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Editorial comment

Welcome to our first edition of the Not for Profit Briefing for 2011. We expect more change for the sector this year—see our articles on topics such as the composition of the Non Profit Sector Reform Council, the Victorian Associations Act changes, discrimination law and the revising of ATO Public Rulings.

The edition also contains information and reminders on issues such as private ancillary fund compliance, insolvent trading, refusing membership applications and disability service funding administration.

Suhanya Ponniah
Editor—Not for Profit Briefing
Lawyer

Non Profit Sector Reform

Non Profit Sector Reform Council

The Australian Government's Non Profit Sector Reform Council is now in place. The members have been announced by Minister for Social Inclusion, the Hon Tanya Plibersek MP. Establishment of the Council fulfils an election promise of the Government.

Further information about each of the members of the Council is available from the Department of Prime Minister and Cabinet [website](#).

The mandate of the Council is to support the Office for the Not-for-Profit Sector in its role to drive and coordinate the Government's agenda for reform of the not-for-profit sector.

The Council will provide advice on issues including:

- the scope of a national 'one-stop shop' regulator – its role, feasibility and structure;
- streamlining Commonwealth Government tendering and contracting processes for government funded NFPs; and
- harmonisation of fundraising and other Commonwealth, State and Territory laws.

The Council will also provide advice on the Productivity Commission's report on the sector and other reviews. It will also support the implementation of [The National Compact: working together](#).

New Regulator?

A scoping study for a national not-for-profit regulator [consultation paper](#) has been released by Treasury. The study seeks "initial views" to determine the role, functions, feasibility and design options for a 'one-stop shop' regulator. Implementation will be the subject of further studies in the future.

It covers a number of areas including:

- whether the regulator should be independent, or whether it may be part of the Australian Taxation Office ("ATO") or the Australian Securities and Investments Commission ("ASIC");

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Murray Baird, Chairman of Moores Legal and Head of Not for Profit Group.

The formation of a Not for Profit Group at Moores Legal grew from a conviction that the needs of the Not for Profit sector for legal and governance advice was best served by a dedicated team of lawyers focussing on the unique issues of the sector.

I think that this initiative coincided with a realisation by leaders in the sector that good governance required expert, timely and accountable professional advice.

We chose the description "Not for Profit" rather than charitable, third sector, community sector, philanthropic, etc. because we believed it reflected the breadth of the sector. It includes industry peak bodies, social clubs, schools, colleges, churches, welfare bodies, professional associations, cultural organisations, housing, health, science, and sport. I prefer to call them "for purpose" organisations but until it catches on we will stick to not for profit.

The themes of the NFP sector over the past decade have been increased compliance, registration, inquiries and change. As a specialist NFP group we have been able to allocate resources to keep abreast of the changes and often contribute our insights to the way change should occur. Sometimes we do this through submissions to Inquiries. We speak and write extensively on the issues. However I believe that our most effective contribution has been our involvement in leading cases where the courts have had opportunity to declare the law.

We believe that a critical mass of lawyers constantly working together on the challenging issues faced by the sector, will benefit all of our clients in the NFP sector.

I also trust that this regular Briefing will be a helpful resource for keeping up with emerging and recurring issues.

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- the scope of the regulator (eg whether it should be sector-wide, whether it should cover Commonwealth laws only);
- information collection by the regulator (what is the most efficient way to do it, and whether it should be publicly available);
- fundraising regulation (what role the regulator should play in this);
- how the regulator will be funded (whether the organisation should pay administrative fees);
- whether different legal forms should be treated differently (eg should charitable trusts be treated differently from charitable institutions?);
- whether the private ancillary fund guidelines should be adopted as a model to reform the regulation and governance of charitable trusts generally.

Moores Legal Comment

Moores Legal is pleased to see the Gillard Government progressing sector reform and believes that an independent regulator is necessary and appropriate.

Our submission to Treasury included the following:

- It is imperative that the regulator is independent and that a regulator within the ATO or ASIC **is not appropriate**;
- The regulator should be sector-wide, acting as the gateway to Commonwealth, State and Local Government exemptions;
- NFPs should be able to make one fundraising application to a national regulator, rather than dealing with multiple State and Territory regimes.
- The private ancillary fund guidelines **should not** be adopted as a model for charitable trust regulation generally. They are over-burdensome and can discourage private philanthropy. Their adoption would undermine the goals of the [The National Compact: working together](#).
- Different legal structures of charitable entity should not be treated differently. The current distinction drawn by the ATO between charitable funds and charitable institutions is inappropriate.



Elizabeth Turnour
Lawyer

Revision of ATO Public Rulings

The ATO publishes a set of Tax Rulings setting out its interpretation of the law, as well as its public rulings program.

Two rulings concerning charities, fringe benefits tax and income tax exemption are being updated in light of the 2008 and 2010 High Court cases of *Word Investments* and *Aid/Watch*, and the 2008 Federal Court decision of *Victorian Women Lawyers' Association*. Revised versions of Tax Rulings 2005/21 and TR 2005/22 are to be issued on 16 March 2011.

In addition, TR 96/8 which deals with school and college building funds is also due to be revised and issued on 20 April 2011.

These will be significant statements by the ATO of its position on key issues in Charity law and the sector will no doubt wish to comment on the drafts.

Suhanya Ponniah
Lawyer

Start/Stop for Equal Opportunity Act 2010

In 2010, the then Victorian Labor Government led by John Brumby enacted the *Equal Opportunity Act 2010* ("the 2010 Act"). It is due to replace the *Equal Opportunity Act 1995* ("the 1995 Act") from August 2011.

The changes to the 2010 Act are extensive, covering a number of areas. The changes to the provisions concerning religious organisations and religious beliefs are significant.

The 2010 Act:

- Elevates the right to equality by listing its protection and promotion as an Objective of the Act. This is a right that sometimes conflicts with the right to religious freedom, and its elevation is likely to lead the Courts to give a narrow interpretation to the religious exceptions contained in the Act.
- Narrows the exception that currently protects discrimination that is necessary to avoid injury to religious sensitivities. The 2010 Act requires the discrimination to be "reasonably necessary". We expect this to be interpreted to mean that the only discrimination protected under this provision is the discrimination that an objective person would think was necessary.
- Requires organisations wishing to rely on an exception (including a religious exception) to bear the burden of proof in establishing that they are entitled to an exemption (s 13).
- Changes the definitions of direct and indirect discrimination, with the effect of expanding the scope of the Act so that more acts or practices are capable of being found discriminatory.
- Limits the number of attributes that the religious exceptions apply to. For example, the exemptions no longer cover discrimination on the basis of age or race (ss6, 82(2)).
- Prohibiting discrimination by religious bodies in their employment practices unless the religious body can prove that the alleged discrimination is an "inherent requirement" of the position.
- Gives wider investigative powers to the Victorian Equal Opportunity and Human Rights Commission.

In our view, the cumulative effect of the provisions is to limit religious freedom.

Robert Clark, Attorney-General of Victoria, has recently announced that some of the changes introduced by the 2010 Act will be reversed on the grounds that they restrict religious freedom. Details on the changes are not yet available. We expect legislation to be introduced into the Parliament in May or June.

How will these announcements affect the decision in *Cobaw Community Health Service v Christian Youth Camps Ltd* ("Cobaw")? *Cobaw* was decided under the provisions of the 1995 Act. If the 2010 Act is reversed,

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Legislative Change Keeps Coming for Victorian Incorporated Associations

There is a queue of changes for associations that have not come into effect yet:

- We are still waiting for changes which were passed in 2009 and 2010 to become effective. The changes relate to:
 - Public Officer becoming “Secretary”
 - Duties of committee members;
 - Members’ rights;
 - Annual reporting requirements and audit thresholds; and
 - Allowing associations to trade.

More details are covered in our [fact sheet](#).

- New model rules and revised regulations are anticipated around the middle of the year.
- There are plans to rewrite the Associations Incorporation Act 1981 (Vic) later in the year to make it more user-friendly.

The plan is for all the changes to become effective on 1 December 2011. For associations who may be wondering what to do, no action is required yet but the proposed changes should be taken into account if your association is considering a revision of its rules. If possible, we recommend holding off on changes to rules until further information is available, probably in the second half of 2011.

Libby Klein
Senior Lawyer

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the position may be the same as when Cobaw was decided. However, *Cobaw* is subject to appeal.

This area of the law is therefore likely to face many changes in the coming months. Organisations who were considering reviewing their organisational policies should consider postponing that review until the position is clear.

We will comment in future Not for Profit briefings on the appeal and any amending legislation when it has been introduced into Parliament.

Elizabeth Turnour
Lawyer

Private Ancillary Funds

Trustees of Private Ancillary Funds (“PAFs”) need to get their act together by 2012 because time is running out to implement the legislative amendments made in 2009.

The new regime for PAFs, previously known as Prescribed Private Funds, commenced on 1 October 2009. Numerous changes have been made regarding the regulation and requirements of new funds and transitional rules apply to existing funds.

Guidelines were prepared for PAFs (“Guidelines”) and a model Trust Deed was subsequently released by the ATO. The Guidelines are not optional. They must be complied with.

Key Features

Some of the key features are as follows:

- In every financial year, a PAF is required to distribute to deductible gift recipients (“DGRs”) amounts equal to **at least 5% of the market value of its net assets** as at the end of the previous financial year.
- All new PAFs must have a **corporate trustee**—PAFs created before 30 September 2009 can retain individual trustees if they wish. A PAF must not acquire a **collectable asset**.
- A PAF may not carry on a **business**.
- A PAF must not borrow or maintain any existing **borrowings**.
- The ATO now has **full regulatory control** over PAFs. (Previously, a new PPF was approved first by the ATO, then the Federal Treasurer, who recommended to the Governor-General that it be “prescribed” as a PPF, hence the name.)
- The ATO has the power to **suspend or remove trustees** of PAFs that breach the Guidelines or other relevant Australian laws. (This was not previously the case).

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Victorian Disability Service Providers: Funding Administration

Since 2008, people with a disability have been eligible to receive an Individual Support Package ("ISP") which entitles them to "purchase" services from a range of disability service providers.

The funding of an ISP can be administered in one of three different ways, or a combination:

1. Through direct payments;
2. Through a financial intermediary;-
3. Through a disability service provider.

Option 2 involves appointing MOIRA Incorporated ("Moira"), a registered disability service provider, to administer the finances of the individual on their behalf. Moira is the State appointed financial intermediary service and as such the costs are borne by the Department of Human Services ("DHS").

Depending on the funding administration arrangement chosen by the individual (which they can change from time to time), there are a number of parties involved – the individual, often their administrator or guardian, Moira, other service providers and your organisation.

Taking a proactive approach by clearly stating the obligations of each party in a written contract will minimise the chances of a dispute, and ensure that you are promptly remunerated for your services. This is particularly relevant given that these arrangements are new to the sector. We would be happy to assist in drawing up such agreements.

Suhanya Ponniah
Lawyer

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- The Guidelines are now enforced through the imposition of **administrative penalties** (previously there was no penalty other than to prospectively remove the PPF status of a non-complying trust fund.)

Transitional Rules

Rules apply to existing funds that were PPFs on 30 September 2009. To summarise:

- They can retain individual **trustees** if they wish.
- Transitional **distribution rules** apply and require that the fund, as a minimum, must:
 - distribute during a financial year, 5% of each gift it received from the previous financial year; and
 - distribute its trust income within the financial year in which it is derived, unless otherwise allowed by the Commissioner of Taxation.
- If there is an **accumulation plan** in place, it can continue to act in accordance with it until the earliest of:
 - when the plan expires; or
 - when the Fund meets its target capital amount; or
 - the end of the 2013-2014 financial year; or
 - the start of a financial year for which the fund chooses not to apply the transitional rule.
- If the fund owned "**collectables**" it must have disposed of them by 1 October 2010. Generally the fund should not acquire collectables.
- If the fund has an existing **borrowing**, it may be maintained but its terms cannot be altered without the ATO's consent. Generally a PAF should not borrow funds or maintain an existing borrowing.
- Most importantly by 1 October 2012, the fund must amend its trust deed to comply with the Guidelines.

Trustees of PAFs are advised to be well-acquainted with the PAF Guidelines and seek advice if you have concerns about compliance.

By 1 October 2012, former PPFs will need to amend their trust deeds to bring them into line with the Guidelines. We would be happy to advise trustees regarding your specific fund.



Suhanya Ponniah
Lawyer

Duty to Prevent Insolvent Trading: A Timely Reminder

Regulatory Guide 217

In late July 2010 the Australian Securities and Investment Commission ("ASIC") released [Regulatory Guide 217](#) ("RG217") regarding a company director's duty to prevent insolvent trading. Although there are some concerns that RG217 overstates (or over simplifies) the obligations imposed on directors by legislation – section 588G of the Corporations Act 2001 (Cth) in particular – it provides a timely reminder about this duty, which applies to for-profit and not-for-profit organisations alike.

Section 588G

Section 588G of the Corporations Act 2001 (Cth) provides that a director may incur a civil penalty and/or commit a criminal offence if s/he fails to prevent the company from incurring a debt at a time when:

- the company is already insolvent; or
- by incurring the debt, or by incurring a range of debts including that debt, the company becomes insolvent –

and the director suspects, or a reasonable person in like circumstances would, on reasonable grounds, suspect, that:

- the company is insolvent; or
- by incurring the debt the company would become insolvent.

"Director" for these purposes includes an alternate director, a "de facto" director (a person who acts as a director, whether or not appointed as such) and, what is commonly called a "shadow" director (a person in accordance with whose instructions or wishes the directors are accustomed to act.)

Section 588H sets out a number of defences to a civil offence, taking into account the circumstances of each particular case, and the "reasonableness" of a director's action or inaction. There are no such defences to a criminal contravention, which is "strict liability".

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Refusing Membership Applications

If you are on the board or committee of an organisation, would you know what to do if you got flooded with membership applications three weeks before the Annual General Meeting?

Can membership applications be rejected?

Most organisations have a governing document, commonly called a "Constitution" or a "Statement of Purpose and Rules".

Sometimes the governing document will contain membership eligibility criteria. In other cases, anyone can apply.

The governing document usually allows the board or committee to consider membership applications and to advise the applicant whether they have been successful or not. By implication, this means that membership applications may be rejected.

On what basis can membership applications be rejected?

The board or committee is not obliged to grant membership to anyone who applies. Factors to consider include:

- any eligibility criteria in the governing document;
- any process in the governing document which is to be followed for dealing with membership applications;
- any policy it has adopted in relation to the criteria for membership; and
- anti-discrimination legislation where applicable.

The courts will not second guess your organisation's decision to reject a membership application unless your organisation is performing a role which might otherwise be carried out by the government, or unless your organisation is subject to anti-discrimination legislation.¹

For example, if it is necessary to be a member of your organisation in order to obtain a licence to engage in a particular type of business, this may be regarded as a "public function" and as a result a decision to reject a membership application may be reviewable by the courts. Otherwise, your

¹ Under the *Equal Opportunity Act 1995* (Vic), clubs which occupy Crown land or receive funding from State or local government, cannot discriminate in relation to membership matters except in certain circumstances. There may be changes to this legislation in 2011. If you have concerns, please speak with us

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It should be noted that the threshold test for what must be established is a "suspicion" of insolvency, rather than an "expectation" as was previously the case. Case law tells us that a suspicion is "more than a mere idle wondering", but rather a "positive feeling of actual apprehension or mistrust". The distinction is a fine one, and RG217 accurately states at paragraph 22:

"Whether a company is insolvent involves a consideration of complex legal and accounting issues. Directors need to obtain and take into account all relevant information about the company's financial position and should consider obtaining appropriate advice if they have reasonable grounds to suspect the company is in financial difficulty."

Section 588G and Incorporated Associations

Amendments to the legislation governing associations contained in the Associations Incorporation Amendment Bill 2010 (which is due to come into effect by December 2011) apply similar obligations to the members of an association's committee of management, who stand in the place of "directors" for these purposes.

Action Plan

RG217 sets out four "Key principles for directors" which provide a useful touchstone for all directors and committee members:

- remain informed
- investigate financial difficulties
- obtain advice
- act in a timely manner.

Moore's Legal would be pleased to provide advice to any directors and committee members who have concerns regarding these duties.



Fiona Thomas
Senior Lawyer

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organisation would be regarded as a "private" organisation (even if it is a "public company limited by guarantee!") and as such has discretion to reject applications as it sees fit.

Do we have to give reasons? Do we have to give the applicant a chance to be heard?

Most not for profit organisations would not have to give reasons for rejecting a membership application.

However, in a [recent decision](#) the Supreme Court of Victoria outlined three circumstances in which an organisation is required to give reasons, and to give the applicant a chance to be heard.

These circumstances are:

- where the organisation has a monopoly in relation to a profession or trade, such that it is necessary to be a member of the organisation in order to engage in that profession or trade;
- where a government bureaucrat's decision relating to a person is likely to be affected by whether the applicant's membership application has been accepted; and
- where the organisation conducts a public activity at a venue that is open to the public upon the payment of a fee, and the organisation wishes to refuse entry to a person. For example, [a member of the public who wants to go to the races is entitled to be given a reason if their entry is refused.](#)

Tips for deciding membership applications

- Know your organisation's rules and follow them.
- If you haven't already got a policy setting out when membership applications would be accepted or refused, consider developing one.
- Consider whether you fit into any of the three circumstances described above, and are therefore obliged to give reasons for rejecting a membership application, and to give applicants a chance to object.

When things get ugly

When controversy is brewing, a factional group may encourage lots of people to apply for membership in order to "stack" a members' meeting to get the outcome they desire. If you are on the board or committee, this is when you really need to know what you are doing. It may pay to do your homework now so that you know where you stand if you find yourself in those circumstances.



Libby Klein
Senior Lawyer

Tax Guide for Sporting Clubs

This month the ATO released a [guide](#) to assist non-profit sporting clubs to assess whether they are eligible for income tax exemption as a “society, association or club established for the encouragement of a game or sport”.

Eligible clubs will be able to self-assess for income tax exemption – that is, they do not have to formally apply to the ATO for such tax concessions as do charities.

Even if they do not meet the requirements, some of the income of sporting clubs is likely to be exempt under the mutuality principle. This guide also published by the ATO provides some information on this.

In Australia, sporting bodies are not characterised as charitable and so some of the concessions available to charities are not available to sporting bodies. However, some sports bodies have a real purpose of providing services to disadvantaged people, or conduct sport primarily to prevent disease or for educational purposes or as an expression of culture. If this is the case, they may be entitled to concessions beyond the usual sports regime.

Suhanya Ponniah
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 Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, 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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