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Update Summary

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NOT-FOR-PROFIT BEST PRACTICE MANUAL

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UPDATED COMMENTARY

Summary for NFP update 2 of 2023

In this update our guest author, Kate Bonney, has reviewed and updated Chapter 50 addressing Defamation.

Introduction to defamation

The author's opening comments are worth noting that, modes of media including the social media space "creates an unmatched level of vulnerability and exposure to public scrutiny, opening the floodgate for potential defamation claims and damage to the reputation of NFPs that may be difficult to repair". See [50.1.101].

Defamation law in Australia

It is noted that, change to defamation law in Australia took effect from 1 July 2021 in Victoria, New South Wales, South Australia and Queensland under the Model Defamation Amendment Provisions 2020 with the remaining jurisdictions subsequently making similar amendments. See [50.1.201].

Recipient of publications - social media and liability

Given the plethora of cases in relation to social media defamation, NFPs should keep up to date with legal developments and remain informed of current cases, relevant risks, and implications. In particular, following the High Court decision of *Trkulja v Google LLC* (2018) 263 CLR 149; 92 ALJR 619; [2018] HCA 25, the author suggests NFPs should regularly monitor searches for their organisation which may connect them to other organisations and persons.

Further, defamation laws will continue to develop to align with current internet and social media usage following the landmark decisions of *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767; [2021] HCA 27 and *Google LLC v Deferos* (2022) 96 ALJR 766; [2022] HCA 27. Following Stage 1 of the amendments to the model provisions implemented from 1 July 2021, the Stage 2 provisions were approved on 9 December 2022 and are anticipated to commence on 1 January 2024. See [50.1.303].

Statutory defences

Publication of matter concerning issue of public interest

It is a defence to the publication of defamatory matter if the publisher can prove that the matter concerned an issue of public interest and the defendant reasonably believed that the publication of the matter was in the public interest.

In determining whether this defence is established the court may consider the following factors as part of the circumstances of a case:

- (a) the seriousness of any defamatory imputation;
- (b) the extent to which the matter published distinguishes suspicions, allegations and proven facts;
- (c) the sources of the information and whether there is good reason to keep the source confidential;
- (d) the steps taken to verify the information in the matter published; and
- (e) the importance of freedom of expression. See [50.1.708].

Qualified privilege

The qualified privilege defence was modified by the 2021 amendments including the list of factors in determining whether the conduct of a defendant in publishing matter about a person is reasonable in the circumstances. These factors now include the following:

1. the seriousness of the defamatory imputation published;
2. the extent to which the published matter distinguishes between suspicions, allegations and proven facts;
3. **the nature of the defendant's business environment;**
4. whether it was appropriate for the matter to be published quickly;
5. any other steps taken to verify the information that was published. See [50.1.709].

Scientific or academic peer review

It is now a new defence to the publication of defamatory material, following the 2021 defamation law amendments, if a defendant can prove that a matter was published either in an academic or scientific journal, if the matter relates to a scientific or academic issue, or if the matter has been independently reviewed for scientific or academic publication. See [50.1.710].

Damages

The maximum amount of damages for non-economic loss that may be awarded is \$250,000, or any other amount adjusted in accordance with the relevant legislative sections of the uniform Acts in each of the jurisdictions from time to time. Of note, the legislation states that only in a most serious case should the maximum amount be awarded. See [50.1.901].

Recent Developments

Sunsubscriber's attention is also directed to the following recent developments which have as yet to be incorporated into the relevant commentary in the work.

Federal taxation

Reporting requirements to self-assess income tax exemption

The Australian Taxation Office has advised as follows:

On 11 May 2021, the Australian Government announced changes to the administration of NFP entities that self-assess as income tax exempt. This was announced as part of the 2021-2022 Federal Budget.

The changes require non-charitable NFPs with an active Australian business number (ABN) to lodge an annual self-review return, to self-assess as eligible for income tax exemption.

The annual reporting requirement came into effect from 1 July 2023 and is designed to enhance transparency and integrity in the system, by ensuring only eligible NFPs access income tax exemption.

For further information please refer to Self-review return requirement | Australian Taxation Office (ato.gov.au);

Agreement reached on reform of charitable fundraising laws

On 16 February 2023, Dr Andrew Leigh Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment, together with Danny Pearson Victorian Minister for Consumer Affairs, advised an agreement had been reached on reform of charitable fundraising laws.

Consequently, when conducting fundraising activities, charitable organisations must ensure that their employees, volunteers, contractors and anyone else who they engage or arrange to raise funds on their behalf comply with the new National Fundraising Principles. See [Agreement reached on reform of charitable fundraising laws | Treasury Ministers](#)

Author Derek Mortimer has updated his chapters throughout the work and significant amendments are referred to below.

Before selecting a structure: issues to consider – Overview

It is noted that there is a surprising lack of a singular definition of the term “not for profit”. Depending on circumstances, attention may need to be paid to the “not secure pecuniary profit for members” and “winding up” provisions for associations incorporated under state association legislation, the “no distribution of dividend” provision in the Corporations legislation for companies limited by guarantee, and the “apply its income and assets for the purposes for which it is established” provisions for certain income tax exempt entities under s 50-50 of the *Income Tax Assessment Act 1997* (amongst other legislation and case law). See [1.1.100].

Impact of taxing statutes

Associations incorporated in Queensland should note changes effective from 1 July 2023 and 1 July 2024 regarding financial reporting thresholds, related party transactions, an internal grievance procedure and winding up provisions for associations that are registered as a charity and have deductible gift recipient endorsement. See [1.1.107].

Impact of the Australian Charities and Not-for-profits Commission Act 2012 (Cth)

The author notes that there has been litigation to determine if the arrangements for distribution of mining royalties create charitable trusts in favour of a particular indigenous group or alternatively whether the trusts created are more in the form of a private discretionary trust: *Adnyamathanha Traditional Lands Association v Rangelea Holdings Pty Ltd* [2023] SASC 51. See [1.1.455].

Land tax

The Victorian State Revenue Office has issued Ruling - LTA-009 in relation to charitable exemptions, that addresses the new term “and occupied” at s 74. The point here is that regard must also be had to revenue rulings, as well as the language of the legislation. See [5.2.104].

Internal disputes

There are examples of courts appointing an “independent chair” or an “administrator” to preside over processes to restore governance. See [55.1.110].

Costs

Damages may be awarded for a breach of natural justice or excess of power by an incorporated club or association, on the basis of damages for breach of the contract between the members and the association founded on its constitution: *Rose v Boxing NSW Inc* [2007] NSWSC 20, cited in *Benson v Ortho-Bionomy Australia Ltd* [2023] NSWSC 687. See [55.1.140].

Constitutional construction

The author has reviewed two recent cases where the courts have considered examples of constitutional interpretation of membership, namely *Grass v New South Wales Chinese Tennis Association Inc* [2023] NSWSC 438 and *Bejawn v The Sikh Association of Western Australia Inc* [2023] WASC 152. See [55.1.317].

Trustees standing to vary trust terms or seek judicial approval for a transaction and cy-pres schemes

Trustees have standing to apply to a court to vary a charitable trusts' terms where it is "expedient" to do so and standing may also be conferred under state Charities Acts such as s 7L of the *Charities Act 1978* (Vic). The application of s 7L was considered in *St Hilda's College Ltd v Uniting Church in Australia Property Trust (Victoria)* [2023] VSC 462.

The difference between a "cy-pres scheme" and an "administrative scheme" was explained by the court in *Northern NSW Helicopter Rescue Service Ltd v Attorney General (NSW)* [2023] NSWSC 515. Here, the court applied s 9 of the *Charitable Trusts Act 1993* (NSW) which they found has a wider scope than the "impossible or impractical to carry out the objects" requirements of a cy-pres scheme. For further judicial explanation of the difference between an "administrative scheme" and a "cy-pres scheme" the author points to *Corish v Attorney-General's Department (NSW)* [2006] NSWSC 1219; and for variation of a cy-pres scheme, *Corporation of the Trustees of the Roman Catholic Queensland Regional Seminary v Attorney-General (Qld)* (2020) 19 ASTLR 227; [2020] QSC 67. See [55.1.815].

Restructuring a not-for-profit organisation

The author confirms that care is needed to identify contracts and leases held by one entity that may not "carry over" due to a restructure. This should not be an issue with "conversion" processes which under the relevant law accept that the identity of the entity does not change despite a change in jurisdiction. However, other types of restructures, such as change of affiliation, or transfer of assets to another entity and windup do not have the benefit of that statutory protection. See [63.1.101].

Other restructures – Co-operatives and generally

New commentary addresses the relevant sections of the *Co-operatives National Law 2013* (CNL) which are Pt 1.4 (Corporations legislation), ss 248, 249, 378, 403, 404 and 409.

Importantly, s 409 CNL confirms that: "When a co-operative transfers to a new body, the corporation constituted by the new body is taken to be the same entity as the corporation constituted by the co-operative." See [63.1.1301].

