

July 2006

# Not for Profits Slow to Detect Fraud

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BDO Chartered Accountants recently released a report which they claim is the first report of its kind on fraud in not for profit organisations. A copy of the BDO report is available from [www.bdo.com.au](http://www.bdo.com.au). The report is based on a survey of over five hundred not for profit organisations in Australia and New Zealand.

Fraud in not for profit organisations includes cash theft, expense account fraud, misuse of an organisation's intellectual property and inventory theft.

The report confirms that most not for profit organisations have well performing systems and procedures which are minimising the instances and amount of fraud in their organisation. The average size of individual cases of fraud in not for profit organisations was significantly lower than in for profit companies (under \$50,000 compared with \$337,730). However, more than 40% of not for profit organisations discovered instances of fraud more than 12 months after the occurrence. Over a third of organisations were only able to discover the fraud after a "tip-off" from either an employee, volunteer, client or customer.

The stewardship, transparency and accountability of not for profit organisations is critical not only to its public standing but ultimately the long term viability of the organisation. Stakeholders,

donors or members expect the organisation to act wisely with limited resources. It only takes one report of illegal or improper behaviour, regardless of whether or not it actually occurred, to damage a not for profit's reputation. Thus as well as fraud prevention, managing reputational risks should be a critical focus for not for profit organisations.

It is important for Directors of not for profit organisations to recognise that fiscal oversight is the responsibility of the entire Board and not just the audit committee. The report highlights the importance of Boards developing and implementing appropriate risk management strategies as well as ensuring that appropriate internal controls are established and followed.

For advice in the areas of risk management and not for profit governance, please contact Moores Legal.

**Matthew Corrigan**  
Lawyer

## School Update: Liabilities for Injuries at School

Schools will be interested to know of a case in the New South Wales Court of Appeal, which again looks at how much supervision is required by schools to avoid liability for injury. The Court handed down its judgment on 21 December 2005 in the case of *Bujnowicz v Trustees Roman Catholic Church*. The case revolved around

the question of the school's duty to students. In this particular case a boy was playing touch football on school grounds during a lunch break when his foot caught in a pothole and he twisted his leg, severely injuring his left knee. The case was brought as a result of an Appeal by the student against the original decision in which it was held the school had **not** breached its duty of care to the student.

The area where the injury took place was used for such activities as touch football, cricket and soccer. Tackle football was prohibited and the playing area was not used for any competitions. Additionally, students were only permitted to use the area if a member of the teaching staff had allowed it and was supervising. The area was occasionally mown and pebbles or stones were removed by the PE co-ordinator or students on detention.

Importantly, evidence was lead as to the school's system as to the safe use of the area. Action taken included:

- PE teachers would report anything unsafe in relation to the area.
- Teachers on playground duty would report anything wrong with the surface.
- Any staff member doing the mowing would report any problems to the PE staff.
- There was an active policy of removing stones and pebbles that came to the surface.
- There was a member of staff responsible for checking the area if anything was reported.

The injured boy also stated that if anything was unsafe, it was always assumed that one of the supervising teachers would be told about it.

The Court noted that the system was "extremely ad hoc". The question before the Court was whether the school had failed to take such reasonable precautions for the safety of those playing the game that would have prevented the injury to the student. The appellate Court found that the school **was** in breach of its duty to the student. It stated that it was the school's duty to take reasonable precautions for the safety of its students playing the running sports of soccer and touch football upon the playing area. The Court stated that this duty required it to implement a regular system of inspection of that area. The purpose of that system being to identify and remedy holes, depressions or indentations of the nature of those which the school's own Deputy Principal regarded as being unsafe for children playing ball sports.

The Court focused its attention on the lack of a systemised policy of checking the area where students were playing sports.

In the case of *Bujnowicz v Trustees Roman Catholic Church*, it was insufficient that a policy existed in relation to assessing the safety of the grassed area. Because it was insufficiently organised, this would appear to have been a large factor in the Court's decision to hold the school liable.

Cecelia Irvine-So  
Lawyer

# Who is entitled to Discrimination Exemption? Mornington Baptist Community Care Case

A recent case of the Victorian Civil and Administrative Tribunal is of interest.

In Mornington Baptist Church Community Caring Inc. ("MBCCC"), the welfare arm of a local church applied for exemption from the religious discrimination provisions of the Equal Opportunity Act. MBCCC wanted to engage volunteers and staff who were practising Christians in line with the mission of the church and its welfare arm.

VCAT refused to apply the exception for bodies established for religious purposes because the body was essentially involved in community care rather than religious matters. The Tribunal said that a diversity of beliefs amongst those who provide welfare services through the Baptist Church caring arm "may well be beneficial to those who receive those services". The Tribunal also hinted that any religious limitation on membership of the association could be unlawful.

The case raises an interesting question of whether a “spin off” or subsidiary entity of religious organisation is entitled to the exemptions for religious organisations and also the nature and extent of religious discrimination exemptions. One implication of the decision is that a faith based welfare organisation may be required to employ staff of other faiths to provide balance of beliefs. However, the tribunal appears not to have addressed wider issues of the nature of a religious organisation or International Conventions on freedom of religion. It may have implications for the way religious organisations structure welfare activities.

**Murray Baird**  
Partner

## Clarity for Pay-Roll Tax and “Charitable Bodies”

Revenue Ruling PT125 became available in May 2006. This Ruling provides clarity to the way in which the Commissioner of State Revenue will apply section 10(1)(bb) of the Pay-roll Tax Act 1971.

Section 10 of the Pay-roll Act sets out various exemptions from payroll tax. Included in the exemptions are “charitable bodies” other than schools or educational institutions or State instrumentalities. The wages paid by such a charitable body must be to people who are engaged “exclusively in work of the body of a charitable nature” to achieve payroll tax exemption.

Many charities are structured to undertake direct charitable activity and to “fundraise” for the work of the charity by the conduct of commercial activities. It is the latter activity that has posed problems for the Commissioner.

*Is the charity liable to pay pay-roll tax for the employees who are engaged exclusively in the commercial activities? Is the charity liable to pay pay-roll tax for those employees who are engaged in both the charitable and non-charitable functions of the organisation?*

The Commissioner takes the view that persons are engaged predominantly in work associated with the body’s charitable activities (such as administrative or management roles) are to be regarded as “engaged exclusively” in charitable work. Therefore no payroll tax applies with respect to their income. A Chief Executive Officer would typically fall within this category.

However, persons who are engaged wholly in the business activities undertaken to fund the charitable work are not engaged predominantly in the body’s charitable activities and their wages are always subject to payroll tax. This is so even if the business activities of the charitable body are incidental and ancillary to the main charitable purpose.

### Summary

Employees of a charity will be:

- Exempt from pay-roll tax:
  - (i) where they are engaged exclusively in charitable work such as nurses providing home care to the aged; and
  - (ii) where they are engaged predominantly in administrative/management role – persons who are either employed as administrators or bookkeepers fall into this category;
- not exempt from pay-roll tax, where they are engaged wholly in the business activities undertaken to fund the charitable work – such as persons running a plant nursery business, the profits of which are used to fund a charity’s activities.

The Commissioner’s ruling does not have the force of the law, but is an indication of how the Commissioner will treat wages paid to particular persons.

Of course, payroll is only payable where the wages paid to employees engaged in non-charitable activities exceed the threshold.

As always, if there is any uncertainty, we would encourage a charity to obtain a private ruling in the matter. Moores Legal has experience in obtaining private rulings and is able to advise should you require assistance.

**Tanya Coleman Costello**  
Senior Lawyer

# New from the ATO: Induction Package for New Administrators

The ATO has recently released an induction package for not for profit administrators. This contains an overview of tax issues which are relevant to not for profits including income tax, GST, tax and employees, tax and fundraising, record keeping and State and Territory government taxes and duties. As well as being an overview, the package contains some useful links to further reading material and discusses other general issues such as endorsement as a Tax Concession Charity.

The package is a good first base for those who are new to the role or as a refresher on the various obligations incumbent on not for profit administrators. The package is available from the ATO's website at [www.ato.gov.au/nonprofit](http://www.ato.gov.au/nonprofit).

We would be happy to discuss any matters raised in the guide as well as more general issues of induction policies and recruitment of appropriately qualified not for profit administrators.

**Cecelia Irvine-So**  
*Lawyer*

## New DGR Categories

Proposed legislation tabled in Parliament on 25 May 2006 will, when enacted, create five new categories of Deductible Gift Recipient ("DGR") from 1 July 2006. The new categories are:

1. Public funds for the reconstruction or critical repair of a damaged war memorial;
2. Public funds established and maintained by a public benevolent institution solely to provide money for the relief of people in distress as a result of a declared natural or man made disaster (including assistance to re-establish a community), whether in Australia or another developed country;
3. Charitable Institutions established to provide short-term direct care to animals that are lost, mistreated, without owners and/or are rehabilitating those animals if they are orphaned, sick or injured;
4. Charitable institutions that would otherwise be a "public benevolent institution" except for the fact that they also undertake activities that would come within the existing DGR categories of "health promotion charity" or "harm prevention charity"; and
5. Public funds that are established solely to provide money for scholarships, bursaries or prizes to promote education where entry is open to persons at a national, state, territory, or regional level.

A DGR is an organisation or trust that is endorsed by the Australian Taxation Office to offer to its supporters and benefactors tax-deductible receipts. DGR endorsement is valued highly as a way of attracting and maximising support, and may be a pre-condition to receiving distributions from certain benefactors.

The new categories distinguish between "funds" and "institutions", and in most cases there are additional requirements to be met.

Moore's Legal is able to assist in drawing appropriate documentation for those clients who may be interested in availing themselves of the new categories.

**Fiona Thomas**  
*Senior Lawyer*

# New Measures to encourage Philanthropy

Five new measures intended to encourage philanthropy have been announced by the Government in the recent 2006/7 Budget (Budget Paper no 2). The measures provide –

1. Tax deductions for donated listed shares

Tax payers will be allowed to claim a tax deduction for publicly listed *shares* donated to a deductible gift recipient (“DGR”).

2. Tax deduction for community foundation donations to the Foundation for Rural and Regional Renewal (“FRRR)

Regional community foundations will be entitled to claim a tax-deduction for specific purpose donations to the FRRR, provided that those purposes, or projects, satisfy established SRRR criteria.

3. Australian Business Numbers for Prescribed Private Funds and Public Ancillary Funds

The process by which Prescribed Private Funds and Public Ancillary Funds may obtain an ABN, as a prerequisite to DGR endorsement, will be simplified.

4. Simplify Gift Fund Requirements for some DGRs

DGRs which are endorsed under more than one category will no longer be required to maintain a separate gift fund for each such category. They will have the option to consolidate multiple funds into one, providing appropriate accounting records are maintained.

5. Compliance requirements for listed DGRs to be standardised

The Commissioner of Taxation will be given the power to review the on-going compliance of specifically listed DGRs (ie. those DGRs who are listed by name in the tables in Division 30 of the Income Tax Assessment Act 1997) and to revoke that DGR status, in the same way as the Commissioner, may review the DGR status of those entities endorsed under the general categories.

It is proposed that these measures will commence on varying dates subject to enabling legislation. Clients who are interested in availing themselves of the benefits proposed in these measures (such as the consolidation of multiple gift funds) should contact Moores Legal’s Not for Profit team for further advice.

**Fiona Thomas**  
*Senior Lawyer*

## No Smoking Inside: New Tobacco Laws

As of 1 March 2006 new tobacco laws were introduced in workplaces whereby smoking is now prohibited in all “enclosed” workplaces whether or not the workers are paid or volunteers.

“Enclosed” means **substantially** enclosed by roof and walls.

### Penalty

Where a person smokes in an enclosed workplace, not only will the smoker be fined or prosecuted, the employer and the occupier may also be fined or prosecuted.

The “occupier” is defined as a person who is over sixteen years of age and who is or appears to be in control of the area or premises. This may include the manager or supervisor of a workplace or part of the workplace.

## Defences

To avoid being penalised, the employer or occupier must take reasonable measures to ensure that staff, customers and visitors are fully aware of the new law and that they must cease smoking in enclosed premises. The employer or occupier will not be guilty of an offence if it can be proved that they did not provide any items to facilitate smoking and that:

- (a) they were not aware, and could not reasonably be expected to have been aware, that smoking was occurring; or
- (b) they requested the person stop smoking and informed the person they were committing an offence.

## Action List

Here is a checklist of actions that employers should take as soon as possible to ensure compliance with the new laws:

1. Cease providing ashtrays, matches, lighters or other items to facilitate smoking in enclosed areas;
2. Employers should communicate to all its staff, customers and visitors verbally and in writing (through signs, newspapers, emails and posters) to assist them in understanding and complying with the new law;
3. Where there is a smoke-free policy in place, it is appropriate to update such policy to reflect the new changes so that the employees are fully aware and clear on their own obligations;
4. Open areas should be identified where smokers may smoke. Whilst the Act does not prohibit smoking outside at the entrance to workplaces or near windows and ventilation ducts, the Occupational Health and Safety legislation provides that employers are obliged to provide a healthy and safe workplace. It is therefore recommended that areas where smoke can or is likely to drift into the workplaces should be no smoking areas; and
5. No smoking signs should be displayed to ensure that employees, customers and visitors are full aware of where smoking bans apply. Should you require to obtain no smoking signs, you should contact Tobacco Information Line on 1300 136 775.

The Not for Profit Team at Moores Legal can assist you in complying with the new Tobacco laws and provide you with further details to help you understand your obligations.

**Tina Lau**  
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

**Murray Baird**  
Corporate Governance  
Head of our Not for Profit Team

**Andrew Sudholz**  
Property Transactions

**Tanya Coleman Costello**  
Taxation & Non Profits

**Tim Adam**  
Compensation & Schools

**Tina Lau**  
Taxation

**Peter Andrew**  
Employment & Schools Law

**Andrew Simpson**  
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Intellectual Property

**Cecelia Irvine-So**  
Volunteer Law

**Katie Dawson**  
Aged Care Facilities

**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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