

The Implications of the Royal Commission and Regulator Activity on NFP Governance

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Disclaimer: This presentation is of general nature only. Legal advice should be obtained in relation to any specific circumstances.

Objective

To gain a non-lawyer's general understanding of the implications principally of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Hayne Royal Commission) and Regulator Activity on the role of a Director in a modern incorporated entity and to consider some strategies in fulfilling that note.

N.B.

We use the term "Director" to include Directors, Officeholders and Committee Members.

GOVERNANCE (R)EVOLUTION: STRATEGIES FOR SUCCESS

Emerging governance issues from the Hayne Royal Commission

**HEALTH PROFESSIONALS VOICE DISAPPOINTMENT
OVER LACK OF BUSH COMMISSION HEARINGS**

**Banking Royal Commission Report takes axe
to sales culture in finance**

**'TERRIFIED' AGEING CHILD ABUSE SURVIVORS
BEGIN TRANSITION INTO AGED CARE**

Aged Care Royal Commission reveals aged-care 'distressing'

HAYNE VERDICT 'SORRY' NOT ENOUGH

IT'S THE NATIONS BIGGEST STORY

Scope

Discussion Limited to:-

- General Law - Fiduciary.
- Corporations Act 2001 (Cth) (“Corporations Act”) which applies to companies and typically in NFP sector companies limited by guarantee.
- Australian Charities and Not-for-profits Commission Act 2012 (Cth) but in particular note ACNC Governance Standard 5: Duties of Responsible Persons sets out the duties of officers (“called Responsible Person”) for ACNC Act purposes which covers registered charities.
- Associations Incorporation Reform Act 2012 (Vic).

(for Incorporated Associations on a state by state basis the following is a useful resource:-
Not-for-profit Law Information Hub, Legal Information for Community Organizations
www.nfplaw.org.au)

Recap

Directors Duties (General Law-Fiduciary):

1. Reasonable care, skill and diligence (avoid insolvent trading);
2. Good faith and for a proper purpose;
3. Not to use information improperly; and
4. Not to use position improperly - disclose and manage conflicts of interest.

Hayne Royal Commission

- Highlighted failure of organisational culture, governance, and remuneration systems; and
- The primary responsibility rests with Boards and Senior Management.

Hayne Royal Commission

1. Obey the law;
2. Do not mislead or deceive;
3. Be fair;
4. Services fit for purpose;
5. Deliver services with reasonable care and skill; and
6. When acting for another act in the best interests of the other.

Key Message:

Delegate but don't abdicate!

Key Message:

Directors remain responsible for delegation or advice if not reasonably satisfying themselves in the circumstances.

Key Message:

"But I am just a volunteer".....is not an excuse!

Cases:

1. Board authorised release of announcement that asbestos claims would be fully funded for the next 50 years. Factually incorrect from the outset. In fact, estimates were that underfunded by 1b dollars. Directors were liable because they could not abdicate responsibility to another Director or management or “expert” advice. (James Hardie case: ASIC v Hellicar & Ors [2012] HCA 17).

Cases Continued:

2. Directors authorised the release of misleading financial statements. \$1.5b short term liabilities classified as long term. Financial statements prepared by management and independently audited. Directors held liable because errors “so obvious” that the Directors had abdicated responsibility. (Centro Case: ASIC v Healey & Ors [2011] FCA 717).

Cases Continued:

3. Mum and Son directors, with mum uninvolved (“silent” or “passive” director) with son running business. Insolvent trading, mum held responsible. (Case: *Morley v Statewide Tobacco Services Ltd* [1993] 1 VR 423).
4. Volunteer Chair of NFP was not subject to a lower standard of skill and care when he signed financial statements which were qualified by the auditors but had been fraudulently prepared. (National Safety Council Case: *Commonwealth Bank of Australia v Friedrich and Ors* (1991) 5 ACSR 115).

Regulator Activity Post Hayne

- ASIC
 - Commercial and non charity companies limited by guarantee
- ACNC
 - Charities
- Incorporated Associations
 - NFP non-charity

Practical Tips

1. Ask simple questions to satisfy yourself on the issue.
2. Beware of potential liability by delegating your responsibility.
Caution: subcommittees
3. Culture:
 - Beware of remuneration policies.
 - KPI's activity v achieving purpose.
4. Minutes.
5. Would an independent person consider that I have acted reasonably and in good faith in the circumstances?

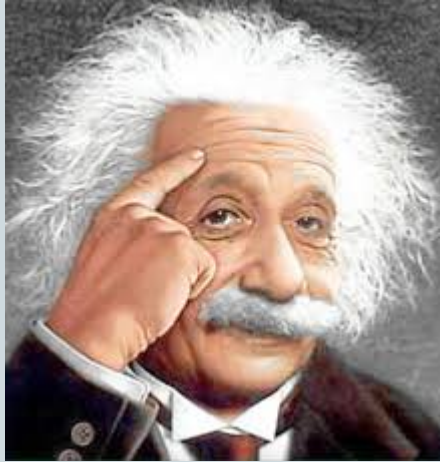
Checklist

1. Why are we doing this?
2. Have I understood the issues?
3. What are the alternatives?
4. Which is the best alternative?
5. Am I satisfied with the information provided?
6. Do I need more information?
7. What additional information do I need?
8. Is the issue consistent with our purpose?
9. Do I have a material personal interest?
10. Would an independent observer agree that I have used an appropriate level of skill, care and diligence?
11. Would an independent observer consider that I have acted in good faith and for a proper purpose?
12. Would an independent observer consider that I had acted in the best interests of the organization.
13. Have I considered the solvency circumstances and impacts of the decision?

Other Relevant Considerations

- Directors and Officers Insurance;
- Risk Management Protocols;
- Delegation Matrix Protocols;
- Compliance Calendar; and
- Forward looking reporting.

GOVERNANCE (R)EVOLUTION: STRATEGIES FOR SUCCESS





Further Information

Royal Commission into misconduct in the Banking, Superannuation and Financial Services Industry.

Final Report 1 February 2019

Interim Report 28 September 2018

Protecting Your Position Commonwealth Laws Imposing Personal Liability on Directors and Officers

March 2017

By Bruce Cowley & Steven Grant

Published by Minter Ellison

ASIC Regulatory Guide 217: Directors Duty to prevent Insolvent Trading

<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-217-duty-to-prevent-insolvent-trading-guide-for-directors/>

Audit Committees – A Guide to Good Practice

Second edition, a Joint Publication from Auditing and Assurance Standards Board, Australian Institute of Company Directors and the Institute of Internal Auditors Australia.

Duties and Responsibilities of Directors and Officer

21st edition, Professor Robert Baxt AO

Company Directors, Principles of Law and Corporate Governance

RP Austin, HAJ Ford AM, IM Ramsay, Lexis Nexis Butterworths 2005.

Boards that Work, a New Guide for Directors

G Kiel and Gavin Nicholson, The McGraw-Hill Companies Inc 2004.

ASX: Corporate Governance Principles and Recommendations

Fourth Edition (February 2019), ASX Corporate Governance Council.



Further Information (Cont.)

See also:-

Australian Prudential Regulation Authority

www.apra.gov.au

Chartered Accountants Australian and New Zealand

www.charteredaccountantsanz.com

Governance Institute of Australia

www.governanceinstitute.com.au

Australian Institute of Company Directors

<http://aicd.companydirectors.com.au>

For USA experience see:-

BoardSource

www.boardsource.org

For information on Incorporated Associations on a state by state basis the following is a useful source:-

Not-for-profit Law Information Hub, Legal Information for Community Organizations

www.nfplaw.org.au

For information on charities the following may be a useful resource:-

Australian Charities and Not-for-profit Commission, ACNC Guides:

e.g. **Governance for Good; The ACNC's Guide for Charity Board Members;**

e.g. **Managing Conflicts of Interest.**



Thank You

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