



# SETSCoP Governance Training Legal Issues in Governance

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# SETSCoP Governance Training

- Webinar 4 – Finance for Non-financial Board Members
- **Webinar 5 – Legal issues in Governance**
- Webinar 6 – Strategy & Risk for Boards



# Objectives



## Objectives

- ✓ To raise your awareness around the legal issues that impact the role of a Director and Manager.
- ✓ Broadly discuss the internal and external legal environments that your organisation may operate within.
- ✓ Examine the limited protections available for Directors.
- ✓ Point you in the direction of what you need to do to accomplish your duties as a Director and as a Manager.

Before we begin a note on applicability...



- Most discussions around Director obligations originate from the *Corporations Act 2001* (Cth).
- However, with very few exceptions most obligations derive from common law and as such they apply equally regardless of whether you are a director of a company or a management committee member of an association.
- They also apply regardless of whether a Director is paid or unpaid.

Law is a complex issue. This presentation is not a substitute for legal advice.

# We are going to cover today...

- ✓ Revise discussion on who is a Director and duties and responsibilities.
- ✓ Internal legal environment – how the organisation governs itself
- ✓ External legal environment – external laws and regulations
  - Employees
  - Operating plan and equipment
  - Consumers
  - Data
  - Intellectual property
  - International operations
- ✓ Protections for Directors.
- ✓ What should Directors do.



# Director duties...



- Director duties are defined in the Corporations Act for Companies limited by guarantee (ASIC) and the ACNC Governance Principles for Associations.
- Duties are the same under common law for Companies and Associations.
- Duties are in three areas:
  1. Loyalty and good faith and;
  2. Care and diligence and;
  3. Specific statutory duties
- Remember the separation of duties between Directors and Managers:
  - “Fingers out, nose in”.

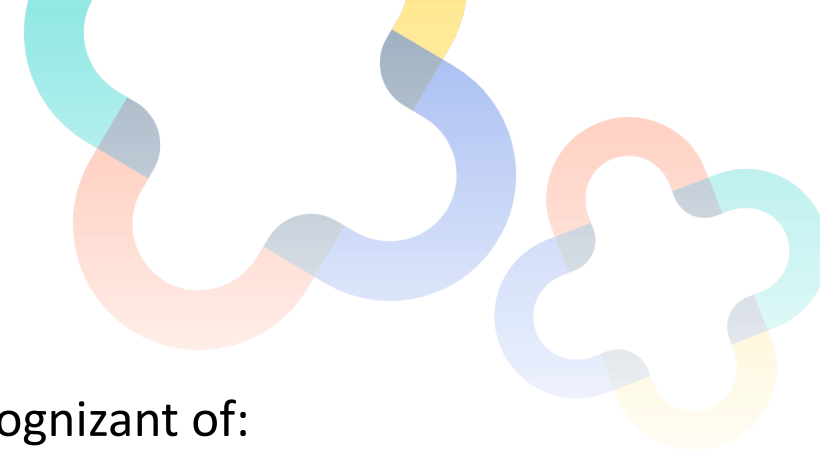
# Who is a Director?



A Director is (could be):

- **Director** - a person validly appointed i.e., over 18, fit and proper person
- **De facto Director** – not validly appointed but takes an active part in directing the affairs of the organisation
- **Shadow Director** – not validly appointed but if the Board is accustomed to act in accordance with their wishes. They can or have the potential to exert their control over decisions.

# The regulators...(and there are a few)



There are a number of regulatory bodies that NFP Boards needs to be cognizant of:

- **Australian Securities and Investment Commission (ASIC)** administers the Corporations Act 2001 (Cth). Applicable for NFP companies (and their directors) limited by guarantee.
- **Australian Charities and Not-for-profit Commission (ACNC)** - the independent regulator of charities.
- **Australian Prudential Regulation Authority (APRA)** – regulates insurance, superannuation, deposit taking, credit providing.
- **Australian Taxation Office (ATO)**– for NFPs applicable for Business Activity Statements (GST, PAYG etc), DGR etc.
- **Various state/territory regulators** – for Associations
- Others include – the ACCC, EPA etc

Many of these will dictate various reporting requirements and standards





# The internal environment

- As a Director you are not expected to know the intimate details of how the organisation operates
- Directors are not required to possess a thorough legal knowledge. (*You don't need to be a lawyer to a good Director*).
- Directors are expected to understand how the organisation regulates itself (internal legal environment).
- Most organisations are governed internally by:
  - The Constitution
  - Delegations of Authority Policy
  - Contracts. Key contracts include:
    - CEO employment contract
    - Supply agreements
    - Grants and funding
  - Directors need to have a board understanding of how these contracts apply.

# Contracts

- As a Director you are not expected to know all the details of the organisation's contracts.
- Nor are you expected to be across the legal detail of contracts.
- Director's must have a broad understanding of the contracts and how they apply and what system is used by the organisation to monitor and comply.
  - For example; often organisations miss the notice period under contracts and leases that they can exercise their rights to renew or re-negotiate because they lack a process or system to monitor these aspects.
- Once a contract has been entered into it becomes binding and generally there is little ability to back out e.g. “buyers regret”.
- As such due diligence become important.





# The external environment

- As a Director you are expected to aware of the legislation that is applicable to your organisation.
- Directors can be held personally liable for the breaches of many laws.
- It is a duty of a Director to make her/his own enquiries that a reasonable Director would make to understand those laws which apply, how they are applicable to the organisation and how the organisation is complying.

Key Areas	Regulatory
Employees	WHS, Workplace Relations, Anti-discrimination, Whistleblowing
Operations, plant & equipment	Environment laws, Climate change, Chain of Responsibility
Consumers (Social Enterprises)	Competition law, Consumer protection, Country of Origin, Weights & Measures, Pricing
Data	Privacy, Cybersecurity
Intellectual property	Types and protection
International operations	Modern slavery, Anti-corruption

# Employees



## WHS - the most important regulatory areas for the Board

- Staff have the right to return home in the same condition that they went to work in
- 2009 endorsement of harmonisation across the states (except Victoria) 'Model Act'
- WHS must be on the Board's agenda regularly and thoroughly discussed.
- There is a duty to do what is 'reasonably practical' to ensure health and safety.
- Most states have introduced 'industrial manslaughter' laws.
- Directors must exercise care and due diligence to ensure the organisation meets its obligations to protect workers and other persons.
- Directors cannot simply leave WHS decision-making to management without continual and consistent enquiries. DO NOT ASSUME.
- WHS KPIs should be part of the CEO's KPIs

# Employees

- Bully, stress, harassment. Part of WHS to provide a healthy workplace.
- Workplace relations – *The Fair Work Act 2009* (Cth)
  - Fair Work Practices
  - Wage underpayment
  - Failure to pay SGL & PAYG
  - GST
- Anti-discrimination, for example; during recruitment
- Child safety.



# Operations, plant & equipment (Social Enterprises)

- Environmental Law
  - State & territory based
  - ESG (Environmental, Social Governance)
- Safe work methods e.g. handling of dangerous goods
- Climate change
- Chain of responsibility - transport
  - Distribution and logistics (social enterprises)



# Consumers (Social Enterprises)



- Competition law (ACCC)
  - Protect the rights of consumers.
  - Pricing – resale price maintenance, third line forcing, price fixing, unit pricing, etc.
  - Weights & measures (state based)
  - Anticompetitive behaviour.
  - Section 155 *Competition and Consumer Act 2010 (Cth)* information gathering powers.
- Consumer protection
  - Misleading or deceptive conduct
  - Unfair contracts
  - Product standards, warranties.
  - The franchise code.

# Data



- Privacy laws – *The Privacy Act 1988* (Cth)
  - Australian Privacy Principles (APP)
    1. Personal information – name, signature, address, telephone number, DOB, bank account details, etc
    2. Sensitive information – racial or ethnic background, health, political beliefs, sexual orientation, criminal record, etc
  - Applies to all businesses (including NFPs) >\$3M and ALL health service providers. Smaller businesses may ‘opt in’ to improve client confidence.
  - Mandatory breach notification
  - Employee privacy
- Cybersecurity
  - Legislation is on its way which will affect most organisations



# Intellectual property

- The Board must ensure it identifies and protects its IP
  - Copyright
  - Confidential information
  - Trademarks
  - Patents
  - Designs
- Boards must also ensure that others IP is respected.
  - For example, Non- disclosure agreements (NDAs) that are entered into by the organisation.



# International operations

- Anti-bribery laws
  - It is an offense to bribe a public official
- Modern slavery – *Modern Slavery Act 2018* (Cth)
  - Includes:
    - Human trafficking
    - Forced marriages
    - Bonded labour
    - Slavery like practices
    - Sexual slavery
    - Child labour and trafficking
    - Domestic servitude
  - Applies to the supply chain

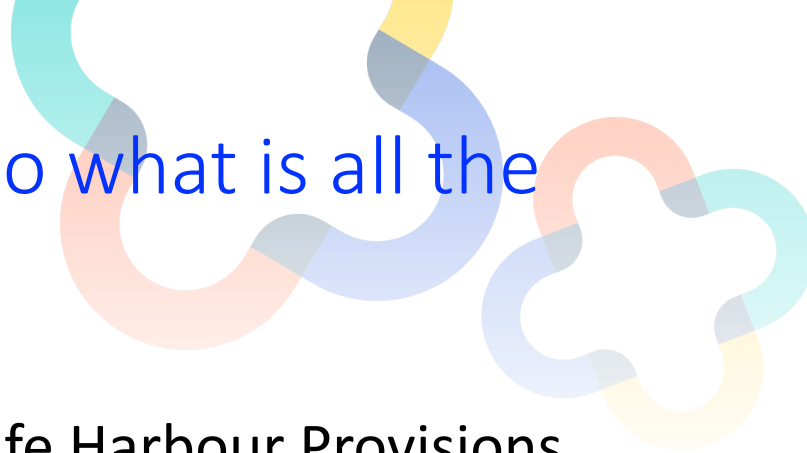


# Protections for Directors

- Deed of Access and Indemnity
  - Common practice for organisations to issue Deed of Access and Indemnity.
  - Provides for:
    - Access to the documents when a person is no longer a Director or Officer
    - Indemnity from the organisation where insurance is not available for
      - Penalties or compensation orders
      - Where there has been an absence of good faith
      - Legal costs for criminal proceedings where there has been a finding of guilt.
- Director and officer insurance (does not apply to WHS offenses in NSW)
  1. D&O insurance against liability for claims against Directors or Officers (Managers)
  2. Defense cost insurance
- Safe Harbour Provisions for Insolvency
  - Provided under the Corporations Act 2011 (Cth)
  - Therefore, only applicable to Companies Limited by Guarantee.



So, there is insurance we can take out, great so what is all the fuss about?



- Deed of Access and Indemnity, Director's Insurance and Safe Harbour Provisions offer only a limited degree of protection.
- They are heavily caveated with terms and conditions.
- The best protection is at all times to act with:
  1. Loyalty and good faith and;
  2. Care and diligence and;
  3. Specific statutory duties, prevent insolvent trading

# What NFP Directors need to do...

Being a NFP Director should not be scary

NFP Directors serve for purpose and are wonderful people

To be a Director you should:

1. Keep informed – of the financial and non-financial position, risk and issues.
2. Be inquisitive – you must inquire, must ask questions (healthy skepticism).
3. Be aware of your duties and responsibilities. Eyes open.
4. Develop your governance skills.
5. Understand the internal and external legal frameworks applicable to your organisation, how they impact, and how your organisation is working to comply.
6. Have the time. It is a serious commitment of time and attention.

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The next webinar (7<sup>th</sup> June) ...

Strategy & Risk

Here we discuss...

A broad understanding of the role of the Board in strategy and risk



# Further information...

**Australian Institute of Company Directors (AICD)**

[www.aicd.companydirectors.com.au](http://www.aicd.companydirectors.com.au)

**Governance Institute of Australia**

[www.governanceinstitute.com.au](http://www.governanceinstitute.com.au)

**SETSCoP Business Guides Governance Series**

<https://setscop.org.au/resource-type/governance-of-not-for-profits/>

**Australian Charities and Not-for-profit Commission (ACNC)**

[www.acnc.gov.au](http://www.acnc.gov.au)

Your local state government office

- Victoria – Consumer Affairs Victoria
- Queensland – Office of Fair Trading
- New South Wales – NSW Fair Trading
- South Australia – Family and Community
- Tasmania – Consumer Building and Occupational Services
- West Australia – Consumer Protection
- Australian Capital Territory – Access Canberra
- Northern Territory – Licensing NT



# Questions?