

Transition to “PHN land”

- a little bit of law to remember on
the journey

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Let's face reality

- It's a political game not a legal game – decision has been made
 - winning a court case or getting judicial review might be fun, but won't win friends and probably expensive
 - but don't rule out a dispute over the PHN RFT process
 - Cth does have the right to terminate your ML funding contract – but don't give them another reason to do so

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But you can make it harder....

- Use some of the tools available
 - Corporations Act and risk of insolvency
 - Fair Work Act and need to consult, provide notice and may be pay redundancies
 - Subcontractor and partnership notices and consultation
 - Professional and ethical obligations to clients and community
 - Dispute resolution clause (pretty limited)

Does it have to be a winding up?

- ❑ Change name and now are the PHN!
- ❑ Member of the new PHN company?
- ❑ Subcontractor to the PHN?
- ❑ Running a new business?

Governance vs Partnership

- Two different concepts and “lenses”
- For future do you want to be:
 - governance/control player; or
 - partner; or
 - commercial subcontractor

Merging with other MLs

- Consortia to bid for PHN
- May want to merge post PHN for other reasons
- New entity or use existing ML?
- Adopt simplest route
 - which ML is largest?
 - member composition of companies

Take a good look at termination clause

- Termination – Cth has “unfettered discretion”
 - Cth only liable for ‘reasonable costs’, ‘unavoidably incurred’, ‘directly related’
 - but capped at remaining unpaid Program funds
 - must stop using funds for other things
 - duty to co-operate with Cth in transition
 - **but** Cth has not yet exercised this.

Intellectual property

- Medicare Local brand is Commonwealth Material so can't use post termination
- However other IP you have developed is yours
 - do you know what your IP is?
 - any value to you or perhaps new PHN or others?
 - any licences to other parties?

Take a look at your constitution

- comply or amend
- Director terms of office, AGM in 2014 and provisions for calling special meetings
- powers and objects – should be OK in ‘PHN land’ but check
- change of name, transfer of business and winding up aspects

Key liabilities

- must not do something that would make you insolvent or trade while insolvent
 - get a letter of comfort from Cth for your audit and sign off of financial statements – both FY
 - monitor cashflow, liabilities and new commitments (staff, leases, equipment)
 - check your subcontracts and other agreements – commitments not yet funded, ability to terminate, liabilities

Commonwealth letter helpful

- Recent letter to all MLs is helpful
 - commits Cth to using termination for convenience clause and at least 3 months notice
 - but does not address all Cth rights on termination
 - sufficient for 13/14 audit and sign off
- Use McGrath Nichol project

Key liabilities

- Leases – termination, reletting and make good
- Employees – notice to them, accrued entitlements and redundancies
- Creditors
- Assets -make sure it is clear who owns the asset and can you prove this?
 - reread clause in funding agreement as Cth can require payment to them of residual value or sale or transfer
- Get “your house in order” review employee and consultant agreements and contracts register

Key liabilities

- Wind up costs (if applicable)
- Make sure all taxes and super are paid
 - directors and officers may have personal liability
- Insurances
 - good D&O needs to be in place!
 - requirement for runoff cover
 - may be requirement to notify insurers

Termination Deed

- Once notice given, negotiate a termination deed with Cth
- Template may not cover your situation and issues
- Timing will be an issue for 14/15 audit and financial statements and post 30 June 2015

Charity status obligations

- ACNC must be advised of:
 - change in name
 - change in address
 - changes in responsible persons
 - changes to constitution
 - cessation as a charity

Transfer of business

- ❑ check your constitution and power to do so
- ❑ consents will be required for leases, equipment leases and other contracts
- ❑ specific provisions under Fair Work Act and employment agreements
- ❑ can't just transfer debts
- ❑ Cth agreement likely to be required
- ❑ careful management so insolvency not triggered

Winding up

- review constitution
- need agreement of members
- transfer all assets and liabilities allows simple de-registration with ASIC
- if not possible, then need to use liquidation process under Corporations Act
- records management and storage

Remember charitable and PBI status

- Charities Act 2013 now in force
 - PHNs health promotion charities?
- protect PBI status in RFT response and PHN establishment process
- PHNs and PBI status
 - no direct service provision
 - ATO and “Hunger Project” decision
 - degree of government control
 - Central Bayside DGP High Court case 2006