

# Looking after your volunteers: *a legal perspective*

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# Who is a volunteer?

- \* No accepted legal definition, however guidance from:
  - \* Fair Work Ombudsman
  - \* Case law
- \* Important to understand to distinguish from the employment or independent contractor relationship

# Characteristics of a volunteering arrangement

- \* Works with the main purpose to benefit someone else
- \* No intention to create a legally binding employment relationship
- \* Under no obligation to attend the workplace
- \* Does not expect to be paid for their work

# Safety

A NFP is required at law to ensure they provide a safe working environment

- \* common law of negligence
- \* Qld negligence legislation
- \* work health and safety

# Safety

There are two sides to safety:

1. safety of the volunteer
2. safety to others because of the volunteer

# Safety to the volunteer: *Negligence Laws*

If your NFP:

- \* owes a duty of care to the volunteer;
  - \* breaches that duty; and
  - \* the breach is the cause of the damage to the volunteer,
- the NFP may be found liable for the damage caused.

# An Example

- \* Geoff, a regular employee of the NFP cleans the stairs of the NFP premises and, contrary to policy, forgot to put up the sign to caution people that the stairs were slippery.
- \* Andrew, a volunteer at the NFP unaware of the slippery stairs tripped broke his leg.
- \* If Andrew can establish that had the sign been up he would not have walked down the stairs, tripping and breaking his leg, the NFP will be liable to the volunteer.

# Safety to the volunteer

Your NFP should maintain adequate insurance to cover the liability and therefore compensate the volunteer for his or her loss (ie indemnify).



# Safety to others because of the volunteer

- \* *Civil Liability Act 2003 (Qld)*
  - \* sets out a special protection for volunteers against personal liability for civil liability which arises as a result of an act or omission they have done, provided:
    - \* good faith
    - \* without recklessness
    - \* while doing community work that has been organised by the NFP
- \* No transfer of liability to the NFP, but jury out on vicarious liability!

# Safety to others because of the volunteer

The NFP may be liable for damage caused by the volunteer who was acting in good faith if the NFP was in breach of a ‘non-delegable duty of care’

- common law duty of care owed by the NFP itself, rather than the volunteer, to the person who suffered damage

# Safety to others because of the volunteer

## Example:

- \* NFP's non-delegable duty of care is to provide adequate training to volunteers.
- \* If someone is injured by a volunteer because the NFP failed to give the volunteer appropriate safety training
- \* The NFP could be liable to pay compensation to the injured person

# Safety to the volunteer: *Work Health and Safety laws*

- \* *Work Health and Safety Act 2011 (QLD)*
- \* Applies to “Persons conduct a business or undertaken”
- \* Does not apply to volunteer associations
  - \* “a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.”
- \* If your NFP does not fit in either – common law negligence law still applies

# Safety to the volunteer: *Work Health and Safety laws*

Impose obligations on your NFP to ensure, so far as reasonably practicable, the safety of volunteers in the workplace

Key issues:

- \* unlawful workplace behaviours, eg discrimination, sexual harassment, bullying and victimisation
- \* unsafe work environment, eg operating machinery

# Safety to the volunteer: *Work Health and Safety laws*

- \* A volunteer director or officer is expected to comply with the duties in WHS Law but cannot be prosecuted for failing to comply with those duties.
- \* However, volunteers have a duty to take reasonable care for their health and safety of others to ensure they are not adversely affected by their actions at work
- \* Therefore can be prosecuted for a breach of that duty

# Safety to the volunteer: *Work Health and Safety laws*

An director may be found personally liable for breach of the WHS Law if:

- \* they receive payment for their position as a director in the NFP (ie they are not a volunteer director); and
- \* they fail to exercise due diligence to ensure that the organisation complies with its duties or obligations under the WHS Law.

# Safety to the volunteer: *Work Health and Safety laws*

- \* When recruiting volunteers: develop a position description to ensure that the volunteers have the appropriate skills and experience for the role
- \* Ensure there is an induction process before commencing the volunteer role



# Safety to the volunteer: *Work Health and Safety laws*

- \* Ensure your volunteers are kept up to date with the NFP's work health and safety policies and procedures
- \* Undertake regular training of volunteers
- \* Adopt a risk management strategy aimed at eliminating, managing or mitigating the effects of those risks associated with the safety of volunteers.

# Insurance

- \* Generally, volunteers are not covered by workers' compensation insurance
- \* Personal accident insurance
  - \* Covers your volunteers for out of pocket medical expenses if injured whilst performing work for the NFP
- \* Public liability, product liability and professional indemnity
  - \* Covers activities (acts or omissions) or your volunteers

# Protecting the Officers in a NFP against liability

Primary ways to protect officers:

- \* Indemnities contained in the NFP's constitution
- \* Deeds of indemnity, access and insurance
- \* Directors and Officers insurance (D&O Insurance)

# Indemnities in Constitution

- \* Indemnified for personal liability
- \* Requires review as the provision *may* provide the NFP may rather that does indemnity the officers
- \* Limitations:
  - \* Constitution may be amended by the members
  - \* Constitution arguably only enforceable by current, and not former, officers
  - \* Out of scope or lack sufficient scope

# Deed of Indemnity, access and insurance

- \* NFP may enter into a deed with the officers
- \* Deed sets out basis for indemnity:
  - \* personal liabilities
  - \* associated legal costs, resulting from role as an officer
- \* Buildings on indemnity contained in the NFP's constitution

# Deed of Indemnity, access and insurance

- \* **Indemnity:** generally limited by law, eg can not indemnify officer for breach of duty or unlawful act or omission
- \* **Access:** provides a right to a officer to access books and records of the NFP even after resigned or retired, for purposes of defending allegations of breach of duties

# Deed of Indemnity, access and insurance

- \* **Deed of indemnity, access and insurance:** places an obligations on the NFP to take out, maintain and pay for D&O Insurance, even after the officer has left the NFP
- \* **D&O Insurance:** may address the gap in coverage given the various limitation on indemnities

# D&O Insurance

- \* Commonly three sides of coverage:
  - \* Side A provides the indemnity for officers
  - \* Side B provides reimbursement to the NFP for its indemnity of officers
  - \* Side C provides cover to the NFP directly for securities transactions
- \* Affordable for NFPs, may be part of insurance package commonly available to community organisations



# Protections for directors under the ACNC Governance Standard 5

- \* Situations where a director possible in breach of a duty even though he or she acted in good faith and took all reasonable steps to comply with their duties.
- \* ACNC Governance Standard 5: operates as defences to a possible breach of duty.

# Protections for directors under the ACNC Governance Standard 5

- \* A director will have complied with the duties set out in the Governance Standards where:
  - \* **Advice:** advice was provided by an employee, professional adviser or expert you reasonably believed to be competent in the subject matter, or by another director/ a committee if the subject matter was within their authority.

# Protections for directors under the ACNC Governance Standard 5

- \* **Duty to act with reasonable care and diligence:** a decision was made:
  - \* in good faith for a proper purpose,
  - \* the director did not have a material personal interest in the matter
  - \* the director informed himself/herself about the subject matter of the decision to the extent he or she reasonably believed to be appropriate, and
  - \* rationally believed that the decision was in the best interests of the NFP

Referred to as the “business judgment rule”

# Protections for directors under the ACNC Governance Standard 5

- \* Duty not to operate whilst insolvent: at the time the debt was incurred the director had reasonable grounds to expect – and did expect – that the NFP was solvent and would still be solvent at the time it had to pay that debt and any other debts

# Paying Volunteers

- \* Certain payments or other benefits are acceptable
  - \* cash, non-cash or a combination
- \* Termed – honoraria, reimbursements, allowances
- \* If a volunteers activities are a pastime or hobby, than any money or benefits received would not be considered assessable income

# Paying your Directors

- \* Check your constitution
  - \* Generally, directors may be paid reasonable compensation for bona fide services rendered to the NFP
  - \* however, for a director to be paid fees in his or her capacity as a director - provision must be provided in the constitution

# Paying your Directors

- \* Care must be taken to ensure that the private benefit of payment of a fee assist the NFP to achieve its purpose rather than simply private gain.
- \* The amount of remuneration and the process for setting that remuneration would be relevant

# Paying your Directors

- \* Before paying your Directors you should check:
  - \* **Fundraising legislation:** eg, in NSW the Charitable Fundraising Act 1991 prohibits member of a governing body from receiving remuneration for their role unless Ministerial approval is obtained.
  - \* **Funding agreement:** some funding agreement restrict the use of funds and, accordingly, paying fees to directors would be outside the allowable use of funds, consequently a breach of contract



# Paying your Directors

- \* **Work Health and safety:** if a Director is paid for services in that capacity he or she will lose immunity from prosecution
- \* **Corporations law:** if the company is a special purpose company, paying director fees will be an offence under the Corporations law

# Privacy

- \* If your NFP is bound by privacy laws this means your NFP should only:
  - \* collect a volunteer's personal information with consent
  - \* use the volunteer's personal information for the purpose for which it was collected; and
  - \* store the volunteer's personal information security.
- \* Volunteers should also be able to access their personal information with the same rights as others.

Questions?

# Thank you

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