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Libby Klein has recently been appointed a **Principal** at Moores Legal.

Libby has expertise in governance, financial services law, tax and structuring of Not for Profits.

She has contributed to numerous publications and frequently presents at seminars, and addresses the boards of not for profit organisations. Libby was an in house corporate lawyer with Invesco before joining Moores Legal, and she has extensive experience in financial services including funds management, insurance and superannuation. Libby's previous roles include marketing and communication, product development and project management .

Editorial comment

After years of lobbying and waiting for reform, the main challenge for the sector now is keeping up with Government proposals. Large scale reforms have been announced with waves of public consultations on the shape of the NFP regulator, the UBIT, Public Ancillary Funds, Tax Rulings and the "in Australia test". The sector is suffering "submission fatigue" and extensive resources are being applied to respond to the Government's reform agenda.

We continue to be concerned that many of the proposed changes bear little resemblance to the recommendations of expert reports commissioned by the Government, such as the *Productivity Commission Report*, the *Inquiry into the Definition of Charities and Related Organisations* and the *Henry Review*.

We also note with concern that while Regulation Impact Statements would have been required for a number of measures outlined under the 2011-2012 Budget, the Prime Minister granted an [exceptional circumstances exemption](#) to seven measures – two of which are the UBIT reforms and the introduction of a statutory definition of "charity". The reason given is that they arose from recommendations of the Henry Review. This belies the fact that the UBIT proposals are in fact inconsistent with the recommendations of the [Henry Review](#): "NFP organisations should be permitted to apply their income tax concessions to their commercial activities."

In this Briefing we refer to the consultations on public ancillary funds and also cover movements in ATO publications and the compliance focus, the *Bicycle Victoria* case and OHS changes amongst others.

We also remind you that as covered in our recent [NFP Alert](#), the closing date for submissions on the "in Australia" changes is 12 August 2011. We are preparing a submission setting out our concerns and encourage you to do the same.

Suhanya Ponniah
Editor

Work Health and Safety - changes afoot

Changes to Work Health and Safety laws in all States and Territories, due to take effect from 1 January 2012, will impact not for profits.

For example:

Are you "just a group of volunteers", employing people from time to time to get things done? You will have obligations to help ensure the health and safety of workers including volunteers.

Are you on a committee of management or not for profit board? You will need to consult with employees and volunteers about safety issues.

The new laws will be based on the common sense requirement to do what is "reasonably practicable" to ensure safety. However, if you have a senior role or are on the board of a not for profit organisation you need to be proactive:

- Understand the new requirements;
- Watch out for the publication of further guidelines; and
- Well before the end of the year, have someone analyse what you need to be doing differently on New Year's Day to make sure you don't fall foul of the new requirements.

Libby Klein
Principal

Cycling is good for the community – Bicycle Victoria

Moores Legal client, Bicycle Victoria, has recently won the right to be recognised as a charity.

Facts

Bicycle Victoria Inc. applied to the ATO for endorsement as a charitable institution and as a health promotion charity, a category of deductible gift recipient. The applications were refused, and challenged by Bicycle Victoria at the Administrative Appeals Tribunal in the case of [Bicycle Victoria Incorporated v Commissioner of Taxation](#) [2011] AATA 0444.

Bicycle Victoria's purpose is "to promote the health of the community through the prevention and control of disease by "More People Cycling More Often". It does this through activities such as working with the government to develop bicycle infrastructure like bike trails and lanes, behaviour change programs like the Ride2School and Ride to Work programs, and flagship events like the Great Victorian Bike Ride. The ultimate aim is to encourage mainstream bike riding to combat physical inactivity which is second only to smoking as a behavioural cause of ill-health in Australian society.

NFP status

Sporting organisations are entitled to income tax exemption and can self-endorse their eligibility. The Commissioner regarded Bicycle Victoria as a sporting organisation.

However charity status is valuable because in addition to income tax exemption, it provides the ability to claim franking credits on share investments and GST concessions, and importantly, recognition in the community as a charity.

Decision

The Administrative Appeals Tribunal found that Bicycle Victoria is a charitable institution because it promotes cycling for the overall purpose of promoting fitness. Bicycle Victoria was not found to be a health promotion charity because its principal activity was not the prevention and control of disease as required, but the promotion of cycling and physical fitness.

The ATO has indicated in their [news service](#) that they are currently considering the implications of the decision. English and Australian cases dating back to 1895 and 1974 respectively had been used as authority for the assertion that encouragement of sport or physical activity was not a charitable purpose. The recognition of Bicycle Victoria as a charitable institution sets a precedent for like organisations that have a similar focus on encouraging exercise for the purposes of health. It reinterprets and applies the law for our 21st century Australian society. To access the judgment, please [click here](#).

New Tax Basics publication

The ATO has just released a new version of its publication, [Tax basics for non-profit organisations](#). It replaces the previous version issued in June 2007 and its addendum. More information can be found [here](#).

A copy can be requested by ordering [online](#) or phoning **1300 720 092** and quoting 'NAT 7966'.

Suhanya Ponniah
Lawyer

New GiftPack

The Australian Tax Office has recently released a new version of its [GiftPack](#) publication which is relevant to current and prospective deductible gift recipients (DGRs) and their donors. The new version applies from June 2010 and replaces the previous one issued in December 2007.

The new GiftPack incorporates changes to the tax law since the guide was last issued, including:

- Changes regarding private ancillary funds:
 - Previously these funds were known as prescribed private funds but from 1 October 2009, the new DGR category of "private ancillary funds" was introduced.
 - Previously each prescribed private fund was listed in the tax regulations. Now these funds are endorsed by the ATO as with most DGRs.
- Changes to the deductibility of political donations:
 - From 1 July 2008, businesses cannot claim tax deductions for gifts and contributions to political parties, independent members and candidates.
 - Non-business individuals can claim a deduction of up to \$1,500.
- Changes effective 3 June 2010 to the requirements for endorsement under the DGR categories for higher education institutions and affiliated residential educational institutions.
- The introduction of three new DGR categories for volunteer bushfire brigades which were effective from 7 December 2010.
- Some changes to the advice on the "in Australia" requirement (page 58) - particularly, in removing a reference to incidental overseas activities. Does this mean they are no longer allowed or is it in anticipation of [legislative change](#)?
- The publication flags the then proposed changes to public ancillary funds – covered on page 5 of this Briefing.

The Publication can be viewed online or you can obtain a hard copy by telephoning 1300 720 092 or ordering [online](#).

Suhanya Ponniah
Lawyer

No news on school building funds

We recently advised that the Taxation Ruling governing School Building Funds was one of several rulings slated for review by the ATO.

As at today's date nothing further has been released and the current ruling - TR 96/8 - remains on foot.

In the current climate of change, we await with interest, and some trepidation, an indication from the Tax Office as to what is proposed for these popular DGR entities.

Fiona Thomas
Senior Lawyer

The ATO's compliance program 2011-2012: "Deterring, detecting and dealing with non-compliance"

The Commissioner of Taxation recently published the annual ATO [compliance program](#) for the 2011-2012 financial year. The compliance program highlights the compliance issues which the ATO is focusing on and specifies what action is being taken to address them.

The Commissioner has highlighted several areas specific to the NFP sector that are attracting the attention of the ATO:

- Promoting good governance of NFPs – a new tool will be released this year to help NFPs understand and meet their tax and superannuation responsibilities;
- The tax exempt status of clubs – the ATO intends to “**monitor higher risk entities** to ensure they have correctly assessed whether they are exempt and whether they have correctly calculated their mutual income”;
- Working with the religious community to “deliver our key messages. We will do this before we undertake reviews to **ensure they are using tax concessions appropriately** for the benefit of the community.”;
- Concerns that some **training organisations endorsed as Public Benevolent Institutions** are going beyond the scope of this endorsement;
- Concerns about incorrect treatment of GST; and
- The obligations of public and private ancillary funds.

The ATO's 2011-2012 compliance program, in conjunction with the changing legislative landscape in the sector, highlights the need for NFPs to remain vigilant and ensure they regularly conduct self reviews of their continuing eligibility for endorsement.

The NFP team at Moores Legal would be happy to provide assistance to any organisation wishing to apply for endorsement or conduct a self-review of their eligibility for tax concessions.

Lachlan McKenzie

Chair of Implementation Taskforce

The Government has appointed Susan Pascoe as the Chair of the Implementation Taskforce for the Australian Charities and Not for Profit Commission ("ACNC").

Susan Pascoe is the former Commissioner with the Victorian State Services Authority and former CEO of the Catholic Education Commission of Victoria.

The Implementation Taskforce is to ensure that the ACNC is ready to open its doors on 1 July 2012. More details can be found in this [Press Release](#).

Suhanya Ponniah
Lawyer

Regulation of Public Ancillary Funds to be aligned with PAFs

The Government has [released](#) exposure draft legislation (including explanatory materials), effecting significant change to the regulation of Public Ancillary Funds (previously simply called "ancillary funds").

The Assistant Treasurer has announced that the intention behind the proposal is to:

- provide for improved standards of governance and accountability
- ensure regular valuation of assets
- clarify investment and distribution rules
- provide for a system of administrative penalties.

In short, the administration and regulation of Public Ancillary Funds will be brought into line with that of Private Ancillary Funds. Important points to note are that, subject to transitional arrangements, in order to obtain or retain DGR entitlements:

- the trustee of a public ancillary fund must be a corporation (or the Public Trustee)
- the funds will be required to lodge an annual income tax return
- the trustee must distribute at least 4% or \$11,000 of a fund's net assets each financial year
- the trustee of a fund must prepare and maintain investment strategies for the fund
- the Federal Treasurer may make legislative guidelines about the establishment and maintenance of funds
- the Commissioner of Taxation may impose penalties on non-compliant trustees.

If enacted, the legislation is due to take effect from 1 January 2012.

We do not believe that many of the implied shortcomings that the legislation is intended to address are, for the most part, real. However we acknowledge that there has long been confusion around the trustees' right to accumulate.

While funds established after the start date will not be able to avoid the new requirements, existing funds - especially those which do not have corporate trustees - will need to consider carefully if, when and how they transition to the new arrangements. Moores Legal can provide advice and assistance on these questions.

Fiona Thomas
Senior Lawyer

Equal Opportunity Act amendments

In our [June 2011 NFP Briefing](#), we reported on the oscillation of Victorian Equal Opportunity legislation.

At the time of our June Briefing, the *Equal Opportunity Amendment Bill 2011* put forward by the Liberal Government had yet to pass both Houses of Parliament. We can now confirm that the Bill was passed and was given Royal Assent on 21 June 2011.

Where discrimination is alleged, religious bodies will not have to show that religious faith is an inherent requirement of a job.

Suhanya Ponniah
Lawyer

ATO responds to Word Investments - Draft Addendum to TR 2005/22

The ATO has finally released its view of the impact of the decision in the *Word Investments* case on TR 2005/22, in the form of a [Draft Addendum](#) to the Ruling.

The addendum confines the implications of the *Word Investments* decision regarding the characterisation of a charitable parent entity and its subsidiaries. It restates the ATO's position prior to *Word Investments* that the charitable status of a subsidiary entity is not determined or influenced by its parent: to be charitable, the subsidiary must have a sole charitable purpose in its own right.

The implications are significant for "business" enterprises established to support charitable and other not-for-profit organisations.

In our view it does not reflect the principles set out by the High Court in *Word Investments*. The High Court looked at the whole context of charitable purpose – not the narrow focus that this Draft Addendum represents.

Tax Rulings are merely the ATO view on a matter. However ATO officers are internally bound to follow them – even if inconsistent with the law declared by the Courts.

Fiona Thomas
Senior Lawyer

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, Dispute Resolution, Family Law and Personal Injury Law.

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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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