



Helping you help others

July 2015

Dear Reader,

The Australian Charities and Not-for-profits Commission (ACNC) has established five governance standards for charities. The last of these standards concerns the duties of board members or other responsible persons to their charities – in other words, their fiduciary duty. 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.

Over the next six months in six different articles we will examine the significant duties of board members of registered charities. In the months to come we will deal with the duty of board members:

1. to act in the best interest of the charity and for a proper purpose;
2. not to improperly use information or their position;
3. to manage financial affairs responsibly;
4. to disclose and manage conflicts of interest; and
5. not to allow a charity to operate while insolvent.

The board members of not-for-profit organisations that are not charitable have very similar duties.

The topic for this month is the **duty of board members to act with reasonable care and diligence**.

In this issue of *Not-for-Profit Law Notes* we will also discuss superannuation obligations and the issue of whether a worker is an **employee or independent contractor** and we take a quick look at the 2015 federal **budget cap placed on the 'meal entertainment' benefits**.

Regards,

David Ford

Board Members' Duty to act with Reasonable Care and Diligence

Board members are required to act with reasonable care and diligence. But what does this look like? To better understand what this means for board members, it is helpful to break it down into four sub-categories.

1. Prepare for and attend meetings

Firstly, board members must do their best to participate. They must attend board meetings whenever they are reasonably able to do so. Beforehand, they should read and try to comprehend the materials they have been given about the topics the board will be discussing.

An example of when board members failed to do this can be found in the James Hardie litigation of 2012. In this case the Board considered a draft announcement to the ASX. Two directors were at the meeting by telephone. They had not seen copies of the draft. Nor did they ask to see a copy. Yet they voted in favour of making the announcement. The Court found that the board members appreciated that a significant announcement was to be made on the controversial subject of whether funding which had been set aside for victims of asbestosis could be

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

guaranteed. The onus was on them to be cautious when voting on the making of the announcement – either by seeking further information or by explicitly abstaining. They gave evidence that they would not have voted for the announcement had they known its terms.

2. Become familiar with the charity's business

One of the other lessons emerging from the James Hardie litigation is that all board members, irrespective of their professional qualifications, are expected to keep themselves properly informed of the charity's business and to apply sound judgment based on proper information. Therefore, a minimum degree of skill and competence is required of board members. This excludes the possibility that board members could escape liability by pleading that they have insufficient education or experience to understand the complexity of the charity's affairs..

3. Ask questions

It follows that if board members have any questions about any of the board's business they should:

seek additional information;

obtain external advice if necessary; and

question the CEO or other person who is putting a proposal.

4. Make considered and independent decisions

While seeking out and accepting the advice of others can be an important step in reaching a decision, board members cannot wholly rely on the judgment of another board member. They must



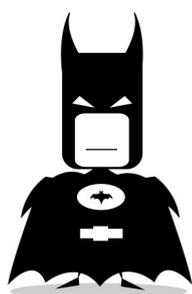
Prepare for and attend meetings

exercise their own judgment. A good way of gauging this is for board members to ask themselves, 'would someone who was observing me think that I am being careful and conscientious in my duties?'

Conclusion

It is therefore important for board members and other responsible persons to prepare for and attend meetings, become familiar with the charity's business, ask questions and make considered and independent decisions. This will help board members to uphold their fiduciary duty, and in turn, ensure that the charity complies with the fifth ACNC governance standard. Next month we will deal with the duty of board members to act in the best interest of the charity and for a proper purpose. If you would like further information please contact David Ford (David.Ford@emilford.com.au) or Andrew Egri (Andrew.Egri@emilford.com.au).

Employee or independent contractor? ... Superannuation obligations



Batman provides security services to your organisation. Is he an independent contractor or an employee? Often, answering this question correctly is difficult and always costly if you get it wrong.

Many organisations engage the services of a worker under the auspices of a "contractor agreement" in the hope of reducing tax and other obligations. However, there is no "quick fix". Simply calling a worker a "contractor" on paper is not determinative of the relationship. As the Federal Court said recently, "the parties cannot create something which has every feature of the rooster, but call it a duck and insist that everybody else recognise it as a duck".

Employee or independent contractor? Superannuation obligations (Cont)

Employers must pay 9.5% of an employee's salary to an approved superannuation fund. In this regard, "employee" has its ordinary meaning. However, the Superannuation Guarantee (Administration) Act 1992 extends the definition of "employee" for the purposes of superannuation contributions to include those that work under a contract that is wholly or principally for the labour of the person.

In two recent cases, the Administrative Appeals Tribunal decided that the workers were contractors rather than employees.

The first matter concerned the nature of the relationship between a commercial fishing vessel operator and its crew members. The operator's vessel went to sea for an average of ten days at a time. The captain was joined on each voyage by up to four crew members who were usually experienced fishermen. While at sea, the vessel anchored at a central spot



each day. The fisherman took smaller boats to head off to remote locations and return at the end of each day with their catch. The details of the catch were tallied by the captain and the operator paid the fisherman under the terms of an agreement between them.

The agreement described the fishermen as "joint venturers" for the purposes of a single voyage, but stated that a fisherman did not hold any right or interest in the vessel.

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Although the cost of maintaining the vessel during the voyage was the operator's responsibility, the

fishermen also contributed towards the costs of operating the vessel. At the end of the voyage, the fish were sold to a buyer and the operator and the fisherman were each entitled to a share of the gross proceeds of the catch in accordance with the agreement. Each of them was required to bear the costs of sickness and accident insurance and it was agreed that "no party is liable for any accident or mishap that occurs during the voyage."

The Tribunal found that the fishermen were contractors, and that the operator was not liable for the superannuation guarantee, stating that, "the contract is not wholly or principally for the labour of the crew member... it is a joint venture agreement that is intended to produce fish for sale. It is true the agreement contemplates the crew members contributing labour, in particular, but they are remunerated on the basis of an outcome. If there was no outcome – if they did not catch any fish... there would be no remuneration. Indeed, it was theoretically possible under the agreement the crew might return to port owing money to [the operator] if there were no fish caught on a voyage."

The Tribunal also heard a dispute over the Tax Commissioner's assessment that licensed plumbing sub-contractors were employees within the meaning of the Act. The Tribunal noted that the workers engaged were free to exercise their discretion in working for themselves as they did not receive instructions or directions on the manner in which the work allocated to them was to be done. The workers also were responsible for providing most of their tools and equipment and held insurance on the basis that the risks rested with each of them.

"In determining whether the workers were employees ..., the Tribunal considered whether the workers were working for themselves or providing labour in the service of another."

In determining whether the workers were employees under the extended definition in the Act, the Tribunal considered whether the workers were working for themselves or providing labour in the service of another. It found that, as each worker provided their own capital and faced a loss if the venture failed, they were not providing their services under a contract that was wholly or principally for their labour. They were therefore

Employee or independent contractor? Superannuation obligations (Cont)

not employees under the extended definition and so not entitled to superannuation contributions.

Emil Ford Lawyers have assisted organisations which have found themselves in difficult situations arising from a misapprehension about the nature of the relationships with their workers.

We can assist your organisation by drafting agreements or reviewing documentation and processes

to minimise the risk of unintended consequences, such as a liability to pay the superannuation guarantee to withhold money from wages and remit it to the ATO, or to pay state payroll tax ... and to pay fines and interest!

If you have an employment query please contact David Ford (David.Ford@emilford.com.au) or Andrew Egri (Andrew.Egri@emilford.com.au).

Limiting FBT Concessions on Salary Sacrificed Entertainment Benefits

A [consultation paper](http://tinyurl.com/nejfdve) (<http://tinyurl.com/nejfdve>) outlining the Federal Treasury's draft legislation proposing a cap on the "meal entertainment" benefits (including holidays, cruises, weddings, and meals and alcohol in restaurants) available for salary packaging to charity and not-for-profit sector workers has been made available for comments. These benefits are to be subject to a new reportable grossed-up exemption cap of \$5,000 from 1 April 2016.

An extract from the consultation paper:

"The measure will introduce a separate single grossed-up cap of \$5,000 for salary packaged meal entertainment and entertainment facility leasing

expenses (entertainment benefits) for employees of public benevolent institutions, health promotion charities and employees of public and not-for-profit hospitals and public ambulance services. Currently these employees can salary package entertainment benefits with no FBT payable by the employer and without the benefits being reported.

All salary packaged entertainment benefits will also become reportable fringe benefits."

If you would like to [make a submission](http://tinyurl.com/ondqaxy) (<http://tinyurl.com/ondqaxy>) you must do so by Friday 21 August 2015.



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