for-profits (**NFP**s), and tailors to both large and small fundraising activities.

Methods to develop a national model

Multiple law reform proposals canvassed in the Report focused on the expansion of the role of the Australian Consumer Law (**ACL**) in the regulation of charitable fundraising. The ACL is the national law for fair trading and consumer protection, and is contained in schedule 2 of the *Competition and Consumer Act 2010* (Cth).

The ACL currently applies to charitable fundraising activities that occur in 'trade or commerce', being those activities that involve the supply of goods or services, the professional fundraising activities of for-profit organisations, or activities that occur in an organised, continuous or repetitive way. Such activities are subject to the ACL's 'misleading or deceptive conduct' and 'unconscionable conduct' provisions, as well as provisions that prohibit false or misleading representations, or engaging in unconscionable conduct in relation to the supply of goods or services. In circumstances of breach, the ACL regulators, the Australian Competition and Consumer Commission (**ACCC**) and state and territory regulators, have multiple enforcement options, including considerable monetary penalties.

To increase consistency in the charitable fundraising sector, participants to the inquiry suggested that the application of the ACL be expanded to specifically capture fundraising activities. The inquiry participants had different ideas about the level of expansion of the ACL, and whether it would involve introducing specific charitable fundraising provisions, or simply removing the 'misleading and deceptive' and 'unconscionable' conduct provisions from state and territory fundraising legislation to confirm the application of the ACL. However, most participants noted the positive impact that a broader role for the ACL could have on charity fundraising regulation, as an already established and purpose-built body of legislation with significant enforcement capabilities.

Alongside the expansion of the ACL, most participants supported the introduction of mandatory national guidelines on charitable fundraising. The guidelines would regulate a national licence system to be followed in each state and territory, reducing uncertainty, red tape and duplication.

> **"This reform proposal is not an alternative to the introduction of a national framework for charity fundraising. Rather, it is an additional method of reducing red tape."**

The role of the ACNC

The ACNC regulates organisations registered as charities under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). The ACNC does not currently regulate the fundraising activities of charities. Rather, registered charities have reporting obligations to the ACNC and must comply with governance standards. So, a charity's fundraising practices may raise questions about its compliance with governance standards, in which case the ACNC may decide to investigate. However, if the ACNC has more general concerns about fundraising activities, these concerns would be referred to the relevant state or territory regulator.

It was proposed in a submission to the Report, by Mills Oakley, that the role of the ACNC be expanded to oversee the assessment of fundraising licences in Australia, as well as the reporting and auditing of charitable fundraising. The ACL framework would then deal with the investigation of poor fundraising conduct. If, for example, the ACCC uncovered a breach

of the 'misleading and deceptive' conduct provision in section 18 of the ACL, this could be a ground upon which the ACNC could revoke a fundraising licence.

Notably, the ACNC regulates around 56,000 charities, while there are about 600,000 NFPs in Australia, and many more charitable fundraising activities conducted by for-profit organisations and individuals. Accordingly, this reform proposal is not an alternative to the introduction of a national framework for charity fundraising. Rather, it is an additional method of reducing red tape, particularly for resource-poor small charities which can be deterred from undertaking the fundraising activities that are so important to the fulfilment of their charitable purposes, on account of the challenges inherent in the current system.

The next steps

Although the Commission did not promote a particular framework for reform, it did call for a nationally consistent model for the regulation of fundraising activities to be introduced within two years.

Despite the Commission's recommendations, there has been to date a trend in the fundraising sector for inquiries that discuss charitable fundraising and recommend national reform, to fail to effect any change. Hopefully this trend will end with the Report, and we can finally see some meaningful reform.

Recent case on meaning of "non-profit organisation" for New South Wales payroll tax

BY John Vaughan-Williams, Associate

In recent years, state payroll taxes have been a commonly litigated area in the not-for-profit sphere, with some charities and public benevolent institutions (**PBI**s) challenging assessments worth multiple millions of dollars in payroll tax.

Payroll tax is a state and territory tax payable by an employer on employee wages, if the amount of those wages is above a certain monetary threshold.

Each state and territory's payroll tax statute contains some form of exemption for charitable entities, but the law and interpretation varies across jurisdictions. The requirements for charitable payroll tax exemptions are arguably stricter than for other taxes, as the exemption not only considers the nature of the organisation, but also the types of activities that its employees are engaged to perform.

The recent New South Wales Supreme Court case of *KinCare Community Services Limited v Chief Commissioner of State Revenue* [2019] NSWSC 182 (**KinCare Case**) was a dispute over an assessment of $3.2 million in payroll tax under the *Payroll Tax Act 2007* (NSW) (**NSW Payroll Tax Act**), over a period of five years. The case revealed some useful insights as to the legal definition of a "non-profit organisation", as well as the types of employee roles which are accepted as qualifying for the exemption. This article will discuss this case.

1. Overview of exemption

In New South Wales, the payroll tax exemption for newly-created charities and PBIs (that is, incorporated from 1 July 2007 onwards) is contained in section 48 of the NSW Payroll Tax Act (**New Exemption**). For charities and PBIs incorporated before 1 July 2007, the exemption is contained in clause 12 of schedule 2 of the NSW Payroll Tax Act (**Transitional Exemption**).

The two exemptions are similar, but differ slightly on the requirements for the objects clause and the activities performed by staff. Although the KinCare Case concerned the exemption under clause 12 of schedule 2, the objects clause was not one of the legal issues in dispute, so most of the law in the KinCare Case can apply to both exemptions.

The relevant elements of the charitable exemption under the NSW Payroll Tax Act are as follows:

a. the taxpayer must either be:
   i. a PBI; or
   ii. a non-profit organisation with:
      A. under the New Exemption (affecting organisations incorporated from 1 July 2007 onwards), <u>its sole or dominant purpose</u> a charitable, benevolent, philanthropic or patriotic purpose; or
      B. if under the Transitional Exemption (affecting organisations incorporated before 1 July 2007), <u>one of its purposes</u> a charitable, benevolent or philanthropic purpose; and

b. the wages which are exempted must be paid or payable:
   i. under the New Exemption (affecting organisations incorporated from 1 July 2007 onwards):
      A. for a kind of work which is "ordinarily performed" in connection with the charitable, benevolent, philanthropic or patriotic purposes; and
      B. to a person who is engaged <u>exclusively</u> in that kind of work; or
   ii. under the Transitional Exemption (affecting organisations incorporated before 1 July 2007), to a person engaged in charitable, benevolent, philanthropic or patriotic work.

> **"Charities should not simply assume that their payroll tax exemptions will remain in effect in perpetuity, and should be regularly reviewing their eligibility."**

2. Facts of Kincare Case

KinCare Community Services Limited (**KinCare**) is a public company limited by guarantee, which was incorporated in 1998. It is registered with the Australian Charities and Not-for-profits Commission (**ACNC**) as a charity and a PBI. Notably, registration with the ACNC has little to no bearing on whether an organisation will be deemed to be eligible for a state or territory tax exemption.

KinCare provides home care services to the elderly, the disabled and also to Aboriginal and Torres Strait Islander people. There are also several for-profit entities which are related to KinCare (**KinCare Group**), and which entered into a series of transactions with KinCare, relating to KinCare's provision of services.

KinCare had previously been granted an exemption from payroll tax as a non-profit charitable organisation, but the Chief Commissioner of Taxation in New South Wales determined that between 1 July 2008 and 1 April 2014 (**Relevant Period**), KinCare was not entitled to the exemption for its wages. This led to an assessment of a liability of $3.2 million in payroll tax.

The arrangements between KinCare and the KinCare Group included the following:

a. KinCare paid fees to the KinCare Group, in exchange for the KinCare Group providing KinCare with nurses and other medical staff;
b. KinCare's administrative staff performed services for both KinCare and the KinCare Group, and the KinCare Group paid KinCare a

fee for the administrative services which were provided to the KinCare Group; and

c. KinCare provided loans to the KinCare Group, and also a guarantee to a bank to allow the KinCare Group to purchase assets.

3. Legal issues in question

In making its payroll tax assessment, the Commissioner had alleged the following regarding KinCare:

a. the arrangements between KinCare and the KinCare Group meant that KinCare was not a "non-profit organisation", as it conferred private benefits; and

b. by the administrative staff of KinCare providing administrative services to both KinCare and the KinCare Group, this meant that the wages paid to administrative staff were not in connection with charitable or benevolent work.

Accordingly, there were four issues for the Court to determine in the KinCare Case:

a. Was KinCare a "non-profit organisation" during the Relevant Period?

b. If yes, were the wages paid by KinCare to administrative staff during the Relevant Period in connection with its charitable work?

c. Was KinCare a PBI?

d. If yes, were the wages paid by KinCare to administrative staff during the Relevant Period in connection with its public benevolent work?

Generally, the requirements to be a PBI at law are more difficult to satisfy than the requirements to be a charity, as a narrower range of purposes and activities are recognised. KinCare conceded that the third and fourth questions were largely academic, as KinCare could probably not be successful in relation to those questions if it was unsuccessful in relation to the first two questions.

Consequently, the Court focused on the first two questions, with only a minor consideration of the third and fourth questions at the end of the judgment.

4. First issue – overview – was KinCare a "non-profit organisation" during the Relevant Period?

The question of being a "non-profit organisation" is commonly thought to be restricted to the contents of an organisation's constitution. However, in the KinCare Case, the Court referred to and applied a two-limbed test from the recent payroll tax case of *Grain Growers Limited v Chief Commissioner Of State Revenue* [2015] NSWSC 925:

a. Does the taxpayer's constitution prevent the payment of dividends to its members, both during its lifetime and on winding up?

b. Is the taxpayer, in its day-to-day operations, carried on for the benefit or gain of particular individuals?

The limb as to the constitution was uncontroversial, as it was accepted that KinCare was restricted from paying dividends to members, both pursuant to its constitution and also the *Corporations Act 2001* (Cth).

The limb regarding the day-to-day operations was where the Commissioner contended that KinCare did not qualify as a "non-profit organisation". The Commissioner argued that, through KinCare's arrangements with the KinCare Group, KinCare existed for the benefit or gain of particular individuals.

The Court analysed each of the arrangements between KinCare and the KinCare Group, in turn.

4.1 Payment for services

The Court first considered KinCare paying the KinCare Group for the services of nurses and other medical staff. The Court held that the services were sourced and paid for on an arms' length basis, and were comparable with what KinCare would have paid to an independent third party for those services. For this reason, the Court held that the procurement of these services was in fulfilment of KinCare's purposes, and was not for the purpose of the benefit or gain of private individuals.

4.2 Administrative Staff

The second arrangement which the Court considered was KinCare's administrative staff performing services for both KinCare and the KinCare Group. The Court considered the entirety of the arrangement, and deemed that the arrangement had the effect of furthering KinCare's objects, and was not for the purpose of conferring benefits on private individuals. The Court held this because:

a. the fees paid by the KinCare Group were at a market rate; and

b. KinCare actually received more money in the fees which the KinCare Group paid KinCare for the provision of these administrative staff, than KinCare paid for its own administrative staff.

The Court held that this meant the arrangement

was commercially viable for KinCare, and was for the objective of furthering its own objects, through generating fees to channel back into its charitable services.

4.3 Loans and guarantee

The final arrangement which the court considered were loans and a guarantee which KinCare provided to the KinCare Group.

With respect to the loans, the Court held that since a commercial rate of interest was paid on the loans, and also since it matched the corresponding rate of interest on money which KinCare borrowed from the KinCare Group in separate loans, the transaction was at arms' length and was not for the purpose of conferring private benefit.

In relation to the guarantee, KinCare had provided a guarantee to a bank to allow the head entity of the KinCare Group to purchase a business. The Court accepted that the KinCare Group would have been unlikely to secure a loan to purchase the business in absence of this guarantee. However, the Court did not accept that this meant a private benefit was conferred on the KinCare Group. Rather, the Court held that it was advantageous for KinCare if the entities in its corporate group were in a strong financial position, and that there was no evidence that the provision of the guarantee had prevented funds being used on KinCare's charitable purposes.

4.4 Court's determination

Arising from the Court's analysis of all of these factors, the Court considered that KinCare qualified as a "non-profit organisation", and rejected the Commissioner's assertions.

The Court then had to consider the second issue – being whether the wages of administrative staff were in connection with KinCare's charitable services.

5. Second issue – were the wages paid by KinCare to administrative staff during the Relevant Period in connection with its charitable work?

When considering the types of employees which a charity engages, there are three broad types. Those are:

a. employees involved directly in the provision of charitable work (for example, in KinCare's case, the nurses);

b. employees involved in commercial activities used to generate funds for a charity's charitable work (for example, employees of a business owned by a charity); and

c. employees who perform administrative work.

The first category of employee has been held by Courts to be in connection with charitable work (and, therefore, their wages are eligible to be exempt from payroll tax), whereas the second category has been held by Courts not to be in connection with charitable work (meaning that their wages are not eligible to be exempt from payroll tax).

The treatment of the third category is more difficult. While a literal interpretation could mean that administration falls outside of direct charitable work, Courts have taken the approach that so long as the administration work relates to the charitable work of an organisation (as opposed to being related a commercial activity, such as a business operated by the charity), it will still be considered to be in connection with charitable work.

In the KinCare Case, the Court held that it was conceptually possible for the administrative employees' wages to be proportionally allocated as follows:

a. the portion performed directly for KinCare, which would be exempt; and

b. the portion performed for the KinCare Group, which would not be exempt.

> **"The case should be a warning to charities to be very careful when entering into transactions with related parties."**

However, on the facts in the KinCare Case, there was insufficient evidence in order to determine how much time had been spent by those administrative employees in each capacity. The KinCare Group paid its annual fees to KinCare for the provision of administrative staff based on a reasonable estimate and apportionment based on the number of staff directly employed by each entity in the KinCare Group.

While the Court held that this was an acceptable method of calculation, the Court also held that it made it impossible for the Court to determine what portion of the wages was exempt. Therefore, the Court held that none of the wages payable to administrative staff during the Relevant Period were exempt. The Court noted that charging an hourly rate, with records kept of the number of hours worked in each capacity, may have sufficed.

Notwithstanding this result, the administrative staff wages were only a portion of the wages being litigated, and KinCare was successful regarding all other wages, which were exempted from payroll tax. The Court noted in its judgment that KinCare had been successful on the major issue of the litigation, and also found in its favour for costs.

6. Third and fourth issues - PBIs

The Court only gave limited attention to the third and fourth issues regarding PBIs, because the Court held that they would not produce a different result from a pure consideration of the first two issues.

The Court accepted that KinCare was a PBI, as it focused on providing benevolent relief to the disadvantaged (the main requirement of PBI endorsement), and held that the majority of wages were exempt from payroll tax during the Relevant Period on this ground. However, the Court encountered the same issue regarding the administrative staff wages, and held that they were not exempt.

7. Take-away points

There are three main points that charities should take away from this case.

Firstly, the case should be a warning to charities as to being very careful when entering into transactions with related parties. All of the transactions between KinCare and the KinCare Group were carefully scrutinised by the Court, and had KinCare failed to adequately document the reasoning for the arrangement (for example, through board minutes), the result may have been different.

Secondly, the Court held that it was conceptually possible for the administrative staff's wages to have been exempt, but the exemption was ultimately unsuccessful due to inadequate record-keeping. If staff are employed in multiple capacities, charities should be able to clearly demonstrate the portion of time which relates to each capacity.

Finally, KinCare had previously been exempted from payroll tax, but this exemption was later revoked by the Commissioner. Charities should not simply assume that their payroll tax exemptions will remain in effect in perpetuity, and should be regularly reviewing their eligibility.

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability – what to expect

BY Luke Geary, Partner and Georgia Haydon, Law Graduate

In 2015, a Senate Community Affairs References Committee held an inquiry into violence, abuse and neglect against people with disability in institutional and residential settings. The key recommendation of the Senate Committee in its report was that a royal commission be established to investigate the abuse experienced by disabled people in institutional settings.

Since then, the issue has been raised numerous times in Parliament and throughout the media; earlier this year, it was noted in Parliament that people with disability continue to be subjected to violence, abuse and neglect, and that, from July – September 2018, the National Disability Insurance Scheme's (**NDIS**) Quality and Safeguards Commission had received reports of over 184 incidents of abuse and neglect, 62 reports of unexpected deaths, 91 reports of injuries, 34 complaints against individual staff or service providers and 75 cases of unauthorised restrictive practices.

The Commission

In light of both the growing attention on the issue of abuse faced by people with disability and numerous calls for a royal commission, the Federal Government on 5 April 2019 announced the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Commission**).

It is anticipated that the Commission will run for three years, with the Commissioners' interim report due on 30 October 2020 and final report due by 29 April 2022.

The Terms of Reference

The Commission's Terms of Reference were announced on 4 April 2019, and allow the Commission a broad scope to consider a range of issues relevant to the complex nature of violence and abuse of people with disability. This is largely in response to the volume of growing evidence illustrating that instances of violence, abuse, neglect and exploitation of people with disability occur in a range of settings: aged care, educational, hospitals, corrective services, and within the disability services sector.

The Commission's inquiry will focus on what governments, institutions **and** the community should do to:

- **prevent** and **better protect** people with

disability from experiencing violence, abuse, neglect and exploitation;

- **encourage reporting** of, and **effective investigations** of and responses to, violence, abuse, neglect and exploitation of people with disability – including **addressing failures** in and **impediments** to reporting, investigating and responding to such conduct;
- **promote a more inclusive society** that can support the **independence** of people with a disability, and their right to live free from violence, abuse, neglect and exploitation;

as well as any matter reasonably incidental to those matters. In assessing those issues, the Commission is also to have regard to **all forms** of violence, abuse, neglect and exploitation of people with disability **whatever the setting or context.**

Next steps

Whilst the Commissioners have been announced, much about the Commission is yet to be determined. However, it is to be expected that the Commission will correspond with industry participants, invite public submissions and issue notices to produce to relevant parties. The Commission will also have powers to compel evidence, produce documents, make recommendations, as well as refer people and organisations to the police or relevant regulatory bodies for investigation.

Further information about the next steps of the Commission will be announced on its website: https://disability.royalcommission.gov.au/.

Parallels to Royal Commission into Aged Care, Quality and Safety

It is anticipated that there will be cross-overs between the issues to be considered by this Commission with those currently being considered by the Royal Commission into Aged Care, Quality and Safety – namely, in relation to:

- funding – in particular, funding provided by the NDIS;
- issues associated with congregate care, and living in institutional settings;
- staff-to-patient ratios;
- record-keeping practices;
- food and nutrition practices;
- access to health services;
- medication mismanagement;
- availability of appropriate care;
- business models and practices, including corporate governance;
- risk management frameworks; and
- regulatory and disciplinary frameworks.

Planning for the Commission

Until further details of the Commission are announced, relevant stakeholders should be taking steps to:

- better understand the function and operation of a royal commission and what the potential issues are that may be of interest to the Commission;
- identify vulnerabilities within their organisation to avoid being caught ill-prepared when the Commission makes requests for information;
- organise their external legal team to prepare a legally privileged advice concerning issues of risks and exposure faced by their organisation;
- ensure they are appropriately resourced to identify areas of concern by developing a data collection and management system. Document review is a time-consuming process, and a proper strategy for this will be vital in responding to any Notices to Produce / Summonses;
- create a working group tasked with responding to requests for information from the Commission; and
- consider the reach of their insurance policies, and whether they are adequate to cover potential liabilities and possibly legal costs.

The Effects of the Royal Commission

There will be significant media and stakeholder scrutiny in the upcoming months as internal and external stakeholders begin to respond to and engage with the Commission and its processes. With this "Royal Commission fever" on the increase, it is to be expected that:

- there is likely to be a level of panic, and information may be misreported or misunderstood;
- there will be more scrutiny and oversight, both internally and externally, of executives and board members of relevant organisations;
- there will be whistleblowing from past or present employees and volunteers;
- risk of exposure to litigation, or re-litigation, may increase; and
- organisations will be doing all they can to protect their brands and will undergo a test of leadership and culture.

The External Conduct Standards are on their way: What do Charities need to know?

BY Clement Ngai, Paralegal

The External Conduct Standards (**Standards**) announced by the Federal Government are expected to come into effect in August of 2019. Although the Standards were scheduled to begin on 1 July 2019, the Standards were introduced by regulation, and will not commence until after having sat in both chambers of parliament for 15 sitting days, to allow for either chamber to move to disallow the regulations. Based on the existing Parliament sitting schedule, the regulations will not come into effect until after 15 August 2019.

The Standards have been introduced to ensure that Australian charities meet minimum levels of transparency and accountability when operating overseas. However, these Standards are expected to impose a significant administrative burden on charities, as they develop the policies and procedures required by the Standards. In September 2018, Mills Oakley provided The Treasury with a written submission in response to the draft proposed Standards. The majority of the issues and recommendations raised in these submissions remain applicable to the Standards tabled to Parliament in late November 2018, and contained in the *Australian Charities and Not-for-profits Commission Amendment (2018 Measures No.2) Regulations 2018* (Cth) (**Regulations**).

Each of the four Standards contained in the Regulations covers a separate facet of operations for charitable organisations including:

a. control of financial resources;

b. record keeping;

c. anti-fraud regulations; and

d. protection of vulnerable individuals.

The Standards apply to any registered entity that operates outside Australia, or works with third parties that operate outside Australia. These Standards cast a wide net and will have a significant impact across the entire not-for-profit sector. Although charities registered with the ACNC as Basic Religious Charities are not required to comply with the existing ACNC Governance Standards, no exemption exists excepting Basic Religious Charities from complying with the External Conduct Standards.

Standard one – Activities and Control of Resources (including financial)

The first of the Standards has the broadest subject matter, covering four requirements for registered entities. Under the Standards, charities must:

a. take reasonable steps to ensure that their activities outside Australia are carried out in a way that is consistent with their purpose and character;

b. maintain reasonable internal control procedures;

c. ensure that funds given to third parties outside Australia are used:

   i. in accordance with the charity's status as a non-profit; and

   ii. with reasonable controls and risk management processes in place;

d. comply with Australian laws relating to nine separate areas (including money laundering, financing of terrorism, sexual offences against children, slavery, trafficking in individuals and debt bondage, people smuggling, international sanctions, taxation and bribery).

Whilst increasing public confidence in the not-for-profit sector is a vital objective for the ACNC, the trade off for this Standard is a substantial increase in the costs to charities that these changes represent. Charities should consider whether it will be necessary to devote additional financial resources to the development, or overhauling, of existing policies and procedures, in order to ensure sufficient compliance with this standard. This is particularly important for basic religious charities, since they have not been required to comply with the ACNC Governance Standards.

Due to the present absence of guidance regarding the precise extent to which charities must take steps to comply with the standard, charities may need to consider whether partnerships with overseas partners may put the charity at risk of breaching the standard; few charities have the resources to litigate in the event that written agreements with the partner organisation are breached, and this may present issues in situations where enforcement of an agreement is necessary to maintain compliance with the standards. Furthermore, charities should also be wary that the standard is silent with regard to steps that charities must take toward sub-contractors; how far down the chain must a charity ensure compliance?

Standard two - Annual Review of Overseas Activities and Record Keeping

The second standard requires a charity to keep records of its activities and expenditure on a country by country basis, for each financial year. Charities that undertake a broad range of operations must be wary of the steps that they will need to take to meet the minimum standard of record keeping required by this standard.

For example, a charity that oversees more permanent or long-term projects would have procedures in place that can facilitate these reporting requirements. However, where an entity provides time-critical emergency relief or short-term project services, they may have difficulty in retaining sufficiently detailed records for the ACNC. For charities that operate internationally, careful consideration of the requirements of the standard may be necessary to minimise the risk of reduced efficiency and effectiveness when conducting charitable work overseas.

The exposure draft of this standard included a provision that could require this information to be included in the charity's Annual Information Statement. The Mills Oakley Not-for-Profit team made submissions during the consultation period with the Treasury, raising concerns that this provision could result in the disclosure of sensitive or confidential information to the broader public. This provision was thankfully excluded from the Regulations tabled to the Parliament in November of 2018.

Standard three – Anti-Fraud and Anti-Corruption

This standard requires the charity to take reasonable steps to minimise risks of corruption, fraud, bribery or other financial impropriety by the responsible entities, employees, volunteers and third parties outside Australia. Additionally, charities must document any perceived or actual material conflicts of interest from these groups.

Although a requirement to report conflicts of interest already exists at a board level, individuals that may not have a vested interest in a charity's operation, such as employees, volunteers and third parties, are now also required to disclose such interests.

Charities should prepare for the increased burden of needing to implement policies and procedures that inform their employees and volunteers of responding to potential conflicts. For larger charities that have a

high turnover of staff, this will represent a significant undertaking; the red tape created by the level of scrutiny, education and compliance may even deter volunteers considering volunteering for the charity. Again, this is of particular significance for basic religious charities, as they are currently exempt from the Governance Standards.

Although many entities already conduct their own due diligence on third parties they intend to collaborate with, the standard is silent as to precisely how closely a charity must examine future partners. Charities should consider whether the time resources and expense associated with higher level of due diligence, may impact on the charity's operations, or for international entities, even require the charity to seek expert assistance.

Standard four – Protection of Vulnerable Individuals

Finally, the fourth standard requires the registered entity to take reasonable steps to ensure the safety of vulnerable individuals outside Australia, who are provided with services or benefits by the charity, or through a third party engaged by the charity.

This standard essentially imposes a duty of care on the charity over 'vulnerable individuals', defined as:

a. a child; or

b. an individual who is or may be unable to take care of themselves, or is unable to protect themselves against harm or exploitation.

Particularly in countries of the Global South, this can extend to a very broad range of people with which a charity may come into contact. Charities should take care in navigating the legal ambiguity in the standard, as to precisely what actions individuals conducting work for the charity would need to take to fulfil this duty of care. Charities should, however, consider the implications of requiring employees and volunteers to report any incidents of harm and exploitation to local authorities, particularly where there is a risk of greater harm to vulnerable individuals.

Conclusions

A failure to meet the External Conduct Standards may result in enforcement powers being used against the charity, including warnings, directions, enforceable undertakings, injunctions, and the suspension and removal of entities from the ACNC register. The ACNC is intending to release guidance for charities in the next few months to assist charities with understanding both the meaning of the standards, and items that charities need to consider.

In the meantime, charities should:

a. have a look at the way they manage their risks around overseas activities;

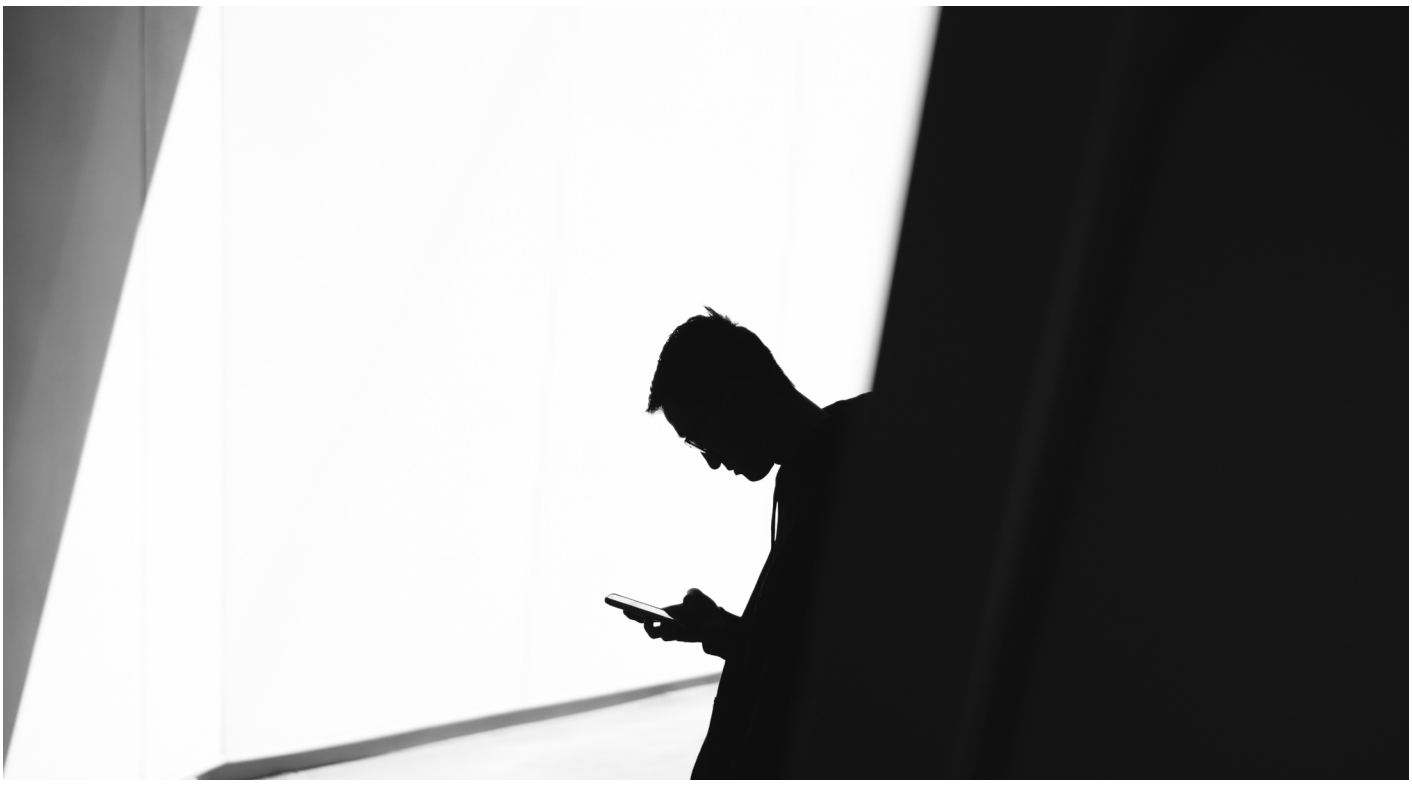
b. have a look at how they send funds overseas;

c. consider what will be necessary to organise the charity's affairs, and so best respond to the requirements of the Standards; and

d. consider the proposed standards and consider how they apply within the charity's context for operating overseas or sending funds overseas.

New whistleblower protection laws – are charities and not-for-profit organisations affected?

BY Gabriella Janu, Law Graduate



The Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth) (**Whistleblower Act**) introduces increased protections for whistleblowers in the corporate and financial sectors. The Whistleblower Act will come into effect on 1 July 2019, implementing key amendments into the *Corporations Act 2001* (Cth) (**Corporations Act**), and the *Taxation Administration Act 1953* (Cth).

This article will focus on the amendments to the Corporations Act, and how they will affect charities and not-for-profit (**NFP**) organisations.

Whistleblower policy

Charities and NFPs that are public companies limited by guarantee, or large proprietary companies,[1] are required to adopt a compliant whistleblower policy as soon as possible, and no later than 1 January 2020.

A compliant whistleblower policy must include information on:

a. the protections available to whistleblowers;

b. to whom protected disclosures may be made, and how they may be made;

c. how the company will support and protect whistleblowers from detriment;

d. how the company will investigate disclosures that qualify for protection;

e. how the company will ensure fair treatment of employees who are mentioned in, or related to, disclosures that qualify for protection; and

f. how the policy is to be made available to officers and employees of the company.

Companies that fail to implement a policy by 1 January 2020 will be in breach of the Corporations Act.

1 Under section 45A(3) of the *Corporations Act 2001* (Cth), a "large proprietary company" is a proprietary company that satisfies at least two of the following requirements for the financial year: (1) $25 million consolidated revenue; (2) consolidated gross assets valued at $12.5 million; and (3) 50 or more employees.

Disclosures that qualify for protection under the Whistleblower Act

In order to encourage increased reporting of illegal and unethical conduct, the Corporations Act provides protection for disclosures of "disclosable matters" that are made by "eligible whistleblowers" to "eligible recipients".

Each of these terms is explained below.

"Disclosable matters"

"Disclosable matters" refer to information that would give a person reasonable grounds to suspect misconduct, or an improper state of affairs in relation to the company or a related company.

Some examples of "disclosable matters" include conduct that contravenes the Corporations Act or any other Commonwealth law that is punishable by imprisonment for 12 or more months, and conduct that represents a danger to the public or financial system.

If the information to be disclosed falls within this description, it can be disclosed by an "eligible whistleblower" to an "eligible recipient".

"Eligible whistleblowers"

"Eligible whistleblowers" are individuals who are, or have been:

a. an officer or employee of the company;

b. an individual (or their employee) who supplies goods or services to the company (whether paid or unpaid);

c. an individual who is an associate of the company; or

d. a relative or dependant of any of the above people.

If the discloser is one of these individuals, they can disclose a "disclosable matter" to an "eligible recipient".

"Eligible ecipients"

"Eligible recipients" include:

a. an officer or senior manager of the company or a related company;

b. an auditor or member of an audit team conducting an audit of the company or a related company;

c. an actuary of the company or a related company; or

d. a person authorised by the company to receive disclosures that may qualify for protection.

"Eligible whistleblowers" can also disclose "disclosable matters" to the Australian Securities and Investments Commission (**ASIC**) or the Australian Prudential Regulation Authority (**APRA**). A disclosure can only be made to a legal practitioner for the purpose of obtaining whistleblower related legal advice.

If the recipient is an "eligible recipient", ASIC, APRA, or a legal practitioner, then an "eligible whistleblower" can make a disclosure of a "disclosable matter" to them, and their disclosure qualifies under the Corporations Act.

Protections afforded to whistleblowers under the Whistleblower Act

If a person makes a disclosure that qualifies for protection:

a. they are not subject to any civil, criminal or administrative liability for making the disclosure;

b. contractual or other rights and remedies cannot be enforced against them on the basis of the disclosure; and

c. the information will not be admissible in criminal or penalty proceedings (other than in respect of the falsity of the information).

So, as long as whistleblowers comply with the procedure set out in the Corporations Act, they will be protected from the consequences that often act as a deterrent to the disclosure of company misconduct.

Non-compliance with the Whistleblower Act

Disclosure of the identity of a whistleblower

A person commits an offence if a disclosure is made to them that is protected under the Corporations Act, and they disclose the identity of the discloser. This offence is subject to a penalty of up to $200,000 (for an individual) or $1 million (for a body corporate).

However, it is not an offence to disclose this information to, for example, ASIC or APRA.

Victimisation or threatened victimisation of a whistleblower

A person commits an offence if they cause or threaten to cause detriment to a person, because they believe that this person has made, or may make, a disclosure that is protected under the Corporations Act.

Some examples of "detriment" are employee dismissal, harassment, intimidation and damage to reputation.

A court can make a number of orders in these circumstances, including an order for compensation

(up to $200,000 for an individual or $1 million for a body corporate), an injunction, an apology and the payment of exemplary damages. If the detrimental conduct involved the termination of employment, a court can also make an order for reinstatement.

Advantages and disadvantages of the Whistleblower Act

Advantages

The Whistleblower Act may increase public confidence in charities and NFPs. Charities and NFPs are eligible for a range of tax and other concessions and exemptions, making them susceptible to significant public scrutiny.

The reforms introduced by the Whistleblower Act will make it easier for company misconduct to become known and to be acted on, and will therefore support greater accountability and transparency. Accordingly, as public companies limited by guarantee and large proprietary companies are subject to the Whistleblower Act, many of which are charities and NFPs with considerable annual income, the community can have greater confidence that these organisations, whilst enjoying some financial benefits on account of being charities or NFPs, are being well-managed and regulated.

More generally, the Whistleblower Act is advantageous in that it ensures that the rights and obligations of whistleblowers, and recipients of information from whistleblowers, are clearly outlined in the corporate sector. Mandating that whistleblower policies be implemented and made available to employees enables whistleblowers to confidently disclose information about misconduct, and for recipients of this information to identify protected disclosures and properly respond.

Disadvantages

It is arguably a disadvantage of the Whistleblower Act that it applies only to public companies limited by guarantee and large proprietary companies There are only around 11,000 public companies out of 600,0000 NFPs in Australia, and even fewer NFPs are large proprietary companies. Accordingly, only a small portion of the NFP sector will benefit from, and be held accountable under, the Whistleblower Act.

Other legal structures that are adopted by charities and NFPs with considerable annual income, most notably, incorporated associations (of which there are over 200,000 in Australia), are not regulated by the Corporations Act. These organisations are therefore unlikely to adopt a whistleblower policy, and benefit from the corresponding increased protection and accountability.

"'Disclosable matters' refer to information that would give a person reasonable grounds to suspect misconduct, or an improper state of affairs in relation to the company or a related company."

Conclusion

The amendments introduced by the Whistleblower Act are ultimately positive in that they provide increased protections for whistleblowers, and greater accountability for company misconduct, in a section of the NFP sector that generally comprises large organisations with high annual income.

Charities and NFPs that are public companies limited by guarantee, or large proprietary companies, should start preparing for the implementation of a compliant whistleblower policy, or be in contravention of the Corporations Act come 1 January 2020. Those organisations that already have whistleblower policies should review the terms of their policies, to ensure that they are compliant with the Whistleblower Act.

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- Royal Commission into Aged Care Quality and Safety - The conclusion of the first round of public hearings
- Recent amendments to Queensland tax exemptions for charitable institutions
- Not-forProfit Exemptions under the Foreign Influence Transparency Scheme
- Changes to lottery laws in New South Wales - *Community Gaming Bill 2018* (NSW)
- Lessons to be learned from the Kimberley college case

Issue 21, Spring 2018

- Registration as a community housing provider with the National Regulatory System for Community Housing
- A new NDIS Quality and Safeguards Commission
- Draft ruling on the 'in Australia' requirement for deductible gift recipients and charitable tax exemptions
- How does the EU General Data Protection Regulation affect your not-for-profit organisation?
- New draft tax ruling - Fringe Benefits Tax Exemptions for Charities
- A new interment rights system for NSW - Complying with Part 4 of the *Cemeteries and Crematoria Act 2013* (NSW)

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