

Top Four Legal Issues Impacting NFPs and Charities

BY Vera Visevic, Partner

In our experience, the four most common legal issues impacting NFPs and charities are: legal duties, liability, indemnities and insurance, common constitutional problems, and intellectual property issues. Below is a summary of the law on these issues.

1. LEGAL DUTIES

Type of Duty	Description of the Legal Duty
NFPs	
Fiduciary duties	<p>The duty of good faith (section 181(1) of the <i>Corporations Act</i>) has a number of components and requires directors to:</p> <ul style="list-style-type: none"> act honestly (and not misappropriate the company's assets); exercise their powers in the interests of the company (and avoid misusing their powers); and avoid conflicts of interests.
Duty of care, skill and diligence	<ul style="list-style-type: none"> The common law, equity and statute impose a duty of care, skill and diligence on directors. Section 180(1) of the <i>Corporations Act</i> provides that directors must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they: <ul style="list-style-type: none"> were a director of a company in the company's circumstances; occupied the office held by and had the same responsibilities within the company as that director. Under this statutory duty of care, an objective standard is imposed.
Defences	<ul style="list-style-type: none"> Business judgment rule (section 180(2) of the <i>Corporations Act</i>). Ought fairly to be excused (section 1318 of the <i>Corporations Act</i>).
Improper use of position or information	<p>Sections 182 and 183 of the <i>Corporations Act</i> 2001 provide that a director, secretary or employee must not improperly use:</p> <ul style="list-style-type: none"> their position; or information (obtained because they are or have been a director etc. of a corporation); <p>to:</p> <ul style="list-style-type: none"> gain an advantage for themselves or someone else; or cause detriment to the corporation.

Type of Duty (continued)	Description of the Legal Duty (continued)
Improper use of position or information	<p><u>Penalty</u> - Under the <i>Corporations Act</i></p> <ul style="list-style-type: none"> As with a breach of sections 180 and 181, contravention of sections 182 and 183 may result in a pecuniary penalty of up to \$200,000.
Insolvent trading	<p>A director is under a duty to prevent insolvent trading under section 588G of the <i>Corporations Act</i>.</p> <ul style="list-style-type: none"> (e.g. <i>National Safety Case</i>).
Duty to disclose	<ul style="list-style-type: none"> Under section 191 of the <i>Corporations Act</i>, a director or an officer of the company must disclose a material personal interest in a matter that relates to the affairs of the company and must give the other directors notice of the interest under section 191(2) applies. Disclosure must be made to a meeting of the board as soon as practicable after the director becomes aware of the interest.
NFPs and Charities	
WH&S	<ul style="list-style-type: none"> You will all be aware of the increasingly onerous but proper obligations on directors and managers of companies to ensure the safety of workers and other people in the workplace, which is itself a very broad term. The scheme of the legislation is: <ul style="list-style-type: none"> intended to ensure that the board and upper levels of management take workplace safety seriously; and does this by imposing non-delegable duties on them in addition to severe criminal penalties. The fines cannot be paid by the company and in many cases the mere fact that an injury has occurred is evidence of a failure to provide a safe workplace.
WH&S exemption for non-paid directors	<ul style="list-style-type: none"> Section 34 of the <i>WH&S Act</i> creates an exception for volunteer directors or officers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty (except a duty under section 28 or 29). This may impact on whether you pay your directors.
Charities	
Governance Standard 5	<ul style="list-style-type: none"> The following duties are switched off by section 111L of the <i>Corporations Act</i> and replaced with the Governance Standards: <ul style="list-style-type: none"> The duty of care and diligence - section 180; The duty to act in good faith - section 181; The duty not to misuse position - section 182; and The duty not to misuse information - section 183.



2. LIABILITY, INDEMNITIES AND INSURANCE

Type of Liability	Description of Legal Liability
NFPs and Charities	
Personal civil liability	<ul style="list-style-type: none"> Personal civil liability means that the director or committee member has a legal responsibility to another person or persons. Failure to meet that responsibility which results in an injury to a person may mean that the director or committee member can be sued by that injured person. Personal liability refers to situations where a director: <ul style="list-style-type: none"> has to use personal funds to meet the organisation's obligations; has to make good losses caused to the organisation because of his or her actions; has to repay the organisation any personal profit from an unauthorised contract or transaction; or is held liable in law for offences caused by or on behalf of the organisation.
Civil liability exemption	<ul style="list-style-type: none"> The fact that directors and officers may be acting in a voluntary capacity and not being paid for their services makes no difference to their legal duties and obligations. However, volunteer directors and officers will be exempted from personal civil liability for their actions while carrying out their volunteer community work. This protection comes from the various State and Commonwealth civil liability or civil wrongs laws.
Tax	<ul style="list-style-type: none"> The <i>Tax Laws Amendment (2012 Measures No 2) Act 2012</i> creates a greater obligation upon directors to ensure companies remit the pay-as-you-go (PAYG) withheld amounts, as well as superannuation guarantee charges within the statutory timeframe. If the PAYG withheld amount is unreported and unpaid three months after the due date, the ATO can issue a director a penalty notice. The director is personally liable for the full amount of the debt.
Superannuation	<ul style="list-style-type: none"> Each quarter, a superannuation guarantee statement is to be lodged with the ATO and a superannuation guarantee charge will apply to an employer who fails to make the minimum superannuation contribution by the due date for the quarter. If the employer fails to make the payment, personal liability will apply from the lodgement day. <p><u>Defences</u></p> <ul style="list-style-type: none"> A director is not liable for a director penalty if the director can establish that: <ul style="list-style-type: none"> Because of illness or for some other good reason, the director was not involved in the management of the company and it was reasonable for the director not to be involved; or he/she took all reasonable steps to ensure the directors caused one of these three things to happen (or no such steps were available): <ul style="list-style-type: none"> the company to meet its obligations to pay; an administrator of the company to be appointed; or

Type of Liability (continued)	Description of Legal Liability (continued)
Superannuation (continued)	<ul style="list-style-type: none"> the company to begin to be wound up; or the penalty resulted from the company treating the Superannuation <i>Guarantee Administration Act 1992 (SGAA)</i> as applying to a matter or identical to matters in a particular way that was reasonably arguable, if the company took reasonable care in connection with applying the SGAA to the matter or matters.

Type of Insurance/Indemnity	Description of Insurance/Indemnity
NFPs and Charities	
Deeds of Access, Indemnity and Insurance (Indemnity deeds)	<ul style="list-style-type: none"> A deed of indemnity sets out the basis for the company to indemnify the director for personal liabilities and associated legal costs which result from their role as a director. Deeds of indemnity also commonly deal with matters such as access to documents and insurance. A company is prohibited from indemnifying a director for: <ul style="list-style-type: none"> a liability owed to the company, for example for a breach of duty owed to the company; a liability for certain specified penalty orders and compensation orders; liabilities arising out of fraudulent, dishonest or criminal behaviour, or conduct involving lack of good faith; and liabilities for legal costs to the above matters, where the director does not successfully defend the claim.



3. COMMON CONSTITUTIONAL PROBLEMS

Areas of Interest	Common Constitutional Questions and Problems
NFPs and Charities	
1. Objects	<p>Question: How do I draft the objects clause of the constitution?</p> <p>Answer:</p> <ul style="list-style-type: none"> • The objects clause of the constitution reflects the following: <ul style="list-style-type: none"> • the purpose of the organisation; • the future direction of the organisation; and • the current activities of the organisation. • The objects clause is an important clause as it should accurately reflect your tax status. • Your objects clause should also be consistent with the content of your website.
2. PBI Status	<p>Question: How do I ensure our entity's PBI status can be retained?</p> <p>Answer:</p> <ul style="list-style-type: none"> • Check the activities the entity is undertaking – to maintain PBI endorsement, the ACNC must be satisfied that the vast majority of an entity's funding and resources are directed towards assisting needs that require benevolent relief. • Check the objects clause in the constitution. • Check the winding up/DGR revocation clause in the constitution.
3. Removal of Director	<p>Question: How can you remove a Director from the board of a company?</p> <p>Answer:</p> <ul style="list-style-type: none"> • Section 203D of the <i>Corporations Act</i> provides that a public company may by ordinary resolution remove a director before their period of office ends. This is a statutory right, conferred upon the company acting in general meeting. It applies despite anything in the company's constitution or any agreement between the company and the Director. • Procedure to remove a Company Director: <ul style="list-style-type: none"> • Notice of intention – the members have to issue the company with notice of intention to move the resolution to remove the Director. The company must be given at least two (2) months notice before the meeting is held. This timeframe can be shortened, as explained below. • Notice requirements – following receipt of the notice by the company, the company has to convene the meeting. The company can hold the meeting in less than two (2) months, so long as the notice for the meeting is issued after the company receives the notice from the members. • Do you need a reason to remove a Director? – Generally there is no requirement to provide reasons to remove a Director of a public company under section 203D of the Act, as a Director's position is at the behest of the members. • Director's rights – the Director is then permitted to: <ul style="list-style-type: none"> • put their case to the members by speaking to the motion at the meeting; and

Areas of Interest (continued)	Common Constitutional Questions and Problems (continued)
3. Removal of Director (continued)	<ul style="list-style-type: none"> • give the company a written statement, stating their case, for circulation to the members. • Following the removal of the Director – the vacancy resulting from the removal of a Director by resolution in the fashion set out above, if not filled at the meeting (the members can appoint someone else to fill the vacancy by ordinary resolution), may be filled as a casual vacancy if this is permitted by the company’s Constitution. • Procedural Irregularities – generally, an irregularity in the procedure set out above does not invalidate the removal of the Director, unless the Court is of the opinion that the irregularity causes ‘substantial injustice’ that cannot be remedied and declares the procedure to be invalid. • Consequences of Contravention of section 203D – breach of section 203D is an offence punishable by a fine of five penalty units, which is equivalent to \$550. An offence based on section 203D is an offence of strict liability. This means that there is no defence to this offence.
4. Proxies at Board Meetings	<p>Question: Are proxies allowed at board meetings? Answer: No.</p>
5. Professional Bodies - Applications for Membership	<p>Question: Can professional bodies reject applications for membership and not provide reasons? Answer:</p> <ul style="list-style-type: none"> • No. It is essential that individual practitioners are fully qualified and accredited to enter into a profession and undertake their services with the level of skill and knowledge necessary to perform their duties to a high standard. Therefore, it is an important function of professional associations that they limit membership to persons who have fulfilled these prerequisites as this protects not only the interests of the profession but also consumers more generally. • However, while professional associations may impose minimum membership requirements, they should ensure that they are reasonable and not so onerous as to create an unnecessary barrier to entry into that profession, thereby limiting competition within the market for those services. • Professional association entry requirements should be clear and transparent and applied in a consistent and equitable manner to all potential members, with an appeal process available for those who are denied entry. The reasons for the imposition of these rules should be able to be substantiated by the association, and for the genuine purpose of maintaining the quality of services provided.



4. INTELLECTUAL PROPERTY ISSUES

Type of Intellectual Property Right	Description of Intellectual Property Rights
NFPs and Charities	
Trademark	<p>Registered Trade Mark</p> <ul style="list-style-type: none"> • A trade mark is a sign used to distinguish the goods and services of one trader from those of another. • A trade mark is a right that is granted for a letter, number, word, phrase, sound, smell, shape, logo, picture and/or aspect of packaging. • A registered trade mark is legally enforceable and gives you exclusive rights to commercially use, licence or sell it for the goods and services that it is registered under. • If you register a business, company or domain name, you do not automatically have the right to use that name as a trade mark. • To protect your business name from being used by someone else, you can register it as a trade mark. • The registration period initially lasts for 10 years and can be continued indefinitely providing that you pay renewal fees. The trade mark is protected in all Australian States and Territories during this time. For international protection, you need to register your trade mark in each country you want protection in. • To be registrable, a trademark must be capable of distinguishing your goods or services from other traders. It is therefore not possible to register a trade mark that is deceptively similar to an existing trademark. Furthermore a trademark that is descriptive cannot be registered. <p>Unregistered Trade Mark</p> <ul style="list-style-type: none"> • A common law trade mark is an unregistered trade mark which has been used (such as a brand name or in advertising) in relation to certain goods or services to such an extent that it is recognised as distinguishing the goods and services of the business using that mark from those of other businesses. Even though it is not registered, in certain circumstances the law will prevent another trader from using the same or a similar trade mark in a way which is considered unfair.
Copyright	<ul style="list-style-type: none"> • Copyright is a legal right given to the authors or creators of works. • Under copyright law, the copyright owner has a number of exclusive rights including the right to publish the work, control copying, prepare derivative works and perform of their work as well as the right to make the material available online. • Copyright protects the written expression of an idea or concept - it does not protect the actual idea or concept itself. • Copyright doesn't give the author of a work a monopoly over the ideas or information expressed in that work - anyone can use the ideas contained in a work provided they do not use the exact words used by the author to describe the idea or concept. • The Copyright Act protects 8 different categories of "works" and "subject matter other than works".

Type of Intellectual Property Right (continued)	Description of Intellectual Property Rights (continued)
Copyright	<ul style="list-style-type: none"> Copyright protection is automatic under Australian law from the moment you place your work in a material form. This includes writing down, recording or filming your work. A work doesn't have to be published to be protected by copyright - copyright also protects unpublished works. Australia does not have a system of copyright registration, so a work does not have to go through a registration process before it can be protected by copyright.

Ownership of Intellectual Property	
The Legal Position with Employees, Contractors and Volunteers	<ul style="list-style-type: none"> As a general rule, an employer will own the intellectual property created by its employees in the course of their employment. However, intellectual property that is created by an employee, other than in the course of employment, is owned by the employee, not the employer. In the absence of a contract to the contrary, a contractor or consultant will own the intellectual property that the contractor or consultant creates. Generally, a volunteer owns the intellectual property that the volunteer creates. If you want ownership of the intellectual property created by the volunteer, the volunteer will need to transfer ownership of intellectual property to you through a written agreement. It is important to show ownership of copyright and other intellectual property rights through written agreements with employees, contractors and volunteers.

Type of Clause	Employment Contracts should include these terms to protect an employer's Intellectual Property rights
NFPs and Charities	
Ownership of Intellectual Property	<ul style="list-style-type: none"> That intellectual property created by the employee in the course of the employee's employment, or in relation to a certain field, is owned by the employer.
Signing Documents to Record the Employer's Ownership of Intellectual Property	<ul style="list-style-type: none"> That the employee will sign any document that the employer reasonably requires (such as a deed of assignment) to record the employer's ownership of the intellectual property created by the employee in the course of employment. This obligation needs to continue during the employment relationship, as well as after the employment relationship has ended. It may be necessary, for example, for an employee to sign patent application documents after the employment relationship comes to an end.
Confidential Information	<ul style="list-style-type: none"> That in relation to the employer's confidential information the employee will: <ul style="list-style-type: none"> keep it confidential and will not disclose it to another person; and not use it in any manner outside the course of employment. This obligation needs to continue during the employment relationship, and also after the employment relationship ends.

Type of Clause (continued)	Employment Contracts should include these terms to protect an employer's Intellectual Property rights (continued)
Scope of Confidential Information	<ul style="list-style-type: none"> • The scope of the employer's confidential information subject to those obligations needs to be broad, and include: <ul style="list-style-type: none"> • the intellectual property created by the employee in the course of employment; • other intellectual property of the employer's, including that created by other employees, in existence when the employment relationship started, or which the employer has licensed from another person; and • other business information such as customer lists, supplier lists, marketing plans and strategies, business plans, financial information, etc.
Waiver of Moral Rights	<ul style="list-style-type: none"> • That the employee waives the employee's moral rights in relation to any works in which copyright subsists (such as computer programs).
Restraint on Competition	<ul style="list-style-type: none"> • Some employment contracts include a restraint on competition. • Such a restraint operates to restrain a former employee from competing with the employer, for an agreed duration, over a specified geographical area. • If the extent or scope of the restraint is too broad, operates for too long, or operates over too large a geographical area, the restraint will be invalid, and the employee will not be bound by it. • But to the extent that the restraint is reasonable, operates for a reasonable period, and over a reasonable area, it will be valid. • These restraint obligations need to apply not just during the employment relationship, but also after it ends.

