ISSUE 1 2023

THIRD DIMENSION

A PRACTICAL LEGAL PERSPECTIVE FOR CHARITIES AND NOT-FOR-PROFITS

Highlights Charities 2022/23 - Looking back and looking forward 2 Climate Change Diligence 4 New Taxation Ruling: Is your Non-Profit Club exempt from Income Tax? 7 Progress of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: An Update 9 The terms of a worker's engagement - why they matter 11

MILLS OAKLEY

Charities 2022/23 - Looking back and looking forward

BY *Sonya Parsons, Partner*

2022 was the year in which Australia moved from fighting COVID-19 to learning to live with the virus, and charities navigated that same course. While the opening up of Australia is a welcome relief for many, the question continues to be - what changes brought about by the pandemic will last?

The first few months of 2023 are showing, that there is an increased focus by regulators on reducing red tape and streamlining compliance processes. Will this trend continue?

As fiscal constraints engulfed many during the COVID period, fundraising became more challenging. Will it increase to pre-COVID levels, particularly with the currently spectacular inflation and cost of living pressures facing Australians?

The latest financial insights from the Australian Institute of Company Directors recorded in its 2022-23 *Not-For-Profit Performance and Governance Study* are optimistic with 50% of not-for-profit organisations participating in the study reporting that they expect profits to return to pre-COVID levels within six months to five years' time and 17% of organisations reporting that they are financially better off since COVID. Only 2% of organisations reported that they may never recover.[1]

The return to face-to-face contact was critical for charities working in the community, particularly with the vulnerable. But will our acceptance of our lives moving online mean more work to do for charities – in protecting the young from online abuse, and the unsuspecting from fraud? As we moved to embracing our local community within a 5-kilometre radius as temporarily mandated by the government, have people become less lonely?

It is certainly the case that charities did not become any less relevant during COVID, with four out of five charities reporting an increased need for their services in September 2021.[2] As always, charities and not-for-profits will continue to do valuable work to enhance the lives of those who need them, and for important causes.

On a 'in case you missed it' (and a few 'before you miss it') basis, here are some of the highlight developments for charities and NFPs in 2022 and early 2023:

July 2022

- Dr Gary Johns steps down as ACNC Commissioner.
- Charities that report at the end of the financial year are required to keep records of related party transactions for the 2023 Annual Information Statement.[3]

September 2022

- NSW introduces a new model constitution for associations.[4]

October 2022

- The Federal Government announces a framework for national consistency on charitable fundraising, which is expected as early as 2023.

November 2022

- Sue Woodward appointed the new ACNC Commissioner.
- The deadline expired for applying for a Direction identification number (if you were appointed as a company director before 31 October 2021).[5]

December 2022

- By 14 December 2022, DGRs needed to have registered as a charity with the ACNC or be operated by a registered charity.[6]

January 2023

- Charities that report at the end of the calendar year are required to keep records of related party transactions for the 2023 Annual Information Statement.
- Treasury released an exposure draft bill and explanatory memorandum for DGR reform for public consultation. The proposed reform transfers administration of the four unique DGR categories from portfolio agencies to the ATO in an attempt to reduce red tape and simplify application processes. [7]

February 2023

- The Federal Government's Productivity Commission commenced its review of Australian philanthropy.[8]
- The October 2022 predictions that nationally harmonised fundraising principles would be agreed early in 2023 are proven true as Commonwealth, state and territory Treasurers agree to a set of nationally consistent fundraising principles. Each participating jurisdiction will release an implementation plan by July 2023 explaining how it will give effect to the principles through regulatory changes or legislation.[9]

March 2023

- The ACNC is (until 16 March 2023) conducting a public consultation on how the ACNC will ask charities to report their related party transactions in the 2023 Annual Information Statement.[10]
- Public consultation on the Australian Accounting Standards Board (AASB) Discussion Paper – Development of Simplified Accounting Requirements (Tier 3 Not-for-Profit Private Sector Entities) proposing a stand-alone accounting standard for smaller non-government NFP organisations (including charities) closes on 31 March 2023.[11]

---

[1] Australian Institute of Directors, *Not-For-Profit Performance and Governance Study 2023 – 23* (Report 2022-23) at page 25

[2] Social Ventures Australia and the Centre for Social Impact, *Partners in recovery: Moving beyond the crisis?* (Report, 2022).

[3] Australian Charities and Not-for-profits Commission, 'The annual information statement' (Web Page) <https://www.acnc.gov.au/for-charities/annual-information-statement>.

[4] Fair Trading NSW, 'Model constitution' (Web Page) <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/starting-an-association/model-constitution>.

[5] Australian Business Registry Services, 'Director identification number' (Web Page) <https://www.abrs.gov.au/director-identification-number>.

[6] Australian Charities and Not-for-profits Commission, 'Entities with Deductable Gift Recipient (DGR) Endorsement' (Web Page, 2021) <https://www.acnc.gov.au/tools/factsheets/deductible-gift-recipients-and-acnc/entities-deductible-gift-recipient-dgr-endorsement>.

[7] Treasury, 'Agreement reached on reform of charitable fundraising laws' (Web Page 2023) <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/agreement-reached-reform-charitable-fundraising-laws>

[8] Productivity Commission, 'Philanthropy' (Web Page) <https://www.pc.gov.au/inquiries/current/philanthropy>.

[9] Australian Taxation Office, 'Deductible gift recipient reform' (Web Page, 2023) <https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/Not-for-profit/Deductible-gift-recipient-reform/>

[10] Australian Charities and Not-for-profits Commission, 'ACNC consultation on reporting relating party transactions' (Web Page) <https://www.acnc.gov.au/acnc-consultation-reporting-related-party-transactions>.

[11] Australian Accounting Standards Board, 'Development of simplified accounting requirements for smaller not-for-profit private sector entities' (Web Page, 2022) <https://aasb.gov.au/news/development-of-simplified-accounting-requirements-for-smaller-not-for-profit-private-sector-entities/>.

Climate Change Diligence

BY Valentyna Jurkiw, Special Counsel

Scientists, analysts, politicians, and business leaders now acknowledge the serious and catastrophic impacts of climate change on the planet, some of which are already apparent and understood to be irreversible.[1]

When the President of the United States of America says that climate change "is about human security, economic security, environmental security, national security and the very life of the planet[2]", as he did at COP27 in Egypt, then it is something that simply must be given due consideration.

Back home in Australia, the Federal Government recently enacted the Climate Change Act 2022 (Cth) which operates as a legislative timetable to implement a net-zero greenhouse gas emissions commitment by 2050. Regulators such as ASIC[3], ASX[4] and APRA[5] have been recognising climate risk as a key concern in policy for a number of years and are increasingly active in providing commentary to business and consumers on the issue.[6]

In this context, climate change diligence must be enacted by all public corporations, including not-for-profits. Organisations will need to embed climate change considerations into their operations, beginning with an analysis of their current position and followed by the development of a framework to ensure they effectively adapt to this new business environment.

Say S.W.O.T

A SWOT (or application of the standard “strengths, weakness, opportunities and threats”) analysis in relation to climate change could be a simple but powerful technique for an organisation to start implementing a climate change response. The analysis should not only examine the risks associated with the forecast of physical climate change within broader legislative, economic and public policy responses to it, but also look for any opportunities that may present.

In order for an organisation to properly consider its strengths, weaknesses, opportunities and threats, its directors, officers and other responsible persons must ensure that climate change is a factor taken into account in decision making, where it is appropriate to do so.

Climate Change Governance

Directors, officers and key management should prepare for accountability to stakeholders in the face of expectations in this policy landscape and they will need to work out how to do so quickly. They should start:

- building climate competency within their organisations but also in their personal capacities;
- actively considering the organisation’s climate culture and how this is formally reflected in business decision making;
- reviewing risk frameworks to factor climate changes into the organisation’s risk management systems;
- considering how their organisation will report on climate outcomes, their approach and the content of such reporting; and
- addressing the allocation and protection of key assets and the maintenance of their value.

Directors and officers of incorporated entities and responsible persons of registered charities all have a duty to exercise care and diligence in decision making.

The duty is defined in the classic case of ASIC V Healey & Ors [2011] FCA 717, a decision which dealt with directors’ failures to properly understand financial statements, meaning that significant errors in those statements went unnoticed. The Federal Court found that notwithstanding their good intentions, directors failed to discharge their duty of care and diligence. In his judgment, Middleton J said:

> "What each director is expected to do is to take a diligent and intelligent interest in the information available to him or her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her.[7]"

The Federal Court acknowledged that there was no obligation to be an expert in the subject matter concerned but that there was a clear obligation to engage with material affecting the company and make appropriate enquiries for the purposes of sound decision making.

The climate change environment is analogous to this. Every member of an organisation’s leadership should be turning their mind to climate change related matters as they emerge, deal with them transparently and ask appropriate questions. In many instances, these matters are developing quickly, and decisions are being made by organisations with imperfect information as a matter of necessity.

Safe Harbour Provisions

The legal protections afforded by the business judgment rule are likely to become very important for directors and officers of organisations. We have written about the business judgment rule in a previous edition of Third Dimension[8] and in that article we explain the rule in detail and its application in the charity and corporations law context. In summary the defence is available to any director or officer who:

- makes a judgment in good faith for a proper purpose;
- did not have a significant personal interest in the subject matter of the judgment;
- has informed themselves about the subject matter to the extent they reasonably believed was appropriate; and
- rationally believed that the judgment was in the best interests of the organisation.

In the uncertain environment of climate change, active consideration, enquiry, review and building of risk

frameworks and reporting will assist organisations to prepare for the impacts of climate change in the for-profit and not-for-profit environment.

Stakeholder Accountability

Boards will also need to consider how they can be accountable to stakeholders[9] and report on their climate change position in a transparent, practical and measured manner. An organisation's climate change statements cannot be aspirational; they must be supported by reasonable grounds.

An emerging issue for all organisations is managing the risks of greenwashing, which is the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical. In mid 2022, ASIC released its *Information Sheet 271* providing guidance on how this risk can be mitigated in relation to financial services products, but the principles in Information Sheet 271 can easily be transferrable to general business practices.[10]

ASIC has stated that taking action against greenwashing is one of its 2023 enforcement priorities.[11] It has been active in this commitment since issuing its first infringement notice against listed company Tlou Energy Limited in October 2022, having issued a number of further infringement notices against companies for greenwashing since then.

On 28 February 2023, ASIC launched its first court action against alleged greenwashing conduct, commencing civil penalty proceedings in the Federal Court against Mercer Superannuation (Australia) Limited (**Mercer**). ASIC has alleged that Mercer made statements on its website about "sustainable" investment options offered by the Mercer Super Trust and that these statements were false and misleading.[12]

Organisations will continue to be held accountable by their stakeholders. The content of representations, made by an organisation, whether in corporate statements dealing with the environment, the contents of publicly available information (for example strategic plans), will need to be carefully considered to avoid risk of liability.

[1] NASA, 'The Effects of Climate Change' (Web Page, 22 November 2022) <https://climate.nasa.gov/effects/#:~:text=Changes%20to%20Earth's%20climate%20driven,plants%20and%20trees%20are%20blooming>.

[2] President Joe Biden, 'Remarks at the 27th Conference of the Parties to the Framework Convention on Climate Change (COP 27)' (Conference, 11 November 2022).

[3] Commissioner Cathie Armour, 'Managing climate risk for directors' ASICI (Article, February 2021) <https://asic.gov.au/about-asic/news-centre/articles/managing-climate-risk-for-directors/>.

[4] ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Web Page, 2019), 7.4.

[5] APRA, *Prudential practice guide: CPG 229 Climate Change Financial Risks* (Report, November 2021).

[6] ASIC Annual Forum, 'ASIC Annual Forum 2022: Climate Change: the new frontier for corporate governance' (Article, 4 November 2022) <https://asic.gov.au/about-asic/news-centre/news-items/asic-annual-forum-2022-climate-change-the-new-frontier-for-corporate-governance/>; APRA, 'APRA publishes findings of latest climate risk self-assessment survey' (Media Release, 4 August 2022).

[7] *ASIC V Healey & Ors* [2011] FCA 717, 718 [20].

[8] Vera Visevic, 'Third Dimension – Is ignorance bliss? An examination of the duty of care and diligence' Mills Oakley (Article, December 2016) <https://www.millsoakley.com.au/thinking/third-dimension-is-ignorance-bliss-an-examination-of-the-duty-of-care-and-diligence/>.

[9] At the time of writing, the first ever action against a Board for failing to appropriately manage climate risk was brought in the UK. Climate Earth, an environmental law charity and a shareholder of Shell UK, has filed a derivative claim against the 11 directors of Shell for failing to appropriately manage climate risk and properly prepare Shell UK for net zero transition. Such actions are likely to become more and more common around the world and will have implications for directors of Australian companies.

[10] ASIC, 'How to avoid greenwashing when offering or promoting sustainability-related products' (Information Sheet, June 2022) <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>; ASIC, *Regulatory Guide 65: Section 1013DA disclosure guidelines* (Report, November 2011).

[11] ASIC, https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/

[12] ASIC, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-043mr-asic-launches-first-court-proceedings-alleging-greenwashing/

New Taxation Ruling: Is your Non-Profit Club exempt from Income Tax?

BY *Jonathan Green, Associate*

A new taxation ruling (TR 2022/2) has recently been issued by the Australian Taxation Office in relation to societies, associations or clubs (Clubs) seeking to determine whether they are exempt from income tax under the Income Tax Assessment Act 1977 (Cth)[1] (ITAA) (also known as the 'games and sports exemption'). The new taxation ruling replaces the previous ruling (TR 97/22) in relation to the games and sports exemption.

What do the changes mean for Clubs?

Firstly, Clubs that have previously been ineligible for the games and sports exemption (because of the extent of their commercial activities, because they did not directly undertake games and sports activities or because they held significant surplus funds) may wish to consider re-assessing their eligibility. If their commercial activities or the holding of surplus funds is a means to achieving their games and/or sporting purposes, they may be eligible for an exemption. Likewise, Clubs that support other organisations to undertake games and sporting activities, whilst not undertaking any games and/or sporting activities themselves, may also be eligible for an exemption.

Secondly, Clubs that have self-assessed as eligible for the exemption and have an Australian Business Number, must complete an annual online self-review form, from the financial year commencing 1 July 2023. Given this new requirement (which has been introduced to provide information to the ATO), Clubs should be certain that they are entitled to the games and sports exemption and should carefully assess their eligibility under TR 2022/2.

On what basis are Clubs eligible for the games and sports exemption?

Pursuant to the requirements of the ITAA[2], a Club qualifies for the games and sports exemption where it:

a. is established for the main purpose of the encouragement of a game or sport;

b. is not carried on for the purposes of its individual members' profit or gain; and

c. meets other special conditions in the ITAA (i.e. is a Club that is not carried on for profit or gain by its members, is physically located in Australia and it undertakes its activities in Australia or meets other prescribed requirements or is a prescribed organisation, complies with its governing rules and applies its income and assets solely toward its purpose).[3]

An entitlement to an exemption is self-assessed by Clubs. However, TR 2022/2 recommends that Clubs 'self-review their entitlement to an income tax exemption each year or when there is a major change in the structure or activities of the club'.[4]

What has changed?

TR 2022/2 refreshes the ATO's view with regard to the application of the games and sports exemption. In particular, TR 2022/2 more explicitly addresses the ability of Clubs to undertake 'commercial activities' as a means of achieving the games and/or sporting purpose of a Club.

The principle established in *Word Investments*,[5] in which the High Court found that commercial activities (that generate income to be used toward the purposes of an organisation) may be considered a means of serving the purposes of the organisation, is applied in TR 2022/2.

As a consequence of *Word Investments*,[6] Clubs must 'objectively determine the extent to which commercial operations are a means to the end of advancing the sporting purpose, or are advancing some other purpose'.[7] The practical application of this is that Clubs must continue to be sure that any commercial activities undertaken serve the games and/or sporting purpose of the Club. However, significant commercial activities, that could possibly be regarded as being more than 'ancillary or incidental, or secondary',[8] may not necessarily prevent a Club from obtaining an exemption if those commercial activities 'are a means to the end of advancing the sporting purpose' of the Club.[9]

In accordance with the principles established in *Word Investments*,[10] the fact that a Club holds or uses surplus funds toward commercial activities does not necessarily mean a Club does not have a main purpose of encouraging games and sports. TR 2022/2 provides that:

a. 'using surpluses from commercial activities to support the conduct of sporting activities is a factor that would support a conclusion that the main purpose of the club is encouraging a game or sport';[11] and

b. 'putting aside surpluses as a contingency fund for unexpected future events' is not a determinative factor in whether the main purpose of a Club is encouraging games or sports, 'provided the club can reasonably show the need for such a fund'.[12]

It follows that the key, with regard to use of surplus funds for activities that are not related to games or sporting activities, is that a Club is able to demonstrate that either:

a. the use of those funds generates income to be used for encouraging games and/or sports; or

b. those funds are being held for a future purpose that will encourage games and/or sports.

Furthermore, TR 2022/2 clarifies, in accordance with the principles established in *Word Investments*,[13] that Clubs 'can demonstrate a purpose of encouraging a game or sport' by providing 'financial and in-kind contributions to other organisations' that directly conduct games and/or sporting activities.[14] This means that Clubs may be eligible for an exemption even if they are not directly involved in conducting games or sporting activity, if they provide financial and in-kind support to other organisations involved in these activities. This is particularly applicable for Clubs that exist as supporter clubs of other Clubs and for whom their main activities involve fundraising. Pursuant to TR 2022/2, such Clubs may now be considered to be encouraging a game or sport.

From the financial year commencing 1 July 2023, Clubs with an active Australian Business Number will be required to complete an annual online self-review form that must be submitted to the ATO as part of the self-assessment process.[15] We anticipate that this form will likely require some justification as to the basis upon which a Club has self-assessed itself as exempt and how it is complying with the requirements for the games and sports exemption.

How can we help?

Our team at Mills Oakley has extensive experience Australia-wide assisting Clubs with assessing their activities and purposes, with regard to eligibility for an income tax exemption. If you would like to discuss whether your Club is eligible for the games and sports exemption, please make contact with our team.

[1] *ITAA* s 45-50.
[2] Ibid s 50-70.
[3] Ibid.
[4] Australian Taxation Office, *Income Tax: The Games and Sports Exemption* (TR 2022/2, 14 September 2022) [5].
[5] *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 ('*Commissioner of Taxation v Word*').
[6] Ibid.
[7] Australian Taxation Office (n 4) [44].
[8] TR 97/22 paragraph 42.
[9] Australian Taxation Office (n 4) [41].
[10] *Commissioner of Taxation v Word* (n 5).
[11] Australian Taxation Office (n 4) [45].
[12] Ibid [47].
[13] *Commissioner of Taxation v Word* (n 5).
[14] Australian Taxation Office (n 4) [42].
[15] Ibid 5.

Progress of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: An Update

BY *Stephanie Armstrong, Lawyer*

In 2022, the work of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Commission) continued with more than 1000 private sessions and 30 public hearings being conducted at the time of writing. The final report of the Commission is slated for delivery on 29 September 2023. Because of the issues being identified by the Commission's work, we anticipate that the rate of regulatory and funding changes in the disability, health, education and aged care sectors will only increase following the Report's delivery.

What have we learned so far?

In its' interim report in 2020[1], the Commission identified some emerging themes:

- ***Choice and Control:*** Just because a person needs assistance does not mean that they do not have a right to autonomy and independence.
- ***Negative Attitudes:*** Negative attitudes (including low expectations, assumptions and stereotypes) can contribute to the abuse and exploitation of people with a disability.
- ***Segregated Settings:*** There is a greater risk of abuse and neglect of people with disability in segregated settings, including within education, homes and living arrangements, employment and day programs.
- ***Restrictive Practices:*** The unwarranted use of restrictive practices (which can include 'protective' or 'disciplinary' restrictions) in response to perceived 'behaviours of concern' is a matter of concern to the Commission.
- ***Services and Supports:*** Services and supports can be a safety resource, but can also enable harm.
- ***Advocacy:*** Advocacy and representation are a key measure to address violence, abuse, neglect and exploitation.
- ***Oversight and Complaints:*** Oversight and complaint mechanisms help prevent the abuse of people with disability, but are not necessarily accessible or effective.

In relation to the matter of oversight and complaints mechanisms, the Interim Report found that:

> Some people with disability described fearing retribution or not being able to access confidential complaints procedures. We have also heard about complaint procedures that are inappropriate for people who are non-verbal or deaf. We have heard that complaints made by people with disability, particularly those with psychosocial or intellectual disabilities, are not always taken seriously or are considered minor. We have been told that reporting and investigation processes are often insufficiently independent and are inaccessible or re-traumatising for the complainant.[2]

What can we expect?

The Commission has focussed on particular sectors, and we can expect that these sectors will see increased regulations, reforms and changes to funding, with underperforming organisations facing funding cuts.[3] These sectors include (but are not limited to): group homes, residential and accommodation services; educational settings; healthcare environments; Australian Disability Enterprises/'sheltered workplaces'; 'Day Programs'; Domestic and Family Violence Services; and NDIS Service Providers.

- The final report is likely to recommend significant reform to practices that the Commission has identified as putting persons with a disability at risk of abuse, including:
- The use of restraints, non-therapeutic medication and isolation, to address behaviours of concern will become increasingly unacceptable.
- The ability of residential care providers to standardise service provision within their facilities.
- The use of segregated services (that is, activities and environments that segregate people with disabilities from the general population such as 'special schools' or sheltered workplaces) in favour of integration.

It is reasonable to expect that these practices will become unacceptable, or at least involve a greater compliance responsibility.

We also predict reforms to support practices safeguarding persons with a disability. All disability services organisations should respond effectively and proactively to the Commission by starting to address how they can:

- improve training for professionals in relation to disability-safe care;
- implement cultural safety practices to address the compounded risks for persons who are culturally and linguistically diverse, First Nations people, and people who live in rural or remote communities;
- improve advocacy and support services to help persons with disability exercise choice and control;
- assure accessibility of complaint management practices and oversight procedures; and
- collect data and use it to monitor their performance.

What about redress?

The Commission has not yet indicated whether it will recommend the establishment of a redress scheme similar to the redress scheme for victims of institutional child sexual abuse but it has stated that it will be looking into the need for redress before the final report is issued. It is certainly prudent for organisations to be considering practices and incidents occurring in the past and preparing to manage complaints and claims in the future and developing strategies to improve current practices to prevent foreseeable harm.

What can you do?

To proactively respond to the work of the Commission and ensure that your organisation is a safe place for persons with a disability, you should:

- Ensure that your organisation has a complaints policy and procedure and review the complaints procedure to identify ways that it may be inaccessible to, or inappropriate for, certain persons with a disability.
- Ensure that professionals in relevant roles are encouraged to access training and resources to properly support persons with a disability.
- Review the qualifications, checks and clearances that your organisation requires of employees and volunteers and consider whether they are appropriate.
- Consider whether your organisation and its services are accessible to persons whose first language is not English, who are First Nations people, victims of domestic and family violence, and people who live in rural or remote locations.
- Consider whether the structure of your funding creates conflicts of interest and develop policies for properly managing and disclosing conflicts of interest.
- Ensure that your organisation has established and implemented inclusive prevention of sexual exploitation and harassment policies.
- Review whether your organisation has policies and procedures in place to manage the use of restrictive practices.

[1] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020).
[2] Ibid 43.
[3] AAP, 'Eight disability employment services are being stripped of government funding. Here's why' *SBS News* (News Article, 21 August 2022) <https://www.sbs.com.au/news/article/eight-disability-employment-services-are-being-stripped-of-government-funding-heres-why/m6mz1yupw>.

The terms of a worker's engagement - why they matter

BY *Hudson Digby, Associate and Sara Taylor, Lawyer*

Charities and not-for-profits often attract a diverse workforce. The terms of engagement of this workforce attracts different legal rights, responsibilities and duties depending on whether a person is an employee, independent contractor, or volunteer. This article summarises recent decisions which have:

- reaffirmed the importance of written agreements being put in place between an organisation and a worker to confirm whether the worker is an employee or an independent contractor, and whether the benefits and protections provided by the Fair Work Act 2009 (Cth)[1] are owed to that worker;
- provided guidance on when the relationship between an entity and its 'volunteers' may lead a court to conclude the volunteer is in fact an employee, for whom the entity is vicariously liable and to whom an entity may owe benefits under the Fair Work Act; and
- highlighted the courts' willingness to test the circumstances in which an organisation can be held vicariously liable for intentional torts by employees and volunteers – an issue of particular relevance to charities and not-for-profits dealing with vulnerable persons.

The Importance of Written Agreements

The High Court started 2022 by delivering two decisions which revisited what is known as the 'multifactorial approach' to the classification of workers as either employees or independent contractors established twenty years ago in the case of *Hollis v Vabu Pty Ltd*.[2] In the period following *Hollis*, the multifactorial approach has typically seen courts assess the '*totality of the relationship*' between a worker and an organisation, by conducting an analysis of all circumstances of control in the working relationship. In that approach, any written agreement is a relevant consideration, but not determinative of the legal relationship between the parties. In *Hollis*, the Court found that the systems and work practices imposed by the organisation on the worker (outside of the terms of the contract) were also important factors for this purpose. The most widely known of these decisions have typically involved 'gig economy' companies, including the likes of Foodora, Deliveroo and Uber.

While the test was applied in *Hollis* as a step in concluding an organisation was vicariously liable for its employee (which would not have been the case if the worker was an independent contractor), the most significant impact of the decision, for all employers, has been whether its workers attract the rights under *Fair Work Act*, including for employee entitlements and the protections against unfair dismissal.

In both *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[3] and *ZG Operations Australia Pty Ltd v Jamsek*,[4] the High Court focussed on the written contract between the organisation and the worker, finding that it was determinative of the relationship between the parties, rather than engaging in the broader analysis of all of the conduct between the parties. The conduct analysis has been commonplace in courts and the Fair Work Commission since *Hollis*.

It was noted by the Court in *Personnel Contracting* that its decision is not a departure from *Hollis* but that *Hollis* involved a partially written, partially oral contract, and the terms of the worker's engagement was therefore not comprehensive. The Court confirmed that the broader analysis of how that relationship had '*come to play out in practice*' was necessary in *Hollis* because the terms of the contract between the parties were not certain. Accordingly, in circumstances where the relationship between the parties is not set out exclusively in contract, a broader review will be necessary to establish the character of the relationship.

In both cases, the Court also found that labels such as "employee" and "contractor" in a written agreement was neither determinative, nor even relevant to their characterisation of the relationship between the parties. Instead, the character of the relationship was defined with reference to the rights and obligations expressed in the contract.

In *Personnel Contracting*, the Court accepted that, notwithstanding that the contract referred to the claimant as an independent contractor, he was, in fact, an employee. Conversely, in *Jamsek*, the High Court accepted that the claimants were independent contractors, not employees, in accordance with the terms of agreements governing their relationship with the defendant.

Subsequent decisions have already indicated that this approach is unduly restrictive, as compared to the prior state of the law. On 17 August 2022, the Full Bench Fair Work Commission handed down its decision in *Deliveroo Australia Pty Ltd v Diego Franco*.[5] In *Franco*, the Commission found the existence of a number of 'realities' which indicated that Deliveroo's control over Mr Franco was akin to an employer and employee relationship. The Commission stated that:

> The various iterations of the contract were drawn up unilaterally by Deliveroo without any negotiation or consultation, and it might be inferred that this was done with an eye to maintaining Deliveroo's position that the delivery workers were contractors and not employees. Many of the changes in the contract were apparently intended to remove any indication that Deliveroo could control the performance of the work. This occurred against a background in which there was no significant practical change to the way in which the work was conducted apart from the introduction and withdrawal of the SSB [Deliveroo's rider booking software].[6]

Nonetheless, the Commission held that '*as a result of Personnel Contracting, we must close our eyes to these matters*',[7] and instead have regard to the written contract. In doing so, the Court held that Mr Franco was not an employee, but an independent contractor, who was not entitled to any remedies for unfair dismissal.

Deliveroo will likely face further scrutiny in relation to the legal obligations it has to its workforce, recently announcing its retreat from the Australian market after being put into administration.

Application of the 'multifactorial approach' to volunteers

Of interest to those operating in the not-for-profit space, the Supreme Court of New South Wales and, subsequently, the Court of Appeal have had recent cause to consider the application of the multifactorial approach to volunteers in *A, B, C, D v Bird, Clancy and Little Pigeon Ltd/as Footprints Childcare Centre*.[8] Much like in *Hollis*, in these decisions, the Court was concerned with concluding whether the organisation was vicariously liable for the conduct of its volunteer.[9]

The decisions concerned allegations of child abuse, and the application of the multifactorial test was necessary because of the historic nature of the allegations. Statutory provisions which may otherwise give rise to vicarious liability (in child abuse cases) for categories of persons beyond employees, were not available to be relied upon by the plaintiff.

Employee or Volunteer?

Accordingly, the plaintiff contended that on applying the multifactorial approach the perpetrator was an 'employee' of the childcare centre, despite being held out as a volunteer.

In finding the perpetrator was an employee, the Court had regard to the following circumstances (at paragraphs [427] to [447]):

- the perpetrator was a shareholder of the business, and described himself as a silent partner;
- the perpetrator's house had been used as collateral for the purchase of the building from which the childcare centre, at which the offences occurred (**Centre**), was run;
- approval was sought for the perpetrator's involvement in the Centre as an 'owner' and not a 'volunteer';
- the perpetrator was described as an owner, a volunteer, cook, OHS officer, maintenance person, the playground supervisor and a member of staff. The Regulations of the Centre (**Regulations**) prescribed that some of these roles could only be performed by an employee;
- the perpetrator worked at the centre 12 hours a day from Monday to Friday, and did maintenance work on the weekend. Employees would have to have been hired to cover his roles if he did not work;
- while the perpetrator did not receive wages, he was remunerated through other benefits, and the evidence indicated that it had previously been agreed that the payment of wages would have reduced the amount of his pension;
- the perpetrator was presented to parents in the same way of staff, as an emanation of the Centre;
- the Centre was able to control his work; and
- the level of supervision afforded to the perpetrator was the same as the employees, despite the Regulations prescribing a greater level of supervision for volunteers.

There was ultimately no challenge to these findings in *Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D*.[10]

While the decision does not displace the ordinary position that an organisation will not be vicariously liable for volunteers, it demonstrates the importance of having regard to the actual character of the relationship, including through the lens of the multifactorial approach, rather than reliance on the 'volunteer' label.

Vicarious liability for an employees' intentional torts or criminal conduct

Further movement in the law on vicarious liability may be on the horizon in 2023. Much as the usual position is that vicarious liability is limited to an organisation's employees, the usual position requires a connection between that employment, and the role given to the employment and the act in question. Typically, where an employee engages in an intentional tort (say, an assault), or a crime, that act is not in the course of performing the employee's role within the organisation, and will not attract vicarious liability.

The exception to that general position is found in the High Court's decision in *Prince Alfred College Incorporated v ADC*[11] and concerns whether the employer has assigned to the employee a special role vis-à-vis the victim, and whether the special role gave the employee the opportunity and the "occasion" for the wrongful act.[12] Relevant factors may include the authority, power, trust, and control vested in the employee, and their ability to achieve intimacy with the victim.

A practical application of this test, can be seen in the *Bird Appeal*,[13] in which the judge held:

- the actual roles which the Centre assigned the perpetrator placed him in a position of considerable power and trust over the children, which he abused;
- the assigned roles gave the perpetrator the opportunity to have close contact with children;
- the perpetrator was given authority by being left unsupervised when he had contact with children (which authority he abused);
- the lack of supervision permitted the perpetrator to not only achieve intimacy with his young victims, but to control them while committing the wrongful acts; and
- the roles the perpetrator was given created the occasion for his wrongful acts.

Special leave has now been granted by the High Court in a decision to revisit the decision of the High Court's test in *Prince Alfred.* The transcript of that application can be read at: *CCIG Investments Pty Ltd v Schokman*[14] and submissions are now available online.

The decision concerns allegations regarding a wrongful act by one employee against another, in accommodation provided by their employer, outside of work hours. In the application, the defendant organisation submitted that the case presents an opportunity for the High Court to revisit Prince Alfred and give "*appropriate focus on the particular act constituting the tortious conduct by the employee and the relation it bears to that which is within the scope or course of employment*",[15] and in particular, that "*the act must bear a sensible relation to the activities for which the employee is employed*".

The submission appears to invite the Court to narrow the focus of the test in *Prince Alfred* to be more closely aligned with the terms of employment. It will be interesting to see what the Court delivers, come the hearing on 9 March this year.

---

[1] *Fair Work Act 2009* (Cth) ('*Fair Work Act*').
[2] [2001] HCA 44 ('*Hollis*').
[3] [2022] HCA 1 ('*Personal Contracting*').
[4] [2022] HCA 2 ('*Jamsek*').
[5] [2022] FWCFB 156 ('*Franco*').
[6] Ibid 181, [53].
[7] Ibid [54](Hatcher and Catanzariti V-P, Cross D-P).
[8] [2020] NSWSC 1379 ('*Bird*').
[9] Luke Geary and Sara Taylor, 'Case Note: *Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B , C and D* [2022] NSWCA 119', *Mills Oakley* (Web Page, September 2022) <https://www.millsoakley.com.au/thinking/case-note-clancy-v-plaintiffs-a-b-c-and-d-bird-v-plaintiffs-a-b-c-and-d-2022-nswca-119/.>
[10] [2022] NSWCA 119 ('*Bird Appeal*').
[11] [2016] HCA 37 ('*Prince Alfred*').
[12] Ibid 54, [55]-[56].
[13] *Bird Appeal* (n 10).
[14] [2022] HCATrans 156.
[15] *CCIG Investments Pty Ltd v Schokman* [2022] HCATrans 156, [240].
[16] Ibid 162, [205].

Meet the Mills Oakley NFPs, Human Rights and Social Impact Team

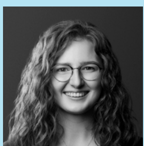
Vera Visevic
Partner
E: vvisevic@millsoakley.com.au

Sonya Parsons
Partner
E: sparsons@millsoakley.com.au

Elizabeth Shalders
Special Counsel
E: eshalders@millsoakley.com.au

Georgia Davis
Senior Associate
E: gdavis@millsoakley.com.au

Hudson Digby
Senior Associate
E: hdigby@millsoakley.com.au



Esther Boresma
Lawyer
E: eboresma@millsoakley.com.au

Sara Taylor
Lawyer
E: staylor@millsoakley.com.au

Luke Geary
Partner
E: lgeary@millsoakley.com.au

Valentyna Jurkiw
Special Counsel
E: vjurkiw@millsoakley.com.au

Carlie Alcock
Senior Associate
E: calcock@millsoakley.com.au

Naomi Brodie
Senior Associate
E: nbrodie@millsoakley.com.au

Jonathan Green
Senior Associate
E: jegreen@millsoakley.com.au

Mayose Rolley
Lawyer
E: mrolley@millsoakley.com.au

Erin Hill
Lawyer
E: ehill@millsoakley.com.au

Melbourne
Level 6, 530 Collins Street, Melbourne VIC 3000
PO Box 453, Collins St West, Melbourne VIC 8007
T: 61 3 9670 9111 F: 61 3 9605 0933

Sydney
Level 7, 151 Clarence Street, Sydney NSW 2000
PO Box H316, Australia Square NSW 1225
T: 61 2 8289 5800 F: 61 2 9247 1315

Canberra
Level 1, 121 Marcus Clarke Street, Canberra ACT 2601
GPO Box 724, Canberra ACT 2601
T: 61 2 6196 5200 F: 61 2 6196 5298

Brisbane
Level 23, 66 Eagle Street, Brisbane QLD 4000
GPO Box 5247, Brisbane QLD 4001
T: 61 7 3228 0400 F: 61 7 3012 8777

Perth
Level 24, 240 St Georges Terrace, Perth WA 6000
PO Box 5784, St Georges Tce WA 6831
T: 61 3 9670 9111 F: 61 3 9605 0933

Adelaide
89 King William St, Adelaide SA 5000
PO Box 3731, Rundle Mall SA 5000
T: 61 8 8330 2900 F: 61 3 9605 0933

Disclaimer
This publication is provided in good faith and is for general information purposes only. This publication does not constitute legal advice, and must not be relied upon. You should seek professional legal advice in relation to matters arising out of the publication. No warranty or representation regarding the reliability, quality or accuracy of any information in this publication is given by Mills Oakley or the authors of the publication.