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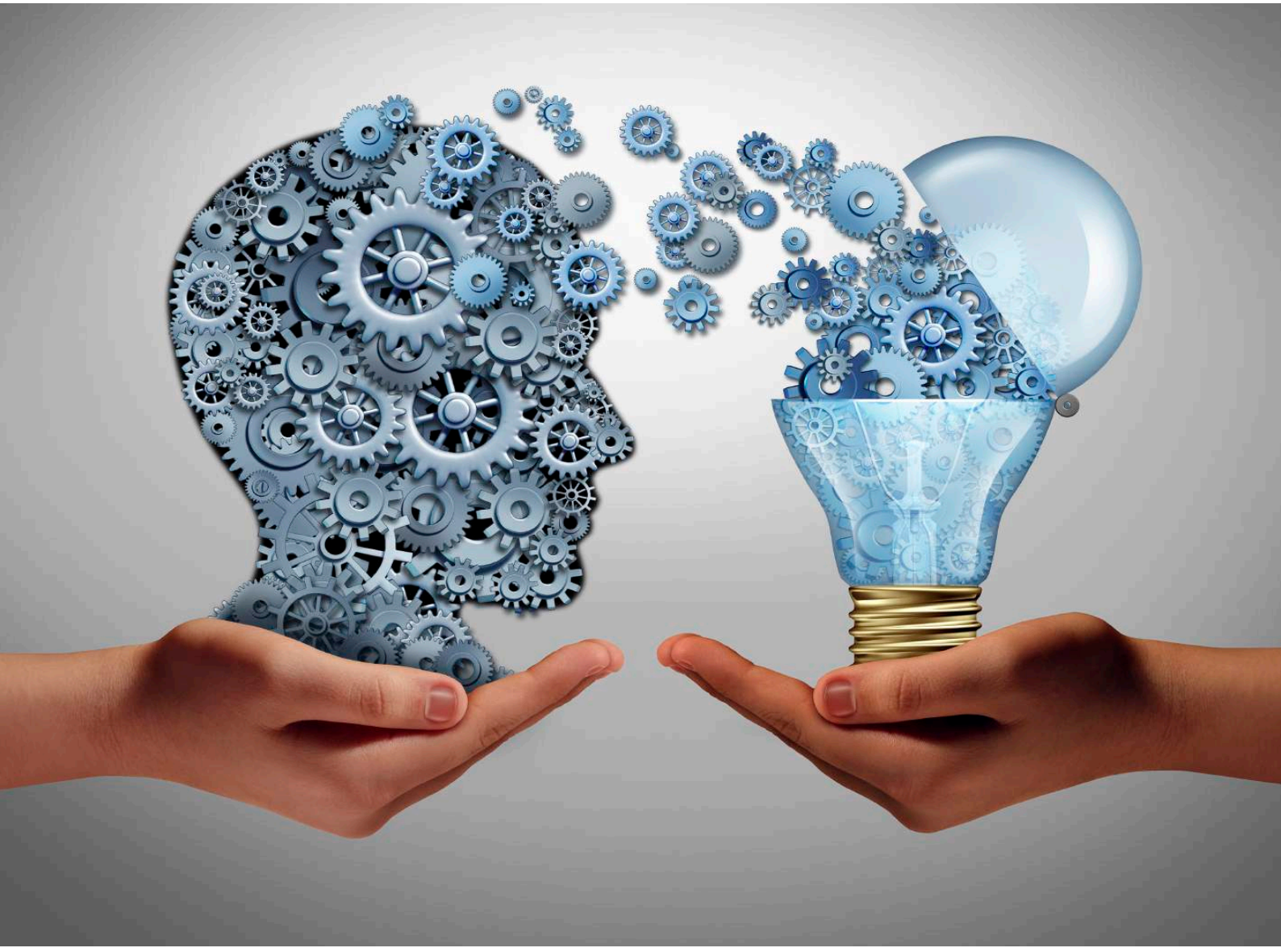
THIRD dimension

A practical legal perspective for charities and not-for-profits



Knowing Your Obligations: Changing Legislation and New Perspectives

MILLS OAKLEY

In Camera Meetings: Upholding Confidentiality or Fostering Secrecy?

BY Andrew Egri, Lawyer

Governing boards of not-for-profit organisations deliberate on a range of issues, from the mundane to highly sensitive and contentious matters.

Many Boards regularly invite senior management and others to attend meetings, perhaps to give a report or to provide a presentation on a particular issue, so that the Board can make a better informed decision.

As a way of managing potentially prickly issues, some Boards conduct the discussion of these issues in camera. However, unless the Board has a clear understanding of the purpose of *in camera* meetings, these meetings can be harmful to the interests of the organisation.

What are in camera meetings?

Also known as "executive sessions", *in camera* meetings are meetings of the Board held behind closed doors, without executive directors or staff being present. *In-camera* meetings can provide the Board with an opportunity to allow for matters of potential conflict to be identified and resolved proactively.

Whether scheduled, or impromptu, in camera meetings are viewed as legitimate board meetings in the eyes of the law, so long as other usual requirements are met, such as those relating to the quorum and notice of meeting.

Purpose

Generally, Boards will hold meetings *in camera* in order to have the opportunity to discuss confidential matters.

Boards may decide to hold a meeting *in camera* for many purposes, including:

1. discussing particularly sensitive matters within its jurisdiction (such as litigation, employee relations, Board succession planning or management performance);
2. discussing sensitive internal governance problems;
3. reviewing the performance and compensation of the CEO or other members of the executive; or
4. in the case of auditors, to safeguard the independence of those officers by providing direct access to the Board without management in attendance.

Risks

In camera meetings must be used judiciously. Regrettably, some perceive there to be a stigma of secrecy attached to *in camera* meetings. This stigma is, in many cases, attributable to the fact that:

1. impromptu *in camera* meetings are usually only called when an important issues arises; and
2. nobody, other than those permitted to attend (ie. the Board members), knows what is being discussed during the *in camera* meetings. This can create a concern within the organisation, that there may be a looming issue or crisis.

Further, not having senior management, and other related parties, in the Board meeting may mean that the Board will not have access to the information it requires in order for it to make the best decision.

Therefore, the improper use of *in camera* meetings may not only lead to the perception that a culture of secrecy exists, but also limit the ability of the Board to make optimal decisions in the interests of the organisation.

Tips

When deciding to hold a meeting *in camera* or otherwise, the most important question for the Board is: do we have the information necessary to make an informed decision? Will excluding someone from deliberations compromise the information, expertise or perspective available to the Board?

As a matter of good governance, Boards might consider regularly allocating time for an *in camera* discussion at a certain point during each of their meetings, rather than conducting full Board meetings *in camera*.

Although *in camera* discussions may be listed on the agenda for each Board meeting, this does not mean that Boards must or should hold *in camera* discussions each time. Rather, the practice is intended to provide

the Board with the opportunity, as required, to discuss those confidential matters where disclosure to executive directors, staff or any other person who is not a member of the Board might be seen as prejudicial to an individual or the organisation.

By regularly including *in camera* discussions as an agenda item at each meeting of the Board, such discussions are less likely to create doubt and mistrust within senior management and other staff.

Boards should consider whether it is appropriate to adopt an *in camera* meeting policy. A policy will typically contain information such as:

1. the purpose of holding *in camera* meetings;
2. the matters that should be discussed at such meetings; and
3. the preparation of the agenda and procedural rules to be followed, including how minutes will be taken and kept.

The increased level of transparency often alleviates concerns surrounding the motives behind *in camera* meetings.

Changes to Ancillary Fund Guidelines

BY John Vaughan-Williams, Lawyer

An Ancillary Fund is recognised by the Australian Tax Office (**ATO**) as a special type of fund, which is eligible to be endorsed as a Deductible Gift Recipient (**DGR**). Some are registered as charities with the Australian Charities and Not-for-profits Commission (**ACNC**), and others are operated by registered charities.

DGRs are split into two types, which are known as 'Item 1 DGRs' and 'Item 2 DGRs'. An Item 1 DGR is one that conducts activities, but an Item 2 DGR is one whose permitted purpose is to make donations to Item 1 DGRs, while not conducting any activities itself.

Ancillary Funds are always Item 2 DGRs; this structure provides a gateway for donors that would like to donate to DGRs, but do not want to make the decisions as to which DGRs to support.

Ancillary Funds are created by trust deeds, and are split into two types – private and public. Both have bodies corporate as trustees, which determine how the assets held in the ancillary fund will be distributed.

A Public Ancillary Fund raises its funds from the general public, whereas a Private Ancillary Fund restricts its fundraising to a specific group, commonly members of a family. The private ancillary fund structure can be a good way of formalising the philanthropic endeavours of individuals or families who have accumulated wealth and then want to make donations that will be held in a centralised source.

In recent times, there has been uncertainty regarding the legal requirements for Ancillary Funds, particularly surrounding distributions.

Since the original *Public Ancillary Fund Guidelines* were released in 2009, and the *Private Ancillary Fund Guidelines* were released in 2011, there has been considerable conjecture as to whether and how they will be amended. Following an exposure draft of amendments to the guidelines for both private and public ancillary funds in December 2015, the guidelines were amended in late April of this year, with immediate effect.

The recent amendments have generally been welcomed by the sector, and followed previous submissions for change from within the sector. The most important effects of the recent amendments are summarised below.

1. Private Ancillary Funds can distribute to Public Ancillary Funds

Private Ancillary Funds are now allowed to distribute assets to Public Ancillary Funds in certain circumstances, whereas this was not previously permitted. This provides greater flexibility for Private Ancillary Funds that would like to contribute to a larger fund that exists for a similar purpose, or upon winding up.

2. Wider Definition of Responsible Person

It is a requirement that directors of the trustee body corporate of an Ancillary Fund include a minimum number of "responsible persons", who meet certain minimum criteria. For a Private Ancillary Fund, there is a minimum of one, and for Public Ancillary Funds, the minimum is three.

The definition of "responsible person" has been widened, to include anyone before whom a statutory declaration can be made. This creates greater flexibility in the establishment of Ancillary Funds, and the appointment of trustee directors.

3. Minimum Distribution Rate

Both Public and Private Ancillary Funds have always been subject to a "minimum distribution rate" – this is a minimum percentage of its net assets, assessed at the end of the previous financial year, that must be distributed to its beneficiaries during that financial year.

This minimum percentage is designed to ensure that Ancillary Funds are actually working to fulfil their purposes, and not merely hoarding assets.

While the percentages have remained the same under the amendments, the Commissioner of Taxation has the discretion to waive them in special circumstances. This change allows circumstances to be considered where, for example, the assets are likely to be worth significantly more in later financial years.

4. Reporting Streamlined between ATO and ACNC

Ancillary Funds that are registered charities now only have to report to the ACNC, and not also to the ATO. This welcome change follows the government announcements earlier in the year which confirmed the future of the ACNC

5. Less Onerous Financial Reporting

Under the previous guidelines, all Private Ancillary Funds were required to have their accounts audited by a registered auditor under the meaning of the *Corporations Act* 2001 (Cth). In line with the government's wider agenda of reducing red tape for charities and not-for-profits, the new guidelines amend this requirement, by now allowing smaller Private Ancillary Funds (ones with assets of less than $1 million in a particular financial year) to have their accounts reviewed, rather than audited. The person who conducts the review does not necessarily need to be a registered company auditor, but can be a person who is a member of a professional accounting body.

A review is generally cheaper, and involves less administration for the organisation involved. While an audit requires evidence to be put forward to show that the accounts show a true and accurate picture of the finances of the organisation, a review only requires the person conducting the review to state whether anything has come to his or her attention to suggest that the financial report is substantively misstated.

6. Wider Investment Options

The examples of permitted investment of funds by Ancillary Funds are now wider. Ancillary Funds can now conduct the following activities, as well as directly giving funds to Item 1 DGRs:

(a) Lend money to a DGR at a better interest rate than the market rate for a financial institution;

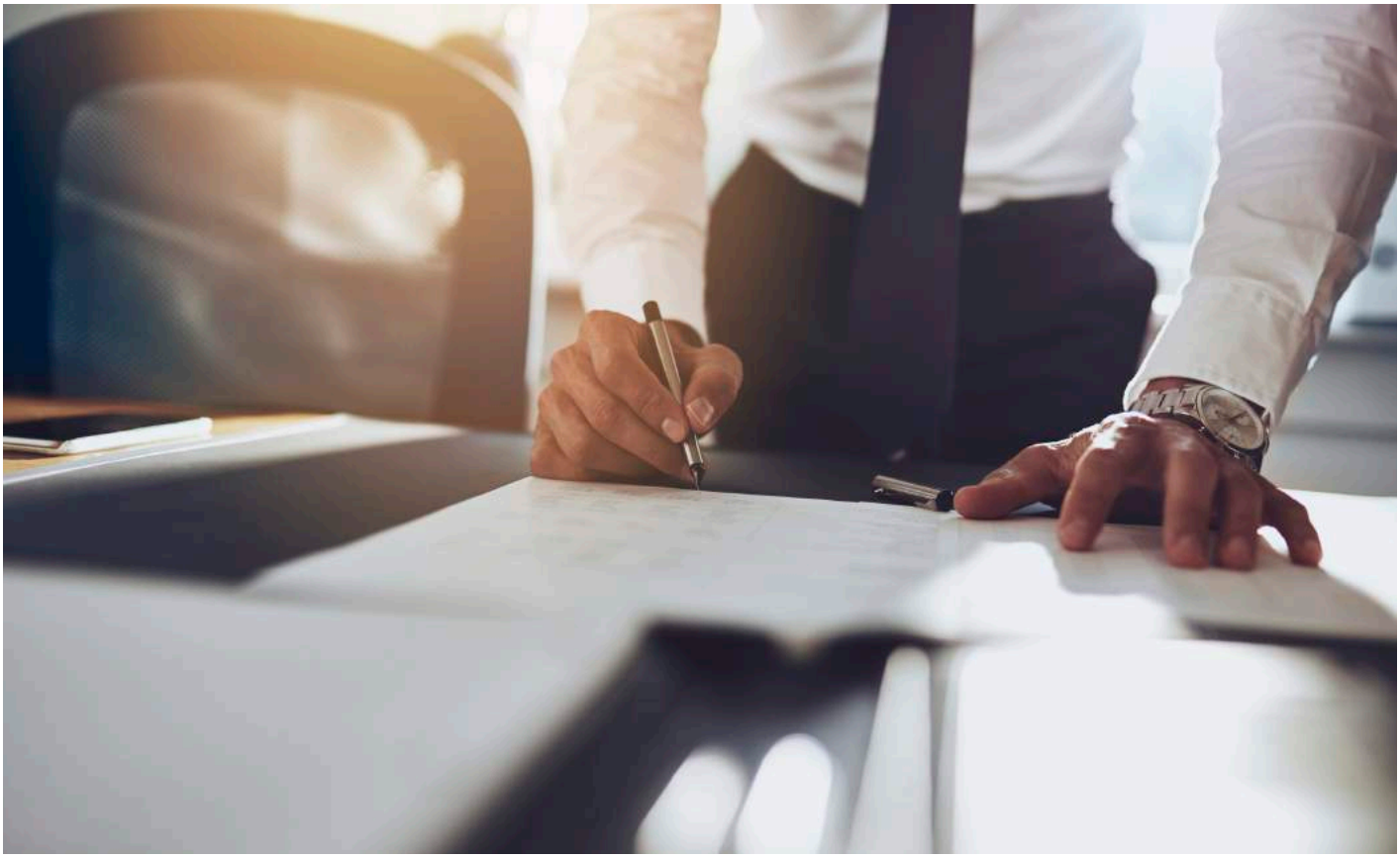
(b) Guarantee a loan to a DGR provided by a financial institution; and

(c) Make payments under the guarantee, if the DGR defaults.

While there is room for further amendment of the Ancillary Fund guidelines in the future, these changes follow a string of recently welcomed changes for the not-for-profit sector in Australia. These recent changes include the rescue of the ACNC, as well as changes to requirements for public benevolent institutions.

Amendments to the legislation for incorporated associations in New South Wales, Western Australia, South Australia and Tasmania

BY Andrew Egri, Lawyer



A number of States have recently amended the legislation that applies to incorporated associations. Incorporated associations will be pleased to hear that, to varying degrees, the amendments reduce the regulatory burden placed on such organisations.

New South Wales

The *Associations Incorporation Amendment (Review) Act 2016 No 1* (NSW) (NSW Act) makes a number of minor amendments to the *Associations Incorporation Act 2009* (NSW).

The main provisions that incorporated associations should be aware of relate to:

(a) Management committee duties

The NSW Act amends the existing legislation by introducing a duty that requires each committee member to carry out his or her functions for

the benefit, so far as is practicable, of the association, and with due care and diligence (for an article on that duty, see *"Is Ignorance Bliss? An Examination of the Duty of Care and Diligence").*

(b) Personal liability of members

If a committee member does or omits to do something in good faith in the lawful execution of his or her functions, he or she will not be held to be personally liable.

These amendments will come into force on 1 September 2016. NSW associations should ensure they are aware of the amendments, and that their governing documents / rules are updated accordingly.

Western Australia

The *Associations Incorporation Act 2015* (WA) (WA Act), which came into force on 1 July 2015, completely replaced the *Associations Incorporation Act 1987* (WA). The WA Act has a number of changes that incorporated associations should be aware of, including:

(a) Financial reporting

The WA Act introduces three different levels of financial reporting and accountability for associations, which is based on their annual revenue:

(i) Tier 1 associations are those with revenue of less than $250,000 per annum and will not be required to have their accounts reviewed by an accountant or an auditor.

(ii) Tier 2 associations are those with revenue greater than or equal to $250,000 but less than $1,000,000 per annum, and will be required to keep accurate financial reports in line with the Australian Accounting Standards. These records must be reviewed by an accountant.

(iii) Tier 3 associations are those with revenue greater than or equal to $1,000,000 per annum, and will be required to keep accurate financial reports in line with the Australian Accounting Standards. These reports must then be reviewed by an auditor.

It is still necessary for associations to provide their financial reports to their members at each AGM, however, it is not required that these reports be given to the Commissioner.

(b) Management committee

There are new obligations for committee members, including a:

(i) duty of care and diligence;

(ii) duty to act in the best interests of the association and for a proper purpose; and

(iii) duty not to misuse their position or any information.

A person cannot sit on the management committee if they:

(i) are an undischarged bankrupt or whose affairs are being dealt with under insolvency law;

(ii) have been convicted of an offence involving fraud or dishonesty which has a period of imprisonment of three months; or

(iii) have been convicted of an offence in connection with the promotion, formation or management of a body corporate.

(c) Privacy

The privacy of members has been further protected by the changes to the law. The membership register is still only accessible by association members, however, the WA Act will restrict how that information can be used.

There is also greater flexibility for how members can provide their contact details to an association. A member may now provide an email address or a post office box instead of their residential address.

(d) Internal dispute resolution process

The WA Act will require that each association has an internal dispute resolution process within its rules. If a dispute remains unresolved, then the rules must set out a way for it to be heard by the State Administrative Tribunal (SAT).

New South Wales, West Australian, South Australian and Tasmanian incorporated associations should ensure they are aware of the upcoming changes to the associations legislation, and seek appropriate legal advice regarding the required amendments to their governing documents

(e) Amalgamation

The new law provides a process for two or more associations which wish to amalgamate into a new incorporated association. This is a similar process to that used in other incorporated associations legislation, however, it has not been used in Western Australia previously.

(f) Winding up or cancellation

There will be a simplified process whereby associations may choose between winding up (which is a more formal process using a liquidator) or cancellation of incorporation (which is a simpler process without the need of a liquidator).

(g) Contact address of association

Each association will be required to notify the Commissioner of its current address. If the address of the association is changed, the Commissioner will also need to be notified within 28 days of the change occurring.

Importantly, all associations will have three years from 1 July 2016 to ensure that either their rules comply with the new law, or to adopt the new model rules.

South Australia

The *Statutes Amendment (Commonwealth Registered Entities) Act 2016* (SA) (**SA Amending Act**) proposes amendments to the *Associations Incorporation Act 1985* (SA) (**SA Act**).

The amendments are expected to come into force on 1 January 2017, from which South Australian incorporated associations registered as charities with the ACNC will only need to submit information to the ACNC. However, charitable incorporated associations will continue to be regulated under the SA Act.

The SA Amending Act also reduces the regulatory burden on charitable fundraising by amending the Collections for *Charitable Purposes Act* 1939 (SA). Charities that previously required a fundraising licence will still be required to notify the Minister if they intend to fundraise in South Australia. However, they will not be required to go through the application and reporting requirements associated with obtaining a separate fundraising licence.

Tasmania

The *Associations Incorporation Amendment Act 2016* (Tas) proposes a number of minor amendments to the *Associations Incorporation Act 1964* (Tas).

The main provisions that incorporated associations should be aware of relate to:

(a) Charities exempt from double reporting

Tasmanian incorporated associations registered with the ACNC will be exempt from providing duplicate financial reports to both the ACNC and the Commissioner for Corporate Affairs. Those charitable incorporated associations that provide annual financial statements to the ACNC will no longer be required to provide financial statements to the Commissioner. The Commissioner can still request a copy of the information that has been supplied to the ACNC.

(b) Aligning the audit and financial reporting requirements with the ACNC's requirements

Tasmanian incorporated associations have been required to undertake financial audits and submit audited statements regardless of their size. The requirement for audited statements will no longer apply to incorporated associations with an annual revenue of less than $250,000.

These amendments will come into force on 1 October 2016. Tasmanian associations will need to ensure they are aware of the amendments, and update their financial reporting practices accordingly.

All New South Wales, West Australian, South Australian and Tasmanian incorporated associations should ensure they are aware of the upcoming changes to the associations legislation, and seek appropriate legal advice regarding the required amendments to their governing documents.

Volunteers & Your Organisation – Knowing your obligations

BY James Thomson, Associate

There is no doubt that volunteers play an integral role within the charitable and not-for-profit sector within Australia.

The services provided by volunteers help supplement the efforts of paid employees and management, whilst allowing the organisation to use funds it would otherwise spend on wages, to pursue its objects and activities.

Most people would assume that a volunteer relationship is simply one in which an individual assists an organisation to carry out its objects and activities, whilst not receiving any "wage" or "salary" in return.

But are there other factors involved in determining whether a person is truly a volunteer?

Also, what liabilities might arise for a charity or not-for-profit organisation in engaging volunteers?

For the purposes of this article, we will examine the nature of a volunteer relationship within the context of charitable and not-for-profit organisations. This article does not consider, for example, the legalities of unpaid internships or work experience arrangements, which are separate arrangements.

1 What makes a volunteer a volunteer?

When engaging volunteers, it is important to understand what makes a volunteer a volunteer.

The law in this area tries to strike a balance between allowing organisations to utilise the valuable resources which are volunteers, and stopping organisations taking advantage of individuals, who really ought to be employed as paid employees.

There is no uniform strict legal definition of a "volunteer" in the context of employment law (although legislation in some Australian jurisdictions has attempted to define the term in other contexts - for example, the *Civil Liability Act* 2002 (NSW) defines a volunteer as a person who does community work on a voluntary basis).

Although each relationship must be examined on its individual circumstances, the following factors will generally support the proposition that a person is a volunteer of the organisation, rather than an employee:

(a) the parties did not intend to create an employer / employee relationship;

(b) the person is not obligated to attend the organisation's workplace or carry out duties (i.e. the person ultimately decides whether to attend on a particular day and at a particular time);

(c) the person does not expect to receive payment in return for the work performed; and

(d) the person is undertaking the work for the purpose of benefiting the organisation, and not to obtain a private benefit for themselves.

Importantly, factor (a) will not be persuasive on its own. In other words, even if a person is referred to as a volunteer in an agreement or other documentation, the presence of other factors may determine that the person is in fact an employee.

When it comes to charities and not-for-profits, the issue of whether a person is genuinely a volunteer or employee, is often much more clear-cut than in for-profits.

Despite this, following these tips will help reduce the risk of an employment relationship arising:

(a) You should consider entering into a short form agreement with volunteers, which should outline, among other things:

(i) that the person is a volunteer, and that neither your organisation nor the person

intends for an employment or contractor relationship to arise;

(ii) that the person is not obligated to attend your workplace or to provide any certain level of volunteer work, and that volunteer arrangements are flexible;

(iii) that the person is not entitled to receive any payment or remuneration for their work, apart from a reimbursement of reasonable expenses (see below);

(iv) that the person is undertaking the volunteer work for the benefit of the organisation to help it achieve its objects; and

(v) that the person agrees to comply with all workplace health and safety and other policies and procedures of your organisation.

(b) You should avoid formalising regular rosters for volunteers, as this may indicate that the volunteer does not have control over when they attend the workplace.

(c) You should carefully consider any benefits provided to volunteers in return for their work. Whilst small gifts, tokens of appreciation (e.g. certificates of appreciation) and the reimbursement of expenses will almost always be acceptable, the payment of a lump sum to a volunteer should not be made, as that may constitute a payment for services.

2 Volunteers and your organisation's liability

Whilst your organisation will not be required to make payments of salary or employment benefits to volunteers, do other liabilities arise?

2.1 Liability to volunteers

The workplace health and safety legislation enacted throughout Australia requires that an organisation ensures the health and safety of its volunteers insofar as is reasonably practicable. Although different legislation has been enacted by each of the States and Territories separately, broadly speaking, they can be summarised as follows:

(a) *Australian Capital Territory, Commonwealth, New South Wales, Northern Territory, Queensland and South Australia* – your organisation will owe duties to its volunteers under the workplace health and safety legislation, unless it is a "volunteer organisation" (i.e. a group of volunteers working towards a community purpose with no paid employees); and

(b) *Western Australia* – employers must ensure, as far as is reasonably practicable, that the health and safety of other persons (including volunteers) is not adversely affected by things such as work that is undertaken by the employer or their employees, any hazard that arises from that work, or from the system of work that is being operated by the employer generally.

Importantly, in each jurisdiction, directors and other officers of an organisation can be held personally liable

for failing to exercise due diligence to ensure that the organisation is complying with its workplace health and safety duties. Directors or officers found personally liable can be subjected to fines and in some cases imprisonment.

It is therefore imperative that organisations (and their directors and officers) ensure that adequate procedures and policies are in place to meet their duties under the legislation, not only to volunteers but to workers in general.

2.2 Liability to third parties

In addition to owing duties to volunteers themselves, in some jurisdictions of Australia, an organisation can become responsible for the acts or omissions of its volunteer.

The law around the vicarious liability of an organisation for the acts or omissions of its volunteers has been legislated by the States and Territories. Although the relevant principles differ between the States and Territories, broadly speaking, they can be summarised as follows:

(a) *New South Wales* – Generally speaking, a volunteer will not be liable for their acts or omissions done or made whilst volunteering, unless they fall within a specific exception under the legislation (see below). Where a volunteer is not liable, the organisation will ordinarily not be liable for the acts or omissions of that volunteer;

(b) *Queensland* – Unlike New South Wales, the legislation does not specifically state that an organisation will avoid liability where their volunteer is not liable. Nevertheless, case law suggests that the Courts will be willing to extend the protection from liability to the organisation, similar to the approach of the New South Wales legislation;

(c) *Australian Capital Territory, Northern Territory, South Australia, Tasmania, Victoria, Western Australia* – Generally speaking, a volunteer will not be liable for their acts or omissions done or made whilst volunteering, unless a specific exception under the legislation applies (see below). In circumstances where an exception applies, an organisation can be held liable for the acts or omissions of that volunteer.

Although it differs between the States and Territories, some examples of the exceptions to the protections afforded to volunteers are as follows:

(a) the volunteer was under the influence of a recreational drug (including alcohol) which impaired their ability to carry out their duties with due care and skill;

(b) the volunteer is acting outside the scope of the activities authorised by your organisation or contrary to instructions given to the volunteer by your organisation;

(c) the liability arises out of the use of a motor vehicle, for which your organisation is required to hold compulsory third party insurance;

(d) the volunteer commits a criminal offence; and

(e) the volunteer's liability arises out of defamatory conduct.

3 Summary

There is no doubt that volunteers play an integral role in the charitable and not-for-profit sector in Australia.

Whilst engaging volunteers does carry with it some risk both with respect to the volunteer and third parties, the benefits of that vital resource will far outweigh the risks, where that risk is properly managed.

Some practical tips for reducing the risk associated with volunteers, is as follows

(a) have volunteer agreements in place with each of your volunteers, covering at least those matters set out above;

(b) ensure that the volunteer's role and duties are clearly defined either in the volunteer agreement or in a separate volunteer workplace policy referenced in the volunteer agreement;

(c) ensure that you have other effective policies and procedures in place covering things such as workplace health and safety, bullying / harassment and the use of recreational drugs; and

(d) ensure that all workplace policies and procedures are reviewed regularly.

Directors and officers should also consider committing a portion of Board meetings to discuss and address any workplace health and safety issues that have arisen since the previous Board meeting.

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- Directors' Rights: Moving Beyond The Call Of Duty
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- A Merger By Any Other Name Is Just As Sweet
- Checklist for Mergers
- Lawyers, Secrets and You
- New Rules for Income Tax Exempt NFPs

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