



DLA PHILLIPS FOX

EVERYTHING MATTERS

# VHA Tax Status Forum

Options

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*Reggio Calabria Club*

*Wednesday 23 April 2008*

# VHA Tax Status Forum

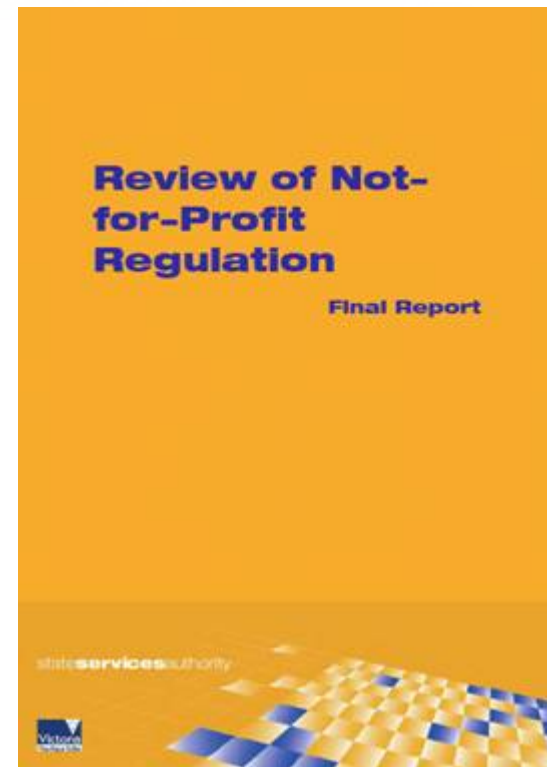
Options

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# OPTION 1 - MAINTAIN STATUS QUO

This will allow DHS to review how it wishes to relate to CHCs in the context of the State Services Authority Review of Not-for-Profit Regulation and allow development of robust funding and service templates



# OPTION 1 - MAINTAIN STATUS QUO

## What does this mean?

- Continue as “declared” CHCs under s 45 of the HSA
- Remain as incorporated associations or become companies limited by guarantee
- Remove controls offensive to ATO

# OPTION 1 - MAINTAIN STATUS QUO

## How is this achieved?

- Exercise exemption power under s 11 of Health Services Act (HSA)

## Health Services Act 1988

### Section 11 – Exemptions

- (1) The Governor in Council, by Order published in the Government Gazette, may declare that any provisions of Part 3 or Part 4 specified in the Order do not have effect in relation to a specified person or agency or class of person or agency.
- (1A)...
- (2) An Order under this section is subject to such terms and conditions (if any) as are specified in the Order.
- (3) An Order under this section has effect according to its tenor.
- (4) A person to whom an Order under this section applies must comply with the terms and conditions (if any) to which the Order is subject.

# OPTION 1 - MAINTAIN STATUS QUO



- Order would state that the following sections in Part 3 of the HSA do not have effect in relation to the CHC class of agency

# OPTION 1 - MAINTAIN STATUS QUO

## Health Services Act 1988

### Section 24 - Rules of registered funded agency

- (1) A registered funded agency must not—
  - (a) change its name; or
  - (b) change its objects or purposes; or
  - (c) amend or alter its constitution; or
  - (d) make, amend or alter its by-laws—

without the approval in writing of the Secretary.

# OPTION 1 - MAINTAIN STATUS QUO

## Health Services Act 1988

### Section 24 - Rules of registered funded agency...

- (2) If the Secretary directs a registered funded agency to amend or alter its constitution, objects, purposes or by-laws or make by-laws with respect to—
- (a) the management of the agency; or
  - (b) the provision of services by the agency; or
  - (c) the election of committees or office bearers of the agency; or
  - (d) except in the case of an agency to which Division 7 applies, the auditing of financial statements of the agency; or
  - (e) the disposition of any surplus assets on the dissolution of the agency; or
  - (f) ...
  - (fa)...
  - (g) in the case of a community health centre or other agency registered under Division 2, the keeping of accounts and records, the qualifications of auditors and reporting to the Minister—
- the agency must amend or alter its constitution, objects or purposes or by-laws or make by-laws accordingly.

# OPTION 1 - MAINTAIN STATUS QUO

## **Health Services Act 1988**

### **Section 50 - Resignation and removal**

- (1) ...
- (2) ...
- (3) The Governor in Council, on the recommendation of the Minister, may remove a member of a board from office, whether the member was appointed, elected or co-opted to that office.

# OPTION 1 - MAINTAIN STATUS QUO

## Health Services Act 1988

### Section 62 – Closure

- (1) If the Minister proposes that a registered funded agency should be closed, the Minister must cause a report of the proposal to be prepared and made available to persons who request it.
- (2) ...
- (3) ...
- (4) ...
- (5) The Governor in Council, on the recommendation of the Minister, may by Order published in the Government Gazette direct that the registered funded agency be closed on and after the date fixed in the Order.
- (6) ...
- (7) ...

# OPTION 1 - MAINTAIN STATUS QUO

## Health Services Act 1988

### Section 65 - Governor in Council may order amalgamation

- (1) The Governor in Council, on the recommendation of the Minister made after receiving advice from the Secretary under section 64(6) or section 64A, may by Order published in the Government Gazette direct that two or more registered funded agencies be amalgamated.
- (2) ...
- (3) ...
- (4) An Order under subsection (1) must declare the new registered funded agency to be either a public hospital or an incorporated association if the Order relates to the amalgamation of two or more agencies all of which are agencies of any of the following kinds—
  - (a) a public hospital;
  - (b) an incorporated association under the **Associations Incorporation Act 1981**;
  - (c) a company within the meaning of the Corporations Act that is taken to be registered in Victoria; or
  - (d) a denominational hospital referred to in section 64A that is a body corporate.

# OPTION 1 - MAINTAIN STATUS QUO

## What is the effect?

Status quo maintained to enable DHS to consider whether to:

- amend HSA;
- “cut loose” all CHCS (option 2) and prepare a rigorous funding agreement that encompasses only necessary regulatory mechanisms including geographical limits if necessary.

This means:

- no forcible amalgamation with hospitals
- no closure
- no arbitrary removal of board or board members
- no control over rules

but keeps all other regulatory controls (Freedom of Information Act, Ombudsman Act, Whistleblowers Act)

## What does this mean?

- Remain as incorporated association or move to company limited by guarantee
- Remove all controls in the HSA including those offensive to the ATO

# OPTION 2 – “UNDECLARE” CHCs

## How is this achieved?

- “Undeclare” by notice published in the Government Gazette

# OPTION 2 – “UNDECLARE” CHCs

## Health Services Act 1988 Section 45 - Community health centres

- (1) If the Secretary is satisfied—
  - (a) that an agency registered under Division 2 is an agency that serves a particular area; and
  - (b) that in the circumstances it is appropriate so to do—  
the Secretary may, by notice published in the Government Gazette, declare—
    - (c) the agency to be a community health centre; and
    - (d) the area specified in the notice to be the area served by the community health centre.
- (2) The Secretary may, by notice published in the Government Gazette—
  - (a) after consultation with a community health centre, vary the area specified to be the area served by the centre; or
  - (b) revoke the declaration of an agency as a community health centre.**

# OPTION 2 – “UNDECLARE” CHCs

## What is the effect?

- **CHCs no longer regulated by or subject to HSA**
- **Confidentiality provisions in s 141 would no longer apply**
- **Freedom of Information Act might not apply (would need to mention individual agencies)**
- **Health Records Act would apply**
- **Whistleblowers Act probably not applicable**

# VHA Tax Status Forum

Introduction to Incorporated Associations and  
Companies Limited By Guarantee

Alastair Macphee, Special Counsel

*Reggio Calabria Club  
Wednesday 23 April 2008*

# About today's presentation



- Special Counsel in Corporate Team at DLA PF.
- Purpose of today's presentation
- Key messages
  1. IA's and CLG's are very similar structures.
  2. No particular concerns about transition, provided you understand the terrain beforehand and act accordingly.
  3. Pre-transition due diligence enquiries.

# What do IA's and CLG's have in common?

- Separate legal entity
- Membership
  - What does it mean to be a “member” of a NFP?
  - Classes of membership
  - Existing membership structure

# What do IA's and CLG's have in common?

- Governing body
  - “Committee of management” vs “Board”
  - Who has the power to cause the entity to act?
  - Delegation
  - Simple model of corporate governance
  - Typical offices
  - Appointment and removal

# What do IA's and CLG's have in common?

- Sources of rules
  - IA: Rules, Statement of Purposes, *Associations Incorporation Act 1981* (Vic), case law
  - CLG: Constitution/Memorandum and Articles of Association, *Corporations Act 2001* (Cth), case law
  - Similarities
  - Advantage of CLG structure – greater legal certainty

# What do IA's and CLG's have in common?

- Reporting to the members and regulator
  - AGM once every year, within 5 months of end of financial year
  - IA's "annual statement" vs CLG's "annual company statement" and preparation and lodgement of financial reports
- Entry into contracts
  - Use of seal
- Tax concessions
- The current climate: heightened focus on governance

# Key differences between IA's and CLG's

- Regulator and applicable legislation
  - IA: *Associations Incorporation Act*, Consumer Affairs
  - CLG: *Corporations Act*, ASIC
- Case law
- Liability of members
- Duties of committee members vs duties of directors and other officers
- Audit and reporting obligations

# IA: Duties of committee members

- Key duties (sections 29A to 29C):
  - Improper use of information
  - Improper use of position
  - Direct or indirect pecuniary interest in contract
- Duties imposed on IA itself
  - Section 30A: maintain adequate and accurate accounting records of financial transactions
  - Section 30B: audit of accounts
- Some specific obligations of “public officer”
- Other duties (fiduciary duties)

# CLG: duties of directors (and officers)

- Threshold issue: statutory duties can extend to “officers”
- Sources of duties:
  - General law duties (fiduciary and common law duties)
  - *Corporations Act* duties
  - *Income Tax Assessment Act* and other Tax Acts
  - Other State and Commonwealth legislation

# CLG: duties of directors (and officers)

- Fiduciary duties:
  - Act in good faith in the best interests of the company
  - Exercise powers for proper purpose
  - Not fetter own future discretions (ie retain discretions)
  - Avoid conflicts of interest and conflicts of duty
  - No unauthorised application of company's property
  - Account to company for unauthorised profits made
  - No diversion or exploitation of business opportunities

# CLG: duties of directors (and officers)

- Common law duties
  - Duty to exercise care, skill and diligence
  - Duty to act lawfully
  - Duty not to prejudice creditor's interests

# CLG: duties of directors (and officers)

- *Corporations Act* duties (officers):
  - Act with care and diligence
  - Act in good faith, in the best interests of the company and for a proper purpose
  - Improper use of position
  - Improper use of information
  - Duty to disclose “material personal interests”
    - Restrictions on being present and voting

# CLG: duties of directors (and officers)

- Duty to prevent insolvent trading
  - When can a director be held personally liable?
  - When does “insolvent trading” occur?
  - Defences
  - This liability can arise in other ways
    - Failure to pay tax to Commissioner of Taxation
    - Failure to pay employment debts
  - Key message

# CLG: duties of directors (and officers)

- “Related party transactions” – member approval required
- Duties imposed on company secretary
- Duties imposed on public officer
- Reliance on information and advice provided by others
- Delegation of powers
  - How to delegate
  - Responsibility for actions of delegate

# CLG: duties of directors (and officers)

- Personal liability of directors and senior management under other legislation:
  - *Trade Practices Act 1974* (Cth)
  - Anti-discrimination legislation
  - Occupational health and safety legislation
  - Environmental legislation

# IA: reporting and audit requirements

- Maintain adequate and accurate accounting records of financial transactions
- “Prescribed associations” must have accounts audited
  - Annual gross revenue > \$200,000; or
  - Assets > \$500,000

# CLG: reporting and audit requirements

- CLG must keep written financial records that:
  - Correctly record and explain its transactions and financial position and performance; and
  - Would enable true and fair financial statements to be prepared (section 286(1)).
- Prepare “financial reports” (section 292)
  - Lodge with ASIC within 4 months of end of financial year
  - Reporting to members (financial report, directors' report and auditor's report on the financial report)
  - Obligations under funding arrangements?

# CLG: reporting and audit requirements

- “Financial reports” generally consist of:
  - Balance Sheet as at the end of the year
  - Income statement at the end of the year
  - Statement of Cash Flows for the year
  - Statement of Changes in Equity/Statement of Recognised Income and Expense
  - Notes to Financial Statement
  - Directors' declaration
  - Directors' report, including the auditor's independence declaration
  - Auditor's report
- Directors' duties re the company's financial records

# Some other things to consider

1. Protection of directors and other officers
  - Directors' and Officers' Insurance (eg VMIA policy)
  - Indemnity, Insurance and Access arrangements
  - Key provisions in Constitution
  - Training/induction for initial and subsequent directors?
2. Pre-transition due diligence enquiries
  - Changes to reporting/audit/compliance/oversight arrangements (internal and external)
  - Impact on key contracts (leases, employment, funding)
  - What do we need to do prior to transitioning?

# Closing

- Any questions?



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# VHA Tax Status Forum

Health Service Integration

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Some CHCs have expressed concerns as to whether they are sufficiently large to be viable under changed conditions.

- amalgamation with other CHCs (or other agencies) which are incorporated associations is an option under s 31 of AIA
- Voluntary amalgamation with public hospitals is an option under s 64A to the extent that a CHC remains declared and is a registered funded agency.



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# VHA Tax Status Forum

Multi-Purpose Model

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# Multi-Purpose Services (MPS) Model

- Not an alternative for maintaining a higher cap as MPSs are considered to be public hospitals and their higher cap was lowered and they received transition funding until 31 March 2008
- If a lower cap is accepted, can a CHC become an MPS?

## Health Services Act 1988

### Section 115C - Objects and functions of multi purpose services

- (1) The objects of a multi purpose service are as approved for the time being by the board of the multi purpose service.
- (2) The functions of a multi purpose service are the provision of any or a combination of the following—
  - (a) public hospital services;
  - (b) health services;
  - (c) aged care services;
  - (d) community care services.

# Multi-Purpose Services (MPS) Model

- However, the concept of an MPS is stated by DHS:

*The aim of the MPS program is to improve provision of services in small rural and remote areas by simplifying funding and accountability mechanisms and by providing a more flexible, co-ordinated and cost-effective framework for service delivery. The concept involves pooling of State and Commonwealth program funds for health and aged care services. This allows a community to reconfigure services to better meet health needs and to provide staff with flexible work setting options across a range of services.*

*The amalgamation of acute, aged care, HACC and community health services gives MPS agencies considerable flexibility in choosing service delivery mechanisms appropriate to local circumstances. Monies provided can be pooled then allocated to specific service types based on local community need.*

# Multi-Purpose Services (MPS) Model

- While not ruling this option out, it is unlikely that existing rural CHCs would be rural and remote and whether DOHA and DHS would agree to altering their status.
- Cannot be totally ruled out but not a great option.



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