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THIRD dimension

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

Define your terms: How the new NSW Charitable Fundraising Guidelines may affect your charity

MILLS OAKLEY

New Charitable Fundraising Guidelines in New South Wales

BY John Vaughan-Williams, Associate

There has recently been much discussion of harmonisation of charitable fundraising laws in Australia, with the South Australian and Australian Capital Territory jurisdictions having taken steps to no longer require charities which are registered with the Australian Charities and Not-for-profits Commission (**ACNC**) to separately go through the application processes to obtain licences.

However, in other states, there is still a standalone fundraising regime in place, which is independent of registration with the ACNC. For charities operating in these states, there can often be uncertainties as to their obligations in certain situations, given that the fundraising legislation is often out of date, and has not been considered judicially.

New South Wales is one state which has not yet harmonised its fundraising regulations with the ACNC. However, NSW Fair Trading has recently taken the useful step of publishing new *Charitable Fundraising Guidelines* (**Guidelines**), which help charities to understand their obligations. Whilst the legislation, being the *Charitable Fundraising Act 1991* (NSW) (**NSW Fundraising Act**) and the *Charitable Fundraising Regulation 2015* (NSW) – as well as any conditions specifically attached to a licence – will always take priority over guidelines, the Guidelines are a good aid to charities when ambiguities arise.

This article will summarise some of the main sections of the Guidelines of which licensed charities in New South Wales should be aware.

Clarification of who is a Trader

In New South Wales, when a licensed fundraiser conducts an appeal in conjunction with another person who is in trade or business, or who otherwise receives benefit from the appeal (known in New South Wales as a "trader", but in some other jurisdictions as a "commercial fundraiser"), there are specific obligations which arise

under the NSW Fundraising Act.

One common method of charities collaborating with businesses is where a business sells a product on the basis that a percentage of sales of that product will be donated to a charity. There had previously been ambiguity as to whether such a business is considered to be a "trader" under the NSW Fundraising Act, as on one interpretation, that business is simply making a donation to the charity.

However, the Guidelines now explicitly state that these types of arrangements are covered by the "trader" provisions of the NSW Fundraising Act.

Contracts with Traders

It has long been the policy of NSW Fair Trading (and its predecessor regulators of fundraising law in New South Wales) to require charities to enter into a written agreement with a trader, before that trader fundraises on its behalf. It was also the policy of regulators to require those agreements to include certain details. However, the details for those agreements were not expressly included in the NSW Fundraising Act, and were normally included in the conditions attached to a licence.

The requirements for these written agreements are now set out in the Guidelines. While there are numerous requirements, some of the most significant clauses which must be included in such agreements are the following:

- the amount of donated funds which will reach the charity;
- the amount of any commission to be received by the trader;
- reporting obligations on the trader, as well as records that it must keep;
- dispute resolution procedures; and
- insurance responsibilities of each party.

Any such agreement should be carefully drafted to ensure that it satisfies the requirements of the Guidelines, and it is recommended that any existing agreements be reviewed.

The Guidelines also set out that a licensed charity must inform NSW Fair Trading within 28 days of engaging a new trader, or the details of a trader change. Since this obligation is on the charity, rather than the trader, charities should be regularly checking as to whether the details that they have provided to NSW Fair Trading on a trader are accurate.

Receipts by Charities

The Guidelines now specifically state that if an appeal is conducted by a licensed charity with a trader, the charity cannot pay more than one third of the gross money obtained to the trader in the form of a commission.

The NSW Fundraising Act states that all proceeds of a fundraising appeal must be applied towards the charitable purposes or objects that were the subject of representations made during the appeal, save for "lawful and proper expenses".

The Guidelines now give examples of the types of expenses which are not lawful and proper. Furthermore, the Guidelines set out that a licensed charity must use reasonable endeavours to ensure that its expenses do not exceed 50% of the gross incomes received. Expenses can span more than traders, and may include any other types of service providers which are used in the appeal (for example, marketing companies, graphic designers, and reimbursements to staff members for costs incurred during the appeal).

These are important restrictions to be considered, as they are not specifically included in the NSW Fundraising Act.

Conflicts of Interest

The Guidelines provide that all licensed charities must have mechanisms for dealing with any conflicts of interest that may occur in relation to its fundraising activities, both between members, and also between officers.

This means that it may not always be sufficient for a charity to have a general conflicts of interest policy in place, and there may need to be specific clauses included regarding the resolution of fundraising disputes. This also may be an issue for charities to deal with in their constitutions.

Conclusion

The Guidelines form a timely and useful tool for charities to better understand their obligations regarding fundraising in New South Wales. All licensed charities, especially those which use traders, should familiarise themselves with the Guidelines, and consider whether any of their existing agreements need to be varied in order to comply.

Australian Accounting Standards Board proposes a new definition of 'not-for-profit entity'

BY Alison Sadler, Lawyer

Background

In 2017, the Australian Accounting Standards Board asked for specific feedback regarding:

a. the definition of a 'not-for-profit entity'; and

b. whether there was sufficient guidance on how to distinguish a for-profit entity from a not-for-profit entity.

The feedback from the consultation was that the respondents supported retaining the term 'not-for-profit entity', but required more guidance in determining whether an entity is a for-profit entity or a not-for-profit entity.

The Exposure Draft 291 Not-for-Profit Entity Definition and Guidance (**Exposure Draft**) was published by the Australian Accounting Standards Board in June 2019. The Exposure Draft proposes a new definition of a 'not-for-profit entity' and provides implementation guidance and examples.

This article will discuss the proposed definition, the importance of the proposed definition, and the implementation guidance.

What is the proposed definition?

The current definition of a 'not-for-profit entity' is:

> *"An entity whose principal objective is not the generation of profit. A not-for-profit entity can be a single entity or a group of entities comprising the parent entity and each of the entities that it controls."*

The proposed definition of a 'not-for-profit entity' is:

> *"An entity whose primary objective is to provide goods or services for community or social benefit and where any equity has been provided with a view to supporting that primary objective rather than for a financial return to equity holders."*

The proposed definition of a 'not-for-profit entity' encompasses two interdependent parts:

a. that its primary objective is to provide goods or services for community or social benefit; and

b. that the provision of equity is to support that primary objective rather than for a financial return to equity holders.

Both parts of the definition need to be assessed together to determine an entity's classification.

What does this mean for not-for-profit entities?

The categorisation of an entity as a for-profit entity or a not-for-profit entity determines which accounting standards and policies are applied to that entity.

Currently, the Australian Accounting Standards set out different financial reporting requirements for for-profit entities and not-for-profit entities, subject to certain exemptions for not-for-profit entities. Therefore, to the extent that an entity's classification is affected by the proposed definition, that entity's accounting procedures may change.

Does the implementation guidance help?

The Exposure Draft provides six key indicators set out below that should be considered when determining if an entity satisfies the definition of a 'not-for-profit entity':

- the stated entity objectives;
- the nature of the benefits, including the quantum of expected financial benefits;
- the primary beneficiaries of the benefits;
- the nature of any equity interest;
- the purpose and use of assets; and
- the nature of funding.

Professional judgement will be required to evaluate the indicators if they are in conflict with one another, which includes considering the significance of each indicator to the overall assessment.

Whilst the Exposure Draft is not a comprehensive guide, it does provide certain guidance on each of the indicators above, and sets out when wholly-owned state entities, private education entities, sports clubs, and social enterprises may be a not-for-profit entity.

"Whilst the Exposure Draft is not a comprehensive guide, it does provide certain guidance on each of the indicators above, and sets out when wholly-owned state entities, private education entities, sports clubs, and social enterprises may be a not-for-profit entity."

Summary

The feedback on the Exposure Draft closed on 9 September 2019. The Australian Accounting Standards Board will shortly provide a response as to if and when the definition will be implemented.

Given the above, entities should consider whether the proposed change to the definition may affect their status as a not-for-profit entity from an accounting perspective.

Update on Disability Royal Commission

BY Luke Geary, Partner and Georgia Haydon, Lawyer

"This Royal Commission is … the product of tireless and persistent efforts by disability advocates and many others who have long recognised that people with disability in this country are routinely subjected to violence, abuse, neglect and exploitation." [1]

There have been a number of important developments since the announcement of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Commission**) on 5 April 2019.

New Commissioner

The Hon. Roslyn Atkinson, former Queensland Supreme Court Justice and President of the Queensland Anti-Discrimination Tribunal, was appointed to the Commission by the Commonwealth Government on Friday, 13 September 2019. The total number of Commissioners now is seven, reflecting the large scale expected of the Commission.

First Public Hearing

> *"… it's from this place, we will uncover uncomfortable truths. It's from this place we will hear stories of violence, abuse, neglect and exploitation."*[2]

On 16 September 2019, the Commission held its first public hearing in Brisbane, setting the scene and intention of the inquiry.

Rebecca Treston QC, Senior Counsel assisting the Commission, quoted statistics outlining the prevalence of abuse experienced by Australians with disabilities: "Almost one in five Australians have a disability. … Every 10 minutes, someone with profound or severe disability experiences physical or sexual violence."

The Hon. Ronald Sackville AO QC, Chair of the Commission, discussed the breadth of the terms of reference, emphasising that the Commission's inquiry extends to people with disabilities in all settings and contexts. He stated:

> *"All of us are deeply conscious of the magnitude and complexity of the task ahead of us. It is truly formidable. We cannot complete that task successfully unless people with disability who have experienced violence, abuse, neglect and exploitation are prepared to tell their stories to the Commission."*

Engagement

Reference was also made to the experiences of First Nations people with disabilities, who typically experience higher rates of violence. The Chair stated that the intention of the Commission was to be as accessible and engaging as possible, and that remote and rural communities would also be at the centre of the Commission's inquiry.

In order to support the Commission's strongly-stated human rights focus and ensure as wide an engagement as possible, the Commission has organised a number of community forums as well as a draft accessibility strategy.

"Almost one in five Australians have a disability. ... Every 10 minutes, someone with profound or severe disability experiences physical or sexual violence."

Community Forums

The first Community Forum was held in Townsville on Monday, 9 September 2019. There were around 150 people in attendance, with 14 speakers sharing profoundly personal stories about their experiences either as a person with a disability, or as a parent or advocate for a person with a disability. Participation in Community Forums presents an opportunity for people to hear about the work of the Commission, as well as to share stories and ideas. There will be a number of other community forums held in differing locations announced on the Commission's website.

Draft Accessibility Strategy

The Commission has been involved in various consultations to date in order to plan for the future, with a view to developing a strategic engagement plan to ensure extensive consultation with people with disabilities, as well as indigenous, LGBTQI, financially marginalised and other subsets within the disability community. A draft of that plan can be found here: https://disability.royalcommission.gov.au/about/Pages/draft-accessibility-strategy.aspx

Submissions

Submissions are an important means of participation and engagement with the Commission; people and organisations can provide information to the Royal Commission about their experiences of violence, neglect, abuse or exploitation of people with disabilities. For those unable to attend a community forum, the Commission is also now accepting submissions. The majority of submissions to date have been made on the issues of housing, justice and health, suggesting that the focus of the public hearings will be in relation to these issues.

Other Methods of Engagement

The Commission has established:

- a website: https://disability.royalcommission.gov.au/Pages/default.aspx
- a 1800 phone number (1800 517 199 or +61 7 3734 1900);
- an email enquiry address: DRCenquiries@royalcommission.gov.au

Commission Themes

The Commission has held three workshops with representatives from the legal sector, a criminal justice workshop in Melbourne in September, and two First Nations workshops in order to develop themes or domains of inquiry to structure its work going forward.

Themes identified to date include:

- Homes and living
- Relationships
- Education and learning
- Economic participation
- Health
- Justice
- Individual autonomy
- Self-determination and the right to the dignity of risk
- Community participation
- Geographical challenges

It is anticipated that new themes will emerge as a result of the hearings, submissions, workshops and engagement with stakeholders and the community.

"There will be a particular focus on restrictive practices, the exclusion of students with disability from education, and issues arising from the types of housing available to people with disability in a community setting or otherwise."

Future Public Hearings

Further hearings will be scheduled, and the Commission will provide additional information about the matters to be addressed during these hearings on its website as the arrangements are finalised.

One or two public hearings were expected to occur before the end of 2019 on the issues of education and learning, and homes and living. There will be a particular focus on restrictive practices, the exclusion of students with a disability from education, and issues arising from the types of housing available to people with disabilities in a community setting or otherwise.

Practice Guidelines

Practice Guidelines have also now been published on the Royal Commission's website (https://disability.royalcommission.gov.au/hearings/Pages/practice-guidelines.aspx) on:

a. General Guidance;

b. Legal Professional Privilege;

c. Witnesses; and

d. Conduct of Hearings.

Support to Access or Engage with the Commission

The Commission's powers are extensive and may be used to compel people or organisations to produce documents, to summons people to give evidence and to refer people and organisations to the police or relevant regulatory bodies for investigation. In the context of this particular Commission, it was acknowledged that these powers must be exercised with care. The powers are not intended to be used to compel people with disability to do anything other than engage with the Royal Commission of their own free will and with appropriate support.

The Government has funded a range of services to assist those requiring support during the Commission: a free legal advisory service, an emotional support service, and a legal financial assistance scheme to assist individuals and entities in meeting the costs of legal representation and disbursements associated with engagement in the Commission. There is also now a fully funded National Disability Advocacy Program (NDAP).

Notices to Produce

As of mid-September, a 'substantial number' (100) of the largest National Disability Insurance Scheme (**NDIS**) providers were advised by the Commission

that they may soon be receiving notices to produce regarding past complaints and investigations into matters of violence, abuse, neglect and exploitation, as well as policies and procedures to investigate and manage such complaints. To date, notices to produce have not yet been issued.

> **"The Chair stated that the intention of the Commission was to be as accessible and engaging as possible, and that remote and rural communities would also be at the centre of the Commission's inquiry."**

Going Forward

i. Larger NDIS providers should be alive to the fact that they may be imminently contacted by the Commission with a Notice to Produce. Despite the targeting at the moment of 'larger NDIS providers', it is to be expected that other providers and organisations will also be contacted on a rolling basis. As such, NDIS providers and other relevant organisations should start preparing for this eventuality.

ii. All providers and other organisations who might be affected by the Commission should familiarise themselves with the Guidelines issued by the Commission, particularly in relation to document management and production, as this will be particularly important when Notices to Produce are finally issued.

iii. Ensure that your organisation has formed a working group tasked with responding to requests to Notices to Produce / Summonses.

iv. Once the Commission commences, consider the following:

   a. preparation of witnesses and representation at hearings;

   b. management of reputational issues;

   c. addressing governance and organisational procedures for where improvements can be made; and

   d. IT and personnel capacity for document management.

v. It is important that organisations engage with the Commission in as forthcoming and transparent a way as possible. To do otherwise will draw attention to the relevant organisations and systems and open the way for wider public scrutiny.

If you would like any assistance in preparing for your possible engagement with the Royal Commission, we would be pleased to support you. Please contact Luke Geary on +61 7 3228 0429 or lgeary@millsoakley.com.au.

1 Transcript of Proceedings, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 16 September 2019, P8-l11 (Hon. Ronald Sackville AO QC).
2. Ibid, P5-l8.
3. Ibid, P9-l4.

Know thy rules: The importance of governing documents

BY Carlie Alcock, Associate

The recent decision in *Christine Moala and Others v Free Wesleyan Church of Tonga in Australia (Victoria) Inc* (***Moala***) is a pertinent reminder of the importance of a not-for-profit's governing documents, in particular its constitution. [1]

A not-for-profit's constitution directs its decision making and marks the path for its operations. Without precise and clear drafting, the decisions of the organisation can be entirely unravelled. Although a well-drafted document on its own is not enough - it is also crucial that all stakeholders are kept informed of their obligations and rights under the constitution.

The issues in *Moala* arose after a dispute broke out in 2014 in the congregation of the Free Wesleyan Church in Melbourne, which led to a number of people walking out of a meeting and independently worshipping at a new location in Weribee.

The church had been known as a Fellowship up until its incorporation as an Association in March 1991 (**Association**). The issue before the Court centred, firstly, around a determination of who the members were at the time of incorporation, as those members automatically became members of the Association under the *Associations Incorporation Act 1981* (Vic). Both parties also agreed that, aside from a possible exception for six of the individual plaintiffs, no new members had joined the Association between the date of its incorporation in 1991 and 18 July 2015, because the membership requirements had not been properly observed.

A decision as to the members was important, as the second issue for the Court was whether a meeting held on 18 July 2015 was validly held. The validity of that meeting would in turn determine whether the new rules and membership admission procedures adopted at that meeting were also valid. The plaintiffs (a number of members of the congregation) claimed that the meeting had not been validly held, as notice had not been given to all members and a number of people who were not members had participated in and voted at the meeting.

Who were the members?

The Court's decision on the membership rule turned on two separate considerations:

a. whether it was a requirement of membership that a member's name be entered into the Registry Book; and

b. whether persons in the congregation were required to attain the status of Lotu Fehu'i, a certain spiritual role within the church, before they were eligible to be a member.

Despite reference to the Registry Book in the Fellowship's constitution, the Court found that the entry of a person's name in the Registry Book was not a requirement of membership. The 1986 constitution read '*Membership is open to anyone wishing to join, but names must be registered and listed in the Registry Book*', and the 1984 version of the constitution had read '*provided their names are registered in the Fellowship's Registration Book*'. However, there was conflicting evidence over whether such a book existed or had been properly kept, and the Court was not satisfied on the evidence that the book produced by the plaintiffs was in fact the Registry Book.

Ultimately, the Court held that the wording in the constitution did not make entry into the Registry Book a pre-condition of membership, but rather imposed a "*requirement for the recording of membership already conferred*".[2] It determined that the obligation to enter a member's name into the Registry Book belonged to the Fellowship, as the prospective member had no authority to ensure their name was entered in the Registry Book, or that such a book even existed or was accurately maintained. Moreover, the evidence suggested that there had been no established practice of entering members' names into the Registry Book, but that custom and practice of the Fellowship had accepted that people were members regardless of whether their names were entered into the Registry Book.

In its decision, the Court referred to the principles outlined in *Project Blue Sky v Australian Broadcasting Authority*,[3] noting that the principles for determining the effect of a failure to comply with a rule "*pointed away from invalidity, particularly where those affected by the non-compliance were neither responsible for nor aware of the non-compliance, or where that non-compliance was with a rule that was not expressed as an 'essential preliminary'*".[4]

> **"The case of *Moala* is a timely reminder to all not-for-profits of the importance of a well-drafted constitution and of the benefits in ensuring that all stakeholders are kept well informed of the rules and procedures of the organisation."**

Does custom and practice make a rule?

The second issue concerning membership was whether persons in the congregation were required to attain the status of Lotu Fehu'i before they were eligible to be members. The argument made by the defendant was that it was the custom and practice of the Fellowship that only persons who were Lotu Fehu'i could be members, despite there being no mention of

such a condition in the constitution. In coming to a decision, the Court made mention that "*the express written text of a rule may be read with or supplemented by unwritten customs or practices*", provided that the customs or practices were "*established, well-known and unquestioned*".[5]

In considering the parties' positions, the Court looked to the objectives of the Fellowship's 1984 and 1986 constitutions, "such as: *"To maintain lasting relationships that are peaceful, joyful and loving between all members".".* In considering the objectives, the Court took the view that the limitation of membership to only those who had attained Lotu Fehu'i would operate to exclude other regular attendees of the church from the benefits of those objectives, which had clearly not been the intention of the objects when drafted. Moreover, there was nothing in the constitution that linked Lotu Fehu'i to membership.

The defendant had also argued that the requirement of Lotu Fehu'i for membership was demonstrated by the fact that only Lotu Fehu'i could vote at quarterly meetings. However, in reviewing the evidence, the Court found that the quarterly meetings appeared to be meetings held specifically for the spiritual leaders in the congregation and that other evidence suggested that Lotu Fehu'i was not required to vote at other congregational meetings, including the meetings held to adopt the 1984 and 1986 constitutions.

The Court therefore found that the membership rule applying during the Fellowship required persons to be baptised and to have had at least three months active participation in the Fellowship's activities, demonstrated through regular attendance at services and class group meetings.

Was the meeting validly held?

Having determined the membership rule applying to the Fellowship, the Court then considered the effect of the application of this rule to the meeting held on 18 July 2015, at which the Association (as it was by then) purported to adopt new rules and new procedures for admission to membership.

In explaining its decision, the Court noted that, where a meeting is conducted by a governing body in which the rules with respect to the giving of notice have not been complied with, "*the meeting is null and void to all intents and purposes and no business can be validly transacted at the meeting.*" As the notice of the meeting had not been given to all members, because the incorrect membership rule had been applied in compiling the list of members entitled to receive it, the Court held that the meeting was not validly convened and the resolutions passed at it were invalid.

Is there any remedy?

As noted above, an additional argument was made by six of the plaintiffs, who claimed that the Association had knowingly led them to believe that they were voting members and that, in acting under that assumption, they had contributed time and money to the church which they would not have otherwise done (a claim of estoppel).

In considering this issue, the Court accepted that the plaintiffs bringing the claim were indeed under an assumption that they were voting members. However, it found that the assumption was invalidly held and that the whole Association had shared in this incorrect assumption as to the membership rule. Therefore, it could not be said that the Association knowingly induced the plaintiffs into believing that they were voting members.

Considerations

The case of *Moala* is a timely reminder to all not-for-profits of the importance of a well-drafted constitution and of the benefits in ensuring that all stakeholders are kept well informed of the rules and procedures of the organisation. Where there has been a misunderstanding as to the membership rules, resulting from unclear drafting or out-dated documents, organisations run the risk of having their important decisions entirely unravelled, potentially unwinding months or even years of decision making and progress.

In light of the decision in *Moala*, not-for-profits need to consider the following points in relation to their governing documents:

a. Is the organisation's constitution well-drafted with clear and precise provisions, particularly around membership and voting rights;

b. Are the governance board, the members and management kept informed of the organisation's rules and their rights and obligations under the constitution; and

c. Does the organisation have in place well-documented processes and procedures for implementing the rules under the constitution?

1 [2019] VSC 205.
2. Ibid 125.
3. [1998] HCA 28; (1998) 194 CLR 355.
4. Ibid 133.
5. Moala 254.

The role of the Australian Competition and Consumer Commission in Not-for-Profit mergers

BY Camille Capati, Law Graduate

Section 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) prohibits mergers that would '*have the effect, or be likely to have the effect, of substantially lessening competition*' in a market. It is from this section that the Australian Competition and Consumer Commission (**ACCC**) gets its power to assess a proposed merger, and to consider what effect it may have on the market as a whole.

What is a merger?

A merger is a contractual agreement between organisations to form a single organisation. Depending on their size and nature, the two most common ways for not-for-profits (**NFPs**) to merge are by:

- One organisation transferring all its assets to the other and then dissolving; or
- Both organisations combining to form a brand new organisation, and then both the previous organisations are dissolved.

Why should NFPs consider mergers?

There has been discussion recently on the need for more NFP organisations to merge as commentary suggests that there are too many NFPs in Australia that provide identical services and/or lack the scale needed to be considered efficient. This is supported by the Commonwealth and State governments encouraging NFPs to either collaborate or merge.

> **"It is important to note that an informal view made by the ACCC to not oppose a merger does not provide the merger parties with protection from legal action by the ACCC or other third parties."**

Some benefits for NFPs in merging are that it may allow them to:

- Better meet their mission;
- Broaden their range of services to existing users;
- Develop or maintain market share;
- Improve efficiency;
- Increase the number of people that they serve; and
- Become more financially stable.

Competition and Consumer Act 2010 (Cth)

Since the CCA focuses on the conduct an entity engages in, rather than the type of entity it may be (whether for-profit or not), its provisions are applicable to an NFP to the extent it engages in 'trade or commerce'. This could include where the NFP engages in fundraising activities involving the supply of goods and services, or fundraising in an organised, continuous and repetitive way, within the context of trade or commerce.

Australian Competition and Consumer Commission

Currently there is no legislative requirement for merger parties to notify the ACCC of a proposed merger, and as such these parties would have the ability to proceed with the merger without seeking any regulatory consideration. However, it is important to remember that the ACCC still has the power to investigate the merger and, if necessary, take legal action.

In some circumstances, it is recommended that merger parties within the NFP sector consider approaching the ACCC once there is a real likelihood that a proposed merger may occur, if the merger is reasonably likely to substantially lessen competition.

Matters to be taken in account when evaluating the level of impact upon competition

Sub-section 50(3) of the CCA lists various matters to be considered when determining whether a merger is likely to *substantially* lessen market competition, including:

- the actual and potential level of import competition in the market;
- the level of concentration in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margin;
- the extent to which substitutes are available in the market or are likely to be available in the market; and
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor.

Available avenues for merger review by the ACCC

Merger parties have two avenues available to them to have mergers considered and assessed by the ACCC on competition grounds:

a. Informal merger review; and

b. Merger authorisation.

Informal merger review

This process enables merger parties to seek the ACCC's view on whether the proposed merger is likely to have the effect of substantially lessening competition. The ACCC assesses the merger on an informal basis applying a substantial lessening of competition test.

It is important to note that an informal view made by the ACCC to not oppose a merger does not provide the merger parties with protection from legal action by the ACCC or other third parties. The informal review process acts as a guide for merger parties to see whether the ACCC would seek an injunction under section 50 of the CCA to stop a merger from proceeding.

If the ACCC forms the view that a proposed merger is likely to contravene section 50 of the CCA, the merger parties may decide to:

- Not proceed with the merger;
- Provide a court enforceable undertaking to address the ACCC's concerns;
- Apply to the ACCC for merger authorisation; or
- Proceed with and defend a court action under section 50.

> **"Currently there is no legislative requirement for merger parties to notify the ACCC of a proposed merger."**

Merger authorisation

Merger parties may seek statutory protection from legal action under section 50 of the CCA by lodging an application for merger authorisation. Whilst the merger authorisation is in force, the authorised parties will be able to acquire the relevant assets without risk of the ACCC or third parties taking legal action for a contravention of section 50 of the CCA. It should be noted that merger authorisation cannot be granted to applications that have already been completed.

The ACCC may not grant authorisation unless it is satisfied that either:

a. The proposed merger would not be likely to substantially lessen competition; or

b. The likely public benefit from the proposed merger outweighs the likely public detriment, including the lessening of competition.

Assessment Outcomes

The ACCC cannot oppose a merger that reduces competition unless the effect is substantial. It also cannot oppose a merger for reasons that are not competition related, for example, community preference or national interest considerations.

If the ACCC considers a merger is likely to substantially lessen competition and the parties still intend to proceed, the ACCC can apply to the Federal Court for an injunction to prevent the merger from proceeding. If the merger has already occurred, the ACCC can apply for penalties to be applied or an order that the newly-merged organisation be divested. The onus is on the ACCC to prove to the Court that the acquisition is likely to substantially lessen competition.

What are the risks?

Merger parties should be aware that some actions they take in anticipation of their transaction completing can expose them to legal action for 'gun-jumping'. This term is used when merger parties start coordinating their activities or behaving as one entity instead of as competitors during the period *before* a merger is completed. This type of conduct will be at risk of being defined as cartel or as anti-competitive conduct.

Proceeding without regulatory approval may put merger parties at risk of the ACCC or other interested parties taking legal action on the basis that the merger would have the effect, or be likely to have the effect, of substantially lessening competition in one or more *substantial* markets in contravention of section 50.

Conclusion

In summary, it is important for NFP organisations to consider the implications of merging. In some instances, it may be best to err on the side of caution and approach the ACCC as soon as there is a real likelihood of a proposed merger that may involve substantial lessening of competition.

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