



Helping you help others

August 2015

Dear Reader,

In this issue of *Not-for-Profit Law Notes* we share the second in a series of six articles covering the duties of Board Members of registered charities. The topic for this month is the **duty of board members to act in the best interest of your charity and for a proper purpose**.

We also discuss some Royal Commission news regarding potential new penalties for institutions involved in abuse of children as well as some worrying findings about financial errors in charity reports. Finally, we share the results of the review of the overseas aid gift deductibility scheme.

Regards,

David Ford

Board Members' Duty: to act in the best interest of your charity and for a proper purpose

In our article last month we examined the first significant duty of board members of registered charities; that is, the duty of board members to act with reasonable care and diligence.

We discussed how this duty, together with the others listed below, make up one of the five governance standards for charities established by the Australian Charities and Not-for-profits Commission (ACNC). The particular standard states that board members or other responsible persons owe a fiduciary duty to their charities. This is one of the highest standards of care imposed and means that board members must not put their personal interests before the interests of the charity or profit from their position, unless the charity consents.

In the months to come we will deal with the remaining four duties. These state that board members have a duty:

- not to improperly use information or their position;
- to manage financial affairs responsibly;
- to disclose and manage conflicts of interest; and

- not to allow a charity to operate while insolvent.

The topic for this month is the duty of board members to act in the best interest of the charity and for a proper purpose. But what does this look like?

Put simply, those acting as board members must make decisions that are in the best interest of their charity and which further its charitable purpose.

The Business Judgment Rule

On the positive side, the courts will respect the judgment of board members in business matters (that is, matters relevant to the business operations of the charity) if they:

- make the judgment in good faith for a proper purpose; and
- do not have a material personal interest in the subject matter of the judgment; and
- inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

Board Members' Duty to act with Reasonable Care and Diligence (Cont) ...

rationally believe that the judgment is in the best interests of the charity. The belief that the judgment is in its best interests is a rational one unless the belief is one that no reasonable person in that position would hold.

Representative or nominee of another organisation

If a person is on a board as a representative or nominee of another organisation, they will generally have to make decisions that are in the best interest of the charity. In other words, they cannot make decisions that are in the best interest of the organisation that nominated them.

Conclusion

It is therefore important that board members ask themselves: 'is this decision in the best interest of my charity and does it further its charitable purpose?' This will help board members to uphold



their fiduciary duty and, in turn, ensure that the charity complies with one of the five ACNC governance standards. Next month we will deal with the duty of board members not to improperly use information or their position. If you would like further information please contact David Ford (David.Ford@emilford.com.au).

Royal Commission News: Potential New Penalties Discussed for Institutions Involved in Abuse of Children



Royal Commission into Institutional Responses to Child Sexual Abuse

The Honourable Justice Peter McClellan (Royal Commissioner) provided the keynote address to the National Assembly of the Uniting Church in Australia recently held in Perth. Addressing some potential recommendations of the Royal Commission, His Honour gave an overview of both civil and criminal law means of dealing with institutions involved in the abuse of children.

One of the possibilities discussed by His Honour was for the criminal law to be amended so that institutions can be found guilty of a criminal offence. That is, one option is to recast offences that currently impose criminal liability on individuals, so that they can apply to institutions.

His Honour noted that the sanctions that would apply to an institution would need to be different to those that apply to individuals. For example, imprisonment of an institution is simply not an

option and a fine may have an "unwarranted and deleterious effect" on non-profit organisations. However, probation orders are possible, such as those found in the *Competition and Consumer Act 2010* and the *Australian Securities and Investments Act 2001*. The effect of these orders would be to prevent institutions from engaging in certain activities (such as child care) for a defined period of time, and such supervisory intervention orders may be a creative way of sanctioning an offending institution "with the focus of the sanction being the reform of institutional behaviour and the promotion of institutional change."

His Honour also discussed possible ways of dealing with difficulties in the civil law as well as the criminal law, to provide effective solutions where they have not necessarily been available in the past. For example, one difficulty which has been commonly encountered by abused persons seeking legal redress in the civil realm is that many unincorporated associations do not have a distinct legal personality which is able to be sued. Therefore, one of the recommendations of the

Royal Commission News: Potential New Penalties Discussed for Institutions Involved in Abuse of Children (Cont) ...

Royal Commission may be a National Scheme administered by the Commonwealth but funded by the relevant institutions, including the various governments where institutional failures have occurred, to provide compensation for victims of abuse.

The work of the Royal Commission has been significant. One of the new elements introduced by this Royal Commission through changes to the *Royal Commission Act* is to create a process called a "private session". The private session is conducted by one or two commissioners and is an opportunity for a person to "tell their story" of abuse in a protected and supportive environment. This is in contrast with the better understood "public hearings" which the Royal Commission also conducts.

The Royal Commission has completed 3,766 private sessions, and there are presently 1,527 people waiting for a private session. So far 666 matters, most coming from private sessions, have been referred by the Royal Commission to the police.

His Honour commented that:

"it is now apparent that when our task is complete we will have documented a period in Australian society where institutions failed the children in their

care...There is no difference in the nature of the allegations nor in the mechanism for institutional failure between institutions conducted by the government and those in the private sector."

"The power of the institution must never again be allowed to silence a child or diminish the preparedness or capacity of adults to act to protect children."

Not only has the Commission provided an opportunity for healing for many victims of institutional abuse, but it hopefully sets a platform for understanding the way in which an institution's culture may contribute to or facilitate the abuse of children in its care, for enhancing institutional accountability, and encouraging positive changes in institutional behaviour. Read the full speech [here](#). <http://tinyurl.com/qj7v473>

The Commission's Final Report on Redress and Civil Litigation is expected to be with the government by the end of August 2015.

For more information, contact [Warwick van Ede](#) (Warwick.vanede@emilford.com.au) who was at the National Assembly to hear Justice Peter McClellan speak.

Review of Overseas Aid Gift Deduction Scheme

The results of the roundtables and submissions for review of the Overseas Aid Gift Deduction Scheme (OAGDS) are now available on the DFAT OAGDS review website.

Two reports are available:

1. **Key Findings:** Short summary (3 pages) of headline results (<http://tinyurl.com/ppruv34>);
2. **Summary of key findings:** an extended report incorporating all of the inputs received throughout the revision process (<http://tinyurl.com/q3txyqs>).

The revision of the guidelines is expected to be finalised by late 2015.

NB: The timeframe for submitting applications under the current guidelines has been extended to **31 October 2015**. Visit the [DFAT OAGDS review website](#) (<http://tinyurl.com/phw6s5w>) for more details.

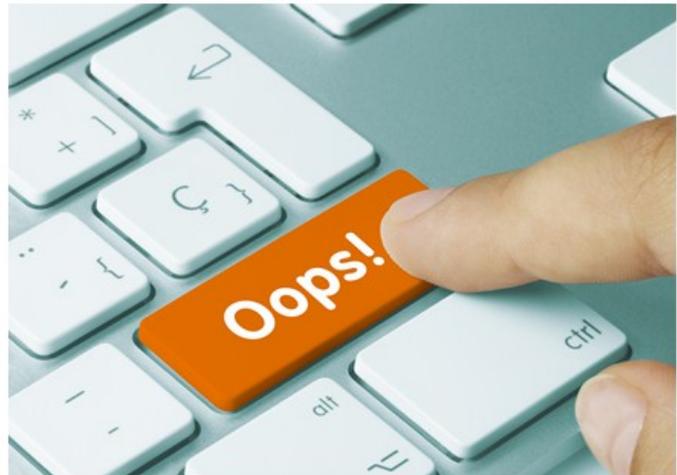


ACNC finds significant financial errors in charity reports

The Australian Charities and Not-for-profits Commission is contacting thousands of charities that have made significant errors in their financial reporting. The charities made these errors in their 2014 Annual Information Statements or annual financial reports. The ACNC is urging the charities to correct the errors as soon as possible to ensure the information available to the public on the Charity Register is up-to-date.

ACNC Commissioner, Susan Pascoe AM, said it was important that charities take action immediately and rectify any errors, adding that "charities will not be penalised for making errors at this point in time."

Nevertheless, mistakes should be corrected as soon as possible to ensure registration with the ACNC is not put at risk.



Common mistakes apparently included miscalculating totals and errors stemming from charities rounding financial figures to the nearest thousand.

Read the full ACNC Media Report <http://tinyurl.com/nmvhkb1>



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