LEGAL UPDATE FOR CHURCHES

CORNEY & LIND
LAWYERS

ABOUT THIS BOOKLET

Corney & Lind Lawyers is a Christian law firm which exists to serve the not-for-profit and charity sector with tailored, specialist legal advice. Our calling (and vision) is to seek to bring order in a chaotic world, delivering redemptive, just and restoring outcomes. This booklet contains some information on current issues we encounter in our practice of the law for churches.

Information in this booklet is general information for educational purposes only and is not legal advice. If you would like advice in relation to any issue raised in this booklet, please contact our team who are ready and waiting to assist.

FOREWORD

ALISTAIR MACPHERSON
MANAGING DIRECTOR

At Corney & Lind, we value charities and believe your ministry and the redemptive work you do is essential to flourishing communities. Our desire is to journey with you and to help you navigate the legal and compliance landscape you face.

We trust that you will find this booklet of assistance .

Please don't hesitate to contact us if you need our assistance.

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PART ONE:

RECENT CHANGES THAT AFFECT YOUR CHURCH

NEW ATO GUIDANCE ON EXEMPT FRINGE BENEFITS: TIME FOR AN INTERNAL AUDIT?

An emerging area of interest (and risk) we have seen is how Churches can utilise exempt fringe benefits for the payment of religious practitioners. However, with the introduction of Phase 2 Single Touch Payroll there are considerable risks for religious institutions who may no longer be eligible to receive exempt fringe benefits.

Single Touch Payroll and Exempt Fringe Benefits
In the 2019–20 Budget, the government announced that Single Touch Payroll (STP) would be expanded to require reporting across the various components of an employee's gross income including salary packaging arrangements. The requirement to report this disaggregated income means each of these components can be identified and treated correctly by the Australian Taxation Office (ATO), and will likely result in a significant increase in compliance action.

Importantly the changes apply to charities and not-for profits which will also need to report on their Salary Sacrifice arrangements, particularly payments to religious practitioners (including exempt fringe benefits payments).

The mandatory start date for STP Phase 2 reporting was 1 January 2022. As such, it is strongly recommended that Churches and Charities consider a full review of their compliance with the exempt fringe benefits regime.

What is an Exempt Fringe Benefit?
Broadly, a fringe benefit is a 'payment' to an employee, but in a different form to salary or wages. A fringe benefit will often be a component of an employee salary package.

An employee can often negotiate with their employer to convert a component of their gross salary into a fringe benefit. This is referred to as a salary sacrifice.

The principal benefit employers and employees may consider Salary packaging Fringe Benefits is that it has the potential to reduce the tax payable by the employee.

This occurs because the employer may be eligible to provide the Fringe Benefit at either a concessional rate or at an exempt (that is, tax free) rate.

The principal benefit associated with including exempt fringe benefits into a salary package is the prospect of reducing the overall tax payable by the employee.

SALARY COMPONENTS	NO SALARY PACKAGE	EFB SALARY PACKAGING
Gross Salary	75,000	75,000
FBT Benefits	NIL	20,000 Mortgage Repayments 8,000 Ministers Expense Account including utility repayments 7,000 Vehicle Repayments
Less: Income Tax	(16,258.86)	(3,443.81)
Less: After FBT	20,000 Mortgage Repayments 8,000 Ministers Expense Account including utility repayments 7,000 Vehicle Repayments	
Remaining Cash	23,741.14	36,556.19
Difference		12,815.05

As can be seen in the table above, a potentially large saving can be made through salary packaging.

What can be included in an Exempt Fringe Benefit to a Religious Practitioner?

Examples of the type of fringe benefits that are permittable include:

- Allowing an employee to use a work car for private purposes (noting that there are specific rules about the division of business and personal use)[16]
- Housing payments
- Car repayments
- Holiday payments
- Giving an employee a discounted loan
- Paying an employee's gym membership/ groceries/utilities
- Providing entertainment by way of free tickets to concerts
- Reimbursing an expense incurred by an employee, such as school fees

As of 1 July 2022, the amount of remuneration that can be paid as an exempt FBT for Religious Practitioners is not capped.[17] This is in comparison to the caps that apply to employees of Public benevolent institutions and care services which are capped at $30,000 per employee.

Notwithstanding, a good rule of thumb is not more than 50% of the percentage of the salary assessed as eligible should be provided as an exempt fringe benefit. This appears to be common over many denominations. It may be that any greater percentage may be subject to increased scrutiny.

What is the possible implication of providing exempt Fringe Benefits to an employee that is not eligible?

Where an exempt Fringe Benefit is provided to an employee who is not eligible, we see the following risks:

- The employer may be prosecuted or fined for making a false declaration on the employee's group certificate, by failing to declare a Fringe Benefit on the Group Certificate;
- The employer may be required to pay Fringe Benefits Tax on the Fringe Benefit when later discovered. Penalty tax could also be imposed, even if the employer is otherwise tax exempt.
- The employee may be required to pay income tax on the benefit. We consider that the employee could bring an action against the employer for such costs as it would have relied upon the employer's false or misleading statements; and
- Reputational damage to the employer for breaching Tax law.

We consider that this is an area that is fertile for investigation and auditing by the ATO, particularly given the large amounts of revenue that is forgone through salary packaging. We recommend to our clients that you 'get your house in order' before an audit is made.

Churches with associated Care Arms or associated Public Benevolent Institutions

In addition to Religious Institutions, the following entities are also eligible for Exempt Fringe Benefits:

- Public Benevolent Institutions ($30,000 per employee);
- Health promotion charities ($30,000 per employee); and,
- Public and Non-profit hospitals ($17,000 per employee).

Other charitable or not-for-profit entities may be eligible for the Fringe Benefits Tax Rebate, which provides a rebate of 47% of gross fringe benefits tax payable, up to certain thresholds. However, the Fringe benefit tax rebate provided to employees of these organisations is not as favourable as the exemptions which churches are eligible to provide to religious practitioners.

Income Assessment for other Purposes

As a result of a salary sacrifice arrangement, the payees tax return will include a Reportable Fringe Benefits Amount. Even though this amount is not included as 'assessable income' for the purpose of income tax assessment, it may be relevant as assessable income for a number of other income test purposes. This includes income assessing for Family Assistance Payments and Centrelink Payments.

PLEASE NOTE: Examples in this article are examples only, and that specific advice should be sought for an individual (including a private ruling from the ATO or Centrelink where appropriate).

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USE OF DGR SCHOOL AND COLLEGE BUILDING FUNDS BY CHURCHES: CASE UPDATE

The financial benefit to any organisation of obtaining Deductible Gift Recipient ("DGR") status for their operations (either in whole or in part) should never be understated. Donations made to a DGR can be deducted from the donor's income for income tax purposes, which can incentive larger and more frequent donations.

Not all charities are eligible for DGR status. Limited categories of charities, or funds operated by charities, may be eligible based on the purpose for which it operates. One such eligible purpose is a school or college building fund, which exists to provide money for the acquisition, construction or maintenance of a school or college building.

Churches and School Building Funds

A church operating solely for the purposes of advancing religion is not generally eligible for endorsement as a DGR in its own right – however, limited ministries associated with churches, if structured correctly, may be able to seek DGR status.

Church-based entities have historically struggled to obtain DGR status for a school or college building funds – especially in circumstances where the building the subject of the fund was to be used for both school- and non-school-based purposes (such as church services).

However, the establishment of Ministry Colleges by churches may provide opportunities for faith-based entities to apply for unique taxation concessions. The recent case of Buddhist Society of Western Australia Inc v Commissioner of Taxation (No 2) [2021] FCA 1363 has taken significant strides in potentially making it easier for religious bodies to obtain DGR status for a school or college building fund in circumstances where that church's operations share a building with a school or college.

The Buddhist Society of Western Australia ("BSWA") was endorsed as a DGR by the ATO for the operation of the Dhammaloka Buddhist Centre Building Fund (the "Building Fund"). Importantly, BSWA was granted DGR status for the Building Fund on the condition that the fund was to be used for the acquisition, construction or maintenance of a building used, or to be used, as a school or college (one of several key criteria for endorsement of a school or college building fund).

In reality, the building was used for a variety of both school- and non-school-based Buddhist activities. The Commissioner, upon review of the Dhammaloka Buddhist Centre's ("DBC") activities, took the view that only 5% were "school" related, and that this was not enough to satisfy that the Building Fund was being used for a school or college. Accordingly, the Commissioner revoked the Building Fund's DGR status.

Expansion of a Constrained Definition of "School"

BSWA's application for Judicial Review of the decision was successful, with the Court finding that the Commissioner had used an incorrect definition of the word "school" to ground its decision to revoke DGR status. The Commissioner was then required to re-decide the matter according to the correct definition outlined by the Court.

The Court made the following observations:

- The definition of "school" or "college" is quite broad and takes its ordinary meaning, normally being "a place where people…assemble for the purpose of being instructed in some area of knowledge or of activity".

- To determine whether an entity is a "school" or "college", one can consider whether the following criteria are present - however, a lack of any of the below criteria does not automatically mean that the entity is not a school:

    - "Regular, ongoing and systematic instruction";
    - A defined syllabus;
    - Qualified instructors;
    - Whether the person receives a formal or portable qualification at the end of the course; and
    - Whether the person undertakes any examinations as part of the instruction.

A "school" can provide teaching of recreational subject matter (such as dance or sport) – it does not need to be vocational education.

In considering whether a building fund is "used, or [is] to be used, as a school or college", it is not sufficient to simply assign percentages for the times that the building is used for school activities versus non-school activities. Identification of the main purpose(s) for which that building is used, and the importance of each of the particular activities carried out to that purpose, is also required. It is also necessary to establish whether there are any connections between the non-school activities and school activities, and how both types of activities contribute to furthering the main purpose(s).

This decision's broadening of the definition of a "school" has presumably expanded the ambit within which a church might seek to obtain DGR concessions – meaning a school building fund DGR endorsement may potentially be available to a church building where the building also houses schooling operations (including ministry schools).

If your church requires advice on whether it can establish a Building Fund to support the needs of its ministry school, please do not hesitate in contacting us.

INCREASED FOCUS ON CONFLICTS OF INTERESTS: DOES YOUR POLICY NEED AN UPDATE?

The Australian Charities and Not-for-profits Commission (ACNC) has been increasingly interested in related party transactions. This should not be a surprise because ensuring that charities follow best practice when managing conflicts of interest bolsters public confidence in the sector.

All charities (other than Basic Religious Charities, which you may be if your church is unincorporated) must report related party transactions to the ACNC in their Annual Information Statement from 2023 onwards. Medium and large charities also must disclose related party transactions in financial reports in accordance with the Australian Accounting Standards.

What is a related party transaction?
Put simply, a related party transaction occurs when something of value (i.e. resources, services, obligations etc.) passes from a charity to a related party (i.e. a person or entity connected to the charity or with influence over the charity).

This could include members of the church's governing body and their close family members, pastors of the church and their close family members, a property-holding body connected to the church or a ministry subsidiary incorporated separately to the church.

One example would be a church deciding to charge nominal rather than market rent to a separately incorporated ministry arm, or the board of the church deciding on the senior pastor's salary package. A transaction can also take place even if no money changes hands.

Why does it matter?
Churches have responsibilities under the ACNC Governance Standards to ensure that its governors (whether they be called the board, management team, church council, management committee, or directors etc.) are obliged to act in the charity's best interests. This includes:

- not misusing their position;
- using the charity's resources wisely; and
- disclosing and managing conflicts.

It also goes without saying that a charity's reputation is central to its ability to attract the confidence (whether that be in the form of donations or volunteers) needed to do the good work that it was set up to do. Effectively and transparently managing conflicts is a key part of building and maintaining that confidence.

Where your church is incorporated as a company, it will also have obligations under the Corporations Act 2001 to seek approval of members for some related party transactions.

What should churches do?
Having the right policies, procedures, and tools in place will help your charity make good decisions regarding conflicts of interest and related party transactions. The ACNC guidance and templates are a good place to start. However, in our experience, tailored training and policies are often needed to help put the principles in action.

We suggest that arrangements between the church and a related party be documented, and any expenses associated with a related party transaction be documented as a separate line item in the accounts. Proposed material variations should be treated as if it were a fresh related party transaction. Transactions should also be recorded in a Register of Interests and Related Party Transactions.

If the related party is a governing body member or a member of their family, or a governing body member is also on the Board of the other entity in a transaction, the governing body (excluding the related member) must decide whether or not the related member should, subject to compliance with the Constitution:

- vote on the matter (this is a minimum),
- participate in any debate, or
- be present in the room during the debate and the voting.

In deciding what approach to take, the governing body should consider:

- whether the related party transaction will realistically impair the related person's capacity to impartially participate in decision-making
- alternative options to the related party transaction, if the transaction is not on commercial terms
- the church's objects and resources, and
- the possibility of creating an appearance of improper conduct that might impair confidence in, or the reputation of, the church.

Please contact us if your board could benefit from training on identifying and managing related party transactions, or if you require advice on updating your church's policies to deal with related party transactions.

PART TWO:

‘GOOD TO KNOWS’ FOR CHURCHES

MANAGING LIABILITY RISK TO CHURCH BOARD/ELDERS

Being a church Board Member/Elder/Governor/Committee Member ('Board Member') is hard work. It takes a mix of relational, spiritual, and commercial discernment to set the framework for the church to flourish. On top of that, most Board Members are volunteers, meaning that they are often time-poor due to competing priorities with business and family. It is therefore important that churches recognise this sacrifice and look after their Board Members by educating them on the personal risks of being on the church Board.

Managing Risks with Indemnities & Insurance
The following strategies may assist in managing your church Board Members' personal liability:

1.Board Member Indemnity in Governing Rules	We recommend that you review your church governing rules to ensure that it provides that the church will, subject only to liability arising from breaches of duties owed to the church itself or criminal liability, indemnify (compensate or hold harmless) its Board Members from personal liability incurred in the performance of their duties. It should also provide that the church can/will pay the fees for any supporting insurance policy (see below). We can assist with reviewing and updating your church constitution should the need arise.
2.Deeds of Access, Insurance & Indemnity	Ordinarily, the general indemnity given in a church's governing document will not deal with director liability and indemnities in any detail. The terms of the governing rules are also in the hands of the church members rather than the Board Members (which are usually but not always different people). This can mean that (although unlikely) the terms of the governing rules might be amended by the members without the Board Members' consent. As a result, many Board Members understandably require detailed direct contractual assurances from their church in the form of a Deed of Access, Insurance & Indemnity. A Deed of Access, Insurance & Indemnity will secure the Board Members' access to records (a claim might arise after they cease being on the Board of the church), the level of Directors and Officer insurance the church is required to maintain, and the extent of the indemnity provided. All in all, a Deed of Access, Insurance & Indemnity can provide peace of mind to your current and future Board Members. We can provide a standard template deed of access, indemnity and insurance for a fixed fee. More complicated deeds may attract an additional fee.
3.Directors and Officers Insurance	Indemnities are only as valuable as the assets which back them up. Therefore, unless the church has substantial assets which it can make available to pay any claims made against Board Members, or the church takes out Directors & Officers ('D&O') insurance, any indemnity given is relatively worthless. We therefore recommend that you consider if your church should take out or review its existing D&O insurance cover.

Managing Other Risks of Personal Liability

It is important to appreciate that not all Board Member personal liability can be managed with indemnities and insurance.

Below are some common risks to be aware of along with tips to manage personal liability:

1. B*reaches of 'Director Duties' owed to the church*

Most structure types will have some form of enforceable 'directors duties' (or in the very least application of the ACNC Governance Standards) which Board Members owe to the church. These generally include:

- to act with a degree of care and diligence;
- to act in good faith and in the church's best interests;
- not to misuse the Board Member's position;
- not to misuse information obtained in the performance of their duties;
- to disclose perceived or actual material conflicts of interest;
- to ensure that the church's financial affairs are managed in a responsible manner; and
- not to allow the church to operate while insolvent.

Breaching these duties will be considered breaching a duty against the church itself and Board Members can be rightfully held personally liable for doing so. The best way to manage this risk of personal liability is through building a healthy Board culture and through professional development to ensure that these duties are well understood. We can provide tailored training upon request.

2. Insolvent Trading

Put simply, insolvency generally occurs when an entity is unable to pay its debts when they are due. This is usually a cash flow test of insolvency rather than a balance sheet test.

The key elements of Board Member insolvent trading are generally that:

- the person was a Board Member at the time the church incurred the debt;
- the church was insolvent at the time the debt was incurred, or became insolvent by incurring the debt;
- at the time the debt was incurred, there were reasonable grounds to suspect that the church was insolvent or may become insolvent by incurring the debt; and
- the Board Member was aware that there were reasonable grounds to suspect insolvency, or a reasonable person would have been aware of that matter.

Personal liability in respect of insolvent trading can be managed by:

- Paying close attention to the church's financial situation;
- Ensuring that Board Members have financial literacy through professional development;
- Taking specific advice on how new significant liabilities might affect the church's solvency;
- In dire situations to avoid personal liability:
  - tipping the church into external administration before it trades insolvent; and
  - Board Members resigning from their position prior to insolvent trading occurring.

3. *Personal Guarantees*

It is commonplace in commercial arrangements (such as in finance applications or leases) for Board Members to be asked to provide personal guarantees. Essentially, by providing a personal guarantee, a Board Member is promising to meet the obligations of the church should it fail to do so (and usually any interest and costs of enforcement incurred in the process).

In our view, it is generally inappropriate for Board Members of a church to provide personal guarantees. This is because they have no personal interest in any capital returns gained by the church as a registered charity (i.e. they are not director-shareholders in a for-profit company). We instead suggest that churches respect that their Board Members are volunteers and instead consider providing alternative forms of security (such as a larger deposit) to manage this liability risk to their Board Members.

We can assist in reviewing security arrangements to ensure that personal guarantees are not provided or assist in obtaining releases of existing personal guarantees in place of alternative security.

NECESSITOUS CIRCUMSTANCES FUND

"Would your church benefit from a Necessitous Circumstances Fund?

Life happens to everyone, and from time to time we could all use a helping hand. In working and consulting with Churches, we are frequently asked for advice on how Churches can raise funds to support ministries that provide assistance to communities in need.

As many of our clients are aware, establishing a Public Benevolent Institution (PBI) is time intensive and requires a significant initial cost outlay. For this reason, although a PBI has Deductible Gift Recipient (DGR) Status and can attract additional contributions, it isn't always an appropriate solution for many churches.

Fortunately, Australian tax law provides an alternative option to establishing a PBI that may be more flexible in use, is more easily established, and crucially, also attracts DGR Status.

A Necessitous Circumstances Fund is a public fund established and maintained to provide relief for individuals in Australia who are in (surprise, surprise) "necessitous circumstances". For those interested, a Necessitous Circumstances Fund is provided for under Item 4.1.3 in s 30-45(1) of the Income Tax Assessment Act 1997 (Cth) (ITAA 97).

A Public Fund is a fund that anyone can contribute to. Importantly, any contributions to a Necessitous Circumstances fund permit a DGR receipt to be issued (which the donor may deduct from their personal income tax).

A Necessitous Circumstances Fund may be established through the creation of a new entity or it may be established as a fund managed by a registered charity. While ordinarily a Church that is registered with the ACNC under the subtype of "advancing religion" would not be able to be dually registered as a PBI (hence the need for a new entity), a Church can establish and facilitate the management of a Necessitous Circumstances Fund without setting up a fresh entity.

So, what can funds in a Necessitous Circumstances Fund be used for?

The definition of a 'Necessitous Circumstances' is not strictly defined in law or through ATO rulings but is suggestive of the following:

The alleviation of poverty (although not necessarily abject poverty or destitution); where the individual in need does not have enough financial resources to have a modest standard of living in Australia.

Necessitous circumstances refer only to financial necessity, rather than extending to need more generally due to factors such sickness, incapacity or age. Whilst the term may refer to poverty, a person does not need be in abject poverty or destitution in order to be considered 'in necessitous circumstances' – simply put, a person may be considered to be in necessitous circumstances when they don't have enough financial resources to have a modest standard of living by Australian standards.

This allows for significantly greater flexibility in the use and application of funds than a Public Benevolent Institution - which, whilst also a deductible gift recipient, has similar but distinct purposes with a number of constraints. A PBI must be benevolent, that is, organised, promoted or conducted for the relief of poverty or distress (sickness, disability, destitution, suffering, misfortune or helplessness) and furthermore the poverty or distress that is relieved must be "of such seriousness as will arouse community compassion and thus engender the provision of relief". This requirement establishes a requisite degree of need that must be present for PBI to be used and is a threshold much higher than a Necessitous Circumstances Fund.

The limitations on PBIs are expanded in the Australian Charities and Not-for-Profit Commission (ACNC) Commissioner's Interpretation Statement, which notes:

The ACNC distinguishes "ordinary human experiences" from those experiences from which people do not recover by themselves with the passage of time – for example, experiences that lead to mental illnesses requiring treatment. Individuals who have experienced family violence may fall into this category. An organisation that assists such people by providing intervention to relieve their condition, is likely to be "benevolent" for PBI purposes because their condition arouses the compassion of the community. The ACNC also recognises that people respond to hurtful experiences in different ways. Therefore the focus ultimately is on the condition of individuals that the entity seeks to assist....To qualify as a PBI, an entity's services must be actually directed towards relieving the poverty or distress experienced by the people it assists. It is not enough that the entity's services are targeted at people in need.

For Churches, there are a number of Ministries that could reasonable be directly funded by a Necessitous Circumstances Fund - for example, any of the following where the provision of funds alleviates an individual's financial necessity:

- Soup Kitchen or Food Bank;
- Domestic Violence relief (accommodation or goods, for example);
- Disaster relief assistance;
- Refugee and Migrant relocation assistance.

Given that the intended recipient of the fund must be in Australia, funds would not accessible in response to say, natural disasters or conflicts overseas.

If your church requires assistance in establishing a Necessitous Circumstances Fund or advice on whether a Necessitous Circumstances Fund would be appropriate to establish to fund your work in the community, please do not hesitate in contacting us.

CURRENT ISSUES IN MANAGING EMPLOYEES AND VOLUNTEERS

Wage Underpayments in Australia

Wage underpayments are a systematically widespread issue in Australia. It includes 'unlawful underpayment or non-payment of employee wages and entitlements. More recently, there have been a higher rate of wage underpayments in particular industries (hospitality, horticulture, retail), highlighting the widespread push for regulation and solutions in this area.

Wage underpayments in Churches

Although churches and charities have not been categorized within those industries that are more susceptible to underpaying their staff, in our practice we see numerous cases where churches and schools have failed to properly pay staff. It is important to note that underpayment not only includes your general underpayment of the hourly rate or yearly salary, it can also include, for example, failure to pay overtime, failure to pay the right superannuation, failure to pay the appropriate amount of annual leave loading, failure to pay travel time etc.

What impact has technology had on payroll?

The introduction of technology in the workplace has evidently made it easier and more efficient for companies to issue pay and invoices to their employees, however, employers need to be careful they are not over-relying on these systems and are still complying with their obligations under their applicable Awards and Instruments.

Employers Record Keeping Obligations

Under sections 535 and 536 under the Fair Work Act 2009 (Cth) and regulations 3.31 and 3.46 of the Fair Work Regulations 2009 (Cth) employer have obligations when it comes to keeping an employees records.

Employers are obligated to keep accurate and complete records for all their employees.

For example, as noted on the Fair Work Ombudsman website employment records must include the following:

- the employer's name
- the employer's Australian Business Number (ABN) (if any)
- the employee's name
- the employee's commencement date
- the basis of the employee's employment (full or part-time and permanent, temporary or casual).

Employers additionally need to keep the following records:

- Hours of work, leave
- Superannuation contributions
- Individual flexibility arrangement
- Annualised wage arrangements
- Guarantee of annual earnings
- Termination
- Transfer of business.

What are the consequences of wage underpayments?

Financial Penalty – If an employer breaches their obligations in record keeping under the Fair Work Act they may be subject to a financial penalty.

Criminal Penalty – Wage theft was classified as a criminal offence in 2020 in Queensland. This was done due to the widespread occurrence of wage theft.

Employers who underpaid employees due to an honest mistake or delay won't be liable for prosecution.

However, employers who have engaged in intentional and deliberate behaviour resulting in underpayment of wages can be charged a maximum of 10 years imprisonment.

Understanding award instruments – getting scope and application right

Underpayments can also commonly arise by an employer's failure to accurately interpret an industrial agreement or Award or correctly identify which Award applies to them. At Corney and Lind Lawyers we often receive enquiries from employers seeking assistance in interpreting a particular clause of an Award or Industrial Agreement as there is often ambiguity in these clauses and are not always straightforward.

What if I discover I have underpaid an employee?

If you have identified any historical underpayments for your employees, you will have an obligation to rectify those underpayments. For example, if you have failed to correctly pay superannuation or an employees hourly rate for 5 years, you will have to retrospectively make up any underpayments for those past five years to your employee.

It is also necessary to consider the various implications for underpayment including:

- Income tax and super implications if there has been historical underpayments;
- Ensuring you have correctly paid payroll taxes associated with historical underpayments; and
- Ensuring you have correctly paid Employees long service leave arising from an underpayment.

It is important Employers attend to these as soon as possible as they each have separate liability attached for the Employer.

Spiritual Appointments

A spiritual appointment differs from an employer/employee relationship. A spiritual appointment is considered to be pre-eminently of a spiritual character (i.e the Minister considers it their 'calling' to be a Pastor/Minstier). Generally a spiritual appointment provides the spiritual appointer (e.g. the church) flexibility in managing the relationship and relief against the legal obligations of an employer.

The National Employment Standards under the Fair Work Act do not apply to a Spiritual Appointee. By way of example, there is no obligation to pay superannuation for a spiritual appointee. A church of course would still have duty of care obligations. Generally WorkCover Queensland insurance coverage would apply to spiritual appointees on the basis stipends are subject to PAYG.

It is important that any agreement surrounding the appointment of a spiritual appointee is carefully worded and that the duties are primarily spiritual duties of a religious nature. We recommend seeking legal advice prior to making a spiritual appointment.

Volunteers

It is also important to ensure your volunteers are not classified as employees. Recently, the Fair Work Commission has been faced with an increasing number of cases involving volunteers. Adam Grinholz v Football Federation of Victoria [2016] FWC 7976 has provided guidance in establishing the pertinent differences between volunteers and employees. The following factors can indicate whether an individual is an employee:

a) the company provides all the necessary equipment;
b) the company exercises a significant degree of control over the volunteer's work;
c) the company requires the volunteer to wear a uniform provided by them;
d) the volunteer does 'productive' work for the company.

Factors which lend to an individual being a volunteer include:

a) if an honorarium is paid via invoice issued by the volunteer;
b) if the volunteers do not receive holiday or sick leave pay;
c) if the volunteer had a written agreement specifying the individual's volunteer status;
d) there was a lack of evidence to indicate that Grinholz was ever described as an employee;
e) if the company has no obligation for insurance, fines, GST or taxation; and
f) if the company does not pay a periodic wage to the volunteer.

In another case, Fair Work Ombudsman v Crocmedia Pty Ltd [2015] FCCA 140 failed to correctly identify students undertaking work experience as paid casual employees and instead classified them as unpaid volunteers, the Court observed that volunteers who are on work experience would not be considered an employee where:

a) The work performed by the volunteer during their work placement/experience is mainly for their own benefit and not the benefit of the business;
b) The placement where the individual is volunteering/undertaking their work placement is relatively short;
c) There is no obligation or expectation for the individual to do productive work; and
d) The company does not gain any significant benefit or value for the work performed by the volunteer.

It is important churches consider whether their volunteers may be classified as employees to avoid any significant fines. We recommend seeking legal advice if you are unsure about the arrangements you have with your current volunteers.

NEW ACNC GUIDANCE AND EDUCATION FOR BOARD MEMBERS

Being on the Board or Management Committee of a charity is hard work. Most governors of charities are involved in a voluntary capacity and are therefore often time-poor due to competing priorities with work, family and church commitments. In this context, understanding your role as a charity governor is all the more important. charity governor is all the more important.

The Australian Charities and Not-for-profits Commission ('ACNC') have recently released online learning materials to help governors of charities better understand their obligations. As at the date of this article, training modules include:

- Becoming a Charity Board Member: What You Should Know
- The ACNC: How We Can Help
- How to Become an ACNC Registered Charity
- Governing a Registered Charity in Australia
- Governance Standards Part A: Introduction and Governance Standards 1-3
- Governance Standards Part B: Governance Standards 4-6 and Winding-Up
- Reporting Obligations of Your Charity Part A: Overview and Basic Financial Skills
- Reporting Obligations of Your Charity Part B: Financial Skills for ANCN Reporting Requirements
- External Conduct Standards
- Fraud Prevention in the Charity Sector
- The Annual Information Statement
- Safeguarding: A guide for Charities

The resources can be accessed via the ACNC website.

We recommend that churches take the time to consider working this ACNC guidance into welcome packs for new board members, or as an ongoing recommended professional development for the board.

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