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WorkChoices - in a nutshell

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The stated aim of the *WorkChoices* legislation is “to create a more flexible, simpler and fairer system of workplace relations for Australia”.¹ However, there is nothing simple about the 687 pages of amending legislation and 3,851 paragraphs of the Explanatory Memorandum!

Some of the complexity is due to the restrictions on the federal Government’s powers under the Constitution. It is also the product of a century of regulation of industrial relations, which the Government is attempting to unravel. Aspects of the new laws were resisted in the Senate, where hundreds of amendments were made.

Who will be covered by WorkChoices?

Not for profit organisations will be affected by the changes, most of which are likely to come into effect at the end of March. However, while many organisations will fall within the new system, others will fall back on the various State industrial relations systems.

The federal Government wants to create a single, national workplace relations system. However, because of its limited powers, the Government has only legislated to cover:

- All Victorian employees.
- All employees in the ACT and Northern Territory.
- Employees in the other States, only if the Employer is a ‘constitutional corporation’.

What types of corporations are covered?

The federal Parliament has constitutional power to make laws about ‘foreign’, ‘trading’ and ‘financial’ corporations. If your organisation is not incorporated (and is not in Victoria, ACT or NT), *Work Choices* will not apply. If your organisation is is incorporated (and is not in Victoria, ACT or NT), the main issue will be whether it is a ‘trading’ corporation. A corporation can be a ‘trading corporation’ if trading activities are substantial and significant, even if they are not the primary purpose.

If a significant part of the business involves telemarketing, raising funds through the sale of goods and services (eg op shops, gift shops, street stalls, training services and other fund raising activities), the company could be covered by *Work Choices*.

The main changes

1. Unfair dismissal
 - Employees cannot bring a claim if dismissal was even partly for operational reasons (eg cannot contest why they were selected for redundancy).
 - Employees cannot bring a claim if the Employer has 100 employees or less.
 - But note that Employees can still claim for ‘unlawful termination’ if the reason for dismissal was discriminatory (on certain grounds).
2. Terms and conditions of employment
 - The *Workplace Relations Act 1996* will contain minimum entitlements to annual leave, personal leave, parental leave and maximum ordinary hours of work.
 - The ‘Australian Fair Pay Commission’ (‘AFPC’) will set basic rates of pay, casual loadings and pay periods.
 - Federal Awards will continue to apply, but some provisions will be invalidated and Awards will effectively be frozen.

¹ *Workplace Relations Amendment (Work Choices) Bill 2005, Explanatory Memorandum*, p 1.

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- Employers and Employees will be able to make Workplace Agreements which will totally exclude the Award (previously Awards still applied where a collective agreement was silent on an issue).
- There is a simplified process for making Agreements (individual and collective). They will no longer be checked and must simply be lodged with the Office of the Employment Advocate.

The Australian Fair Pay and Conditions Standard

Initially the 'Standard' (set by the Act and the AFPC) will include:

- federal minimum wage of \$12.75 per hour;
- right to pay for every hour worked;
- maximum of 38 hours per week (on average, and more if reasonable);
- 10 days of personal leave per year;
- 4 weeks of annual leave per year, accruing every 4 weeks. (Note that 2 weeks per year can now be cashed in, if agreed in a formal workplace agreement);
- 2 days of compassionate leave per occasion;
- 12 months of unpaid parental leave.

More generous federal Award terms (if any) relating to these issues will continue to apply.

Implications for Employers

Employers should:

- Comply with Standard, bearing in mind that wage reviews will take place (probably annually). Initially, the main changes are to the amount of personal leave and the annual leave arrangements.
- Have appropriate contracts in place so that salary covers all hours worked.
- Consider making individual or collective workplace agreements for increased flexibility in working arrangements – for example, exclusion of penalty rates, redundancy pay, allowances, rules about minimum shift lengths.

For Employers covered by *Work Choices*, there will soon be scope for far-reaching changes to employment practices. However, Employers must still consider contractual obligations to Employees, and any changes to the terms and conditions of existing employees will require their agreement.

The Workplace Relations team at Moores Legal can assist you to update your contracts to comply with the new Standard, and advise you about managing your workforce under the new system.

Leanne Tully
Senior Lawyer

Risk Management, NFPs and the Media

All organisations, no matter their size or financial status, must consider risk management.

Risk management, as defined in '*Running the Risk – risk management tool for volunteer involving organisations*', published by Volunteering Australia in 2003, is

'the process of managing your organisation's exposure to potential liabilities. It does this by identifying risks in order to prevent them or reduce them, and by providing for funds to meet any liability if it occurs.'

As you develop and review your risk management strategies, you ask questions which seek to identify, analyse, evaluate and treat those risks. However, one question which is often overlooked is a communications question. It goes something like this:

What kind of negative publicity against our organisation, one of our employees or volunteers, would adversely affect our reputation and ability to achieve our mission?

Much of risk management is related to reputation. Clearly negative publicity, even if you actually fulfil the other criteria of your risk management document, can have devastating consequences. Therefore any risk

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management process undertaken by your organisation would be strongly advised to include a media strategy as part of it.

Peter O'Neill, the Marketing and Communications Manager of the NSW State Emergency Service, has written a number of papers on risk perception and managing crises.

The following extract is taken from Peter O'Neill's 2003 paper titled "Developing an Effective Crisis Media Plan":

"The aim of a crisis media plan is to inform the public about the incident, provide community safety actions, maintain public trust and confidence that the event is being managed effectively. It should also protect and promote the reputation of the organisation and its brand."

As part of your risk analysis, you would have rated the identified risks. What is the likelihood of the risk occurring (almost certain, likely, possible, unlikely, rare), Consequences (catastrophic, major, moderate, minor, insignificant) and the Level of Risk (extreme, high, moderate, low). The risk management process allows you to put in place measures which can minimise certain risks, but have you received media coaching to prepare you for the inevitable media assault when things go pear-shaped.

Like any other business, the not-for-profit sector needs to be prepared. This means developing an entire strategy around each articulated risk, practising it, revising it, and of course, seeking to minimise the potential of any of the risks erupting.

For example, all schools have a bullying policy. Does every teacher and every student understand it? Does your school's day-to-day ethos reinforce the anti-bullying stand or are students receiving quite a different message? Do you have a succinct statement on your school's stance on bullying? Is it gobbledygook, or is it short, sharp and easily understood?

One of the most publicised risks facing charities and development organisations is donated funds being misappropriated. Have you devised your risk strategy? Have you practised scripts 'just in case'?

As you devise or revise your risk management plan, you can incorporate a media strategy. It would answer the following questions in relation to each articulated scenario:

- How are we responding to this issue?
- What is being done to protect beneficiaries/volunteers/the public?
- What is being done to ensure this never happens again?
- How do I protect the reputation of my organisation without appearing heartless?

When dealing with the media, there are a few unbreakable rules.

- Never say 'no comment'. That's not to say you can't get back to the journalist after you have researched their questions, but 'no comment' immediately labels you guilty.
- Never speak 'off the record'. Do not say anything you are not prepared to have printed or recorded.
- Always be polite, helpful and honest (without implicating your organisation's reputation).
- Always keep your focus on the well being of your key stakeholders, and avoid discussion about financial losses, and other cold hard facts.
- Have only one spokesperson, preferably the CEO.

Just as you need professional help in devising your risk management policy, you will find the process of developing an accompanying media plan much easier if you consult the expert. **Positive Media** can help you write and practise your media strategy. We specialise in the NFP and education sectors. The author has a Master of Development Studies and has spent many years working in the NFP sector.

As well as providing the journalistic skills to devise the media questions and responses, we can coach you in the actual experience of facing the media. We will interview you using television cameras and radio microphones. We will review your performance together. Together we will hone your language, helping you to speak in short 'sound bites'. It will remove your anxiety about the media. You will be confident and ready when the media comes calling (and you might find you are prepared to take the initiative on issues you want publicised).

For more information, please contact me on (03) 9817 2928, mobile 0403 063 499 or email: penny@positivemedia.com.au. Our website is www.positivemedia.com.au.

Penny Mulvey
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Penny Mulvey is a co-director of Positive Media Pty Ltd, a Melbourne-based media consultancy specialising in the not-for-profit and education sectors. Penny is a journalist who started her career, following completion of a

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BA majoring in Communications, in radio and television news in the early 1980s. She and her family worship at St Hilary's Anglican Church Kew.

Land Tax and Trusts -The impact of the new regime on Charitable Trusts

From 1 January 2006 a new method of imposing land tax on Victorian real property held in trusts has been introduced.

The new regime imposes a 0.375% land tax surcharge on Victorian real property with a value of between \$20,000 and \$1,620,000 which is held in certain trust structures. A number of categories of trusts are excluded from the new regime, including charitable trusts.

Despite being excluded from the new regime, the trustees of charitable trusts holding land in Victoria are required by 31 March 2006 to complete a "Notification of lands held on trust" form and lodge it with the State Revenue Office ("SRO"). The form is very straightforward to complete and can be found on the SRO's website at www.sro.vic.gov.au.

Krista Fitzgerald
Lawyer

Release of ATO Rulings

Two new Australian Tax Office ("ATO") Rulings may affect the way charities operate and gain tax concessions, and may lead to substantial restructuring of charitable entities. Each of the Rulings can be accessed at www.ato.gov.au/nonprofit and following the links to "New Taxation Rulings Released". A third is a clearer restatement of an earlier ruling on charities and Australian Business Numbers.

- TR2005/21 Income Tax and Fringe Benefits Tax: Charities
- TR2005/22 Income Tax Companies Control by Exempt Entities
- MT2005/D1 The New Tax System: The Meaning of Entity Carrying on an enterprise for the purposes of entitlement to an Australian Business Number

TR2005/21 Income Tax and Fringe Benefits Tax: Charities

This Ruling sets out the views of the ATO on the meaning of "charitable institution" and "charitable fund". The Ruling has practical implications for a tax exemption, tax deductibility, fringe benefits tax and GST.

The concept of "charity" cover the following four "heads of charity" :

- relief of poverty (ie. welfare);
- advancement of education (generally schools, universities etc);
- advancement of religion (church missions etc) ;
- other purposes beneficial to the community (a "grab bag" of worthwhile causes not under the first three headings).

One of the key concepts in the Ruling is that the conduct of a business or commercial enterprise can disqualify an entity from being charitable. The Ruling attempts to draw a distinction between business activities which are "merely incidental to the carrying out of a purpose" and those that indicate a commercial purpose that eclipses a charitable intention.

In particular the Ruling says that where an organisation carries out operations to generate surpluses which are ultimately applied to a charitable purpose, the organisation may be categorised as commercial rather than charitable.

In our view the Ruling will become an important reference point for any organisation wishing to be categorised as charitable to access tax concessions. Care needs to be taken that fundraising doesn't jeopardise concessions.

Keep in mind that the Ruling is only the view of the ATO and not necessarily an accurate statement of the law.

In our view, the Ruling is inconsistent with the stated intention of Government that charities need to take responsibility for their own viability through fundraising.

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TR2005/22 Income Tax: Companies controlled by exempt entities

Some charities will have associated entities carrying out focused aspects of their work including managing property, investments or fund raising ventures. If these aspects are kept within the structure of the charitable entity and are ancillary to its main purpose, they will fall within the charitable purpose of the entity.

However if they are separately incorporated or operate separately in some other way, the Tax Office will examine them to see if they are, in themselves, charitable.

For example, the Ruling says that an investment arm simply investing the money of a charity and earning income for the charity may be regarded as charitable in itself but that an active business enterprise for the same purpose may not be charitable.

Organisations should look at each of their controlled entities to ensure that each stands on its own feet as charitable.

Again the Ruling ought not be taken as an accurate statement of the law but merely the view of the ATO and its interpretation of the law.

MT 2005/D1 The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number

MT2005/D1 is a rewrite of MT2000/1. The purpose of the Ruling is to provide assistance to entities to determine their entitlement to an Australian Business Number (ABN). There is helpful guidance on treatment of branches of non-profit entities as separate entities for GST purposes, discussion of treatment of Ministers of Religion and entitlements to ABN and a discussion as to whether charitable religious and other non-profit institutions are said to be carrying on an "enterprise".

The Ruling will be helpful to the not for profit sector in determining whether an entity is entitled to an ABN or whether an entity is required to register for GST.

The Ruling is still in draft and subject to Industry and Professional Comment and is not yet authoritative.

Murray Baird
Partner

Workplace Giving

In August 2005, the Commonwealth Department of Family and Community Services launched an initiative known as Workplace Giving Australia. Under this initiative, employees may make donations to deductible gift recipients ('DGRs') through their employers, by deductions directly from their salaries and forwarded on by their employers.

While such donations do not attract any additional tax concessions, it is open to employers to adjust the amount of PAYG tax withheld according to the donation made. This means that employees need not wait until their tax return before receiving the benefit of their tax deduction; however, it is up to the employer whether to go to the trouble of making such adjustment.

If you are a DGR, you should:

- approach employers to request that:
 - they set up a Workplace Giving program for their employees;
 - they include you on the list of DGRs to which their employees may make donations; and
- consider setting up a Workplace Giving program for your own employees.

To help you 'sell' the Workplace Giving program to employers, you can direct them to the guide 'How to set up a workplace giving program' located at <http://www.ato.gov.au/content/downloads/n9185-06-04.pdf>. You can also find out more about Workplace Giving at <http://www.partnerships.gov.au/> and at <http://www.ato.gov.au/businesses/content.asp?doc=/Content/36715.htm>.

We can assist you in putting the appropriate procedures in place for a Workplace Giving program, and answer any questions that you may have.

Nils Versemann
Senior Lawyer

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Charities & Motor Vehicle Trading

The Australian Taxation Office ("ATO") has quite an extensive library of Fact Sheets which can be of great assistance to charities. Recently an update to the "GST and Motor Vehicle Trading for Charities" Fact Sheet became available. Charities and not for profit bodies who trade in motor vehicles should have a look at the latest Fact Sheet on the ATO homepage and following the Non-Profit News Service prompts to for 2005/2006 to Number 0122.

The Fact Sheet is based on the application of the non-commercial rules under the *GST Act* on sales of motor vehicles. Importantly it makes clear that when a charity purchases a motor vehicle and uses its current vehicle as a trade in there are two transactions taking place that should be treated separately without offsetting the trade-in against the price of the vehicle purchased. The two transactions are:

- The purchase of the new motor vehicle; and
- The sale of the trade-in vehicle.

Where the non-commercial rules apply, charities and non-profit entities must treat the trade-in as GST-free. There is no choice as to whether you treat the trade-in as a taxable sale and issue a tax invoice to the dealer or not. Where the non-commercial rules apply the dealer is not entitled to a GST credit on a GST-free trade-in.

There are many helpful questions and answers on the Fact Sheet and certain hot tips. For example:

Question: When do I issue a tax invoice for a motor vehicle I trade in?

GST-free trade-ins

If you (meaning an endorsed charitable institution or gift deductible entity or government school or endorsed trustee of a charitable fund) and the dealer agree on a trade-in price that is less than 75% of the price you originally paid for the vehicle, you do not have to issue a tax invoice for the trade-in and the dealer is not entitled to claim a GST credit.

For record keeping purposes you may issue an invoice that clearly shows the trade-in does not include GST.

Handy hint

If you do not quote your Australian Business Number ("ABN") when you trade-in a motor vehicle, the dealer must withhold 48.5% of the value of the trade-in unless you can prove to the dealer that you are exempt from income tax.

There is also helpful information about selling at auction and about correcting mistakes in activity statements.

Tanya Coleman-Costello
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

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