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# Glossary

**Disclaimer:** The Department of Family and Community Services (FACS) does not warrant that these definitions are correct. Directors should seek professional legal advice relevant to their issues.

**board** – the governing body of a non-government organisation, comprising directors.

*Note:* Some organisations refer to their board as their management committee and to the directors as members of that committee. In this manual, we use the term ‘board’ to include ‘management committee’.

**compliance** – being in accordance with the requirements under the applicable law and regulations.

**conflict of interests** – a situation that occurs when a conflict has arisen between a public duty and private interests whereby the conflict could influence how the person undertakes his or her official duties and meets his or her official responsibilities.

**consideration** – the value that is attached to a contract between parties, usually in relation to finance.

**constitution** – the name given to an organisation’s memorandum and rules.

**contract** – a legally binding and enforceable agreement that two or more parties have reached and that can be either expressed in writing or implied according to the parties’ conduct and/or actions.

**diligence** – the amount of care and caution a person should exercise according to his or her circumstances.

**director** – a person who has been formally elected and/or appointed, under law, to a board, in accordance with the organisation’s constitution. *Note:* Some organisations refer to the members of their governing body as management-committee members. In this manual, we use the term ‘director’ to include ‘management-committee member’.

**duty of care** – the obligation to take reasonable care to avoid causing harm to another person.

**enmity** – a feeling or condition of hostility, hatred, ill-will, animosity or antagonism.

**express agreement** – an oral or written contract in which the parties have used words to state the terms of their contract and express their intentions.

**express terms** – the specific terms that the parties have agreed on and that must include each party’s specific duties and the entitlements that the performance of the duties entails.

**fiduciary duty** – the legal duty to act solely in another party’s interests; in the corporate context, it means that a director is duty bound, under the law, to act in good faith for the organisation’s benefit.

**governance** – a corporation’s framework of rules, relationships, systems and processes through which people in the corporation exercise authority and control.

**harassment** – unwelcome or unreciprocated behaviour whereby a person could make another person feel intimidated, offended, belittled, or apprehensive.

**health information** – information or an opinion about:

- a person's health or disability, at any time in his or her life
- the wishes a person has expressed about how he or she wants his or her health services to be provided
- a health service either provided or to be provided to a person
- a person, such as information about his or her donation or intended donation of his or her body parts, organs or bodily substances
- a person's genes.

**incorporation** – the situation whereby an organisation has complied with the requisite procedures and formalities for establishing a corporation or any other legal or political body.

**indemnity** – a reference to a contractual agreement that two parties have made whereby one agrees to cover or pay for potential losses or damages the other causes. For example, an organisation might have 'professional-indemnity insurance' whereby the insurance policy includes coverage for the insured party for potential claims against the organisation. Also, the organisation and its board members (directors) will often have a 'deed of indemnity' between them whereby the organisation indemnifies the board members from potential claims against any board member.

**insurance** – a type of contract whereby the insurer agrees, for the insured's payment of a premium, to indemnify the insured against loss in the case of specific events. The document that contains the insurance contract is called the insurance policy.

**intellectual property** – a commercially valuable product of the intellect, including copyrighted property such as a literary or artistic work, as well as 'ideational' property, such as a patent, an appellation of origin, a business method or an industrial process.

**legal entity** – an entity that has, in the eyes of the law, the capacity to make a contract or an agreement and is able to assume an obligation and pay off its debts. Under the law, a legal entity is responsible for its actions and can sue and be sued.

**liability** – either 'subject to a legal obligation' or 'the obligation itself'. A person who commits a wrong or breaks a contract or trust is said to be liable or responsible for it.

**misappropriation** – a dishonest dealing with either property or funds by a person who has been entrusted with it for a specific purpose.

**monitor** – regularly check, supervise, observe critically or record the progress of an activity, an action or a system in order to identify any changes.

**negligence** – failure to exercise proper care.

**non-pecuniary interest** – an interest in relation to politics, religion, recreation, family or another type of matter.

**objectives** – what an organisation wants to achieve as a result of the activities the organisation has planned. The term is often used interchangeably with the term 'goals' and/or 'aims'.

**organisation** – a company, a firm, an enterprise or an association, or another type of legal entity, whether or not it is incorporated, or public or private, that has its own function/s and administration.

**pecuniary interest** – a financial interest or another material benefit or cost.

**personal information** – a piece of information or an opinion about a person, including information that is being held in a database, whether or not it is true, and whether or not it is recorded in a material form, and that can be used to identify him or her.

**policy** – a general statement of a principle for guiding people in making corporate, business or government decisions.

**privacy** – a person's right to be secure from unauthorised disclosure of information about himself or herself when the information is contained in any type of documentation.

**procedure** – a specific statement that contains details of what steps or actions people are to take in a specific situation.

**risk** – the chance that something will happen that will have an impact on the organisation's objectives. Risk is measured in relation to likelihood and consequences.

**risk management** – the process of identifying, assessing and judging risks; assigning ownership of the risks; taking actions to mitigate or anticipate the risks; and monitoring and reviewing how the risk management is progressing.

**subcontractor** – a person who undertakes work for a contractor and is therefore not directly employed by the person who wants the work done.

**vicarious liability** – a situation whereby an employer can be found liable for wrongs an employee commits in the course of his or her employee's work.

**volunteer** – a person who willingly gives his or her time to an enterprise 'for the common good' and derives no financial benefit from participating in the enterprise (based on the definition provided by Volunteering Australia).

**Work Health and Safety (WHS)** – a policy under which a business entity provides a safe and healthy workplace for itself as well all its employees, volunteers, visitors, contractors and suppliers.

# About this chapter

As a director, you need to be aware of the obligations and responsibilities you have accepted in relation to the legal issues that might arise in your organisation.

The purpose of this chapter is for you to have a practical approach to understanding and implementing policies for safeguarding your organisation against the risks associated with running a non-government organisation (NGO).

At the end of the chapter, you will find some checklists that your entire board can copy and work through either each year or as required.

## 2.1 An introduction to legal issues

### 2.1.1 The board's role

The board has a legal obligation to ensure that the organisation acts within the law at all times and complies with all the legal requirements that are applicable.

The board is responsible for protecting the organisation from the consequences of legal action that may be taken against it.

In order to meet the organisation's overall legal obligations and fulfil a fiduciary duty, board members need to:

- be aware of the laws and legal issues that may affect the organisation
- be clear about their role and the legal requirements of being a board member
- ensure that the organisation has policies and procedures in place so it can comply with all the relevant laws and legal requirements
- have methods for monitoring how each of the organisation's departments is complying with the organisation's legal and contractual requirements
- use the relevant legal requirements and considerations to guide themselves in making informed decisions
- have adequate risk-management processes in place for the organisation, including adequate insurance cover.

### 2.1.2 Areas of law

Following is an outline of each of the three main areas of law that boards need to be aware of.

It is not a comprehensive list, so please check whether the type of service your organisation provides is regulated in any way.

#### **1. Legislation in relation to incorporation and the organisation as an entity**

Most organisations will be incorporated under the [Associations Incorporation Act 2009 \(NSW\)](#) or the [Corporations Act 2001 \(Cth\)](#).

According to the requirements included in these two Acts, your organisation must have a set of operating rules, its board members must fulfil specific duties and act in the organisation's best interests, and the organisation must keep specific records and in some instances report about them to the relevant regulating body. Your organisation might also need to register one or more business or trading names, register one or more trademarks or protect its intellectual property.

#### **2. Employment and industrial relations**

Employment of paid staff members is governed under legislation at state/territory and Commonwealth levels whereby work conditions, pay rates, holidays, superannuation, safety at the workplace and disciplinary procedures are all regulated.

### 3. Managing the workplace

Other legislation affects how an organisation manages its workplace/s, including how it manages its relationship with its staff members, volunteers and service users. In general, the requirements are based on the need to:

- act fairly and reasonably
- follow 'due process' by, for example, adhering to Australia's 'anti-discrimination' legislation, [Anti-Discrimination Act 1977 \(NSW\)](#).
- protect the staff members' and service users' wellbeing by, for example, adhering to [Australia's 'child protection' legislation](#), and the [Work Health and Safety Act 2011 \(NSW\)](#).

#### Service provision

Various types of services may also be regulated by legislation specific to them. This includes:

- the [Community Services \(Complaints, Reviews and Monitoring\) Act 1993 \(NSW\)](#), under which a formal complaints system is provided for people who use a community-service organisation
- the [Children and Young Persons \(Care and Protection\) Act 1998 \(NSW\)](#), under which childcare services and 'out-of-home care' services for children younger than 16 are regulated
- the [Disability Inclusion Act 2014 \(NSW\)](#), in which the rights to service provision that people with disability have and the minister's powers and responsibilities in relation to funding of services are outlined
- the [Disability Services Act 1986 \(Cth\)](#), in which the National Standards for Disability Services are underpinned
- the [Home and Community Care Act 1985 \(Cth\)](#), in which the Home Care Standards are underpinned
- the [Aged Care Act 1997 \(Cth\)](#), under which aged-care services, including residential facilities, are regulated
- the [Boarding Houses Act 2012 \(NSW\)](#), which includes the licensing and standards for 'general' boarding houses as well as 'assisted' boarding houses for people with additional needs and may impact on services providing supported accommodation services.
- the [National Disability Insurance Scheme Act 2013 \(Cth\)](#), in which the requirements for registering to be a registered provider of supports are set out.

#### Management of contracts

Most organisations enter into a wide range of contracts including:

- employment agreements
- service agreements with service users
- leases on premises
- funding agreements
- partnership agreements with other agencies
- contracts with suppliers of goods and services.

### Taxation and fundraising

The Australian Taxation Office (ATO) administers taxation legislation, which:

- requires the payment of tax on wages paid
- allows for exemptions from income tax, capital gains tax and/or fringe benefit tax for certain classes of organisations
- allows tax deductions for donors to fundraise for particular types of causes.

Fundraising is also regulated by the NSW State Government through the [Charitable Fundraising Act 1991 \(NSW\)](#), which is administered by the NSW Office of Liquor, Gaming and Racing.

### Buildings and the environment

Buildings are regulated by the Local Government, and particular conditions apply for fire and safety in buildings used as workplaces, accommodation or for public gatherings. Any building work or changes of use of buildings may also require Local Government approval.

#### 2.1.3 Compliance

Organisations must demonstrate that they are compliant by meeting the relevant legislative requirements; adhering to the relevant industry code/s; meeting the relevant organisational standards as well as the standards of good corporate governance, ethics and community expectations.

An effective organisation-wide compliance program will result in an organisation being able to demonstrate its commitment to compliance.

An organisation that fails to ensure compliance exposes itself to the possibility of a fine, a penalty, a legal claim or a claim for injury or damages. If it fails to comply with the applicable 'incorporation' legislation and its regulators' requirements and corporate standards, its directors might also be disqualified for from undertaking a director's roles in the future. On numerous occasions the courts have considered an organisation's commitment to compliance when determining the appropriate penalty to be imposed for contraventions of relevant laws.

Policies and procedures to achieve compliance must be integrated into all aspects of how an organisation manages its operations, including financial, risk, quality, environmental and health and safety management systems and its operational requirements and procedures.

#### 2.1.4 Australian/International Standard Compliance Program AS ISO 19600

This new international standard includes principles and guidance for organisations so they can better design, develop, implement, maintain and improve a compliance program that is flexible, responsive, effective and measurable. In the standard, risk management is included as an essential aspect of any system for managing compliance.

The program's implementation and management elements will differ between organisations, whereby the determining factors will be the organisation's size and structure and what type of business it undertakes.

## 2.2 Decision making

### 2.2.1 Introduction

Decision making can be a multi-faceted and complex activity, whereby even a decision about a seemingly simple matter can have a serious impact on people in the community, so non-government organisations (NGOs) must have policies and procedures in place in order to be supported and informed when making decisions and so they are able to make decisions that are both fair and consistent.

### 2.2.2 Legislation

When people in an organisation make a decision that is subject to legislation whereby a person's interests will be adversely affected, they must have clear legal authority to do so.

They must correctly interpret and apply the legislation that is relevant to the decision. Most pieces of legislation now contain objectives and/or guiding principles for aiding people's interpretation.

#### ***Sex Discrimination Act 1984 (Cth)***

[\*Sex Discrimination Act 1984 \(Cth\)\*](#) includes a range of circumstances and types of conduct that amount to the following three types of discrimination:

#### **1. Direct discrimination**

This type of discrimination occurs when someone is being treated unfairly compared with another person who is in the same or similar circumstances, because of his or her sex (gender), sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, or family responsibilities.

#### **2. Indirect discrimination**

This is the type of discrimination whereby a requirement that is the same for everyone has an effect or a result that is unequal and unreasonable under the circumstances in question. For example, if an employer is saying that he or she needs a specific job done by a person who is 180 centimetres tall, he or she could be indirectly discriminating against men and the members of some ethnic groups, who are less likely to be that height. Those job candidates would be able to claim indirect sex discrimination and/or race discrimination if they can show that someone that tall is not really needed to do the job.

#### **3. Sexual discrimination**

It is unlawful to discriminate against a person based on his or her sex (gender), sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, or family responsibilities. However, a person cannot claim sexual discrimination if the services in question are legally available to persons of one sex only.

#### ***Racial Discrimination Act 1975 (Cth)***

Under the [\*Racial Discrimination Act 1975 \(Cth\)\*](#), it is unlawful for a person to do any act in which a distinction, an exclusion, a restriction or a preference is involved, including offensive behaviour that is based on race, colour, descent, or national or ethnic origin, which behaviour constitutes racial vilification.

### ***Disability Discrimination Act 1992 (Cth)***

Under the [Disability Discrimination Act 1992 \(Cth\)](#), it is unlawful for a person to discriminate against another person on the ground of either his or her disability or a disability of any of his or her associates.

However, it is not unlawful to discriminate against a person if:

- the person is not reasonably capable of performing the actions that are reasonably required in relation to the activity he or she has been excluded from
- the persons are selected by a method which is reasonable on the basis of their relevant skills and abilities and relative to each other
- an activity is conducted only for persons who have a particular disability and the person does not have that disability.

### ***Anti-Discrimination Act 1977 (NSW)***

Under the [Anti-Discrimination Act 1977 \(NSW\)](#), it is unlawful to discriminate against or harass someone when:

- the discrimination or harassment is in association with the person's employment, for example when he or she is applying for, doing or leaving a job
- he or she is getting, or trying to get, most types of good or service, for example from a shop, a hotel, a place of entertainment, a bank, a doctor or a and hospitals
- he or she is applying to get into, or study at, any educational institution, for example a government or non-government school, a college or a university
- he or she is renting or buying accommodation such as a unit, a house, commercial premises or a hotel/motel room
- he or she is trying to enter, join or obtain services from a registered club.

### **Anti-Discrimination Board of NSW**

The Anti-Discrimination Board of NSW, part of the NSW Department of Justice, promotes anti-discrimination and equal-opportunity principles and policies throughout NSW. It administers the anti-discrimination laws and handles complaints under the [Anti-Discrimination Act 1977 \(NSW\)](#).

### **NSW child protection legislation**

There are four pieces of NSW legislation relating to child protection:

The [Advocate for Children and Young People Act 2014 \(NSW\)](#)

The [Child Protection \(Offenders Registration\) Act 2000 \(NSW\)](#)

The [Children and Young Persons \(Care and Protection\) Act 1998 \(NSW\)](#)

The [Ombudsman Act 1974 \(NSW\)](#)

Under this legislation an employer must not commence employing or continue to employ in child-related employment a person that they know is a prohibited person.

A prohibited person is a person who has been convicted of a serious sex offence or acts of indecency that would receive a prison sentence of 12 months or more if it was committed in NSW. A prohibited person must not apply, undertake or remain in any child-related employment.

## Working With Children' Check

The 'Working with Children' Check ('WWCC') is a prerequisite for anyone who is in child-related work as defined in the [Child Protection \(Working with Children\) Act 2012 \(NSW\)](#) (the Act), whereby the Children's Guardian is responsible for processing requests for a WWCC.

A WWCC involves:

- a National Criminal History Record Check ('NCHRC') in relation to convictions (whether 'spent' or 'unspent'), charges (whether heard, unheard or dismissed) and for child abuse, child pornography, sexual activity or acts of indecency
- a check of relevant apprehended-violence orders ('AVOs') that have been made in order to protect a child or children
- a check of completed relevant disciplinary proceedings that involved child abuse, sexual misconduct or an act or acts of violence that occurred when a child or children was or were present or that the person directed at a child.

Other requirements include that an employer must neither commence employing nor continue to employ a person in child-related work if the employer knows or has reasonable cause to believe that the person does not have WWCC clearance, has not applied to the Children's Guardian to obtain clearance or is subject to an interim bar under the Act.

## The National Criminal History Record Check ('NCHRC')

For a number of industries, a valid and current national police check, known as the National Criminal Record Check ('NCHRC'), is now mandatory for assessing a person's suitability for employment, volunteering or other work engagement.

Through the NCHRC, an individual authorises the organisation to obtain criminal history information, including information about any outstanding charges and criminal convictions and/or findings of guilt that have been recorded against that individual.

Under the [Disability Inclusion Act 2014 \(NSW\)](#), (the 'DIA') disability service providers must screen all existing and future relevant workers in order to determine their suitability for providing services and support to people with disability.

Disability service providers must have a policy for screening their staff members, and the policy must include stipulation that all relevant workers and board members who work directly with people with disability whereby face-to-face or physical contact is involved must undergo an NCHRC before they commence work with the organisation in question. People who have been convicted of one or more specific prohibited offences or who refuse to undergo a criminal-record check must not be employed to directly work with people with disability.

Under the DIA, 'relevant workers and board members' are defined as employees, volunteers, subcontractors, students – other than school students who are doing work experience – and board members (directors).

The check must include at least one 'referee' check and be undertaken at least every four years.

A police check is required under other pieces of legislation that are relevant in sectors other than the disability sector. For example, aged-care services that receive funding from the Commonwealth Government must comply with the [Aged Care Act 1997 \(Cth\)](#), under which Act approved providers must ensure that all their new staff members, volunteers and key personnel – including their board members) have a current (within three years) National Criminal History Record Check (NCHRC).

Directors must ensure they are aware of the WWCC requirements and/or the NCHRC requirements that are relevant to their organisation and that their organisation meets the requirements.

### 2.2.3 Workplace Conduct Policy

A Workplace Conduct Policy provides an organisation with an ethical framework for the decisions, actions and behaviour of its employees.

A Workplace Conduct Policy should cover:

#### 1. Harassment and inappropriate behaviour

Harassment is unwanted or unwelcome behaviour whereby a person could make another person feel intimidated, offended, belittled or apprehensive. It can result in a legal claim against the person or people who are involved as well as against the organisation. Employers can be held legally responsible for sexual harassment of or discrimination against their employees.

The three categories of harassment are outlined as follows:

##### (a) Sexual harassment

Sexual harassment includes:

- an unwelcome sexual advance, such as inappropriate touching or deliberately brushing up against another person
- an unwelcome request for sexual favours, such as promising the other person something in return for a sexual favour or threatening him or her if he or she does not meet the request
- unwelcome conduct of a sexual nature including a statement, orally or in writing, of a sexual nature such as jokes or comments directed at a person's body, looks or sexual orientation
- behaviour that creates a hostile work environment because the person is constantly making inappropriate references to sexual matters and/or displaying sexually explicit material
- behaviour that involves blackmail and/or another type of coercion.

##### (b) Abusive behaviour

Following are some examples of abusive behaviour:

- physical abuse such as assault
- verbal abuse such as shouting or humiliating workers in order to 'motivate' them
- emotional abuse such as blackmail, repeated requests or demand
- neglect such as failure to provide basic physical and emotional necessities
- abuse of power which the harasser holds over the harassed.

##### (c) Discrimination

Discrimination involves treating or proposing to treat the other person less favourably compared with someone else, on the basis of an attribute or personal characteristic the person has.

## 2. Protection of personal information and/or privacy

Invasion of a person's privacy, including misuse of his or her personal information, is unlawful under the following NSW state and Commonwealth laws:

In the [Privacy Act 1988 \(Cth\)](#) (the Privacy Act), 'misuse of personal information' is a general reference to use of personal information for a purpose other than the purpose it was collected for.

In the [Privacy Amendment \(Enhancing Privacy Protection\) Act 2012 \(Cth\)](#) (the Privacy Amendment Act), the Commonwealth Government made many significant changes to the *Privacy Act 1988 (Cth)*, and the changes commenced on 12 March 2014.

The Privacy Amendment Act includes privacy standards for dealing with personal information and also includes 13 Australian Privacy Principles ('APPs') in place of the previous National Privacy Principles ('NPPs').

The matters dealt with in the 13 Australian Privacy Principles are listed as follows:

1. open and transparent management of personal information
2. anonymity and pseudonymity
3. collection of solicited personal information
4. dealing with unsolicited personal information
5. notification of the collection of personal information
6. use and disclosure of personal information
7. direct marketing
8. cross-border disclosures
9. adoption, use or disclosure of government related identifiers
10. quality of personal information
11. security of personal information
12. access to personal information
13. correction of personal information

For more information about the APPs, visit the [website](#) of the OAIC (Office of the Australian Information Commissioner).

The Act is applicable to:

- the government
- the private sector and not-for-profit organisations ('NFPs') that have an annual turnover of more than \$3 million
- some organisations that have an annual turnover of \$3 million or less, including:
  - private sector health service providers: traditional health service providers such as private hospitals, day surgeries, medical practitioners, pharmacists, allied health professionals, complementary therapists such as naturopaths and chiropractors, gyms and weight loss clinics, childcare centres, private schools, and private tertiary educational institutions
  - businesses that sell or purchase personal information
  - some other types of organisation.

A number of the APPs significantly differ from the previous NPP principles, including APP 7, which is about the use and disclosure of personal information for the purpose of direct marketing, and APP 8 on cross-border disclosure of personal information.

#### ***Privacy and Personal Information Protection Act 1998 (NSW)***

The [Privacy and Personal Information Protection Act 1998 \(NSW\)](#) ('the PPIP Act') is an outline of both how NSW public sector agencies manage personal information and the functions of the NSW Privacy Commissioner.

The agencies that are duty bound under the PPIP Act are:

- NSW public sector agencies
- statutory authorities
- universities
- NSW local councils
- other bodies if their accounts are subject to the Audit Office of New South Wales (the NSW Auditor-General).

#### ***Health Records and Information Privacy Act 2002 (NSW)***

The [Health Records and Information Privacy Act 2002 \(NSW\)](#):

- sets privacy standards for dealing with health information
- contains the 15 Health Privacy Principles
- is applicable to the private sector organisations and the public sector in NSW
- is administered by the NSW Information and Privacy Commission.

If your organisation has privacy obligations under both the [Privacy Act 1988 \(Cth\)](#) and the [Health Records and Information Privacy Act 2002 \(NSW\)](#), it must comply with both acts concurrently. However, according to section 109 of the Commonwealth of Australia Constitution, when a law of the State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

### 3. Confidentiality

Confidentiality means ensuring that information is accessible only to those authorised to have access and only on a [need-to-know](#) principle. Directors have a responsibility to ensure that the organisation has a policy and associated systems in place to protect both personal and organisational information.

### 4. The duty of care, and negligence

The 'duty of care' is the obligation to take reasonable care to avoid injury to a person whom it can be reasonably foreseen might be physically or emotionally injured by an act or omission.

If anyone who is acting on behalf of an organisation breaches the duty of care and there is harm resulting as a consequence of the breach, the organisation may be held to have been negligent and thus liable for damages.

#### Vicarious liability

In general, an individual is personally liable for his or her own unlawful acts. However, employers are generally liable for wrongs committed by employees, in the course of the employee's work or a person acting on behalf of an organisation. This is referred to as vicarious liability.

### 5. Consent and guardianship

Consent is only valid if the person consenting is fully informed and has the capacity to understand, matters such as:

- the nature of the proposed treatment or service and its effects or impact
- any risks associated with the treatment or service
- the nature and effects of, and the risks associated with, any alternatives, or the impact of undertaking no action, and the person is able to communicate his or her decision.

If a service provider believes that a person is not capable of giving a valid consent, then the service provider has a legal responsibility to seek and obtain consent from a substitute decision maker or person responsible such as a guardian.

In the context of the [Guardianship Act 1987 \(NSW\)](#), 'substitute consent' is a reference to a situation whereby the person is not capable of giving his or her consent to the proposed medical treatment.

### 6. Conflict of interest

A conflict of interest refers to a situation whereby a conflict arises because the person in question has a personal interest in the matter at hand and the matter is the subject of a decision he or she is to make or is associated with his or her duty.

A conflict of interest can involve a pecuniary interest or a non-pecuniary interest, and both enmity and friendship can lead to either an actual conflict of interests or a perceived conflict of interests.

A conflict of interest can be:

- actual, whereby a conflict directly arises between the director's existing duties and responsibilities and his or her existing private interests
- reasonably perceived, whereby a person could reasonably perceive that the director's private interests either are or are likely to lead to improper influence over how the director is undertaking his or her official duties, whether or not this is in fact the case
- potential, whereby the director has a private interest that could conflict with his or her official duties in the future.

## 7. Procedural fairness

An organisation must have clear policies and systems for supporting procedural fairness in all the organisation's processes for managing complaints about discrimination or harassment, staff grievances, matters to do with staff discipline, and eligibility and disputes in relation to service users.

The rules of natural justice are that:

- the person in question must receive notice of, and know the nature of, any decisions made about him or her
- the person in question must be given the opportunity to be heard either by way of a submission in writing or another method before the decision is made
- the person/body who/that is hearing the case should act in good faith and without bias.

### Rule 1: Notification of the accusation/s

Notification of an alleged complaint against a person should:

- be in writing and delivered personally to the person in question
- include a clear setting out of the nature, details and basis of the alleged breach
- include a clear setting out of the penalties that might be imposed if the determination is that the alleged breach has occurred
- include a clear setting out of the time, date and composition of the hearing and the place it will be conducted at
- include advice to the person as to whether he or she has the right to respond to the alleged breach, either in person or by way of a written submission
- include advice to the person in relation to the level of representation he or she is entitled to.

### Rule 2: The right to be heard (have a fair hearing)

In general, for the person to have a fair hearing, someone other than the person who made the original decision must conduct the hearing, standard procedures must be followed at it, and:

- only relevant evidence must be considered
- any evidence introduced at it must be corroborated
- the person in question must be present at it, if appropriate
- the person in question must be given the opportunity to make representations
- all relevant facts must be disclosed.

### **Rule 3: The right to an unbiased hearing**

In this context, bias can be considered to be in the form of:

- evidence of pre-judgment
- a financial interest in the outcome
- a conflict of interest.

#### **2.2.4 Developing the organisation's 'workplace conduct' policy**

Decision makers who develop a 'workplace conduct' policy are better able to exercise their discretionary powers appropriately, consistently and fairly.

The only people an organisation can enforce its policy against are people it has a contract with and who have agreed to be bound under the policies; they include staff members; volunteers; directors; contractors; and, in some circumstances, service users and their families.

##### **The policy's name and purpose**

The name of your organisation's 'workplace conduct' policy must reflect both the type of policy it is and what is covered in the policy. The two options for the policy's name and purpose are:

1. having a separate policy for each type of discrimination and harassment, whereby you name it, for example, your anti-discrimination policy
2. having an integrated policy whereby you take into account all types of discrimination and harassment, whereby you name it, for example, your code of conduct or your code of ethics.

The purposes of having a 'workplace conduct' policy are to ensure that:

- everyone in the organisation meets all the relevant legal requirements
- the organisation's decision makers consider all the relevant factors
- the decision makers are consistent in their decision making
- the decision making process is based on both transparency and accountability
- the policy's purpose, what is covered in the policy, whom it is applicable to and when it commences are clearly stated.

##### **Breaches**

The 'workplace conduct' policy must include a clear statement about the type of personal conduct that will amount to a breach of the policy.

##### **The complaints process**

The 'workplace conduct' policy must include the details of who can make a complaint, the form the complaint is to be in and how the complaint will be investigated.

##### **Penalties or sanctions**

The 'workplace conduct' policy must include the details of the penalties or sanctions the organisation can impose for a breach of the policy.

#### **2.2.5 Conclusion**

Workplace conduct is essentially about managing risk whereby the organisation prevents itself from both causing harm to its service users and personnel and losing the public's support and confidence.

## 2.3 Contracts

### 2.3.1 Introduction

It is becoming increasingly important that directors be aware of their responsibilities under contract law.

This section of the manual is a summary of the legal issues that non-government organisations (NGOs) should consider when they are preparing a contract and entering contractual relations.

Organisations are finding that contracts between themselves and their funding bodies – such as a funding agreement or sponsorship agreement, a contract or an agreement with their service users and a contracts or an agreement with its external providers – are becoming increasingly important.

### 2.3.2 The elements of a contract

A contract is a legally binding and enforceable agreement reached between two or more parties. A contract may be expressed in writing or implied by the conduct or actions of the parties.

#### **Reduce it to writing**

It is prudent for all contracts to be in written form, rather than verbal, so that the intentions of the parties are clear from the outset and can not be disputed.

#### **Essential elements of a contract**

There are six essential elements required to form a legally binding contract:

1. offer and acceptance
2. consideration
3. intention to create legal relations
4. the parties' capacity, whereby an organisation must be incorporated (have a legal existence) in order to form contracts with other parties
5. legal purpose, whereby a contract for an illegal purpose will not be enforced in a court of law
6. genuine consent, whereby the parties must freely consent to the nature of the contract freely, without mistake about the nature of the contract, or undue pressure or misrepresentation.

#### **Application of the *Competition and Consumer Act 2010 (Cth)***

The [Australian Consumer Law](#) is contained in Schedule 2 of the [Competition and Consumer Act 2010 \(Cth\)](#) ('the CCA Act') and is applicable to the area of contract law.

Section 18 of the Act, prohibits corporations from engaging in conduct that is misleading or deceptive or is likely to lead to mislead or deceive.

The CCA Act is also applicable in specific circumstances whereby one party is seeking to exclude its exposure to liability. Under section 64 of the Act, in cases of a contract for supply of services, the supplying party cannot exclude liability in relation to the due care and skill which should be afforded to the party accepting the supply of the services. This also means that any materials supplied in connection with services must be fit for their particular purpose.

## **Operation of the contract**

### **Express terms**

Express terms are the specific terms agreed upon by the parties and should include the specific duties of each party and the entitlements that follow on from the performance of these duties.

A 'positive covenant' is an 'express' term whereby a party has to perform a task or comply with a positive obligation.

By contrast, a 'negative covenant' imposes a negative obligation to refrain from certain actions.

### **Implied terms**

'Implied terms' are non-specified terms of a contract that are nevertheless binding on the parties. Implied terms include, for example:

1. services will be rendered with due care and skill
2. any goods supplied with the services will be fit for the purpose
3. where the purpose is made known, the services and any material supplied in connection with them will be fit for that purpose.

Implied terms may also be in the form of a positive or negative covenant.

### **Terms incorporated by reference**

The parties to a contract may agree to incorporate other terms by reference in the contract. For example, the NSW Disability Service Standards (or the National Standards for Disability Services) can be incorporated in a service agreement as if they were otherwise expressed in the agreement.

It is not possible to incorporate by reference essential terms of a contract.

### **Conditions and warranties**

A 'condition' is a fundamental term of a contract. If breached, the innocent party is entitled to both terminate the contract and sue the other party for damages.

If the service agreement includes the stipulation that the organisation keep proper accounting records and the organisation fails to do so, the organisation has breached the contract and the other party can legally terminate the agreement.

A 'warranty' is a term of lesser importance whereby if it is breached, the innocent party can sue the other party for damages whilst still operating under the contract. A warranty might include an agreement to keep the terms of the contract confidential, whereby if one party breaches the confidence, the other party may choose to sue for damages.

### **Pre-contract representations**

A pre-contract representation is a statement made in the course of negotiations and may form a term of the contract. The misrepresentation does not prevent the contract coming into being, but because of the representee's decision to enter into the contract based on a false understanding, the representee is permitted to rescind the contract. Hence, the contract is voidable and the remedy for misrepresentation is rescission.

By way of example, where an employee represents in pre-contractual negotiations that they are qualified to undertake a specialist job and the employer enters into a contract on this basis only to later discover that this is not the case, then the employee who made the representation can be held liable for breach of contract, and their employment can be terminated.

### Limitation of liability

A well-defined exclusion clause may be inserted into a contract to exclude or limit the liability of a party for breach of contract.

### 2.3.3 Breach of contract

A breach of contract occurs when one party fails to perform their obligations as agreed in the contract. Breaches to a contract may include:

- failure to comply with a term(s) of the contract
- announcing an intention to be no longer bound by the contract (anticipatory breach)
- delay in performing an obligation.

It is recommended that legal advice be sought in relation to breaches of contract and the potential remedies available.

### 2.3.4 Variations to a contract

There is sometimes the need to vary the terms of a contract. In this instance it is important to document the variations and have them signed by both parties. Failure to do so may lead to misunderstandings and disputes over the terms of the contract.

### 2.3.5 The tendering process

A tendering process is used to identify and select service providers for many aspects of human services. This process (also known as an Expression of Interest or EOI) is used to engage contractors to provide products and services.

Organisations should be careful when sub-contracting (that is, engaging another body to provide services that it has contracted to provide). Most contracts require that any sub-contracting be formally agreed to by the body letting the contract, and head contractors should ensure that their sub-contractors are engaged with a formal contract, and that they carry relevant insurances. The organisation should also ensure that there is a process in place to maintain that sub-contractors' insurances remain current.

Under the [Work Health and Safety Act 2011 \(NSW\) No. 10](#) ('the WHS Act'), the organisation shares the responsibility for maintaining a safe work environment. Organisations must remain aware that subcontracting does not constitute wavering of their WHS responsibilities.

### 2.3.6 Service Agreements

A service agreement is a written agreement between a provider and an individual service user and it is legally binding.

In the NDIS context, the service agreement contains the terms and conditions under which the recipient of the individualised funding (or NDIS participant) will use their funding and the service provider will provide services.

By signing the service agreement, the service provider agrees to provide the services in accordance with the terms and conditions.

Under the NDIS, a service agreement will typically include:

- the supports to be provided under the service agreement
- the cost of the supports
- how, when and where the NDIS participant would like his or her supports to be provided
- how long the NDIS participant will need the supports to be provided
- when and how the NDIS participant's service agreement will be reviewed
- how any problems or issues that arise will be dealt with
- the NDIS participant's responsibilities under the service agreement, such as the responsibility to let his or her service provider know if he or she is unable to get to an appointment
- the service provider's responsibilities under the service agreement, such as the responsibility to work with the NDIS participant to deliver his or her supports in the right way
- how the NDIS participant or his or her service provider can either change or terminate the service agreement.

For more information about service agreements under the NDIS, visit [the NDIS website](#).

### 2.3.7 Funding agreements under the NDIS

In the disability sector, under the National Disability Insurance Scheme (NDIS) individualised funding arrangements will place people with disability at the centre of decision making and offer increased choice and control over their services and supports. Under the NDIS, government funding is no longer provided as block funding to a service provider.

With the gradual rollout of the NDIS, funding for reasonable and necessary supports will be provided to individuals with disability participating in the Scheme operated by the National Disability Insurance Agency (NDIA). To receive payment for the services and supports provided, an organisation is required to submit a claim (known as a Payment Request) via the online portal on the NDIA website [ndia.nsw.gov.au](http://ndia.nsw.gov.au). Funding for reasonable and necessary supports is allocated to an individual and is only transferred to the service provider of the person's choice, when that person receives the service.

Service providers therefore need to have arrangements in place with both the NDIA and their service recipients, who are called participants:

- to become a registered provider under the NDIS, NSW service providers need to register with the NDIA via an online application process. As part of the registrations process, service providers are required to deliver supports which are consistent with the NDIS Terms of Business, the NSW Quality and Safeguards Working Arrangements and the Guide to Suitability. These documents are available via the "Providers tab" on the NDIS website: <https://myplace.ndis.gov.au>
- the agreement between a service provider and a participant is known as a service agreement and relates to the services the organisation agrees to deliver to support the participant. A service agreement is different from the NDIS plan in that the plan includes a list of the NDIS supports whereas the service agreement includes information about the specific types of support and cost

- the NDIS has developed and published indicative pricing for all disability supports, including specialist disability services. The pricing can be found in the [2017–18 Price Guide](#), which is available on the NDIS website and is an outline of the specific services that providers must provide quotations for, including but not limited to:
  - early childhood and intervention
  - multidisciplinary programs
  - customised assistive technology
  - home modifications
  - specialist disability accommodation.

### 2.3.8 Conclusion

A contract or agreement creates legal obligations between contracting parties. It is essential that it be reduced to writing so that the obligations of each party are clear. Care must be taken to ensure that the contract is valid and that it meets the organisation's objectives. It is recommended that organisations obtain legal advice before entering into new contracts or if variations to a contract are required.

## 2.4 Insurance

### 2.4.1 Introduction

Insurance is an essential part of running any organisation. Taking out the right insurance will help protect the organisation and minimise its exposure to risk.

### 2.4.2 Why insure?

An incorporated organisation is a legal entity, and its liability will be limited to the extent of its surplus assets and any other contribution its members require in accordance with its constitution. The amount is usually limited to a small sum such as 'an amount not exceeding \$1'. By taking out insurance, the organisation protects not only its surplus assets but the personal assets of the directors and office bearers in cases in which they might be found personally liable.

#### **Examples of legal claims or risks that organisations are exposed to**

- Negligence claims
- Civil liability, including claims in relation to discrimination
- 'Work health and safety' (WHS) claims
- Employment liability

### 2.4.3 Commonwealth insurance

Regulation of insurance is a Commonwealth Government responsibility.

Under the [Insurance Act 1973 \(Cth\)](#) and the [Australian Prudential Regulation Authority Act 1998 \(Cth\)](#), companies must apply to the Australian Prudential and Regulation Authority (APRA) to be authorised to undertake an insurance business.

The Australian Securities and Investments Commission (ASIC) was established under the [Australian Securities and Investments Commission Act 2001 \(Cth\)](#), and the Act includes provisions similar to those set out in section 18 of the [Competition and Consumer Act 2010 \(Cth\)](#) in relation to misleading and deceptive conduct in association with provision of financial services.

Under the [Corporations Act 2001 \(Cth\)](#), the Commonwealth has:

- conferred authority on ASIC to regulate insurers
- established a single licensing regime for all providers
- differentiates between retail and wholesale products
- established insurers' disclosure obligations
- states how insurance intermediaries such as insurance brokers must operate.

#### 2.4.4 Insurers

Insurers identify and calculate the potential risk of loss of the policy holders, establish appropriate premium rates, and write policies that cover these risks.

##### **Insurance intermediaries (brokers)**

An insurance intermediary is a person who arranges insurance for an organisation in exchange for a fee from an insurer. Their obligations are governed by the [Corporations Act 2001 \(Cth\)](#).

An intermediary must be authorised in the particular area in which they operate (for example life or general), either under their own Australian Financial Services Licence (AFSL) or under an authority from one or more insurers who have an AFSL, and must have professional indemnity cover.

An intermediary must disclose the following:

- the fee/s, if any, that will be charged
- Commission and any other payment received from the insurer or from anyone else for arranging the insurance
- Name and place of business of the insurer
- Association which the intermediary or any employees or agents have with a proposed insurer
- whether they are authorised to act in the particular area of insurance in question. The effect of section 71 of the [Insurance Contracts Act 1984 \(Cth\)](#) is to oblige brokers to tell their service users about various matters before the contract of insurance is executed.

##### **Obligations on intermediaries**

Intermediaries are obliged to:

- arrange effective and appropriate cover with a solvent and reputable insurer
- advise the insured organisation about its obligations
- avoid a conflict of interests between the organisation's obligations to the insured party and its obligations to the insurer
- handle claims reasonably carefully.

#### 2.4.5 Insurance relevant to non-government organisations

The following types of insurance policy might be applicable to non-government organisations, and what is generally covered in them, that is, what type of insurance cover an organisation has, will depend on the contract of insurance.

Organisations must seek professional advice in determining both what insurance is available and what insurance is appropriate for their requirements.

##### **'Public liability' insurance**

Organisations that take out this type of insurance policy protect themselves against 'negligence' claims a third party might make in relation to bodily injury or property damage that has resulted from operation of the organisation's business.

### **‘Professional indemnity’ insurance**

Organisations that take out this type of insurance policy cover professional people who are in the business of giving advice and/or acting on behalf of other people; two examples are counsellors and paralegal staff members.

A person is covered for legal liability when he or she has undertaken an act, made an error or omission or been neglectful in fulfilling his or her professional duties. Any of these actions can cause the professional to be sued for negligence, so if the organisation has taken out ‘professional indemnity’ insurance, the person will be insured against that type of claim. This type of insurance cover can include insurance against payment of damages for libel, slander and defamation.

### **‘Directors’ and liability insurance**

This type of policy often overlaps with ‘professional indemnity’ insurance cover and is designed for organisations’ directors and officers, who can be sued by their own organisations or third parties for acts of negligence. This type of insurance cover is especially important if the organisation has a large financial turnover.

### **‘Association liability’ insurance**

This type of insurance is distinguished from ‘directors and officers liability’ insurance in that it usually includes coverage of both directors’ and officers acts of negligence and the organisation for its directors’ and officers’ acts of negligence.

### **‘Personal accident’ insurance**

This applies to individuals within organisations such as service users, staff and volunteers. It usually provides cover in the form of weekly fixed payments as a protection against loss of income if a person is unable to work through sickness or accident, or in the form of a lump sum to dependants in the event of accidental death.

Forms of benefit under this type of policy may also include medical benefits, student assistance benefits, home help allowance and parents’ inconvenience allowance in a case where a child is injured.

### **‘Volunteers personal accident’ insurance**

Non-government organisations that engage volunteers must carry both ‘public liability’ insurance and ‘volunteer personal accident’ insurance. The latter type of insurance policy includes coverage for volunteers’ accidental injury or death that has resulted from an authorised activity they were undertaking on behalf of the organisation, and it includes travel to and from the activity. This insurance also normally covers loss of income and various out of pocket expenses, including medical and pharmaceutical expenses (on the approval of the insurer).

### **‘Work health and safety’ cover**

Non-government organisations are subject to NSW ‘work health and safety’ laws under the [Work Health and Safety Act 2011 \(NSW\)](#). Directors must remember that a ‘work health and safety’ issue can result in bringing of a personal criminal prosecution against them as individuals.

### **Workers compensation**

Workers compensation is required by law for all organisations with employees, even those employed on a casual basis. This type of policy covers expenses such as wages and medical bills if a person is injured in the course and scope of their work.

**'Property contents' insurance**

This form of policy generally covers contents of all buildings used by the organisation against such incidences as theft or burglary (or attempt), accidental breakage of glass and damage to electrical household appliances by electrical burn out.

**'Fidelity' insurance**

This form of insurance generally provides protection to organisations against misappropriations by their employees.

**'Building' insurance**

This type of policy generally covers buildings owned by an organisation and commonly includes protection against risks such as fire, lightning, storms or rain water where it enters through an opening made by a storm (flood damage often being excluded).

**Travel insurance**

This type of policy generally provides cover against risks arising during interstate or international travel for work purposes, including losses arising from cancellation of flights, loss of baggage and personal contents, loss of equipment and personal injuries sustained during travel.

**2.4.6 Duty of disclosure**

A prospective insured organisation has legal obligations to disclose every matter that they know, or that they could be reasonably expected to know, will be relevant to the insurer's decision whether to insure and, if so, on what terms. Organisations should advise the insurer of all potential claims that may be made against the organisation.

Organisations should inform their broker immediately of any incident for which they may be liable.

**2.4.7 Conclusion**

Organisations must have appropriate insurance cover in order to protect their assets. In order to assess the insurance required, organisations should assess the type of risks they are subject to and then ascertain whether insurance is available and appropriate in the circumstances.

## 2.5 Other issues

### 2.5.1 Intellectual property

Intellectual property law is concerned with protecting ideas and information, such as artistic or literary creations (e.g. copyright), patents, industrial designs, trade marks, service marks and trade and business names.

The principal legislation covering the protection of intellectual property rights in Australia are:

- the [Trade Marks Act 1995 \(Cth\)](#)
- the [Copyright Act 1968 \(Cth\)](#)
- the [Designs Act 2003 \(Cth\)](#)
- the [Patents Act 1990 \(Cth\)](#)
- the [Competition and Consumer Act 2010 \(Cth\)](#).

### 2.5.2 Forms of intellectual property

#### Trade marks

A trade mark can be a word, phrase, letter, number, shape, logo, picture, aspect of packaging or a combination of these. It is used to distinguish the goods and services of one trader from those of another.

Trade mark registration is not compulsory but it is advisable as it creates a proprietary right in the registered proprietor of a trade mark and gives its owner the exclusive legal right to use, license or sell it within Australia for the goods and services for which it is registered.

#### Infringement of trade marks

Infringement occurs when a person or organisation uses a trade mark of a registered proprietor without authorisation or uses a trade mark substantially identical or deceptively similar to the registered trade mark in the course of trade relating to the goods or services for which the trade mark is registered.

#### Copyright

The originator of a literary work owns the copyright and may authorise its use by another person or organisation. Copyright can only be claimed in the expression of ideas, facts, methods or systems in material form.

In Australia, copyright protection is free and automatic from the time a piece of work is first written down or recorded in some way, provided it has resulted from its creator's skill and effort and is not simply copied from another work.

#### Who owns copyright?

Generally, the author of the copyright is the owner except if the work is produced on commission for another, in the course of employment, or where there is some other agreement in relation to the work. All works produced in the course of employment by employees, are owned by the employer.

The owner of the copyright has the exclusive right to reproduce, publish or broadcast the work.

### The copyright notice

A copyright notice does not need to be on something before it is protected by copyright in Australia, but it does serve to notify people that the work may be protected and identifies the person claiming the rights. The notice usually consists of the symbol ©, followed by the name of the copyright owner and the year of first publication.

### Infringement of copyright

A person infringes a copyright when they reproduce copyright material without the copyright owner's permission.

### Business and corporation names

#### Business names

People and organisations best protect their business name, company name and/or domain name when they register each of them as a trade mark.

Business name registration is only applicable in the state in which it is registered and will not prevent somebody else registering the same business name in a different state. Business name registration is limited to words and names.

#### Corporation names

Registration under the [Corporations Act 2001 \(Cth\)](#) does not offer protection of a proprietary right, but simply prevents another Australian company registering under the same name.

#### Domain names

A domain name serves as the product identity for a business on the Internet. The self-governing regulatory body .au Domain Administration (auDA) controls administration of registration of '.au' domain names.

- auDA plays a key role:
- in the market for 'domain name' services
- in development of policies for governing specific issues, for example use of generic domain names, such as community.com.au, and geographical domain names, such as sydney.com.au
- in identification of domain names that might not be licensed, such as anzac.com.au)
- in resolution of disputes about ownership of a domain name.

### Protection and exploitation

Where registration is available for particular property it should be sought. Where an organisation allows another party to use its intellectual property (for example, in a partnership agreement), obligations should be placed on the other party to take active steps to protect the organisation's intellectual property.

### Other matters

Organisations may decide to include a clear objective in their constitution in respect of their intellectual property.

If they do include that type of clause, they must define the term 'intellectual property' in the constitution so they have a sound legal basis on which they can develop and exploit their intellectual property.

### 2.5.3 Passing off

The use of a logo or name by another may constitute passing off. Passing off occurs where a competitor's property in his or her business or goodwill is likely to be injured by a representation. It represents an exploitation of the goodwill of the organisation.

#### **How is passing off proved?**

Passing off will be established if there is a misrepresentation made by a trader in the course of trade to prospective or ultimate consumers of goods or services supplied by him or her which is calculated to injure the business or goodwill of another trader and which causes, or will probably cause, actual damage to a business or goodwill of the plaintiff.

# References

## **The Anti-Discrimination Board**

Phone: (02) 9268 5544

TTY: (02) 9268 5522

Website: [www.lawlink.nsw.gov.au/adb](http://www.lawlink.nsw.gov.au/adb)

## **The Australian Domain Name Administrator (.auDA)**

Phone: 1300 732 929

E-mail: [info@auda.org.au](mailto:info@auda.org.au)

Website: [www.auda.org.au](http://www.auda.org.au)

## **The Australian Securities and Investments Commission (ASIC)**

Phone: 1300 300 630

E-mail: [info.enquiries@asic.gov.au](mailto:info.enquiries@asic.gov.au)

Website: [www.asic.gov.au](http://www.asic.gov.au)

## **Australian Standard AS 3806:2006 Compliance Programs**

Standards Australia

Phone: (02) 9237 6000

E-mail: [mail@standards.org.au](mailto:mail@standards.org.au)

Website: [www.standards.org.au](http://www.standards.org.au)

## **The Australian Taxation Office**

Phone: 132 866

Website: [www.ato.gov.au](http://www.ato.gov.au)

## **The Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT)**

Phone: 1300 006 228

Website: [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au)

## **Home Care Standards**

The Department of Social Services

Phone: 1300 653 227

Website: [www.dss.gov.au](http://www.dss.gov.au)

## **Health Privacy Principles**

The Office of the NSW Privacy Commissioner

Phone: 1800 472 679

E-mail: [ipcinfo@ipc.nsw.gov.au](mailto:ipcinfo@ipc.nsw.gov.au)

Website: [www.ipc.nsw.gov.au/](http://www.ipc.nsw.gov.au/)

## **The NSW Information and Privacy Commission**

Phone: 1800 472 679

E-mail: [ipcinfo@ipc.nsw.gov.au](mailto:ipcinfo@ipc.nsw.gov.au)

Website: [www.ipc.nsw.gov.au/](http://www.ipc.nsw.gov.au/)

### **IP Australia**

Phone: 1300 65 1010

TTY: (02) 6283 2363

E-mail: [assist@ipaaustralia.gov.au](mailto:assist@ipaaustralia.gov.au)

Website: [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

### **The National Criminal History Record Check**

Phone: 1800 080 095

Website: [www.nationalcrimecheck.com.au/police-checks-individuals](http://www.nationalcrimecheck.com.au/police-checks-individuals)

### **The Australian Privacy Principles**

Office of the Privacy Commissioner Phone: 1300 363 992

TTY: 1800 620 241

E-mail: [privacy@privacy.gov.au](mailto:privacy@privacy.gov.au)

Website: [www.privacy.gov.au](http://www.privacy.gov.au)

### **The National Standards for Disability Services**

The Department of Social Services

Phone: 1300 653 227

Website: [www.dss.gov.au](http://www.dss.gov.au)

### **NSW DSS Standards in Action**

Website: [www.adhc.nsw.gov.au/sp/quality/standards\\_in\\_action](http://www.adhc.nsw.gov.au/sp/quality/standards_in_action)

The National Disability Insurance Agency

Phone: 1800 800 110

Website: [www.ndis.gov.au](http://www.ndis.gov.au)

### **NSW Fair Trading**

Phone: 13 32 20

TTY: 1300 723 404

Website: [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

### **The NSW Office of Liquor, Gaming and Racing**

Phone: (02) 9995 0300

Website: [www.olgr.nsw.gov.au](http://www.olgr.nsw.gov.au)

### **The Work Health and Safety Act 2011 (NSW)**

WorkCover NSW

Phone: 13 10 50

Website: [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)

### **The 'Working With Children' Check**

The Office of the Children's Guardian

Phone: (02) 9286 7219

E-mail: [kids@kidsguardian.nsw.gov.au](mailto:kids@kidsguardian.nsw.gov.au)

Website: [www.kidsguardian.nsw.gov.au](http://www.kidsguardian.nsw.gov.au)

# APPENDIX 1: Checklists

## Checklist 1: Compliance

For more information, see section 2.1.3 in this chapter.

- Use this checklist in order to better develop your organisation's policies and procedures for monitoring and implementing legal compliance and meeting its legal obligations.
- Consider having you and your fellow directors complete the checklist each year.
- To answer each question, place a tick under the column headed 'Yes' or 'No', and make notes under the column headed 'Comments and/or actions'.

Questions			Comments and/or actions
The board's role	Yes	No	
Do our organisation's directors understand their legal responsibilities in relation to:			
• incorporation?			
• employment and industrial relations?			
• managing the workplace?			
• providing services?			
• managing contracts?			
• taxation?			
• fundraising?			
<b>Managing our organisation's building/s and environment</b>			
<b>Monitoring and compliance</b>			
Does our organisation have policies and procedures in place for ensuring it complies with the relevant laws?			
Does our organisation have a systematic way of monitoring whether it is meeting its legal obligations?			
Does our organisation always consider the relevant legal requirements when making decisions?			
Does our organisation have a 'risk management' plan in which it addresses the risks that might arise from any legal action?			

## Checklist 2: Decision making

For more information, see section 2.2 in this chapter.

- Use this checklist in order to better develop your organisation's policies and procedures by supporting and informing its directors in making decisions consistently and fairly.
- Consider having you and your fellow directors complete the checklist each year.
- To answer each question, place a tick under the column headed 'Yes' or 'No', and make notes under the column headed 'Comments and/or actions'.

Questions	Yes	No	Comments and/or actions
<b>The board's role</b>			
Do our organisation's directors understand:			
• the <i>Sex Discrimination Act 1984</i> (Cth)?			
• the <i>Racial Discrimination Act 1975</i> (Cth)?			
• the <i>Disability Discrimination Act 1992</i> (Cth)?			
• the <i>Anti-Discrimination Act 1977</i> (Cth)?			
• Australia's 'child protection' laws?			
• the 'Working with Children' Check?			
<b>Screening</b>			
Do our organisation's directors understand the requirements in relation to conducting a 'National Criminal History Record' Check?			
Does our organisation carefully select and screen its staff members, volunteers and subcontractors?			
Does our organisation have arrangements in place for screening our staff members, volunteers and subcontractors on an ongoing basis?			

Questions				Comments and/or actions
The board's role	Yes	No		
<b>Our 'workplace conduct' policy</b>				
Do our organisation's directors understand its 'workplace conduct' obligations?				
If your answer to the previous question was 'Yes', does our organisation have a 'workplace conduct' policy, or its equivalent, in place in which we have:				
• covered harassment?				
• covered discrimination?				
• covered privacy and confidentiality?				
• addressed consent and guardianship?				
• outlined who has the power to implement the policy?				
• specified the policy's purpose?				
• specified whom the policy is applicable to?				
• included preventive measures?				
• included standards of both expected behaviour and inappropriate behaviour?				
• outlined what constitutes a breach?				

Questions				Comments and/or actions
Decisionmaking	Yes	No		
• outlined the 'complaints and investigation' process?				
• outlined the penalties that can be imposed?				
• outlined the 'complaints and appeals' process?				
Policy implementation				
Does our organisation have a reporting procedure in relation to discrimination, harassment and/or abuse?				
Would our organisation know how to handle an allegation of discrimination, harassment and/or abuse?				
Would our organisation's staff members, volunteers and directors know what to do if faced with an allegation of discrimination, harassment and/or abuse and/or an alleged breach of our organisation's policy?				
Do our organisation's staff members, volunteers and directors understand what constitutes discrimination, harassment and/or abuse and/or a breach of the organisation's policy?				
Does our organisation have processes in place for monitoring whether it is protecting the privacy of both personal information and health information?				
Do our organisation's staff members, volunteers and directors understand the 'privacy legislation' requirements?				
Do our organisation's service users and their families as well as other agencies, staff members and volunteers know how to report or raise a concern?				
Does our organisation regular hold both information sessions and training sessions?				

Questions			Comments and/or actions
Decisionmaking	Yes	No	
Natural justice			
Does our organisation have policies and systems in place for supporting natural justice and procedural fairness in relation to:			
<ul style="list-style-type: none"> <li>enabling our service users to access their services?</li> </ul>			
<ul style="list-style-type: none"> <li>disciplining our staff members'?</li> </ul>			
<ul style="list-style-type: none"> <li>addressing our staff members' grievances?</li> </ul>			
<ul style="list-style-type: none"> <li>having a 'submission' process?</li> </ul>			
<ul style="list-style-type: none"> <li>having an 'appeals' process?</li> </ul>			
Does our organisation have a process in place for providing a fair, unbiased hearing in order to resolve disputes?			
Does our organisation communicate the principles of natural justice and procedural fairness to its stakeholders?			

### Checklist 3: Assessing your ‘workplace conduct’ policy

For more information, see section 2.2.3 in this chapter.

- Use this checklist in order to better assess your organisation’s ‘workplace conduct’ policy.
- Consider having you and your fellow directors complete the checklist each year.
- To answer each question, place a tick under the column headed ‘Yes’ or ‘No’, and make notes under the column headed ‘Comments and/or actions’.

Questions	Yes	No	Comments and/or actions
Is the purpose of our organisation’s policy to protect the health, safety and wellbeing of our service users and their families, our staff members and volunteers, and anyone else who might be participating in the activities we conduct?			
Does our organisation provide a safe environment for the people who are either using or providing its services and for the people who are participating in any activity we conduct?			
In having this policy, is our organisation confirming it will not tolerate harassment, discrimination or abuse of anyone who is either using or providing its services or anyone who is participating in its activities?			
Is our organisation clearly stating its belief that everyone who is either using or providing its services or who is participating in its activities has the right to:			
• be treated respectfully and with dignity?			
• retain his or her privacy and to have his or her personal			
• information managed confidentially?			
• have any complaints dealt with fairly, confidentially and sensitively and to be given the opportunity to be heard before any penalties are imposed?			
Is the policy applicable to:			

Questions	Yes	No	Comments and/or actions
<ul style="list-style-type: none"> <li>all the organisation's paid and unpaid staff members and its directors?</li> </ul>			
<ul style="list-style-type: none"> <li>the organisation's service users and their families?</li> </ul>			
<ul style="list-style-type: none"> <li>associated organisations and individuals, such as partner organisations?</li> </ul>			
<ul style="list-style-type: none"> <li>any other person or organisation, such as a sponsor, who/that has agreed in writing to be bound under the policy?</li> </ul>			

## Checklist 4: Contracts

For more information, see section 2.3 in this chapter.

- Use this checklist to better develop your organisation's contracts.
- Consider having you and your fellow directors complete the checklist each year.
- To answer each question, place a tick under the column headed 'Yes' or 'No', and make notes under the column headed 'Comments and/or actions'.

Questions			Comments and/or actions
Preliminary matters	Yes	No	
Will our organisation put the arrangement in writing?			
• If your answer to the previous question was 'Yes', is our organisation to draft contract?			
• Does the contract have both a clear starting date and a clear finishing date?			
Consider whether the following six essential elements are accounted for in the contract:			
1. Has there been both an offer and acceptance of it?			
2. Does the contract entail any consideration?			
3. Is there an intention to create legal relations between the parties?			
4. Do the parties have the legal capacity to enter into the agreement?			
5. Is the contract for a legal purpose?			
6. Have the parties genuinely consented to the terms of the contract?			
Contractual terms and conditions			
Are the contract's specific terms in accordance with our organisations' understanding of the agreement?			
Are each party's obligations set out in the contract?			
Does the contract include any terms that require clarification?			

Questions				Comments and/or actions
Termination and disputes		Yes	No	
Does the contract include adequate opportunity for our organisation to terminate the agreement, and if so, on what grounds?				
Does the contract include a clause whereby the parties are directed to a specific type of dispute resolution?				
Does the contract contain provision for the return of property, including intellectual property, if the contract is terminated?				
Final matters				
Do the signatories to the contract have the capacity or the authority to bind their organisation?				
Does our organisation have a copy of the contract as both or all the parties executed it?				
If there are schedules, are they attached to the contract?				

## Checklist 5: Insurance (a)

For more information, see section 2.4 in this chapter.

- Use this checklist when you are taking out, clarifying or reviewing an insurance policy for your organisation.
- Consider having you and your fellow directors complete the checklist each year.
- Answer each question under the column headed 'Answer and/or action'.

Question	Director Issue	Answer/Action
What is covered in the policy?	What types of liability is our organisation indemnified for under does the policy?	
What is excluded in the policy?	Exclusions will be included in a contract of insurance; for example, under a policy for 'public liability' insurance, 'personal injury' can exclude libel, slander, defamation, criminal acts and/or child molestation.	
Who is covered under the policy?	Is the policy extended to our organisation's staff members, directors, employees, volunteers, service users and/or visitors?	
When is our organisation covered under the policy?	<ul style="list-style-type: none"> <li>• Are all things that occur in the course of our organisation's business covered in the policy?</li> <li>• How has our business been defined in the policy?</li> <li>• Does the coverage include official events?</li> <li>• Does the coverage include social events?</li> <li>• What is the period of the coverage, for example '1 July 2018 to 30 June 2019'?</li> <li>• What does our organisation's 'risk management' plan entail?</li> </ul>	
Where is our organisation covered under the policy?	<p>The two questions to answer are as follows:</p> <ol style="list-style-type: none"> <li>1. Where will the litigation be commencing?</li> <li>2. Where did the breach or incident occur?</li> </ol> <p>Most policies will include coverage of proceedings that are commenced in Australia only.</p>	
What is the level of cover?	What is the maximum amount our organisation will be indemnified for if liability is established?	
What is the excess our organisation will have?	Is this figure reasonable in relation to the types of claim that might be made against the policy, for payment if a claim is made against the policy?	

Question	Director Issue	Answer/Action
<p>Is it a 'claim made' policy or an 'occurrence' policy?</p>	<p>A 'claims made' policy is an insurance policy for which claims will be accepted only when the claim is made in the insurance period.</p> <p>For example, if your policy includes coverage for the period from 1 July 2018 to 30 June 2019, only claims made during that period will be covered regardless of when the incident resulting in the claim occurred, whereas an 'occurrence' policy will include coverage of any incidents that occur in that insurance period of regardless of when the claim is made.</p> <p><i>Note:</i> Since the government introduced the policy of 'GST payable on insurance payouts', insurers have been more reluctant to offer an 'occurrence' policy, because of the increased 'reserve' requirement they must maintain in order to meet the claims.</p>	

## Checklist 6: Insurance (b)

For more information, see section 2.4 in this chapter.

- Use this checklist each year when you are managing your organisation's insurance policies.
- To answer each question, place a tick under the column headed 'Yes' or 'No', and make notes under the column headed 'Comments and/or actions'.

Questions	Yes	No	Comments and/or actions
<b>Types of insurance</b>			
Does our organisation understand the role of both an insurer and a broker?			
Has our organisation taken out the following types of insurance?			
• public liability			
• professional indemnity			
• directors' and officers' liability			
• associations liability			
• personal accident			
• volunteer personal accident			
• work health and safety			
• workers compensation			
• property contents and/or building			
<b>Knowledge of our organisation's insurance policies</b>			
Does our organisation understand:			
• what is covered under the policy?			
• what is excluded under the policy?			
• who is covered under the policy?			
• when those parties are covered?			
• where those parties are covered?			
• what the level of cover is?			
• what the excess is if a claim is made?			
• whether the policy is a 'claims made' policy or an 'occurrence' policy?			
Has our organisation 'shopped around' for a competitive premium price?			
Has our organisation made all the relevant disclosures to its broker and/or its insurer?			
Has our organisation consulted with all the relevant people in the organisation in relation to potential claims?			

## Checklist 7: Intellectual property (a)

For more information, see section 2.5.1 in this chapter.

- Use this checklist when you are managing or reviewing the intellectual property your organisation owns.
- To answer each question, place a tick under the column headed 'Yes' or 'No', and make notes under the column headed 'Comments and/or actions'.

Questions			Comments and/or actions
Development	Yes	No	
Does our organisation's constitution include a reference to intellectual property (IP) in its 'Objectives' and 'Powers' sections?			
Has our organisation both developed and documented any logos, names and/or programs?			
Protection			
Has our organisation registered a business name in each relevant state and/or territory?			
Has our organisation registered its domain name?			
Has our organisation applied to register one or more trade marks for:			
• any name/s?			
• any logo/s?			
• any of the organisation's other distinctive elements?			
Has our organisation applied a copyright notice to:			
• any publications?			
• any promotional materials?			
• any reports and/or policies?			
• any of the organisation's other works and materials?			
Has our organisation retained copyright ownership of any of our contractors' work/s?			
Has our organisation licensed the scope and/or the type of use of our intellectual property to any of our stakeholders such as a sponsor or a supplier?			

Questions	Yes	No	Comments and/or actions
Development			
Infringement			
Does our organisation require our stakeholders to tell us about any infringement they have made?			
In relation to infringements, can our organisation take action by way of:			
• the <i>Copyright Act 1968</i> (Cth)?			
• the <i>Trade Marks Act 1995</i> (Cth)?			
• the <i>Competition and Consumer Act 2010</i> (Cth)/Common Law Passing Off			

## Checklist 8: An introduction to legal issues

For more information, see section 2.1 in this chapter.

- Use this checklist when you are reviewing the information in section 2.1 of the manual.
- To answer each question in relation to whether you do or don't have the relevant understanding or only a limited understanding, place a tick under the column headed 'Yes', 'No' or 'Limited'.
- If you tick any box headed 'No', please undertake another review of that part of section 2.1.

Questions	Yes	No	Comments and/or actions
Do you understand the responsibilities that you as a board member have for your organisation's legal compliance and risk management?			
Are you aware of the main areas of law that affect your organisation?			
Does your organisation have an effective compliance program that is integrated in its:			
• financial system?			
• system for managing risk?			
• system for managing quality control?			
• system for managing the environment?			
• system for managing workplace health and safety?			
• operational procedures?			
Are you aware of the Australian Standard AS 3806:2006 Compliance Program?			

## Checklist 9: Decision making

For more information, see section 2.2 in this chapter.

- Use this checklist when you are reviewing the information in section 2.2.1 of this chapter.
- To answer each question in relation to whether you do or don't have the relevant understanding or only a limited understanding, place a tick under the column headed 'Yes', 'No' or 'Limited'.
- If you tick any box headed 'No', please undertake another review of section 2.2.1.

Questions	Yes	No	Limited
Do you understand what constitutes:			
• sexual harassment?			
• abusive behaviour?			
• discrimination?			
Do you understand the privacy requirements in relation to:			
• personal information?			
• health information?			
• confidentiality?			
Do you understand what constitutes consent?			
Do you understand the NSW 'child protection' legislation?			
Do you understand the 'service provider' requirement to conduct 'Working with Children' Checks?			
Do you know who in your organisation is responsible for screening employees?			
Do you and your fellow directors have access to your organisation's 'workplace conduct' policy?			
Has your organisation included preventive measures in its 'workplace conduct' policy?			
Do you understand the rules of natural justice, including:			
• notification of a decision before the decision is made?			
• the right to be heard?			
• the right to have an unbiased hearing?			

## Checklist 10: Contracts

For more information, see section 2.3 in this chapter.

- Use this checklist when you are reviewing the information in section 2.3.1 of this chapter.
- To answer each question in relation to whether you do or don't have the relevant understanding or only a limited understanding, place a tick under the column headed 'Yes', 'No' or 'Limited'.
- If you tick any box headed 'No', please undertake another review of section 2.3.1.

Questions	Yes	No	Limited
Do you understand:			
1. 'offer and acceptance'?			
2. 'consideration'?			
3. 'intention to create legal relations'?			
4. 'the parties' legal capacity'?			
5. 'the contract's legal purpose'?			
6. 'genuine consent'?			
Do you understand:			
• 'express terms'?			
• 'implied terms'?			
• 'conditions and warranties'?			
• 'representations'?			
In relation to entering into a contract, are you aware of:			
• any verbal and/or written representations?			
• the need to put the contract in writing?			
• the need to observe the relevant formalities?			
• the tendering process?			
• the need for freedom and capacity to contract?			
• 'restraint of trade' issues?			
• 'implied terms'?			
• limitation of liability?			
Are you familiar with all contracts your organisation enters into?			

## Checklist 11: Insurance (c)

For more information, see section 2.4 in this chapter.

- Use this checklist when you are reviewing the information in section 2.4.1 of this chapter.
- To answer each question in relation to whether you do or don't have the relevant understanding or only a limited understanding, place a tick under the column headed 'Yes', 'No' or 'Limited'.
- If you tick any box headed 'No', please undertake another review of section 2.4.1.

Questions	Yes	No	Limited
Do you understand the Government's role?			
Do you understand the role of insurers and intermediaries (brokers)?			
Do you understand why insurance is necessary?			
Do you understand:			
• 'public liability' insurance?			
• 'professional indemnity' insurance?			
• 'director's and officers liability' insurance?			
• 'associations liability' insurance?			
• 'personal accident' insurance?			
• 'volunteer personal accident' insurance?			
• 'work health and safety' cover?			
• 'workers compensation'?			
• 'property contents' insurance?			
• 'fidelity' insurance?			
• 'building' insurance?			
• travel insurance?			
Do you understand the duty of disclosure?			
Do you understand the consequences of a breach of the duty of disclosure?			

## Checklist 12: Intellectual property (b)

For more information, see section 2.4 in this chapter.

- Use this checklist when you are reviewing the information in sections 2.5.1 and 2.5.2 of this chapter.
- To answer each question in relation to whether you do or don't have the relevant understanding or only a limited understanding, place a tick under the column headed 'Yes', 'No' or 'Limited'.
- If you tick any box headed 'No', please undertake another review of section 2.5.1 and/or section 2.5.2.

Questions	Yes	No	Limited
Do you know what intellectual property is?			
Do you understand:			
• trade marks?			
• copyright?			
• patents?			
• business and corporation names?			
• domain names?			
In relation to the <i>Competition and Consumer Act 2010</i> (Cth), do you understand:			
• section 18 of the Act?			
• what constitutes 'passing off'?			

# APPENDIX 2: Developing a flowchart for a ‘workplace conduct’ policy

1. Jurisdiction for implementing the policy
    - Constitutional power to implement and enforce the policy
    - Adoption of the policy as a by-law or a regulation
    - Who the policy be enforced against:
      - Employees?
      - Directors?
      - When there is a written agreement for a party such as a contractor to comply with?
- 

## 2. Purpose and prohibited conduct

- An integrated policy or a separate one?
- What type of conduct is to be covered in the policy?
  - Standards of behaviour, that is, as stated in a code of ethics and conduct?
  - Inappropriate behaviour?
  - Sexual harassment?
  - Abuse?
  - Breach of privacy or confidentiality?

## 3. Preventive measures

- Screening:
  - Interviewing?
  - Checking references?
  - Police checks?
- A ‘prohibited persons’ declaration?

## 4. Offences

- What is an offence according to the policy?
- What is the ‘complaints investigation’ process?
- What is the process for a hearing?
- What penalties can be imposed?
- What rights of appeal are there?













**Intellectual property: Exercise 1**

You are a director of a disability organisation, and your organisation has just successfully bid for the rights to host an event to welcome home the NSW Paralympians next year. Included in the bundle of rights you receive in relation to the exciting event is the opportunity to develop and exploit your organisation’s intellectual property during the event.

You are aware that organisers of similar events have derived significant revenue from merchandising, sponsorship and licensing associated with the event. However, the organisers have also experienced problems with ‘ambush marketing’ and rogue merchandisers.

1. What types of intellectual property will you consider in relation to the event?

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2. What can you do to develop and proactively protect your organisation’s intellectual property during the event?

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3. What are your responsibilities in relation to business and/or company names?

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4. Three months before the event, public excitement and anticipation about the Olympics and Paralympics are starting to increase. You have just received a call from one of your major sponsors, who has heard that a similar event is being planned by a retailer of sports goods. What can you do?

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# APPENDIX 4: Points to consider when doing the exercises

## Decision making: workplace conduct – Exercise 1

Consider the following questions:

- Does your organisation have a ‘workplace conduct’ policy in place?
- Is the service user’s ongoing safety included in your organisation’s policy?
- Is natural justice ensured for the employee and safety ensured for service users in your organisation’s policy?
- Does your organisation have the power to discipline the driver?
- What disciplinary measures would you want to see implemented?
- Should your organisation be conducting its own investigation, given that the matter is in the hands of police? The answer to this question is ‘Yes’, because your organisation cannot afford to sit back and do nothing while the police conduct their investigation. Your organisation should also deal with the issue internally. However, you need guidance in order to make sure that your investigation does not lead to compromising of the police investigation. Where will you get this type of advice?
- Notify your insurer.
- Does your organisation have procedures in place for dealing with the media? Who will the spokesperson be? What will he or she say? What else do you need to ask yourself?

## Decision making: workplace conduct – Exercise 2

- In this case, the organisation is faced with two competing potential liabilities: breach of discrimination laws and breach of the duty of care owed to the other participants.

Under the [Anti-Discrimination Act 1977 \(NSW\)](#), it might not be unlawful to exclude a person from participating in a sporting activity on the grounds of his or her age. Furthermore, under the Act it is not unlawful to exclude a person from participating in a sporting activity on the grounds of his or her disability.

- In this instance, it is arguable that under NSW legislation, it is not unlawful to discriminate against Daniel.
- However, if the discrimination is unlawful, your organisation will have to consider its duty of care to Daniel and the other participants, by asking itself whether it is reasonably foreseeable that the other competitors might be injured due to Daniel’s participation. Ultimately, assuming that the discrimination is unlawful, the organisation will have to weigh up the two competing legal issues and decide which risk it prefers to take.

As a director, you might check that the following elements are in place:

- An organisational policy in relation to discrimination
- That your organisation's managers have access to legal advice so they can obtain guidance about issues that have potentially conflicting legal implications
- That your organisation has a process in place for clearly assessing and documenting actual and potential risks, and that your organisation's staff members have been educated about how to document risk assessments, whereby the organisation will be supported if a claim is made against it.

### **Contracts: Exercise 1**

Consider the following questions:

- Are the industry body's 'good practice' guidelines applicable to your organisation's employee? If so, in what way?
- The employee might have a valid argument, because the existence of a 'drug testing' policy and her obligations under it have not been communicated to her.
- The 'drug testing' policy should have been included in the contract 'by reference', whereby there might well be a reference to disciplinary action that can be taken if employees are under the influence of a drug or alcohol while at work, but there might not be a specific requirement that the person undergo testing; also, the policy itself should have been made available to the employee.

### **Contracts: Exercise 2**

The following elements should be included in the agreement the organisation has made with the 'grounds maintenance' contractor:

- The name of the parties – the names of the individuals, the company, and so on
- The nature of the relationship – is the person a contractor or an employee, and is subcontracting allowable?
- The term or period of the agreement
- Clear specification of the 'grounds maintenance' contractor's duties and responsibilities
- The hours he or she is required to work
- Who he or she reports to, and when
- Whether and how often his or her performance will be reviewed

- The details of policies or procedures the contractor is required to follow – in relation to, for example, anti – discrimination, a ‘work health and safety’ policy, a code of conduct, or confidentiality
- The qualifications that the contractor and any staff members he or she subcontracts is required to have
- Any benefits the ‘grounds maintenance’ contractor will receive in relation to matters such as remuneration, equipment, and travel and food allowances, and when and how the remuneration will be paid
- How the agreement can be terminated by each of the parties, including specification of the period and procedure for the termination
- How disputes will be dealt with
- Whether the ‘grounds maintenance’ contractor can do similar work elsewhere – ‘restraint of trade’ stipulations
- Who is responsible for insurance, what type of insurance it is and the level of the insurance cover
- Who is responsible for any liability that arises as a result of the services the contractor provides
- Whether the contractor is required to wear specific clothing or use specific equipment for either all parts of or any part of the work he or she undertakes.

## Insurance: Exercise 1

Consider the following questions:

- Did you advise your organisation's broker at the time of the incident? (The obligation to disclose)
- In relation to which insurance policy is likely to be applicable, consider who is being sued and what type of claim it is. In this case, it is the organisation and the driver who are being sued. The organisation's directors have not been sued. The claim is a claim in negligence.
- In relation to the driver, directors and officers liability insurance and associations liability insurance are likely to be applicable. However, they are most likely to include exclusion for criminal offences and/or sexual offences. Whether the driver will be covered under these policies will depend on the wording of the insurance policies.
- The organisation will not be covered under directors and officers liability insurance (because the directors have not been individually sued); however, the organisation might be covered under 'associations liability' insurance or 'public liability' insurance. Whether the association will be covered under these policies will depend on their wording.

## Insurance: Exercise 2

This 'hypothetical' is based on an actual case. Following is a summary of the issues that arose:

- The nature of the claims in this case includes product liability (under 'public liability' insurance) and failing to provide proper instructions, and/or negligence ('professional indemnity' insurance).
- In this case, the 'public liability' insurer and the 'professional indemnity' insurer refused insurance on the basis that the claim was under the either of those policies (that is, 'the professional indemnity' insurer claimed that the claim was a 'product liability' claim, and vice versa). Furthermore, the insurer in both cases stated that even if the claim were covered under the policy, cover would not be provided because there had been no disclosure of the incident when the policy was renewed.
- In this case, the organisation advised the broker verbally. However, in one instance the broker stated that it had not been advised, and in the other instance, it had been questionable as to whether the broker had advised the insurer. The issue of whether the organisation had advised the broker would have been resolved if each party had advised the other in writing.
- In summary, the organisation in this case thought it had adequate insurance. However, given that the insurers did not accept the claims, they had to defend the action with its own resources. They could have sued the broker and/or the insurer (for negligence and breach of contract). However, there is no guarantee that the action would have been successful.

### Intellectual property: Exercise 1

1. In relation to the event, consider the following types of intellectual property:

- Registration of business names if you intend to trade under the event name
- Registration of a domain name for the event's Internet presence (Note that you require a business name in order to register the domain name.)
- Registration of trade marks in relation to elements such as the event's name, logo/s, shape/s, imagery and mascot/s
- Copyright in relation to any publications, promotional materials, recordings and other works and materials
- Registration of event-associated designs that will be new and original from those used when the event was previously conducted

2. Apart from considering registration of appropriate forms of intellectual property as outlined in point 1, take the following actions:

- Ensure that a copyright notice is applied to all printed materials in order to notify the world at large that you are asserting proprietary rights over the material.
- When you are commissioning a designer to develop elements such as a logo, make sure you own the intellectual property in relation to the items the designer develops.
- License the use of intellectual property to third parties, and ensure that the parties clearly understand what type of licence it is.
- When entering into agreements with sponsors, suppliers and broadcasters, make sure the agreements include addressing of the 'intellectual property' issue. Who will own the 'intellectual property' rights in relation to the marketing and broadcast materials that are developed? Which logos and/or images will be licensed to supplier and sponsors for use in their marketing programs? Make sure the sponsors and suppliers know they are required to return all intellectual property to the event organisers when the agreement ends.

3. Whether you are an incorporated association or a company limited by guarantee, if you intend to trade under the name of the event, you will need to register the event name as a business name in each state and/or territory you wish to trade in. Consider developing a separate event company, in which case you will need to register the company with the Australian Securities and Investments Commission.

4. In that case, you might be able to pursue your competitor for breach of the [Competition and Consumer Act 2010 \(Cth\)](#) (the Act) and/or under the 'common law' tort of 'passing off'.

Under section 18 of the Act, it is unlawful for corporations to engage in conduct that is misleading or deceptive or is likely to result in misleading or deception. Furthermore, under section 29 of the Act, corporations must not represent that goods or services have sponsorship, affiliation uses or benefits the goods or services do not have.

Event organisers can take a preventive step by restricting participants' ability to promote the products or services of companies that are in direct competition with the event's official sponsors, by way of specific clauses in the agreements.