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Editorial

There is something for everyone in this edition:

- Employers will be interested in a recent case on safety for employees and an article on fringe benefits.
- ATO updates regarding tax rulings and Decision Impact Statements for a few cases
- We alert you to a High Court case to come on *Bargwana* regarding charitable trusts.

To begin, we feature an article on social media – a great tool for NFPs, but be aware of the legal issues.

We welcome your feedback on the issues raised in this Briefing, and any topics you would like to see covered.

Suhanya Ponniah

Liability for social media marketing

Introduction

The power of social media to galvanise communities and bring about social change was palpably evident with its role in the Arab Spring. Of late, social media has become an important communication and marketing tool, and a tool for social activism.

Many organisations, particularly NFPs, use Facebook and Twitter to promote their causes and interact with the community. Social media is not just used by a young audience any more: it is used by [65% of adult American internet users](#), showing how influential it has become. There are now over [750 million people](#) on Facebook alone.

Organisations are often unaware of the legal implications of using social media, which are briefly summarised here.

Issues to look out for

Social media law touches on many areas. An organisation can be liable for posts made on its Facebook or Twitter page, breaches of privacy, defamation and intellectual property issues.

Facebook and Twitter pages

The Federal Court recently determined that organisations can be liable for posts made by third parties on their Facebook and Twitter pages. In *ACCC v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74, Justice Finkelstein stated that a company was responsible for misleading reviews that customers had written on the company's Facebook page, because the company knew of the Facebook posts, had the power to remove them and did not take steps to do so.

Tips:

- Set a policy of regularly monitoring your social media pages. Promptly delete incorrect, misleading, defamatory or discriminatory posts and content that infringes intellectual property rights.
- Include a statement on your website and social media pages that you are not responsible for content posted by third parties, but be aware that this is not absolute protection.

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ATO updates

Tax rulings

The ATO's [Public Rulings Program of 16 August 2011](#) indicates that:

School Building Funds

The release date of the Tax Ruling on school and college building funds (currently [TR 96/8](#)) is still yet to be advised.

Subsidiaries of Exempt NFPs

The update to [Tax Ruling 2005/22](#) regarding companies controlled by exempt entities will be updated to incorporate the [Draft Addendum](#) released in June and is planned for issue on **9 November 2011**. The Draft Addendum purports to incorporate reference to the *Word Investments case*.

Charities

The final version of [Tax Ruling 2011/D2](#) on charities is planned for issue on **12 October 2011**.

Bicycle Victoria – Decision Impact Statement

Finally the ATO [Decision Impact Statement](#) on the *Bicycle Victoria* case was released and indicates that TR 2011/D2 will be updated to refer to the decision before it is published as a final ruling.

The Statement also indicates that:

“the ATO will apply the decision to institutions that promote an activity that is sporting or recreational in nature, if the facts indicate that the activity is a means by which a broader charitable purpose is achieved.”

Suhanya Ponniah

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Intellectual property

Organisations may unwittingly infringe intellectual property law by posting photos, text or other content that the organisation does not own. Organisations may also be liable if third parties post infringing content on their website or social media page. It is easy to copy and post material from one site to another, making such violations increasingly common.

Tips:

- Develop a policy concerning use of other people's material.
- If the organisation is requested to remove material that allegedly violates intellectual property law, seek legal advice fast.

Privacy

Organisations should note that information gathered through social media may be subject to privacy laws that restrict how the information can be used. They should also be cautious about what information they put on social media sites, as the site may gain ownership of that information.

Tips:

- Ensure that you and your employees do not disclose confidential information on social media.
- Develop an employee policy – see the tip below.

Employment law

Organisations can be liable for misleading, defamatory and other inappropriate statements that an employee makes on social media. Alternatively, an organisation may wish to discipline or terminate an employee's employment if they behave inappropriately online. First check whether this is permitted under the law.

Tip:

- Put in place an employee social media policy, to establish clear expectations for conduct. It may be helpful to seek legal advice on what to include in the social media policy.

Katrina Chow and Suhanya Ponniah

More from the ATO

Wentworth – Decision Impact Statement

The ATO has published its response to the decision of the Full Federal Court in [Federal Commissioner of Taxation v Wentworth District Capital Ltd \[2011\] FCAFC 42](#) ("Wentworth").

A short summary of the Full Federal Court decision is available in our [June Not for Profit Briefing](#) and a link to the ATO Decision Impact Statement ("DIS") can be found [here](#).

The ATO appears keen to read the decision narrowly and confine the decision to its facts.

The ATO notes the facilitation of the commercial supply of services in a town that would otherwise not be provided with those services would not *always* be a community service. The ATO makes clear at several points that it will assess each case on its particular facts and circumstances.

Although the Court endorsed 5 principles for identifying a community service purpose the DIS does not give any examples of how the ATO might apply those principles and so the real impact of the *Wentworth* decision still remains to be seen.

Elizabeth Turnour

Compliance for charities? Strict or forgiving? The Bargwanna saga

The High Court has given the Commissioner of Taxation leave to appeal the Full Court decision in [Bargwanna](#).

Mr and Mrs Bargwanna were trustees of a charitable trust.

There were irregularities in the administration of the trust. The Tax Office said that it was not being applied exclusively for charitable purposes and therefore was not exempt from income tax.

The stark question that the case raises is this:

Is tax exemption a privileged status which requires a stringent approach to compliance or can trustees make some mistakes and still retain charitable status?

The Administrative Appeals Tribunal and Edmonds J in the [Federal Court](#) took the stringent approach. Edmonds J said:

"... privileged status of exemption from income tax ... demands strict adherence to the requirements that must be met before the status is conferred"

The [Full Court of the Federal Court](#) took a more liberal view. They said:

"It seems unlikely that the purpose... is to deny a fund its exempt status merely because a trustee is inept or makes a mistake".

The High Court has decided to look at the question of the circumstances in which a fund is applied for charitable purposes. Presumably they will consider what type of breaches both in scope and intention will disqualify a fund from being charitable.

The question of whether strict compliance or generally charitable compliance is a significant question and the outcome in the High Court should make this clearer.

In our view compliance ought not be so strict that it does not make room for human error in the pursuit of charitable ends.

Murray Baird

Fringe benefits

Employment law issues

Many not-for-profit employers are eligible for fringe benefits tax exemptions or rebates. Making sure that the salary packaging arrangements comply with tax legislation is imperative. However, ensuring compliance with employment legislation is equally important.

Two issues relevant to fringe benefits payments will be explored below:

- Can the minimum wage be paid by a combination of fringe benefits and money?
- What conditions must be met in order for a salary deduction to be lawful?

Minimum wage comprising fringe benefits and money

All employees covered by the national workplace relations system are entitled to be paid at least a minimum wage. That minimum wage may be derived from a Modern Award. For employees who are not covered by an award, the minimum wage is set by Fair Work Australia.

Fair Work Australia increased the National Minimum Wage to \$589.30 per week or \$15.51 per hour (before tax), as of 1 July 2011. Wage rates in Modern Awards increased by 3.4% as of 1 July 2011.

Generally employers must pay their employees in 'money' (by cash, cheque, EFT or alike). (See [s 323 of the Fair Work Act 2009\(Cth\)](#)). However, if an employer offers salary packaging to employees up to the maximum exempt or rebateable amount, in some cases this can result in the money component of the employee's remuneration falling below the minimum wage. Does this place the employer in breach of its legal obligations?

The *Fair Work Act 2009(Cth)* has addressed this issue, by providing that an employer may deduct an amount from an employee's wages if the deduction is made in accordance with conditions set out in the Act. These conditions are explained below.

Conditions for making deductions from salary

Whether an employee is being paid the minimum wage or a much higher salary, the employer must comply with certain conditions before making deductions from salary.

One of the key requirements is that the deduction must be authorised, either:

- in writing by the employee (or parent/guardian where the employee is under 18); or
- under an enterprise agreement, award, legislation or order of a court or Fair Work Australia (see [section 324](#)).

The deduction must also be principally for the employee's benefit (section 324(1)(a)).

An authorisation has no effect if the deductions authorised are either:

- directly or indirectly for the benefit of the employer or a party related to the employer; or
- unreasonable in all the circumstances (see [section 326](#)).

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Checklist for compliance

An employer and employee may agree to deductions from the employee's pay in accordance with a salary sacrifice arrangement, even if this takes the money component below the applicable minimum wage, provided that:

- The employee's overall package is at least equivalent to the minimum wage;
- The employee authorises the deduction (and any variation to the deduction) in writing;
- The written authorisation specifies the amount of the deduction;
- The deduction is principally for the employee's benefit;
- The deduction is not directly or indirectly for the benefit of the employer or a party related to the employer; and
- The deduction is not unreasonable.

Leanne Tully

Senior Lawyer, Workplace Relations

Case note: An employer's duty to provide a safe working environment

Introduction

In May 2011, the Western Australia Court of Appeal held in *Laing O'Rourke (BMC) Pty Ltd v Kirwin* [2011] WASCA 117, that an employer's responsibility to provide a safe working environment extends only to what is 'reasonably practicable' under Occupational Health and Safety Laws.

Facts

Laing O'Rourke (BMC) was a company that undertook construction works in an area affected by cyclones. The company provided units called 'dongas' which were to be used by its employees during cyclones. Some of the dongas collapsed when Cyclone George passed over the area in 2007. A number of employees were injured and sued the company for failing to provide a safe working environment.

Finding

The court held that the company had provided and maintained a safe working environment for its employees at the time of the cyclone.

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Reform agenda

The Government continues to drive its reform agenda for the sector on the “in Australia” test, the UBIT and the new regulator.

We await a timetable and further draft legislation.

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Key messages

The court stated key messages that are important for Australian employers today.

- The responsibility of employers to provide and maintain a safe working environment for employees is *not an 'absolute duty'*. This means that employers are not under a duty to ensure that accidents never happen. Instead they must take steps to provide and maintain a safe work environment that a normal person would consider to be reasonably practicable steps.
- Even if a decision was not, in *hindsight*, the best decision at the time, the courts will not look at the situation with the benefit of hindsight, but will have regard to the circumstances that arose at the time of the event in deciding if the employer provided a safe working environment.

Conclusion

Employers should remember that one of their primary responsibilities is to provide for the safety of their employees. This involves taking steps that are reasonably practicable in the circumstances, to provide and maintain a safe working environment for employees.

Wendy Ooi and Suhanya Ponniah

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 & Construction 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 Profits

Fiona Thomas
Senior Lawyer
Not for Profits

Libby Klein
Senior Lawyer
Not for Profits

Suhanya Ponniah
Lawyer
Not for Profits

Elizabeth Turnour
Lawyer
Not for Profits

Aaron Farr
Lawyer
Not for Profits

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
Senior Lawyer
Volunteer Law

Allan Swan
Principal
Estate Planning

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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