

Corporate & Commercial Newsletter

April 2015

Holman Webb's Corporate and Commercial practice is dedicated to achieving commercially effective results for all our clients and that starts with a commitment to understanding each client business and the industry in which they operate.

The team provides a broad range of corporate and commercial legal advice (including mergers and acquisition, incorporation and management of corporations and other businesses, joint ventures, commercial agreements and corporate governance) and advises multi-national corporations, SMEs, start-ups, government and not-for-profit organisations.

We are delighted to announce we have recently been shortlisted as Australasian Lawyer – Law Firm of the Year (100 – 249 Lawyers) with the winner to be announced in May 2015.





The Importance of Cyber Security

By Tal Williams, Partner

One of the greatest fears of any business relates to the ability of hackers and ex-staff to obtain access to their computer systems, steal their intellectual property and cause significant commercial damage. I recently attended a conference in Washington on electronic communications and large parts of the sessions were dedicated to the issue of cyber security.

Presentations were given by the FBI, Homeland Security and CIA who all confirmed the prevalence of cyber-attacks. One notable point was that many attacks are not directed at the central systems of businesses. Hackers have found that these systems are often quite well protected by firewalls. The attacks, however, are directed at peripheral apparatus – laptops, mobile access devices and remote access computers. Hackers have found that these devices are far less protected and once infiltrated provide a clear and open line to the central business.

From a legal point of view businesses must ensure that they have in place strict policies in relation to the use of these peripheral devices to ensure that these devices are

as protected as their central systems. Things as simple as the length and strength of passwords have been found to be very important in deterring hackers, policed policies in relation to which machines are able to be utilised to obtain remote access, utilisation of both password and question based login access, for example, what was the name of your first pet are all found to have a significant impact upon accessibility to your systems.

In Australia the Australian Defence Signals Directorate has affirmed the utilisation for particular IT methodologies to prevent unauthorised access. It has compiled a list of over 30 actions. That list can be found at [http://www.asd.gov.au/publications/Mitigation Strategies 2014.pdf](http://www.asd.gov.au/publications/Mitigation_Strategies_2014.pdf).

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Proposed Short-Term Mobility Visa

By Venus Amoro-Njuguna,
Senior Associate



In response to the review of the skilled migration and temporary visa program, the Department of Immigration and Border Protection (DIBP) published a paper in December 2014 proposing a Short-Term Mobility Visa that would allow foreign workers entry into Australia for up to 12 months to perform specialised work, without a 457 skilled migration visa.

If implemented, these changes are likely to have a significant impact on employers. The new visas would not be subject to English language or skills requirements and employers would not be required to conduct labour market testing in order to show that there is no Australian worker who could fill the relevant position. The Short-Term Mobility Visa would replace the existing category 400 visa, which currently allows skilled or specialist entrants to work for up to six weeks.

It is anticipated that the program will free up temporary migration by creating a new set of visa subclasses for people coming in for less than a year by reducing red-tape. Under the current proposal, the Short-Term Mobility Visa will have the following key features:

- The visa could be granted for up to 12 months, depending on the work or activity to be undertaken;
- The visa allows for multiple entries into Australia;
- Applicants can apply in Australia or outside Australia;
- Employers would need to satisfy the Genuine Temporary Entry requirement;
- Applicants would need to meet health, character and security requirements; and
- Family members cannot be included on the same visa application. Family members would have to apply for their own visa if they intended to work or study in Australia.

Visa holders would be allowed to apply for subsequent visas such as permanent work visas where the work is considered ongoing.

Submissions on the DIBP paper closed at the end of January. A targeted stakeholder engagement will be held in March 2015 to develop the framework further. As regards the Short-Term Mobility Visa, the DIBP has indicated that further areas for investigation will address the potential scope of the visa subclass to reflect stakeholder feedback received during the developmental phase. An implementation paper is also due to be released in August or September 2015 which will provide details on a fully developed visa framework. The program is not set to commence until 1 July 2016.

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Current Developments in Charity Law

By Jonathan Casson, Partner

One of the roles of the ACNC is to provide guidance on its interpretation of the impact of changes in the law relating to charities. So far, the ACNC has issued three interpretation statements and has an exposure draft for another interpretation statement in train.

Despite the overview of the Office of the Register of Indigenous Corporations, charities relating to **Indigenous Organisations** may be registered and governed by the ACNC. The unique legal issues in indigenous matters include the recognition of indigenous disadvantage, the application of the public benefit test to indigenous organisations and the impact of the Charities Act 2013, which commenced on 1 January 2014.

The ACNC's attitude to indigenous charities is designed to complement the "Closing the Gap" strategy. The Interpretation Statement provides a useful guide to the way in which the ACNC will approach the question of relief of poverty generally, not just in respect of indigenous organisations.

Another Interpretation Statement deals with changes in what constitutes a Public Benevolent Institution. It arises out of the decision of the Federal Court in **The Hunger Project** (PBI). Prior to this decision it was generally thought that a charity must distribute aid directly to qualify as a PBI. The accepted view is now that the fact that such an institution does not itself directly give or provide that relief, but does so via related or associated entities, is no bar to it being a PBI. This is in stark contrast to the previous ATO Taxation Ruling 2003/5 which imposed a "directness" test. The Interpretation Statement provides a summary of the issues in the case and how the ACNC will apply the case when making decisions.

An exposure draft under consideration by the ACNC relates to **Health Promotion Charities**. This is defined as an *institution whose principal activity is to promote prevention or the control of diseases in human beings*. This is a statutory definition and the ACNC will interpret the words in their ordinary meaning.

To be a Health Promotion Charity the entity must satisfy all the elements of the definition. For example it must be an institution, its activity must be to promote the prevention or control of diseases in human beings, (as opposed to injury, accident or a general health condition or a symptom (unless such a symptom may, if untreated, may lead to a disease)).

The ACNC states that "promote" would extend to a charity that, for example, raises awareness about the benefits of immunisation.

In its first ruling for 2015 the ATO has issued TR 2015/1 dealing with special conditions for tax exempt entities. It focuses on:

- the need to comply with all substantive requirements in its governing rules;
- the application of income and assets solely for the purpose of the entity;
- what is meant by applying funds solely for the entity's purpose;
- a discussion of what is an ancillary purpose; and
- the manner in which the entity may accumulate income.

The ruling gives some interesting examples and can be found at

<http://law.ato.gov.au/atolaw/view.htm?docid=%22TXR%2FTR20151%2FNAT%2FATO%2F00001%22>

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Insurance and Commercial Contracts – Named Insured v Interested party – what does it mean?

by Sandra Ivanovic, Senior Associate

In commercial negotiations, a principal will often insist on being named as an insured on the insurance policy of the contractor. Negotiation will then focus on whether the principal should be a 'named insured', included as an 'interested beneficiary' or simply 'noted' on the policy. The contractor will usually prefer to have the principal's interest merely 'noted' on its policy. What does this mean for the principal and how is it different to being named as an insured or a beneficiary?

Named Insured: Being a named insured means that you are a party to the insurance contract, can give and receive notices and make a claim and enforce the policy directly against the insurer.

Third party beneficiary: The key differences between being named an insured or being listed as an interested party is that the interested party is not a party to the insurance contract and cannot receive and give notices under the policy. But this does not impact on the interested party's right to recover under the policy. The right of a person specified as an interested party to claim and enforce the policy (as a third party beneficiary) is enshrined in both common law and statute.

The Insurance Contracts Act 1984 (Cth) (ICA) provides a person who is not a party to the insurance contract but is specified as a third party beneficiary, with a right of recovery in accordance with the insurance contract.

The High Court in the 1988 case of *Trident Insurance v McNiece Bros* held that in certain circumstances non-contracting parties who were named as beneficiaries in policies were entitled to be indemnified in respect of losses covered by the policy. While the common law is now only relevant to contracts of insurance which are not regulated by the ICA, it remains a guide for the interpretation of the ICA.

Noted: A person whose interests are 'noted' on a policy is not necessarily entitled to claim under that policy. The notation serves to put the insurer on notice that someone else has an insurable interest. The precise wording and surrounding circumstances become relevant in determining whether the insurance provides a benefit to a party merely "noted" on the policy.

Knowing the differences when negotiating is essential to ensure adequate protection of your interests.

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Beware the Watchdog! The ACCC's targets for 2015

by Corinne Attard, Partner

On 19 February 2015 ACCC Chairman Mr Rod Sims outlined the regulator's compliance and enforcement priorities for 2015.

For industries such as franchising which are subject to specific ACCC regulation, this is always of interest but all companies operating businesses in Australia are subject to the Competition and Consumer Act 2010 (Act) and should understand the areas on which the ACCC elects to focus to ensure that they have their compliance house in order.

The four enduring priorities of the ACCC remain:

- cartel conduct;
- anti-competitive agreements and practices;
- misuse of market power; and
- product safety.

To quote Mr. Sims "The detriment caused to both consumers and competition means these forms of conduct will always be in our sights."

Conduct involving pricing and dealings with competitors and suppliers all have the potential to fall foul of the Act's provisions and can lead to enforcement action by the ACCC.

The new additional priority areas for 2015 are as follows:

1. Medical and health sector

The focus will include anti-competitive conduct such as attempts to limit access to products, patients, procedures or facilities and allegations of unconscionable conduct and misleading and deceptive conduct by medical professionals.

2. Stronger Enforcement of Industry Codes

On 1 January 2015 the ACCC received new powers to enforce the mandatory Franchising Code of Conduct (Franchising Code) by the issue of infringement notices of \$8,500 for companies (\$1,700 for individuals and other



entities) where the ACCC has reason to believe there has been a contravention of the Franchising Code.

For serious breaches of certain Franchising Code provisions it can seek penalties of up to \$51,000 from the Court.

In addition a new Code of Conduct has just been introduced for the grocery sector, the *Food and Grocery Code of Conduct*. Like the Franchising Code it requires the industry participants to act in good faith, and provides a dispute resolution process. It also sets out minimum standards and prohibits certain conduct and provisions in supply arrangements.

A retailer or wholesaler must sign up for the new Code to be bound but suppliers are not required to sign up to the Code. They will be covered by the Code whenever they deal with a retailer or wholesaler that has agreed to be bound by the Code.

3. Online businesses

For 2015, the ACCC will concentrate on "emerging systemic consumer issues in the online marketplace" such as significant delays by online businesses in addressing consumer complaints.

4. Highly concentrated sectors

Competition and consumer issues in highly concentrated sectors such as the fuel and supermarket sectors will remain a priority.

5. Truth in advertising

Misleading advertising claims will be a target particularly if they are made by large businesses with the potential to result in significant consumer detriment, or where the conduct is likely to become widespread if the ACCC does not intervene.

...and the rest

The remaining ACCC priorities for 2015 are carbon tax repeal to ensure the full pass through of the carbon tax removal, scam disruption, particularly dating and romance relationship scams, and conduct affecting vulnerable consumers such as indigenous consumers, older consumers, and consumers who are newly arrived in Australia.

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Update on Director's Duties in the Not-for-profit sector

by Alison Choy Flannigan,

Partner

Introduction

Directors and officers of Australian companies which are incorporated under the *Corporations Act 2001 (Cth)* (**Corporations Act**) and which are also charities registered under the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (**ACNC Act**) owe a number of responsibilities and duties. This article is a very brief summary of their duties.

What duties apply?

Directors duties under Governance Standard 5 of the *Australian Charities and Not-for-Profits Commission Regulation 2015 (Commonwealth)* (**ACNC Regulation**) passed under the ACNC Act currently apply to directors of not-for-profit charities which are registered with the ACNC which are not Commonwealth companies or subsidiaries of Commonwealth authorities.

Part 1.6 of the Corporations Act states that certain sections of the Corporations Act do not apply to those charities, including sections 180 to 183 (directors duties) and section 185, to the extent that it relates to 180 to 183.

Note that some provisions of the Corporations Act still apply to charities, including some criminal offences.

Please note:

- Many of the duties of directors in the Corporations Act are similar to duties in the Governance Standard 5;
- The Commonwealth Government has announced that it will abolish the ACNC, the repealing legislation has not yet been passed¹; and
- Directors owe similar obligations in equity and common law.

Therefore, taking this all into consideration, we recommend that it would be prudent for directors and officers of charities to be mindful of directors duties both under the Corporations Act and Governance Standard 5.

Who is a “responsible entity”?

The ACNC Act refers to “responsible entity” of a “registered entity”. A “responsible entity” of a company which is registered under the ACNC Act includes a director of that company, a person who performs the duties of director, and a member of the committee of management of the unincorporated association, regardless of the name of the position or whether or not he or she is validly appointed or duly authorized to act. If the registered entity is a trust, the responsible entity is a director of the corporate trustee.

Governance Standard 5

Governance Standard 5 requires a “registered entity” to take reasonable steps to ensure that its “responsible entities” (including directors) are subject to, and comply with, the following duties:

- to exercise the director’s powers and discharge the director’s duties with the degree of care and diligence that a reasonable individual would exercise if they were a director of the company;
- to act in good faith in the company’s best interests, and to further the purposes of the registered entity;
- not to misuse the director’s position;
- not to misuse information obtained in the performance of the director’s duties as a director of the company;
- to disclose perceived or actual material conflicts of interest of the director. A perceived or actual material conflict of interest that must be disclosed includes a related party transaction;
- to ensure that the company’s financial affairs are managed in a responsible manner; and
- not to allow the company to operate while insolvent.

1. *Australian Charities and Not-for-Profits Commission (Repeal) (No1) Bill 2014 (Cth)*.

Protections under Governance Standard 5

There are four areas of protection under the Governance Standard.

Protection 1

(1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:

- (a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
- (b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual's professional or expert competence; or
- (c) another responsible entity in relation to matters within their authority or area of responsibility; or
- (d) an authorised committee of responsible entities that does not include the responsible entity.

(2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity's knowledge of the registered entity and the complexity of the structure and operations of the registered entity.

Protection 2

A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:

- (a) the responsible entity makes the decision in good faith for a proper purpose;
- (b) the responsible entity does not have a material personal interest in the subject matter of the decision;

- (c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate;
- (d) the responsible entity rationally believes that the decision is in the best interests of the registered entity.

Protection 3

A responsible entity meets this protection if:

- (a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
- (b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.

Protection 4

This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.

Further information

Please note that this briefing paper is up to date as of 8 April 2015 (the date of preparation). Directors and officers must be mindful to keep up to date with changes to legislation and the common law.

Further information is available at:

http://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds_overview.aspx?hkey=456b1d22-8869-4ad0-a0cd-48607244216e

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MEET THE TEAM



Venus Amoro-Njuguna

Venus has extensive experience advising clients in relation to corporate, regulatory and transactional matters, including the restructure of corporate groups, the sale or acquisition of shares and businesses, corporate governance and competition and consumer matters. Venus has acted for a range of clients providing advice on corporate and commercial contract preparation and negotiation, the protection and commercialisation of intellectual property, due diligence and transaction completion processes.

Venus complements her corporate and commercial work with close involvement with the firm's not-for-profit and charity clients, providing advice for membership and constitutional issues, structuring and re-structuring and tax status.



Sandra Ivanovic

Sandra is a Senior Associate in the Holman Webb Health, Aged Care and Life Sciences Team. Previously she was a senior commercial lawyer with the NSW Ministry of Health where she gained in depth experience and an understanding of the health industry. With over eight years of commercial and regulatory legal experience within the public and private sector Sandra has extensive corporate and commercial knowledge with a focus on the health industry. Her public sector experience has also provided Sandra with invaluable knowledge of how the Government sector operates and a deep understanding for the need to strike a balance between commercial and policy considerations in providing legal advice.

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