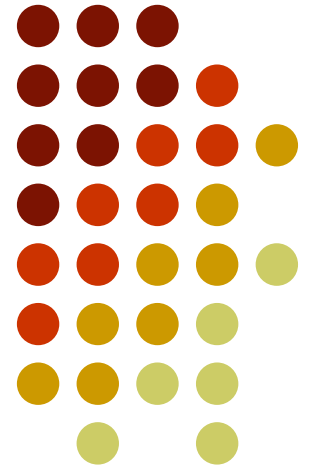


Exploring personal 'due diligence'

presented by
Sallie Saunders
Building Better Boards Pty Ltd
www.betterboards.com.au



Incorporation provides...



- Limited liability for members of the board and members of the organization - usually limited to the assets of the group or the contribution members may have agreed to provide in the establishment rules
but...
- board members can carry a personal risk if they do not exercise the required level of care and diligence

On legal liability of nonprofit board members...



“...there is nothing in the code (now Corporations Law) to suggest that the standard to be expected of a part-time non-executive director of a non-profit company is different from the standard expected of a director of a profit-making company”

Victorian Supreme Court decision on Commonwealth Bank vs Friedrich & Ors (1991)



Am I a director?

- The term ‘director’ is often used to include people who are on the governing body of an organisation
- Irrespective of the legal structure used to form the organisation, the directors, or members of the management committee or council members etc of the organisation have ultimate responsibility for the organisation.
- All have the same general legal duties



What legal duties?

- The members of the governing body of all organisations (including nonprofits) have a range of general legal duties.
- These include
 - Fiduciary duties (from court-made case law)
 - Statutory duties (from legislation)
 - and duties from the Constitution (or Rules)

Two broad categories



- Duties of good faith and loyalty - require the director to act strictly in the interests of the organisation
- Duties of care and diligence - require the director to attend to their role with care and diligence and to ensure, among other things, compliance with relevant laws

Care and diligence means...



- Reading and considering all board papers
- Attending and actively participating in meetings
- Understanding the finances and operations of the organisation
- Asking questions and seeking professional advice
- Developing the ability to make well informed decisions
- Ensuring that the organisation complies with its many specific legal obligations

A Director Code of Conduct



- A Director Code of Conduct sets out the expectations of the directors
- It provides tangible evidence of the organization's commitment to their legal and ethical responsibilities and to informing directors about them
- It enhances the organisation's reputation for fair and responsible dealings

Some issues to be included in a Code of Conduct



- Due diligence
- Professional integrity
- Conflicts of interest
- Board member compensation
- Gifts and gratuities
- Political activities
- Nepotism
- Use of information
- Violations of standards

Are we being diligent?

- Checklist for your board



Tips for avoiding personal liability



- Know the provisions of Constitution or Rules
- Ensure compliance with state and federal law
- Attend board meetings regularly
- Dissent on record when you disagree
- Avoid conflicts of interest
- Obtain adequate documentation
- Do not obtain financial or other benefits from the organization

Warning signs for boards...



- Financial signs
- Signs from meeting structures and processes
- Signs from personal relationships
- Service delivery and management/operational signs

Which statement is most correct?



- As a director, or member of the governing body, of a not-for-profit I may be personally liable if the board:
 - A. makes a bad decision which harms the interests of the organisation
 - B. makes a bad decision, because we didn't exercise care and diligence in reaching the decision, which harms the interests of the organisation
 - C. makes a bad decision, because we didn't exercise care and diligence in reaching the decision

Reference: Elizabeth Jameson (2007) in Fishel, The Book of the Board (2nd ed), p112.