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Productivity Commission's Report on the Contribution of the NFP Sector

The Productivity Commission's Draft Research Report [Contribution of the Not-for-Profit Sector](#) was released in October 2009, with the final report expected early in the New Year. Although the process is not complete, there are clear directions for the future of the NFP sector.

A brief profile of the NFP sector

An important contribution of the Report is information about the characteristics of the NFP sector. Observations include:

- the number of entities (approximately 600,000). Over half are small unincorporated entities with no employees, approximately 2% are companies limited by guarantee (70% of whom have revenue of less than \$1 million) and approximately 23% are incorporated associations;

- the sector's contribution to national income, which in 2006-07 was comparable with the size of the wholesale trade sector and larger than the communications sector;
- the proportion of the labour force employed within the sector (8.9%), which is predominantly within social services, and education and research;
- the contribution of volunteers—estimated to be approximately 4.6 million, the number of which has increased over the last decade though the hours volunteered has declined;
- diversity in the range and scope of activities within the NFP sector - the largest sector is religion by virtue of the number of organisations, while education is the largest category when measured by national income; and
- the funding sources, of which approximately a third is from government, 10% from philanthropy and the remainder from self-generating activities.

The way forward for the NFP sector

The report makes the following proposals:

- The establishment of a Commonwealth incorporated association as an alternative legal structure, which NFP organisations that operate across State/Territory borders could adopt or migrate to.
- A 'report once use often' principle for the sector is proposed. The reporting initiatives include:
 - the adoption of Standard Business Reporting;
 - a Standard Chart of Accounts; and
 - the Australian Accounting Standards Board's project on service performance reporting by NFP entities.
- The need for the Commonwealth and State/Territory governments to develop a harmonised approach to fundraising legislation.

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New bodies

The Productivity Commission recommends that the regulatory framework underpinning the sector would be enhanced by the creation of the following bodies:

- **Registrar for Charitable and Community Purpose Organisations** — a Commonwealth organisation that will be a 'one stop shop' for NFP organisations having responsibility for registering and regulating NFP entities.
- **Centre for Community Service Effectiveness** — whose initial focus would be on developing 'best practice' approaches to evaluation of government funded community services.
- **Office for Not-For-Profit Sector Engagement** within the Department of Prime Minister and Cabinet—who will be responsible for implementation, and coordination between relevant Ministers, of the reform agenda and development of knowledge systems in the sector.

The Productivity Commission's reform agenda is both bold and wide-ranging. We now await the Henry Review. The government's response to both reports will indicate whether we can expect the proposed reforms to become reality.

Michael Sadhu
Lawyer

More Legislative Changes for Incorporated Associations

Any association thinking about its Constitution will be bewildered by change and rumours of change in the regulatory environment.

Changes were made earlier in 2009 to the *Associations Incorporation Act 1981 (Vic)* ("the Act"), as outlined in June edition of [NFP briefing](#).

Further changes to the Act are proposed. An exposure draft of the changes is expected in mid January 2010.

A revision of the model rules is not expected now until late 2010. Our advice is to wait and see what changes need to be made unless it is imperative to change your constitution now.

Libby Klein
Senior Lawyer

Directors' Duty to Prevent Insolvent Trading

ASIC has proposed changes to its guidelines to help directors understand and comply with their obligations in relation to insolvent trading.

Under section 588G a director has a positive obligation to prevent a company from incurring a debt when the company is, or would become, insolvent by incurring a debt, when there are reasonable grounds to suspect the company is or would become insolvent.

The proposed [Regulatory Guide](#) suggests key principles that directors should take into account when complying with their duty to prevent insolvent trading—they will also be considered by ASIC, amongst other factors, when assessing contravention of the duty.

Although the proposed guidelines are directed towards directors of profit-making corporations, executive and non-executive directors of companies limited by guarantee face the same duty, and should therefore review their company's processes and procedures to ensure compliance with the key principles.

While the guidelines are only in draft form (see below), they provide useful "clues" as to ASIC's attitude to directors' obligations in relation to insolvent trading. The guidelines are to be finalised after the end of January 2010.

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Summary of Draft Guidelines

Key principle	Evidence of compliance
Directors must inform themselves	Directors must ensure that they remain fully informed of the company's affairs to enable an understanding of the company's financial position and its cash flow requirements. Directors should ensure for example: <ul style="list-style-type: none"> proper books and records are maintained, including ensuring that financial statements are regularly prepared; outstanding debtors and creditors are regularly reviewed; and they engage in actively monitoring the company's financial affairs by frequently considering actual financial results compared with budgeted projections.
Directors should investigate financial difficulties	When the company is experiencing financial difficulty or there are indicators of insolvency (e.g. continuing deficits, uncertainty about future funding sources or grants, cheques being held back), directors should confirm the company's financial position and assess available options.
Professional advice	When there are reasonable grounds to suspect that the company is experiencing financial difficulty, directors should consider obtaining professional advice about whether, for example, the company is already operating whilst insolvent and whether it can continue to operate whilst assessing its future options.
Directors should act in a timely manner	Where advice has been obtained about the company's viability, and regardless of whether the company is or is not already insolvent, the advice should be considered and acted upon in a timely manner. In these circumstances, incurring of additional debt should be carefully monitored, with concerns about solvency carefully minuted.

Michael Sadhu
Lawyer

Changes to How Education and Training is Provided to Overseas Students

A new Act in Federal Parliament could impose new requirements on the training of overseas students to be met by 31 December 2010.

The *Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009* currently before Federal Parliament, is seeking to amend the Act, to impose additional requirements for registration and re-registration. One of the proposed amendments is that course providers have providing education and/or conducting research as their primary purpose.

This amendment will not affect educational institutions such as TAFE colleges or schools, which will already have the provision of education and/or the conducting of research as their primary purpose.

However, it may have significant impact upon organisations that provide education as a sideline to other activities. An example might be a church that also trains missionaries. If the Bill becomes law in its present form, it may require these organisations to restructure, so that the training and/or education is conducted in a separate legal entity.

The indicative timing for these new requirements being imposed is 31 December 2010. This may create a tight timeframe for organisations that need to incorporate a new entity, possibly register that new entity as a registered training organisation (RTO), and obtain confirmation or endorsement for relevant tax concessions in time to commence operations by the end of 2010. Organisations that may potentially be affected by this amendment should therefore consider their possible approach now, with a view to implementing that approach as soon as possible after the changes become law.

The Bill also seeks to introduce a range of other amendments, which will affect all organisations providing education or training for overseas students. We intend to cover these in more detail in a later issue, once the Bill has progressed further through parliament.

Nils Versemann
Senior Lawyer

Are You Financing Terrorism?

The Federal Government has released guidelines for Not for Profits regarding counter-terrorism financing, called "[Safeguarding your organisation against terrorism financing](#)".

All Not for Profits should consider whether they are taking sufficient measures to ensure that they are not paying money (either as payment for services or as donations) to "listed" individuals or organisations. Individuals and organisations may be listed on one of two lists. Further details are available via the link above.

This is likely to be particularly relevant to organisations which send money overseas.

Examples of what must be avoided include:

- Associating with a listed organisation;
- Receiving or providing training to any listed person or organisation;
- Receiving funds from or making funds available to a listed organisation; and
- Provide support or resources to a listed organisation.

These obligations apply whether or not your organisation has obligations as a "reporting entity" under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* which is administered by the Australian Transaction Reports and Analysis Centre ("AUSTRAC").

Penalties can be serious, in some cases involving potential terms of imprisonment of 3-25 years.

Libby Klein
Senior Lawyer

Annual Review Fees for Companies – Are you paying too much?

The standard fee for lodging an annual review is \$1000. A lower fee of \$40 applies to companies which qualify as "special purpose companies". A special purpose company is a company whose constitution requires it to pursue charitable purposes only and to apply its income in promoting those purposes; and prohibits the company making distributions to its members and paying fees to its directors; and requires its directors to approve all other payments the company makes to them.

To qualify for the lower annual review fee, make sure you tick 'charitable purposes only' on Question 2 on form 201 when registering your company, or tick B3 on form 484 when changing your company to a 'special purpose company'.

Libby Klein
Senior Lawyer

Aid/Watch Lodges Appeal

Aid/Watch is a non-government aid organisation that "monitors, researches, campaigns and undertake activities to ensure that aid projects are appropriate for their local communities and environmentally effective".

In our [September 2009 NFP Briefing](#), we reported on the outcome of Full Federal Court case [Commissioner of Taxation v Aid/Watch Incorporated 2009](#) (FCAFC 128) in which the Court found that Aid/Watch's political activities disqualified it from being a charitable institution.

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Aid /Watch has now lodged an appeal with the High Court. Although Moores Legal does not expect a decision from the High Court for at least 12 months, the case provides the High Court with an opportunity to consider some longstanding contentious issues in charity law.

Michael Sadhu
Lawyer

Read this before Distributing Funds to Public Hospitals

Government public hospitals are not charities. They are arms of government. Any trustees of charitable trusts intending to distribute to government public hospitals should be aware of new guidelines issued by the Victorian Department of Justice in November 2009. The simple advice is to avoid donations to government public hospitals unless it is imperative as part of your philanthropic strategy. If it is, you will need to obtain professional advice on the form of your deed and your classification by the Australian Taxation Office.

Murray Baird
Principal

Selecting Company Directors – Beware the Company Constitution!

The process of electing or appointing Board members is usually set out in the constitution of a company, and may include selection requirements such as personal characteristics, experience, or a particular process that must be carried out.

In the recent case of *Andrews v Queensland Racing Ltd* [2009] QSC 338, the Court held that strict compliance with these requirements is essential for good governance. In this case, the company employed a consultant to limit the shortlist of applications for the position of director to a maximum of four candidates, despite its constitution requiring a shortlist of a minimum of four people, which prevented eligible candidates from being able to be elected by the members. The Court prevented the company from inducting the directors that were chosen in this way, and required them to conduct the short listing process again in strict compliance with their constitution.

This case demonstrates that the selection of company directors is not just a procedural issue – it goes straight to the heart of good governance. Having directors selected in strict accordance with the constitution is a right of all company members, and failure to do this is considered an injustice to other applicants by the courts.

Moores Legal Comment

This case serves as a reminder that all companies, regardless of size or purpose, should take care to comply with their constitution at every point in the process of selecting a Board member. If you have any questions about the requirements for electing or appointing directors of your organisation, please do not hesitate to contact us for advice.

Jacqui Pitt

Update on Private Ancillary Funds (PAFs)

If you have a Private Prescribed Fund (now known as a Private Ancillary Fund), do not be alarmed if you receive a letter from the Australian Taxation Office notifying you that your fund has been endorsed as a Deductible Gift Recipient.

Previously, these funds obtained their “Deductible Gift Recipient” status by being “prescribed” by the Governor General. Under the new regime, it is the Australian Taxation Office which “endorses” (rather than “prescribes”) your fund as a Deductible Gift Recipient.

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You do not need to take any action if you have received an endorsement notice. The Australian Taxation Office is simply confirming your status as a Deductible Gift Recipient under the new regime.

If you have not received an endorsement notice, you may wish to seek confirmation from the ATO that your fund is endorsed as a Deductible Gift Recipient. We can assist if required.

For further information see our article in [September 2009 NFP Briefing](#).

Libby Klein
Senior Lawyer

Changes in the Moores Legal Not for Profit Group

At the end of 2009 Moores Legal farewells Derek Mortimer who is leaving to pursue other interests. We have recently welcomed lawyer Michael Sadhu who comes to us with an extensive background including policy work on Not for Profit accounting standards and a strong tax and accounting background. Michael will provide greater breadth to our Not for Profit group particularly in the area of tax and corporations provisions.

The Moores Legal Not for Profit Team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our Team

Murray Baird
Corporate Governance
Head of our Not for Profit Team

Fiona Thomas
Not for Profits

Michael Sadhu
Not for Profits

Libby Klein
Not for Profits

Andrew Sudholz
Property Transactions

Tim Adam
Compensation & Schools

Peter Andrew
Employment & Schools Law

Andrew Simpson
Bequests & Estates
Aged Care Facilities

Nils Versemann
Intellectual Property

Cecelia Irvine-So
Volunteer Law

Allan Swan
Estate Planning, Superannuation & Structuring

Moores Legal is a law firm servicing companies and businesses, Not for Profit organisations and individuals across Melbourne in the areas of Commercial Law, Workplace Relations, Property Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, Dispute Resolution, Family Law and Personal Injury Law.

DISCLAIMER: This Not for Profit Briefing is of a general nature only. Specific legal advice should be sought rather than relying on this Briefing.

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MOORESLEGAL

9 Prospect St, Box Hill Vic 3128 Lev 10, 350 Queen Street Melbourne Vic 3000
12/1140 Nepean Highway Mornington Vic 3931
Telephone: (03) 9898 0000 Facsimile: (03) 9898 0333
info@mooreslegal.com.au www.mooreslegal.com.au