

## INDEX

The Victorian Charter of Human Rights.....	1
What do shopping centre directors and community committees have in common?.....	2
Robbing Peter to pay Paul in your not-for-profit empire.....	3
When can a member access the members' register? .....	4

## Updates aplenty

With ongoing changes within the not-for-profit sector, we are issuing a second Briefing this month.

Committee reports back on *Charter*

Last week the Scrutiny of Acts and Regulations Committee released a [report](#) on the Review of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The next step is for the Victorian Government to respond to the committee recommendations in the next six months.

We will continue to update you as changes come to light.

## The Victorian Charter of Human Rights

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("the *Charter*") protects 20 human rights of Victorians. Recent decisions have considered the application of the *Charter*, and have established key principles:

*Sudi*: VCAT does not have power to deal with *Charter* issues

Case: *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011) ("*Sudi*")

- **Facts:** Mr Sudi was living in public housing. The Director of Housing applied for a possession order to evict him under s 344 of the *Residential Tenancies Act 1997* (Vic). Mr Sudi argued that the application was not legal because the Director infringed his right to privacy, family and home, in applying to evict him.

VCAT found that the Director did breach this human right, and that the application was invalid. The Director appealed, arguing that VCAT did not have the power to review the Directors' decision in relation to the *Charter's* rights.

- **Key decision:** The Court of Appeal found that VCAT does not have the power to review whether the Director's decision was made in violation of the *Charter*. Chief Justice Warren stated that, VCAT is set up 'for the inexpensive and quick resolution of disputes'. Such decisions can only be reviewed by the Supreme Court.

*Momcilovic*: High Court confirms the validity of the *Charter*

Case: *Momcilovic v The Queen* [2011] HCA 34 (8 September 2011) ("*Momcilovic*")

- **Facts:** In *Momcilovic*, Ms Momcilovic was automatically convicted of drug trafficking because she lived with a drug trafficker and drugs were found in her apartment. She appealed, arguing that she had no knowledge of the presence of the drugs, and that the automatic conviction under the *Drugs, Poison and Controlled Substances Act 1981* (Vic) interfered with her human right to be presumed innocent until proven guilty.

- **Key Points:** In deciding to set aside Ms Momcilovic's conviction, the High Court found that:
  - By requiring 'all statutory provisions [to]...be interpreted in a way that is compatible with human rights', the *Charter* requires all Victorian legislation to be interpreted in light of the *Charter's* human rights.
  - However, this does not mean that Courts should 'radically reinterpret' the legislation so as to undermine Parliament's intention in relation to the operation of the law.
  - Courts also have power to make declarations telling Parliament that certain laws are incompatible with *Charter* rights.

## Conclusion

These cases are timely given that the *Charter* is currently subject to review by the Victorian Government.

Wendy Ooi and Suhanya Ponniah

# What do shopping centre directors and community committees have in common?

## The Centro Case

The Centro Group is involved in Shopping Centre ownership and management. Directors and the Chief Financial Officer have been found to be negligent in reviewing the 2007 financial statements of the group in the case of *ASIC v Healey & Ors* [2011] FCA 717 ("the *Centro* case"). The accounts did not match the reality. The Judge in the *Centro* case said that a core requirement of directors is to understand financial statements and to consider whether they are consistent with the director's knowledge of the company's financial position. Although the *Centro* case concerns a public listed company, it is relevant to community organisations and not-for-profit bodies as a sign post for good governance. It helps to explain the duty of care for governing bodies.

## Background

In 2009, the Australian Securities and Investments Commission ("ASIC") commenced legal proceedings against directors of the Centro Group. ASIC alleged that the directors breached their duty of care by 'rubber stamping' financial accounts that failed to disclose billions of dollars of short term liabilities and guarantees. Justice Middleton found that the directors 'acted...without exercising the degree of care and diligence the law requires of them'.

## Key Responsibilities

The case clarifies the standards required of governing bodies in relation to financial reports.

### Duty to read reports

Directors must actively read and understand financial documents in satisfying their duty of care. They must ensure that such accounts contain information that accords with the company's affairs and that material matters are not omitted. Directors must also make further enquiries 'if matters...in the financial statements call for such enquiries'. Directors must therefore not merely 'rubber stamp' decisions, but must understand financial information with an enquiring mind to satisfy their obligations.

### Delegation

Directors are entitled to delegate tasks and may rely on specialist knowledge in relation to the organisation's financial affairs. However, directors must still take a 'diligent and intelligent interest' and apply an 'enquiring mind' in approving financial statements. Directors must therefore not solely rely on others, no matter how competent they may be.

### Financial literacy

Directors need to have enough financial literacy to 'understand basic accounting conventions'. This is because 'a director is not relieved of the duty to pay attention to the company's affairs...even outside the area of the director's expertise.'

## Conclusion

The *Centro* case sends a timely reminder that boards must take an active interest in the organisation's financial reports if they are to fulfil their obligations under Australian law.

**Murray Baird and Wendy Ooi**

## Robbing Peter to pay Paul in your not-for-profit empire

Not-for-profits often have more than one legal entity. Is it okay to shift money from one to the other, if one entity is a bit short?

### Case Study

PoorCousin Ltd is run by the same people as its sister entity, BigBucks Ltd.

The two entities do different types of work in the not-for-profit sector. They do not share a similar purpose.

PoorCousin has a cash flow problem and wants BigBucks to pay off some of its debts.

The financial controller of PoorCousin is also the financial controller of BigBucks. She sees no issue:

**"...after all we all come under the same umbrella. We can just shift some funds from BigBuck's bank account, into PoorCousin's bank account."**

If you were on the Board of Big Bucks, which attitude would you take?

- a. no problem, just do it, this is an operational matter. Why have you brought it to the Board?
- b. no problem - let's resolve as a Board to allow that payment.
- c. not under any circumstances, we need to run the entities completely separately.
- d. okay provided it's a formal, documented loan with a realistic repayment plan.

The proper answer is (d). If you are on the Board of BigBucks, your duty is to make decisions in the best interests of BigBucks. BigBucks' assets must be used to further BigBuck's purposes as set out in the company's constitution. Directors would be breaching their duty to the company if they allowed discretionary payments to be made to PoorCousin just because the directors are sympathetic to PoorCousin.

### When you are wearing two hats

As in the commercial sector, the same people commonly sit on the boards of more than one not-for-profit entity.

If you are in that position, you must make decisions in the best interests of each company.

Sometimes this might put you in a difficult position. What if you are inclined to vote one way considering the interests of one organisation, but tempted to vote the other way considering the interests of the other organisation?

This means you have a "conflict of duty". Such conflicts are a fact of life, and the law recognises that. You will not be breaching your duty to either company provided you have the consent of both companies to be on both boards.

If one is a wholly-owned subsidiary of the other, check whether the constitution of the subsidiary expressly authorises you to act in the best interests of the parent company. If so, you will not be breaching your duty to the subsidiary if you act in the best interests of the parent, provided the subsidiary doesn't become insolvent as a result.

Libby Klein

## When can a member access the members' register?

### Change for companies

From 13 December 2011, three key changes will apply to Australian Companies:

1. **Providing purposes:** Previously, anyone seeking to access a company's members' register did not have to provide reasons. Now, anyone seeking access must state each purpose for which they wish to access the register. If their purpose is to:
  - solicit a donation from a member of a company;
  - solicit a member of a company by a stockbroker or sharebroker;

- gather information about the personal wealth of a member of a company;
- make an unsolicited off-market offer to purchase financial products;

the company may lawfully refuse that person access to the register of members.

2. **Viewing format:** Previously, companies could provide a copy of its members' register in any form. Now, where the members' register is kept in electronic form, it must be available for inspection in an electronic form, 'produced by a commercially available spreadsheet or database'.
3. **Fees:** Companies can now charge higher fees to members accessing the members' register. Companies can charge a \$250 base fee, 5 cents per member between 5000–19,999 members, and one cent per member for members over 19,999.

## No change for Associations

The Victorian Government in 2010 proposed changing the law to give members the right to inspect and obtain a copy of an association's register of members. This proposal was not followed, given the 'possibility of the provision leading to the disclosure of the personal circumstances of members'. Accordingly, it appears *that the current law still stands* in relation to accessing the association's register of members. Members do not have the automatic right to inspect and obtain a copy of the register.

Murray Baird and Wendy Ooi

## 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.

*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.*

**Murray Baird**  
Principal  
Not for Profit

**Libby Klein**  
Principal  
Not for Profit

**Fiona Thomas**  
Senior Lawyer  
Not for Profit

**Suhanya Ponniah**  
Lawyer  
Not for Profit

**Elizabeth Turnour**  
Lawyer  
Not for Profit

**Aaron Farr**  
Lawyer  
Not for Profit

**Andrew Sudholz**  
Principal  
Property Transactions

**Peter Andrew**  
Special Counsel  
Employment & Schools Law

**Andrew Simpson**  
Principal  
Bequests & Estates  
Aged Care Facilities

**Nils Verseemann**  
Senior Lawyer  
Intellectual Property

**Cecelia Irvine-So**  
Principal  
Volunteer Law

**Allan Swan**  
Principal  
Estate Planning

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

9 Prospect St. Box Hill Vic. 3128  
12/1140 Nepean Hwy. Mornington Vic. 3931  
Tel: [03] 9898 0000 Fax: [03] 9898 0333  
info@mooreslegal.com.au  
www.mooreslegal.com.au

**MOORESLEGAL**