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THIRD
dimension

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

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Casually serious: New rights for casual workers

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Fair Work Commission decision to give casual workers the right to request permanent employment

BY Samantha Wood, Law Graduate

Fair Work Commission decision

On 5 July 2017, the Full Bench of the Fair Work Commission (**Commission**) decided in its 4 yearly review of modern awards, that casual employees can qualify for the right to request permanent employment after 12 months of work if they meet certain criteria (**the decision**). This article provides an overview of the decision.

In its decision, the Commission considered submissions from the Australian Council of Trade Unions and developed a draft model casual conversion clause. Once the decision enters into operation by way of an order, it will affect 85 modern awards including the social, community, disability services, aged-care, retail, banking, agriculture and restaurant industries amongst others.

The primary reason for the decision was that without this casual conversion clause, these awards did not achieve the modern awards objective, which:

> *"...together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions...".*

Currently, under most awards, the applicability of most National Employment Standards (**NES**) entitlements depends on whether the employer chooses to engage and pay an employee as a casual or as a permanent employee. Therefore, the employer has the capacity to deny NES entitlements to casuals who otherwise might readily be engaged as permanent full-time or part-time employees. The Commission found that while this practice is not widespread, some employers do engage indefinitely casual persons who may be employed permanently, thereby circumventing the application of the NES safety net for these employees. A casual conversion clause can remedy this practice to better achieve the modern awards objective.

How many casual workers are in the NFP sector?

According to the Australian Charities Report 2015 which surveyed 39,756 charities, the number of employees in 2014 totalled 1,050,295. In 2015, this number grew to 1,057,663. While the number of employees overall has grown modestly from 2014-2015, charities gained 5,140 part-time employees, and 7,396 casual employees, and lost 5,876 full time employees. In 2015, casual employees constituted 25.8% of the total number of employees in the charity sector.

This means that the not-for-profit sector is seeing an increase in the number of casual workers who may, after the Commission's decision, be eligible to be considered for permanent employment. Not-for-profit organisations and charities in all states and territories (except for Western Australia) are affected by this decision and should therefore be aware of its implications.

What are the employer's obligations?

Under the new model casual conversion clause, an employer must provide all casual employees (whether they become eligible for conversion or not) with a copy of the casual conversion clause within the first 12 months after their initial engagement.

What can the employee request?

The regular casual employee can request to convert to:

1. full-time employment, if they have worked an average of 38 hours or more in the preceding 12 months; or
2. part-time employment if they have worked less than an average of 38 hours per week, in the 12 months before the request is made.

How can the employee qualify to request permanent employment?

To qualify, the employee must be a "regular casual employee". This is someone who, over 12 months, has:

> *"...worked a pattern of hours on an ongoing basis which, without significant adjustment, could continue*

to be performed in accordance with the full-time or part-time employment provisions of the relevant award."

This means that qualifying for permanent employment contemplates some, but not significant, adjustment to the employee's working patterns.

Additionally, the more flexible the hours of work provisions for full-time and part-time employees, the greater the opportunity there will be for casual conversion to occur.

When can an employer refuse the employee's request for permanence?

According to the decision, if an employee elects to become permanent, the employer may refuse this request on the grounds that:

(a) it would require a significant adjustment to the casual employee's hours of work to accommodate them in full-time or part-time employment in accordance with the terms of the applicable modern award;

(b) it is known or reasonably foreseeable that the casual employee's position will cease to exist in the next 12 months;

(c) the employee's hours of work will significantly change or be reduced within the next 12 months; or

(d) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated in the current circumstances.

The Commission notes that these considerations must be based on facts which are known or reasonably foreseeable, and not be based on speculation or lack of certainty about the employee's future employment.

Additionally, a conversion request should only be refused after consultation with the employee.

What does the employer have to do if the request for permanence is refused?

The employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the relevant award's dispute resolution procedure.

Under many dispute resolution procedures, the employee or the employer may refer the matter to the Commission if the dispute cannot be resolved at the workplace level.

Long-term regular casuals benefit

In the decision, the Commission relied on expert evidence that showed 29% of casual workers work full-time hours, however the average weekly hours worked by part-time casual employees was 16.1. While the length and regularity of casual employment varies, a significant proportion of casual employees exist who:

(a) have worked for their current employer for long periods of time as a casual;

(b) have a regular working pattern, which in some cases may consist of full-time hours; and

(c) are dissatisfied with their casual status and would prefer permanent to casual employment.

Further, the evidence demonstrated that for adult long-term casuals who are financially dependent on their casual employment, the absence of benefits that come with permanent employment can be particularly detrimental. For many, long-term casual employment means:

(a) working while sick;

(b) not taking recreational leave because of concerns about whether any absence from work will endanger future employment;

(c) the incapacity to properly balance working hours without notice; and

(d) potential for the sudden loss of what had been regular work without any proper notice or adjustment payout.

How does the decision immediately affect employers?

The decision means that employers must, as soon as possible:

(a) review their labour engagement practices to determine the extent to which their operations will be impacted by the change;

(b) develop systems to identify casuals engaged on regular and systematic work patterns and to monitor their period of engagement;

(c) develop systems to notify casuals of their rights especially as evidence indicates that casual employees are less likely to have access to workplace information than permanent employees;

(d) consider and respond to any request by a casual employee to convert to permanent employment; and

(e) consider implementing an audit system to ensure compliance with the clause.

Commercial fundraisers – Have you considered your obligations?

BY John Vaughan-Williams, Lawyer

With the recent surge in social enterprises, many not-for-profits are using the services of commercial fundraisers. The world of charitable fundraising regulation in Australia is complex in itself, but the regulation of commercial fundraisers adds another layer of complexity. Like all charitable fundraising law, commercial fundraisers are regulated differently across State and Territory jurisdictions, and there has often been only limited judicial consideration of the various laws.

There are legal obligations in place on both commercial fundraisers themselves, and also the charities which hold fundraising licences and use commercial fundraisers. Licensed charities should revisit whether they are satisfying all of their obligations surrounding the commercial fundraisers that they use.

What is a Commercial Fundraiser?

The most traditional example of a commercial fundraiser is street-collectors, who attempt to sign up individuals to pledge donations to a charity. Often, these collectors are not employed by the charity itself, but by a sub-contracted fundraising company.

It is fairly clear that companies which organise street-collecting are commercial fundraisers, but there also are other more subtle types. For instance, when a company markets a product on the basis that a certain percentage of sales will be donated to a charity, the company will, in some jurisdictions, will be considered a commercial fundraiser, and sometimes even require a fundraising licence.

Recent examples of this are Coca-Cola Amatil, which has marketed on its Mount Franklin bottles that a percentage of sales will be donated to the McGrath Foundation, and Coles Group Limited, which has marketed on some of its home-brand products that a percentage of sales will be donated to Red Kite.

Further, fundraising apps, as well as crowd-funding websites, are becoming more common in the current climate. These apps and websites generally provide a platform for donors to make pledges, generally in small amounts, to charities, with the owner of the app or the website charging a small fee to the charity for the service. The companies which provide these services are often also considered commercial fundraisers by law, and sometimes will themselves require fundraising licences.

However, while these are some examples, the difficulty lies in that each State and Territory regulator has different interpretations of the meaning of a commercial fundraiser. A company may be deemed to be a commercial fundraiser in one jurisdiction and not another, despite a nearly identical statutory definition.

Definitions in each Jurisdiction

The New South Wales, Victorian, ACT and South Australian jurisdictions all specifically define commercial fundraisers or traders in statute.

Other jurisdictions include some requirements surrounding fundraisers who derive a commercial benefit, but do not include specific definitions.

A brief summary of the definitions and some related considerations is set out in table format on the next page.

Obligations on Commercial Fundraisers

In most jurisdictions, a commercial fundraiser is required to have a written agreement in place with the licensed charity in order to fundraise on its behalf. Sometimes, this agreement needs to be lodged with the regulator, and approved.

However, in Victoria (and in no other jurisdiction) a commercial fundraiser is required to be separately licensed, even if the charity on behalf of which it fundraises is licensed. This needs to be considered when for-profit organisations and charities collaborate on projects, which

Jurisdiction	Legislative Reference	Definition	Practical Considerations
NSW	*Charitable Fundraising Act 1991* (NSW); s 11(1)	A person fundraising: (a) in connection with the supply of goods or services in the course of any trade or business carried on by the person; or (b) otherwise partly for the person's benefit.	• If the fundraising occurs in connection with trade or business, but no commission fee is charged, is (a) satisfied? • What exactly is required in order for the fundraising to be considered "partly for the person's benefit"?
VIC	*Fundraising Act 1998* (Vic); s 3	A person who is retained on a commercial basis by another person to administer all or part of a fundraising appeal for the other person.	• What exactly is a "commercial basis"? • For example, would the payment of an administration fee, or the reimbursement of expenses be considered a "commercial basis"?
ACT	*Charitable Collections Act 2003* (ACT); s 12	A person who is engaged on a commercial basis by a person conducting the collection to conduct all or part of the collection for the other person.	• As in the Victorian jurisdiction, how exactly is the term "commercial basis" defined?
SA	*Collections For Charitable Purposes Act 1939* (SA); s 4	A person who receives valuable consideration to act as a collector.	• In contract law, the bar for "valuable consideration" is low; does this principle apply to the Collections For Charitable Purposes Act 1939 (SA)?

include fundraising. It is quite likely in such arrangements that both the for-profit and the charity would require a licence in Victoria.

Similarly, as part of the current boom in social enterprise, it is becoming more common for there to be for-profit organisations and charities within the same corporate group. Even though there is separation between the different parts of the corporate group, it is possible that both the for-profit and the charity would need to be licensed in Victoria. Advice should be sought when uncertain.

Even in the other jurisdictions, there are legal requirements in place regarding the agreements between licensees and commercial fundraisers, and these requirements require detailed consideration. Sometimes these agreements must be lodged with the regulator, and the licensee is required to keep the regulator informed of certain details regarding the arrangement.

Summary

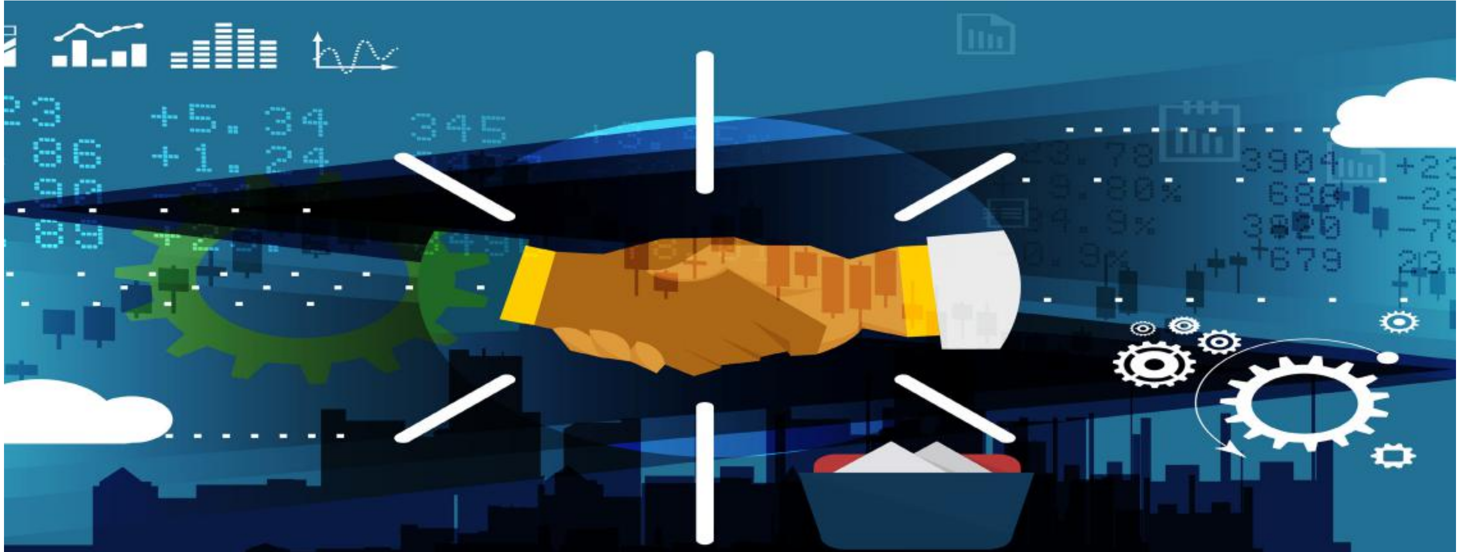
As this brief summary of the law shows, commercial fundraisers, or charities which are considering using the services of commercial fundraisers, need to give detailed consideration to the various laws which apply before completing fundraising activities on a national basis. There are obligations which are placed on both the commercial fundraisers, and the charities on behalf of which they fundraise.

Charitable fundraising is a particularly complex area of law, primarily due to the differing requirements across the different jurisdictions.

If a charity or a commercial fundraiser is uncertain whether the commercial fundraiser is required to be licensed, or whether the agreements in place between them are compliant, then they should seek the guidance of the relevant regulator, or seek legal advice.

Fair’s fair: the unfair contract terms regime

BY By Andrew Egri, Lawyer



With courts now hearing the first claims under the expanded unfair contract laws which have been in force since 12 November 2016, it is a timely reminder to not-for-profit organisations to act fairly in their contractual relationships.

New application of unfair contract laws

A term can now be declared void by a court if it is:

- in a contract regarding an interest in land or the supply of goods or services;
- the contract is a ‘small business contract’ which is a ‘standard form contract’; and
- unfair.

The expanded regime applies to contracts which are entered into after 12 November 2016. A contract entered into before 12 November 2016 is also covered by the expanded regime, if the contract is renewed or varied after that date.

What is a ‘small business contract’?

A ‘small business contract’ is a contract where:

- at least one of the parties is a small business (which employs less than 20 people, including casual employees employed on a regular and systematic basis, as well as a not-for-profit organisation); and
- the upfront price payable under the contract does not exceed $300,000 (or, if the contract term exceeds 12 months, $1,000,000).

What is a ‘standard form contract’?

A ‘standard form contract’ is one that has been prepared by one of the parties and is offered on a ‘take it or leave it’ basis.

A contract is less likely to be a standard form contract if negotiations occur prior to the preparation of the contract, or if the other party was given an effective opportunity to negotiate the terms of the contract prepared. Contracts that take into account the specific characteristic of another party or the particular transaction are also less likely to be standard form contracts.

What is an ‘unfair’ term?

A term of a small business contract is unfair if:

- it would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment to a party if it were to be relied on.

The law provides a sample of unfair contract terms, including those which permit only one party to:

- terminate the contract;
- vary the terms of the contract;
- renew or not renew the contract;
- determine whether there has been a breach of the contract; and
- assign the contract without the consent of the other party.

The Sensis example

Earlier this year, in the first action taken under the expanded regime, the Australian Competition and Consumer Commission (ACCC) accepted a court-enforceable undertaking from Sensis.

Sensis had been representing to customers that its White Pages and Yellow Pages online packages and printed bundles had a minimum contract terms of 12 months and monthly fees. However, Sensis failed to disclose to potential customers that on expiry, the packages would renew automatically for an additional 12 month term. If this additional term was cancelled after a certain date, the customer would incur a cancellation fee equal to the cost of the remainder of the extended term.

As a result of the ACCC's investigation, Sensis gave an undertaking to refund affected customers and to adequately explain to customers the terms of their automatic contract renewals and cancellation processes.

> ***"While the expanded application of the unfair contract laws provide additional protections to not-for-profit organisations, early identification of potential unfair terms is key"***

Following the Sensis investigation, the ACCC has made the new unfair contract terms laws an enforcement priority. ACCC Deputy Chair, Dr Michael Schaper, said that the ACCC "has serious concerns about the use of wide-ranging termination clauses that allow a business to unilaterally terminate a contract without reasonable cause." Dr Schaper also warned that businesses which continue to use these termination clauses in their standard form contracts with small businesses risk ACCC enforcement action, including court proceedings to have those clauses declared unfair.

How are not-for-profit organisations affected?

Not-for-profit organisations that use standard form contracts should take the opportunity to review any standard form contracts to ensure that the terms contained would not be unfair. Any terms which are found by a court to be unfair are void and unenforceable, which may significantly impact a not-for-profit organisation's standing.

Not-for-profit organisations which are 'small businesses' and are bound by or offered standard form contracts are also encouraged to review the terms of those contracts to identify potential unfair terms and consider raising them with the other parties. While the expanded application of the unfair contract laws provide additional protections to not-for-profit organisations, early identification of potential unfair terms is key, as going to court remains a costly exercise. In contract law, as always, prevention is better than cure.

Public Companies & Related Parties: Should our organisation be concerned?

BY Clement Ngai, Paralegal & Benjamin Lyon, Paralegal

If your not-for-profit has been established as a company, the company directors have significant duties associated with their role in orchestrating the operations of the not-for-profit. Under the common law and the *Corporations Act 2001* (**the Act**), obligations have arisen in order to protect members from improper behaviour by directors. However, this piecemeal development of the law has resulted in complex requirements and restrictions which are not always easy for directors to comprehensively understand. This is particularly so in the case of related party transactions which are instituted in Chapter 2E of the Act and are known to be legally complex and often confusing to understand.

In light of this, ASIC released Regulatory Guide 76 (**RG76**) in relation to "Related Party Transactions", to assist public companies and their professional advisers in better governance and disclosure in relation to related party transactions. [1] Directors of not-for-profit companies should take particular caution in relation to potential related party transactions, not only to avoid the hefty penalties associated with breaches in this area, but also to ensure that transparency and accountability are a hallmark of their organisation.

Duties and obligations relevant to Related Party Transactions

Directors considering engaging in related party transactions must be aware that the provisions affecting directors entering related party transactions are not limited to the 'Related Party Transactions' chapter (Pt 2E) of the Act. Before specifically considering Part 2E of the Act and its provisions for related party transactions, directors should consider the following duties and obligations:

1. Obligations concerning use of position and information

Under sections 182 and 183 of the Act, company directors have obligations not to use their position, or information acquired as a director, to gain an advantage for themselves or someone else, or cause detriment to the organisation.

2. Obligation to give notice of material personal interest

Under section 191 of the Act, company directors have obligations to disclose to other directors any material personal interest. Furthermore, directors cannot vote on a matter in which they have a material personal interest, or attend directors' meetings while the matter is being considered, unless ASIC or the other directors provide relief, in accordance with the requirements of the Act. Although this section does not apply to registered charities, similar obligations are imposed on charities through the ACNC regulations (Governance Standard 5).

3. Fiduciary Duties

Under the law of equity, directors owe fiduciary duties towards their companies: a duty not to place themselves in positions of conflicting interests, and a duty not to make a profit at the expense of the company.

4. Related Party Disclosures

Under the Australian Accounting Standards Board (AASB) related parties disclosure standards, AASB 124, not-for-profit public entities must make numerous disclosures about known financial relationships with related parties.

Related Party Transactions under Part 2E of the Act

What parties are covered under 'related parties' of a public company?

Section 228 of the Act contains a list of parties that are to be considered related parties of a public company. These include:

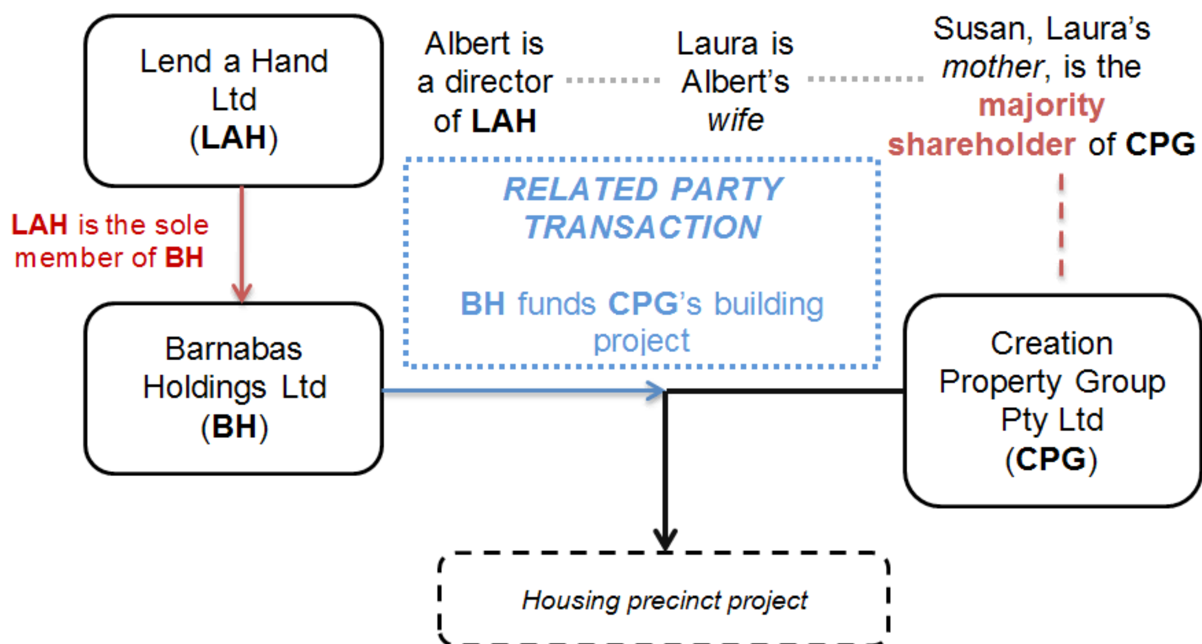
- controlling entities of the company;

- directors (of the company, or of any entity controlling the company);
- persons making up a controlling entity of a public company (where the entity is not a body corporate); and
- spouses, parents and children of the persons listed above.

It further includes:

- any entities controlled by the parties listed above;
- any entity that was a related party in the previous six months or (has reasonable grounds to believe that it) will be a related party in the future; and
- any entity that acts in concert with a related party on the understanding that the related party will receive a financial benefit if the company gives the entity a financial benefit.

The following fictional example of a related party transaction demonstrates the wide potential scope of section 228:



__CPG__ is a related party of __LAH__, since it is controlled by the parent of a spouse of a director of __LAH__.

__CPG__ is also a related party of __BH__, since __LAH__ has control over __BH__ and __CPG__ is a related party of __LAH__, as explained above.

__BH__'s funding of __CPG__'s building project would therefore be a related party transaction under section 228 of the Act.

Why should our company be concerned?

In order to protect the interests of a public company's members as a whole, section 208 of the Act requires the public company to obtain approval from its members when proposing to give a financial benefit to a related party. There are also exceptions to this requirement in sections 210 – 216 of the Act, as summarised below.

However, if a company fails to obtain member approval and none of these exceptions apply, a director involved may be liable to civil penalties. Furthermore, criminal penalties may even be relevant if the director's involvement in the related party transaction is considered dishonest (s209(3)).

What significant exceptions are there to obtaining member approval?

1. The 'arm's length' exception

A public company may provide financial benefits to related parties without member approval when the terms agreed would have been reasonable in the case that the parties were dealing at "arm's length" (s210). RG76 describes an "arm's length" relationship as "where neither bears the other any special duty or obligation, they are unrelated, uninfluenced and each acts in its own interests." This is an objective test which considers several additional factors; however there is no established, step-by-step test. Due to this complexity, RG76 suggests that directors should only rely on this exception when they are 'persuaded that the exception does apply, rather than it being merely arguable that it applies.'[2]

2. Reasonable remuneration for officers or employees

A public company may provide financial benefits to related parties without member approval, where the benefit is remuneration or a reimbursement of expenses incurred in the related party's capacity as:

- an officer or employee of the company;
- an entity controlled by, or that controls, the company; or
- an entity that is controlled by the same entity as the company.

The financial benefit must still be reasonable in the circumstances – e.g. reimbursements must correspond to invoices for the related party's expenses (s211).

3. Payment to officers for indemnities, exemptions, insurance premiums and legal costs in respect of liabilities incurred as an officer

A public company may provide financial benefits to related parties without member approval where they are payments by way of indemnities, exemptions, insurance premiums, and legal costs if the payment is in respect of a liability incurred in the related party's capacity as an officer of the company (s212). The benefit must be reasonable in the circumstances and the section must be read in light of restrictions on indemnities and insurance found elsewhere in the Act (ss199A-199C).

4. Benefits to or by a closely-held subsidiary

A public company may provide financial benefits to related parties without member approval, or receive benefits from them, where the related party is a wholly-owned subsidiary of the company (s 214).

5. Benefits that do not discriminate unfairly

A public company may provide financial benefits to a member of the company who is a related party without member approval, provided that the benefit is provided in the party's capacity as a member and does not discriminate unfairly against any other members (s215).

> ***"One of the best ways to proactively manage related party transactions is for companies to develop a policy or process for how related party transactions will be dealt with".***

Confidently avoiding liability

Member approval

Where there is still doubt in a director's mind as to whether the statutory exceptions are applicable in the circumstances of a proposed related party transaction, it is advisable not to proceed without obtaining member approval. Material that will be put before members must be lodged with ASIC, in accordance with the process set out in the Act. Generally, this must be done at least 14 days before a notice convening the meeting is sent out to members. If the entities entering into related party arrangements wish to offer securities, disclosure documents will also need to be provided subject to the requirements of the Act and RG76.

Related Party Disclosure Policy

This is a recommendation that has been made by both the ACNC, and the Governance Institute of Australia. This could be in the form of a separate policy, within an existing conflict of interest policy, or within the board charter of the company. Furthermore, a company secretary should maintain and regularly update a register of directors' material personal interests, and proposed related party transactions.

Expert Advice

Since breaches with regard to related party transactions are complex to determine and carry substantial penalties, this is an area of the law that requires particular care. If directors find that they do not have the knowledge or expertise necessary to assess all aspects of related party transactions, RG76 makes it clear that directors should obtain expert advice, [3] acknowledging that advice is not a replacement for the director's careful consideration of the issue at hand. [4]

Circumspection in relation to the applicability of exceptions, gaining member approval, and developing governance policies will work towards ensuring transparency, and accordingly building the public trust and confidence that is so crucial to achieving the goals of charities and not-for-profits.

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[1] Australian Securities and Investments Commission, Related Party Transactions, Regulatory Guide 76, 30 March 2011.

[2] RG 76.94

[3] RG 76.90

[4] RG 76.91

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