

# IT'S THE LAW: Ten things every Board member needs to know about their legal responsibilities

A presentation for the Board Builder Conference 2014

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24 March 2014

# Introduction – Directors' duties

- Sources of directors' duties?
- How do they differ between types of NFP?
- What are directors' duties and to whom are they owed?
- The ACNC Act
- Penalties
- Other matters and legislation
- 10 things to take home
- Questions

# Source of directors' duties

- Equitable / Common law fiduciary duties – duties imposed by the courts over time
- Statutory duties (both State and Federal)
- Both give rise to duties on the directors of Not-for-Profit organisations (NFPs)

# Does the legal form of a NFP entity make a difference to directors' duties?

- 3 common legal structures for an NFP:
  - Unincorporated association
  - Incorporated association (governed by state Associations Incorporation Acts)
  - Public company limited by guarantee (governed by Corporations Act 2001 (Cth) / ACNC Act 2012 (Cth))
- Though directors' duties may vary based on legal form they have traditionally been generally similar in nature

# Directors' duties

- What are directors' duties?
- To whom are directors' duties owed?
- Primary directors' duties under the Corporations Act, (now similar in the Victorian Associations Incorporation Reform Act):
  - duty to act with care and diligence
  - duty to act in good faith and in the best interest of the company and for a proper purpose
  - duty to avoid a conflict of duty and interest
  - duty not to misuse information or position of director,have been modified if you are a registered NFP under the ACNC Act.

# ACNC Act

- Modification of the law as it applies to NFPs registered under the ACNC Act.
- Regulation by ACNC not by ASIC
- 5 new Governance standards and Protections under the ACNC Regulation 2013:
  - Purposes of the NFP
  - Accountability to members
  - Compliance with Australian laws
  - Suitability of directors (responsible entities)
  - Duties of directors (responsible entities)

# ACNC Act (Cont.)

- Protections under Governance standard 5
- Reasonable steps to comply with duties
  - if the director (responsible entity) meets a protection NFP (registered entity) is taken to have taken all reasonable steps to ensure that its directors have complied with the duties
- Protection 1
  - if the director, in the exercise of the director's duties, relies on information, including professional or expert advice, in good faith, and after the director has made an independent assessment of the information
- Protection 2
  - the director makes the decision in good faith for a proper purpose;
  - the director does not have a material personal interest in the subject matter of the decision;

# ACNC Act (Cont.)

- the director informs itself about the subject matter of the decision, to the extent the director reasonably believes to be appropriate;
  - the director rationally believes that the decision is in the best interests of the NFP.
- **Protection 3**
  - at the time when the debt was incurred, the director had reasonable grounds to expect, and did expect, that the NFP was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
  - the director took all reasonable steps to prevent the NFP from incurring the debt.
- **Protection 4**
  - if, because of illness or for some other good reason, a director could not take part in the management of the NFP at the relevant time



# Penalties

- Corporations Act:
  - Pecuniary penalty orders; disqualification orders; Compensation orders
  - All statutory duties (except the duty to act with care and diligence) can also carry criminal penalties
  - Although there are defences available if prosecuted, they are not universal.
- ACNC Act:
  - Penalties for disregard of the ACNC Act can be \$10,200, recklessness in operation of the Act \$6,800; and failure to take reasonable care \$3,400.
- Associations Incorporation Reform Act 2012 (Vic):
  - Liability, fines and penalties are less onerous than under the Corporations Act but the Corporations Act provisions partially apply

## Other matters

- Directors' obligations
- Reliance on information or advice provided by others
- Business Judgment Rule – once only referable to companies but now applies to associations too
- Insolvent trading
- Potential personal liability under Income Tax Acts for unpaid company taxes

## Other legislation

- Charities Act 2013 (Cth)
- Trade Practices – Competition and Consumer Act 2010
- Occupational health and safety laws
- Privacy Act 1988 (Cth) – New APPs
- Other Commonwealth, State and Territory laws

# Case Studies

- Commonwealth Bank of Australia v Friedrich 1991
- Recent controversies? David Jones Limited

# 10 things to take home

1. Acquire an understanding of the business of the company
2. Read the Constitution of the company
3. Read board paper, agendas, minutes and all other relevant documentation and prepare for directors' meeting so that you can be informed about the activities of the company and generally monitor corporate affairs and policies; accordingly, you are well advised to attend all board meetings
4. Be familiar with the financial status of the company by reading financial statements and asking questions or management;
5. Enquire about the activities of the company, regardless of your expertise and voice your concerns about company policy or conduct if necessary
6. Keep abreast of the financial position of the company and retain competent senior management

# 10 things to take home (cont.)

7. Avoid conflicts of interest
8. At least consider directors' and officers' insurance – it can cover your board for many ills
9. Use your common sense – eg. if you're asked to sign something know what it is about and what it means
10. If in doubt, seek appropriate legal and financial advice

## Questions?

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