

# MEMORANDUM OF ADVICE

## Re Board Members with Intellectual Disability

*“The Australian corporate governance landscape is changing. Gradually, there has been a shift towards imposing greater personal liability on directors.”*

Australian Institute of Company Directors<sup>1</sup>

### 1. THE ISSUES

2. I am asked on behalf of the Australasian Society for Intellectual Disability (**ASID**) to provide legal advice about the feasibility of including people with disability on boards of disability service provider organisations.<sup>2</sup>
3. In particular, I am asked whether there are legal obstacles that prevent a person with intellectual disability being a board member?
  - (a) If so, what are they? And how could organisations legally overcome these?
  - (b) If not, what should organisations consider from a legal perspective in making such appointments?
4. To the extent that the particular circumstances of a company are relevant to answering this question, I am asked to differentiate between a company limited by guarantee, which is:
  - a registered charity with the Australian Charities and Not-for-profits Commission (**ACNC**); and
  - a registered National Disability Insurance Scheme (**NDIS**) provider; and
  - operating in States or Territories where occupational health and safety due diligence responsibilities apply.
5. The approach that I have taken in formulating this advice has been influenced by a bias, which should be articulated at the outset. As Anderson and Bigby observed in 2024, “Including expertise from the lived experiences of people with disabilities in the design of policy and service systems, as well as the delivery, review and governance of services, is a growing expectation of communities and regulatory authorities.”<sup>3</sup> I sought in answering the questions posed of me to identify a legal justification for including persons with an intellectual disability in a decision-making role on boards of directors. Ultimately, however, I have concluded, to my

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<sup>1</sup> Australian Institute of Company Directors, “Fiduciary Duties of Directors”, <https://www.aicd.com.au/board-of-directors/duties/fiduciary.html>.

<sup>2</sup> **Conflict of interest declaration:** For a short period I served as a Special Senior Counsel Assisting the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. However, in the capacity I did not work on issues bearing on the matters in respect of which I am asked for advice in this context.

<sup>3</sup> S Anderson and C Bigby, “Nothing About Use Without Us’. Including Lived Experiences of People with Intellectual Disabilities in Police and Service Design” Ch 12, in C Bigby and A Hough (eds), *Disability Practice* (Springer, 2024).

disappointment, that this is not possible as inherent in intellectual disability is an absence of the demanding skills that are prerequisites as a matter of law to the discharge of the role. Accordingly, I have recommended other means of drawing upon the lived experience and the insights of persons with intellectual disabilities to enrich the functioning of board members.

## **2. SUMMARY OF ADVICE**

- a. *There are good reasons in principle for persons with the relevant form of disability to participate in the governance of disability service provider organisations; amongst other things, they can add a valuable additional perspective to decision-making.*
- b. *There is no reason why people with disability, other than intellectual disability, should not serve as board members of disability service provider organisations.*
- c. *However, there are significant reasons of principle and of law (impediments) why people with intellectual disability are not suitable to serve as board members and committee members of disability service provider organisations. Principally, such persons will be unable, by virtue of insufficient governance literacy, numeracy, digital facility, and organisational awareness and competence to be able to discharge core board members' financial and governance requirements, consistently with what is required by law, including under the Corporations Act and NDIS legislation. This is especially so when a failure to discharge these requirements can result in significant civil, and even criminal, liability.*
- d. *While the requirements of companies limited by guarantee, registered charities, registered NDIS providers are not identical to the obligations under the Corporations Act, members of diverse committees and boards have significant, personal and non-delegable duties which people with intellectual disability are not going to be able to discharge satisfactorily.*
- e. *To appoint people with intellectual disability to boards risks exposing them to legal liability and eroding the ability of boards to be able to undertake their obligations imposed by law to the necessary standard.*
- f. *However, this is not to say that creative options for involving non-director participation of people with intellectual disability on boards and via committees are not feasible. Indeed, people with lived experience of intellectual disability are likely to be able to add valuably in such roles.*

## **BACKGROUND AND RATIONALE**

6. The United Nations Convention on the Rights of Persons with Disabilities<sup>4</sup> mandates promotion of a non-discriminatory environment in which people with disability can participate fully and on an equal basis with others in public life. For example, Article 29(a) of the Convention provides that:

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- (a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen

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<sup>4</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>.

representatives, including the right and opportunity for persons with disabilities to vote and be elected...

7. In addition, the 2022 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability observed that:

the very point of involving people with lived experience of disability in the decision-making process affecting them or other people with disability is to bring insights, understanding and perspectives that will not otherwise be available to the decision-making body.

The risks created by having a Board heavily weighted towards directors with commercial or legal experience, but without people with lived experience of disability, are obvious. Even with the best of intentions, the focus of the Board is more likely to be on the perceived operational requirements for Sunnyfield (including reputational risks), rather than on ensuring that the needs of clients are being met to the highest standards. It is one thing for an organisation to state that it aspires to giving the highest priority to the needs of people with disability; it is another to translate that aspiration into reality. If the Board does not have the benefit of the experiences and insights of people with disability, the directors are less likely to receive all the information they require to discharge their responsibilities effectively.<sup>5</sup>

8. The 2021 NDIS Quality and Safeguards Commission's Practice Standards and Quality Indicators state that, amongst the indicators that should be demonstrated:

Opportunities are provided by the governing body for people with disability to contribute to the governance of the organisation and have input into the development of organisational policy and processes relevant to the provision of supports and the protection of participant rights.<sup>6</sup>

9. In formulating this advice, I have taken into account two Across the Board projects: the 2025 public report, *Inclusion of People with Disabilities on the Boards of Not-for-Profit Disability Service Providers*<sup>7</sup> which built upon the 2023 *Director Pathways Project: An Investigation of the Pathways and Experiences of Australian Directors with Disabilities*<sup>8</sup>.
10. In the 2025 report, the researchers interviewed representatives of 24 disability service providers. In short, the findings were that 13 providers (54.2%) reported they had one director with disability, while 11 providers (45.8%) reported none. Of the 24 providers

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<sup>5</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Report – Public Hearing 13 (5 April 2022), paras 404-405, [https://disability.royalcommission.gov.au/system/files/2022-04/Report%20-%20Public%20hearing%2013%20-%20Preventing%20and%20responding%20to%20violence%2C%20abuse%2C%20neglect%20and%20exploitation%20in%20disability%20services%20%28a%20case%20study%29\\_0.pdf](https://disability.royalcommission.gov.au/system/files/2022-04/Report%20-%20Public%20hearing%2013%20-%20Preventing%20and%20responding%20to%20violence%2C%20abuse%2C%20neglect%20and%20exploitation%20in%20disability%20services%20%28a%20case%20study%29_0.pdf).

<sup>6</sup> NDIS Quality and Safeguards Commission, NDIS Practice Standards and Quality Indicators (November 2021), <https://www.ndiscommission.gov.au/sites/default/files/2024-10/ndis-practice-standards-and-quality-indicators.pdf>, p7.

<sup>7</sup> A Hough and C Bigby, *Inclusion of People with Disabilities on the Boards of Not-for-Profit Disability Service Providers* (LaTrobe University, 2025), <https://opal.latrobe.edu.au/ndownloader/files/54166751>.

<sup>8</sup> A Hough, C Bigby & A Brookes, *Director Pathways Project: An Investigation of the Pathways and Experiences of Australian Directors with Disabilities* (LaTrobe University, 2023), <https://opal.latrobe.edu.au/ndownloader/articles/21893145/versions/1>.

who participated, however, 21 (87.5%) were committed to increasing inclusion of directors with disability.

11. Significantly for the advice sought from me, only the one provider of services to people with intellectual disability was identified as having included a director with intellectual disability; others had included a director with other forms of disability.<sup>9</sup> In short, then the presence of directors with an intellectual disability is unusual.
12. The authors of the 2025 report commented that:

Some of those same boards are unwilling or reluctant to include directors with intellectual disabilities, for reasons such as believing that people with intellectual disabilities might not be competent to understand the complexity of their legal responsibilities and how to discharge them, and especially given the funding crisis many providers are experiencing. Further, they might be concerned about the role of support people to such directors and the potential for manipulation, and be concerned about the possibility that the director might be manipulated by third parties.

We note that there is no published research on the efficacy of appointing directors with intellectual disabilities.<sup>10</sup>

13. These authors noted that in a provider of services to people with intellectual disability, which had not included a director with a disability,

board discussions about inclusion had focused on whether a person with intellectual disability would have capacity, including because of potential personal liability. The interviewee stated that progress about any form of inclusion of people with disability on the board had stalled because of that issue.<sup>11</sup>

14. They identified that: “In relation to the issue of including directors with intellectual disabilities, we note that while there is some support and action, such inclusion remains controversial and insufficiently supported. Legal advice might add value.”<sup>12</sup>

### **3. THE DILEMMA**

15. The conflicting considerations are well summed up in an article by Curryer et al who summarised the dilemma as follows:

One concern, expressed by some participants, was that people with intellectual disability are not suited to governance roles due to the complexity and legal responsibility of these roles.

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<sup>9</sup> This raises difficult issues in relation to the utility of having as members of a body providing services to persons with intellectual disabilities a person who has a physical or other disability. While this results in the presence on a board of a person lived experience of disability, such a disability may be very different from an intellectual disability and constitute at best a limited additional perspective.

<sup>10</sup> Hough & Bigby, 2025, op cit, at p13.

<sup>11</sup> Hough & Bigby, 2025, op cit, p12.

<sup>12</sup> Hough & Bigby, 2025, op cit, p24.

However, such concerns need to be balanced with the positive contribution diversity brings to boards.<sup>13</sup>

16. While there are diverse definitions of intellectual disability, that in section 3 of the *Disability Act 2006* (Vic) is useful: “the concurrent existence of (a) *significant sub-average general intellectual functioning*; and (b) significant deficits in adaptive behaviour— each of which became manifest before the age of 18 years.”<sup>14</sup>
17. The question upon which my advice is sought, then, is whether a person with significantly substandard intellectual functioning can satisfy the legal and ethical requirements for functioning on a board of directors. A comparable question arises in respect of participation in a committee of an incorporated association.

#### 4. ENTITY TYPES

##### Companies

18. A **company** is an entity that is a company registered with the Australian Securities and Investments Commission (ASIC) under the *Corporations Act 2001* (Cth) and it can include an unincorporated registrable body.<sup>15</sup>

##### *Proprietary and public companies*

19. A **proprietary company** can be limited by shares or by unlimited with share capital, while a **public company** can be limited by shares, limited by guarantee or unlimited with share capital.<sup>16</sup>
20. A company’s management can be governed by provisions of the *Corporations Act* that apply to the company as “replaceable rules”, by a constitution, or by a combination of both.<sup>17</sup> Understanding of these and capacity to apply them discerningly and appropriately is a fundamental attribute of a member of a board of directors.
21. A proprietary company must have at least one director who ordinarily resides in Australia, while a public company must have at least three directors, two of whom must ordinarily reside in Australia.<sup>18</sup>

##### *Companies limited by guarantee*

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<sup>13</sup> B Curryer, M Donnelly, K Roots, M Spencer, W Harding & K Sneath, “Inclusion of People with Intellectual Disability in the Decision-Making and Governance of Disability and Community Organisations” (2025) 50(3) *Journal of Intellectual & Developmental Disability* 255.

<sup>14</sup> See too *Crimes (Forensic Procedures) Act 2000* (NSW), s3; *Disability Services Act 2006* (Qld), s12; *Disability Services Act 1993* (SA), s3; *Disability Services Act 1993* (WA), s3; *Disability Services Act 2011* (Tas), s3; *Disability Services Act 1991* (ACT), s5; *Disability Services Act 1993* (NT), s3. See also W Brookbanks and I Freckelton, “Legal Issues in Offenders with Intellectual and Developmental Disabilities” in W Lindsay and J Taylor (ed), *The Wiley Handbook on Offenders with Intellectual and Developmental Disabilities: Research, Training and Practice* (Wiley, London 2018), ch 4.

<sup>15</sup> *Corporations Act 2001* (Cth), s9.

<sup>16</sup> *Corporations Act 2001* (Cth), s112.

<sup>17</sup> *Corporations Act 2001* (Cth), s134.

<sup>18</sup> *Corporations Act 2001* (Cth), s201A.

22. A **company limited by guarantee (CLG)** is a registered public company with a particular form of organisational structure. One of the key advantages of this legal form is that it allows the organisation to operate nationwide. The strict legal requirements of this structure also provide potential donors, clients and business partners with confidence that the organisation is run according to stringent principles and acknowledged standards.
23. However, like all other companies, CLGs must comply with the applicable provisions of the *Corporations Act*. They are formed on the principle that the liability of members is limited to the amount they agree to contribute if the company is wound up and this determines or limits the liability of the company's members.<sup>19</sup> This amount is typically nominal and set out in the company's constitution.
24. A CLG cannot pay dividends. Usually, it has a constitution that sets out specific rules governing the internal affairs of the company. The *Corporations Act* also contains rules that deal with those affairs. The replaceable rules will not apply if the constitution so provides.
25. A CLG must have at least three directors and one secretary on its board, register a minimum of one member, and be internally managed by a constitution or replaceable rules. CLGs have a number of legal obligations and financial reporting rules, substantially consisting of obligations to:
  - undertake regular financial reporting;
  - arrange for reviews of financial reports; and
  - share annual reports with members.
26. ASIC requires CLGs to appoint a registered company auditor within a month of registering, keep up-to-date financial records, prepare, submit, and have audited regular financial statements and reports each fiscal year, and send copies of the documents to all members.
27. Directors of a CLG generally have the same legal duties, responsibilities and liabilities as directors of other entities registered as public companies under the *Corporations Act*. There are also specific provisions in the *Corporations Act* that govern companies limited by guarantee that undertake other corporate activities – such as issuing securities other than shares.
28. Organisations often use CLGs because they are particularly suited for conducting non-profit activities on the basis that:
  - they cannot pay dividends;

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<sup>19</sup> See Better Boards, “What Is a Company Limited by Guarantee?”, <https://betterboards.net/non-profit-fact-sheets/company-limited-by-guarantee/>.

- they cannot issue shares and therefore no person can acquire a controlling interest or profit from a share sale; and
- each member of the company has a single vote.

29. A CLG has obligations, including:

- making their books and records available for inspection by directors;
- keeping written records of members' resolutions and meetings;
- ensuring that no dividends are paid to members;
- holding meetings as required by the *Corporations Act*; and
- complying with additional governance standards when the company is a registered charity.

30. Many charities are CLGs. If a CLG is registered with ASIC, it can apply to be registered as a charity with the ACNC.<sup>20</sup> This provides the potential for charity tax concessions but it also creates a series of additional or alternative obligations.<sup>21</sup>

### ***Incorporated associations***

31. A club or community group that operates as a not-for-profit can be registered as an **incorporated association**.<sup>22</sup> This means that the members have decided to give their organisation a formal legal structure and the club or “community group” becomes a legal entity that remains even if its membership changes. The legal entity can enter into contracts in its name and, for example, can borrow money, buy equipment or provide services. Incorporation protects an association’s individual members from legal liabilities.<sup>23</sup>

32. Incorporated associations are formed under, and must comply with, the relevant legislation of their state or territory. For convenience, reference is made in this advice to the legislation governing incorporated associations in Victoria, the ***Associations Incorporation Reform Act 2012*** (Vic). Similar legislation applies throughout Australia.

33. The body that manages an incorporated association is described as a “**committee**”.<sup>24</sup>

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<sup>20</sup> Australian Charities and Not-for-profits Commission, “Before You Start a Charity”, <https://www.acnc.gov.au/for-charities/start-charity/you-start-charity>.

<sup>21</sup> Australian Charities and Not-for-profits Commission, “Ongoing Obligations to the ACNC”, <https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc>.

<sup>22</sup> For a comparison of an incorporated association as against a public company limited by guarantee, see <https://www.sport.nsw.gov.au/sites/default/files/2021-04/incorporated-association-vs-pcl-by-guarantee.pdf>.

<sup>23</sup> Consumer Affairs Victoria, “What is an Incorporated Association?”, <https://www.consumer.vic.gov.au/clubs-and-fundraising/incorporated-associations/what-is-an-incorporated-association>.

<sup>24</sup> *Associations Incorporation Reform Act 2012* (Vic), s3.

34. Under the *Associations Incorporation Reform Act*, incorporated associations may have their own rules that comply with the Act or may otherwise adopt “model rules”.<sup>25</sup> Incorporated associations have the power to raise, invest and borrow money.<sup>26</sup>

### *Unincorporated associations*

35. An **unincorporated association** is little more than a group of persons with a common interest.<sup>27</sup> It is not a separate legal entity. It is informal although its members can make their own rules about how the association is managed. Sometimes the rules are referred to as a constitution. However, an incorporated association is an entity under tax law and treated as a company for income tax purposes.<sup>28</sup>

## 5. REGISTERED DISABILITY PROVIDERS

36. The *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) permits “a person” to apply to the NDIS Commissioner to be registered as an **NDIS provider**.<sup>29</sup> The NDIS Act stipulates that an “NDIS provider” can be either a person or an entity, with “entity” being defined to be either a partnership or an unincorporated association.<sup>30</sup> The *Acts Interpretation Act 1901* (Cth) provides that in Commonwealth legislation, reference to a “person” generally can also include a body corporate.<sup>31</sup> As such, individuals with an Australian Business Number (**ABN**) or other organisational structures can apply to be registered NDIS providers.
37. Relevantly, the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (Cth) provide that, when assessing an application for registration, the Commissioner needs to consider, among other things, whether the applicant is, or has been, an insolvent under administration under the *Corporations Act* and whether there have been any findings or enforcement actions against them by regulatory bodies, such as ASIC or the ACNC.<sup>32</sup>
38. There may be additional substantive and procedural obligations for registered NDIS service providers in Queensland. This is because, under the *Human Rights Act 2019* (Qld), registered NDIS services providers are deemed to be “public entities” and bound by that Act when performing functions of a public nature.<sup>33</sup> This means they must consider human rights and must not unjustifiably limit human rights.<sup>34</sup>

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<sup>25</sup> *Associations Incorporation Reform Act 2012* (Vic), ss 47 and 49.

<sup>26</sup> *Associations Incorporation Reform Act 2012* (Vic), s 30.

<sup>27</sup> Institute of Community Directors Australia, “Unincorporated Associations”, <https://www.communitydirectors.com.au/help-sheets/unincorporated-associations>.

<sup>28</sup> Australian Government, Australian Taxation Office, “Legal Structures for Not-for-Profits” (1 November 2021), <https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/getting-started/in-detail/registration/legal-structures-for-not-for-profits>.

<sup>29</sup> *National Disability Insurance Scheme Act 2013* (Cth), s73C.

<sup>30</sup> *National Disability Insurance Scheme Act 2013* (Cth), s 9 (definitions).

<sup>31</sup> *Acts Interpretation Act 1901* (Cth), s2C.

<sup>32</sup> *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (Cth), r 9(2).

<sup>33</sup> *Human Rights Act 2019* (Qld), s9(2)(a).

<sup>34</sup> *Human Rights Act 2019* (Qld), ss 8 and 58.

39. However, this is not the case under both the *Human Rights Act 2004* (ACT) or the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>35</sup>
40. Section 73F of the NDIS Act obliges registered providers to comply with conditions, including applicable standards and other requirements of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (Cth) (**the Standards**).<sup>36</sup> Section 73V obliges registered providers to comply with the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* (Cth) (**the Code of Conduct**) and relevantly includes an obligation that any supports and services be provided in a safe and competent manner, with care and skill (NDIS Code of Conduct s 6(1)(c)).
41. The standards include obligations to:
- identify and manage risks to participants;<sup>37</sup>
  - ensure that there are identifiable, accurately recorded, current and confidential information concerning each participant;<sup>38</sup>
  - ensure that each participant’s needs are met by workers who are competent in their role, by holding the relevant qualifications and having the relevant expertise and experience to provide person-centred supports;<sup>39</sup> and
  - ensure each participant can access competent and appropriate support for their needs.<sup>40</sup>
42. Section 73J of the NDIS Act provides that a person contravenes this section if the person is a registered NDIS provider and breaches a “condition” (including those captured by s 73F) to which the registration of the person is subject.
43. Section 73V(3) of the NDIS Act requires compliance with the Code of Conduct and relevantly includes an obligation that any supports and services be provided in a safe and competent manner, with care and skill: NDIS Code of Conduct s 6(1)(c).
44. Where a provider contravenes ss 73J or 73V of the NDIS Act, they are liable to be penalised pursuant to s 82(3) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) read together with s 73ZK of the NDIS Act.
45. Importantly, a series of civil penalty actions has been taken against disability service provider organisations based upon their failure to manage risk effectively and to undertake suitable client planning and safety implementation. The following are the principal decided cases:

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<sup>35</sup> *Human Rights Act 2004* (ACT), s 40(1) and *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1).

<sup>36</sup> <https://www.legislation.gov.au/F2018L00631/latest/text>.

<sup>37</sup> NDIS Act, s73F(2)(c), NDIS Practice Standards, cl 10 of Sch 1, Pt 3.

<sup>38</sup> NDIS Act, s73F(2)(c), NDIS Practice Standards, cl 12 of Sch 1, Pt 3.

<sup>39</sup> NDIS Act, s73F(2)(c), NDIS Practice Standards, cl 15 of Sch 1, Pt 3.

<sup>40</sup> NDIS Act, s73F(2)(c), NDIS Practice Standards, cl 18 of Sch 1, Part 4.

- *Commissioner of the NDIS Quality and Safeguards Commission v Australian Foundation for Disability*<sup>41</sup> (*Afford*) (Abraham J): **a penalty imposed of \$400,000;**
- *Commissioner of the NDIS Quality and Safeguards Commission v LiveBetter Services Ltd*<sup>42</sup> (*LiveBetter*) (Raper J): **a penalty imposed of \$1,800,000;** and
- *Commissioner of the NDIS Quality and Safeguards Commission v Valmar Support Services Ltd*<sup>43</sup> (*Valmar*) (Raper J): **a penalty imposed of \$1,916,250 plus costs.**<sup>44</sup>

46. Section 82(6) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) provides that in determining the pecuniary penalties that can be imposed, the Federal Court must take into account all relevant matters, including:

- (a) the nature and extent of the contravention; and
- (b) the nature and extent of any loss or damage suffered because of the contravention; and
- (c) the circumstances in which the contravention took place; and
- (d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

47. In *Commissioner of Taxation v Balasubramaniyan* Raper J held that those factors are not exhaustive of what may be relevant, and that the factors identified in other civil penalty contexts may also be relevant:

The factors identified additionally include matters such as: the seriousness of the conduct; the size of the contravening company; the deliberateness of the contravention and the period over which it extended; whether further contraventions are likely; whether the contravention arose out of conduct of senior management; whether the contravenor has a corporate culture conducive to compliance as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and whether there has been co-operation with the authorities, including in the context of the proceedings.<sup>45</sup>

48. The civil actions undertaken recently have demonstrated that the Commissioner of the NDIS Quality and Safeguards Commission is taking a strong stand to protect recipients of NDIS services. There is a real potential for board members to be proceeded against under the civil penalty provisions in the NDIS Act, in light of the fact that, aside from frontline workers becoming defendants, so too have a chief executive officer, a chief operating officer and a regional manager. It is clear that the NDIS legislation imposes a range of obligations (enforced by the potential for civil penalties) and that those responsible for breaches of the legislation that endanger vulnerable recipients of NDIS services are at risk of enforcement. In some circumstances board members, if on notice and/or authorising the taking of risks, or failing to implement a suitable corporate culture, could be vulnerable alongside a

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<sup>41</sup> [2023] FCA 629.

<sup>42</sup> [2024] FCA 374.

<sup>43</sup> [2025] FCA 11.

<sup>44</sup> See A Hough, C Bigby and D Marsh, “Federal Court Cases about Harm to People with Intellectual Disabilities in Service Provision: Lessons for Safe Support” (2025) *Research and Practice in Intellectual and Developmental Disabilities* (in press).

<sup>45</sup> *Commissioner of Taxation v Balasubramaniyan* [2022] FCA 374 at [93].

provider's managers. It follows that Board members need to be able to be alert and engaged with their body's conduct so as to provide guidance and assistance to avoid the company engaging in conduct or creating a culture of risk which results in such penalties, as well as to avoid any form of acquiescence in conduct that breaches ss 73J to 73V of the NDIS Act. This is a significant responsibility which requires a significant level of capacity, knowledge and engagement.

## 6. ROLE OF A BOARD

49. The responsibilities of a **board** in general terms are to provide high level governance to an organisation, not management, which is provided by staff. A board provides oversight and advice, and it creates and monitors key organisational policies.
50. A board has many of the same functions as a "**committee**" of an incorporated association and, as will be seen below, many of the duties of a board member / director are similar to those of an office holder of an incorporated association.
51. The Victorian Government has provided the following guidance in relation to a board's responsibilities:
  - establish a governance framework, including a compliance framework to ensure the organisation meets its obligations;
  - set the strategic direction to help the organisation achieve its purpose;
  - oversee financial performance of the organisation;
  - oversee a risk management strategy and risk management performance;
  - oversee the performance and remuneration of the organisation head;
  - operate within its statutory powers and policies;
  - oversee the occupational health and safety of the organisation; and
  - manage stakeholders.<sup>46</sup>
52. Boards are obliged to:
  - follow their organisation's rules on holding meetings and making decisions;
  - keep records of meetings;
  - follow the code of conduct for directors;
  - have a strong gifts policy for directors;

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<sup>46</sup> Victorian Government, "Duties and Responsibilities of Boards and Board Directors", <https://www.boards.vic.gov.au/duties-and-responsibilities-boards-and-board-directors#your-legislated-duties-as-a-board-director>.

- keep good financial records;
- put controls in place to prevent fraud;
- set up processes to deal with conflicts of interest by directors;
- keep good financial records for at least three years for auditing; and
- have a strong risk management system.

## 7. RESPONSIBILITIES OF BOARD MEMBERS

53. A **board member** is a person who is on a company's or incorporated association's board of directors. They are often elected by stakeholders.<sup>47</sup> An officer of a corporation includes a **director** or **secretary** of a corporation, as well as a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or who has the capacity to affect significantly the corporation's financial standing.
54. There are few constraints upon who can be a director, save that a director must be at least 18 years of age and not disqualified under Part 2D.6 of the *Corporations Act*.<sup>48</sup>
55. Members of a board of directors can and sometimes must consist of:
- a **chair** who is responsible for leading the board and ensuring its effectiveness, including setting the agenda for meetings, facilitating board discussions and ensuring appropriate contributions from board members;
  - a **deputy chair** who supports the chair and stands in for them when they are unavailable;
  - a **treasurer**, who is responsible for overseeing financial matters;<sup>49</sup>
  - a **secretary**, who is responsible for maintaining accurate records of board meetings, including minutes and resolutions, as well as compliance with legal and regulatory requirements, such as filing of annual returns and maintenance of the constitution;
  - **non-executive directors**, who are board directors but not part of the management team, often having specific skills or expertise that complement the board's overall composition; and
  - **executive directors**, who are board directors who hold management positions and are able to provide insights into the day-to-day operations of

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<sup>47</sup> See Australian Institute of Company Directors, Role of the Board (1 January 2020), <https://www.aicd.com.au/board-of-directors/duties/liabilities-of-directors/role-of-board.html>.

<sup>48</sup> *Corporations Act 2001* (Cth), s201B.

<sup>49</sup> Commonly, though, companies limited by guarantee do not have a treasurer.

the organisation and assist in aligning the board's decisions with the organisation's strategy and goals.<sup>50</sup>

56. Typically, non-executive directors contribute to a board by:

- providing an independent perspective on the organisation's strategy, priorities and performance;
- challenging assumptions and offering constructive analysis and critiques;
- bringing specific skills, expertise, or networks to the board;
- ensuring that the interests of stakeholders are considered in board decision-making;
- monitoring whether the organisation and its management team are meeting their key performance indicators and the objectives set by the board;
- participating in board committees and contributing to their work;
- helping to identify and manage risks facing the organisation; and
- providing guidance and support to the management team as needed.

57. The Australian Institute of Company Directors usefully summarises that it is expected that board members will work together to ensure the success of the organisation by:

- clearly defining the roles and responsibilities of each board member;
- fostering a culture of open communication, trust, and respect;
- encouraging diverse perspectives and constructive debate;
- focusing on the organisation's mission, vision, and strategic objectives;
- monitoring the organisation's performance and holding the management team accountable;
- identifying and managing risks facing the organisation;
- ensuring that the interests of stakeholders are considered in board decisions;
- participating in regular board evaluations and continuously improving board effectiveness;
- engaging in ongoing learning and development to stay informed about industry trends and best practices; and
- collaborating with the management team to support the organisation's success.<sup>51</sup>

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<sup>50</sup> See generally DW Duffy (Corporate Governance Institute), [https://www.thecorporategovernanceinstitute.com/insights/guides/what-are-the-titles-and-descriptions-of-board-members/?srsltid=AfmBOop7IGXbv9-6DpNwlBdJVSq973gYjtsIKcOtrG63Rmvk\\_SFec56F](https://www.thecorporategovernanceinstitute.com/insights/guides/what-are-the-titles-and-descriptions-of-board-members/?srsltid=AfmBOop7IGXbv9-6DpNwlBdJVSq973gYjtsIKcOtrG63Rmvk_SFec56F).

<sup>51</sup> <https://www.aicd.com.au/board-of-directors/roles/members.html>

58. Another formulation (to similar effect), in a cognate context, has been provided by the Institute of Community Directors Australia:

Board members are charged with working collectively to act as the “mind” of the community group they serve. In doing so, they must work together to:

- Determine the group’s mission and purpose;
- Set a strategic vision and plan;
- Ensure the group is financially and legally accountable;
- Appoint and monitor the group’s CEO (if there is one);
- Ensure the group has adequate resources;
- Work to ensure the group’s public image; and
- Assess the board’s effectiveness.<sup>52</sup>

59. It notes that in practice, this can involve a plethora of tasks, including:

- setting and approving budgets;
- managing risk;
- keeping on top of relevant laws and regulations;
- approving major programs and projects undertaken by the group in achieving its mission;
- attending and participating in meetings;
- serving on board committees;
- undertaking or overseeing fundraising activities;
- representing stakeholders’ views during meetings;
- speaking about the group at functions;
- acting as the group’s media spokesperson;
- lobbying on behalf of the group; and
- organising and attending board retreats and other evaluation activities.<sup>53</sup>

60. Directors are authorised under the *Corporations Act*, subject to the organisation’s constitution, to delegate any of their powers to:

- a committee of directors;
- a director;
- an employee; or
- any other person.<sup>54</sup>

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<sup>52</sup> <https://www.communitydirectors.com.au/help-sheets/board-members-and-what-they-do>.

<sup>53</sup> Ibid.

<sup>54</sup> *Corporations Act 2001* (Cth), s 198D(1).

61. However, despite this authority, directors remain responsible for the exercise of the delegated power, subject to some qualifications.<sup>55</sup>
62. The 2011 decision by the well-regarded commercial judge, Federal Court Justice Middleton in *Australian Securities and Investment Commission v Healey*<sup>56</sup> provides a useful summary of relevant principles.
63. His Honour emphasised that a director is an “essential component of corporate governance ... The role of a director is significant as their actions may have a profound effect on the community, and not just shareholders, employees and creditors.”<sup>57</sup> He explained further that this involves:

15. ... taking responsibility for documents effectively signed-off by, approved, or adopted by the directors. What is required is that such documents, before they are adopted by the directors, be read, understood and focussed upon by each director with the knowledge each director has or should have by virtue of his or her position as a director. I do not consider this requirement overburdens a director, or as argued before me, would cause the boardrooms of Australia to empty overnight. Directors are generally well remunerated<sup>58</sup> and hold positions of prestige, and the office of director will continue to attract competent, diligence and intelligent people.

16. The case law indicates that there is a core, irreducible requirement of directors to be involved in the management of the company and to take all reasonable steps to be in a position to guide and monitor. There is a responsibility to read, understand and focus upon the contents of those reports which the law imposes a responsibility upon each director to approve or adopt.

17. *All directors must carefully read and understand financial statements before they form the opinions which are to be expressed in the declaration required by s 295(4). Such a reading and understanding would require the director to consider whether the financial statements were consistent with his or her own knowledge of the company’s financial position. This accumulated knowledge arises from a number of responsibilities a director has in carrying out the role and function of a director. These include the following: a director should acquire at least a rudimentary understanding of the business of the corporation and become familiar with the fundamentals of the business in which the corporation is engaged; a director should keep informed about the activities of the corporation; whilst not required to have a detailed awareness of day-to-day activities, a director should monitor the corporate affairs and policies; a director should maintain familiarity with the financial status of the corporation by a regular review and understanding of financial statements; a director, whilst not an auditor, should still have a questioning mind.* [emphasis added]

64. His Honour noted that more is necessary for a director than a mere “going through the paces”.<sup>59</sup> A director is not relieved of the duty to pay attention to the company’s affairs which might reasonably be expected to attract inquiry, even outside the area of the director’s expertise.<sup>60</sup>

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<sup>55</sup> *Corporations Act 2001* (Cth), s 190.

<sup>56</sup> [2011] FCA 717.

<sup>57</sup> [2011] FCA 717 at [14].

<sup>58</sup> Of course, many not-for-profit directors do not fall into this category.

<sup>59</sup> [2011] FCA 717 at [19].

<sup>60</sup> [2011] FCA 717 at [18].

65. However, Justice Middleton was pragmatic in his explanation of directors' responsibilities, acknowledging that directors are not required "to have infinite knowledge or ability".<sup>61</sup> He accepted that directors are entitled to delegate to others the preparation of books and accounts and the carrying on of the day-to-day affairs of the company. However,

what each director is expected to do is to *take a diligent and intelligent interest in the information available to him or her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her.* Such a responsibility arises in this proceeding in adopting and approving the financial statements. Because of their nature and importance, the directors must understand and focus upon the content of financial statements, and if necessary, make further enquiries if matters revealed in these financial statements call for such enquiries.

No less is required by the objective duty of skill, competence and diligence in the understanding of the financial statements that are to be disclosed to the public as adopted and approved by the directors.

No one suggests that a director should not personally read and consider the financial statements before that director approves or adopts such financial statements. A reading of the financial statements by the directors is not merely undertaken for the purposes of correcting typographical or grammatical errors or even immaterial errors of arithmetic. *The reading of financial statements by a director is for a higher and more important purpose: to ensure, as far as possible and reasonable, that the information included therein is accurate. The scrutiny by the directors of the financial statements involves understanding their content. The director should then bring the information known or available to him or her in the normal discharge of the director's responsibilities to the task of focussing upon the financial statements. These are the minimal steps a person in the position of any director would and should take before participating in the approval or adoption of the financial statements and their own directors' reports.* [emphasis added]<sup>62</sup>

66. This brief summary of board members' responsibilities highlights the fraught issue of where the baseline for Board member competency should be drawn. Notably, Justice Middleton framed a requirement to incorporate *taking* "a diligent and intelligent interest in the information available to him or her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her."
67. A subset of this is financial literacy.
68. Corporate governance and accountancy academics, Jackie Bettington and Gavin Nicholson, in 2024<sup>63</sup> have provided useful conceptual assistance in this respect. They have argued that it is necessary to distinguish between **financial expertise** and **financial literacy** and noted that directors' financial literacy aligns with directors' duty of care in meeting individual legal obligations, directors' duties being individual not the responsibility of the board.

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<sup>61</sup> [2011] FCA 717 at [20].

<sup>62</sup> [2011] FCA 717 at [20]-[22].

<sup>63</sup> J Bettington and G Nicholson, "Director Financial Literacy: Defining a Baseline Competence for Board Oversight and Legal Accountability" (2025) *Corporate Governance: An International Review*.

69. They have contended that basic financial literacy for directors is essential as it provides them with the independence of mind necessary for meaningful participation in board discussions and thereafter decision-making:

While “People can ‘read’ something ... it does not mean that they will ‘understand’ what they have read”. Financial literacy enables directors to “ascertain the financial health of the entity”, assess “whether the financial statements represent a true and fair view of the company's financial position”, and detect “key risks” including “material misstatement of the financial statements and the continued adoption of the going concern assumption/not trade insolvently”.

Financially literate directors can “read and understand a complete set of financial statements, unaided”. This literacy extends beyond grasping fundamental concepts like “assets” and “liabilities,” which “must be understood in order to debate issues arising from the financial statements”. It empowers directors to “test the information provided and be satisfied as to its relevance and appropriateness”, “critique an answer which may be full of accounting jargon”, and ensure that “the financial story that has been presented to the board at regular board meetings is seen in the general purpose financial statements”.

While the required level of technical knowledge is not extensive, it must be sufficient to independently grasp the information presented. Without these, basics directors have “important gaps in their understanding,” and cannot “decipher the organisation's financial story” (DNP.R2). This can lead to flawed assumptions such as believing “a business is fine as long as it has cash” and an over- reliance on others.<sup>64</sup>

70. In addition, Bettington and Nicholson identified that financial literacy allows directors with other areas of expertise to engage more meaningfully in financial discussions and enables them to move from being a passive observer to being an independent participant. They argued that directors’ financial literacy involves the ability to undertake independent verification of whether financial information aligns with management’s narrative about the entity’s performance, position and solvency:

This requires foundational competence, including familiarity with basic accounting terms such as “assets,” “liabilities,” and “profit,” and the relationships between them. Without this understanding, directors cannot meaningfully engage in board financial monitoring or fulfil their legal responsibilities. ... Where directors lack financial literacy, their contributions to board monitoring are limited.<sup>65</sup>

71. Therefore, their view is that directors need to be at least financially literate. Inevitably, this also requires significant digital literacy.

## 8. DIRECTORS’ DUTIES

72. In summary, what is required of board members (and office holders of an incorporated association) is that they act:

- honestly and in good faith;

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<sup>64</sup> Bettington and Nicholson, 2025, op cit, at 13.

<sup>65</sup> Bettington and Nicholson, 2025, op cit, at 15.

- in the best interests of their organisation;
- with integrity;
- in a financially responsible manner;
- with a reasonable degree of care, diligence and skill;
- by disclosing and managing conflicts of interest; and
- according to the Act or documentation that founded their organisation.<sup>66</sup>

73. More particularly for duties of directors, Part 2D.1 of the *Corporations Act* sets out the responsibilities of directors. These statutory duties are in addition to the fiduciary duties that directors owe the organisation in equity.<sup>67</sup> The following paragraphs identify specific provisions that are relevant for discharge of directors' responsibilities. However, I note that section 111L of the Act "turns off" some directors' duties from registered charities (a notable exception being s. 588G about preventing insolvent trading), although it has been argued that there are good reasons for them to be "turned back on".<sup>68</sup> However, reviewing the Act's duties is relevant because it sheds light on the nature of directors' duties and not all companies supplying services to intellectually disabled people are charities.

74. Section 180(1) of the *Corporations Act* provides, amongst other things, that a director must discharge their duties with "the degree of care and diligence that a reasonable person would exercise if they were a director of a corporation in the corporation's circumstances" and occupied the office held by, and had the same responsibilities within the corporation as the officer.

75. Section 180(2) contains the "Business Judgment Rule":

A director ... of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

- (a) make the judgment in good faith for a proper purpose; and
- (b) do not have a material personal interest in the subject matter of the judgment; and
- (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

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<sup>66</sup> See Justice Connect, *A Guide to the Legal Duties of Not-for-Profit Committee Members, Directors and Office Holders* (October 2023), [https://content.nfplaw.org.au/wp-content/uploads/2023/10/Duties-Guide.pdf?\\_ga=2.113892679.1119379106.1759278129-1863815498.1759278129](https://content.nfplaw.org.au/wp-content/uploads/2023/10/Duties-Guide.pdf?_ga=2.113892679.1119379106.1759278129-1863815498.1759278129).

<sup>67</sup> *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64 at [28]; see Australian Institute of Company Directors, "Fiduciary Duties of Directors", <https://www.aicd.com.au/board-of-directors/duties/fiduciary.html>.

<sup>68</sup> <https://www.unsw.edu.au/content/dam/pdfs/law/unsw-law-journal/2020-2029/2022/Issue-452-09-Nel-de-Koker.pdf>.

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

76. A “business judgment” is broadly defined in section 180 to mean “any decision to take or not take action in respect of a matter relevant to the business operations of the corporation”.
77. The requirements in section 180 are objective. They require contextually appropriate care and diligence on the part of directors. In terms of the exercise of business judgment, a number of things are required of directors. Good faith, informing themselves to the extent they *reasonably* believe is appropriate and formation of a reasonable belief are all necessary. It appears that capacity to make decisions about matters relevant to business operations is assumed.
78. Persons with an intellectual disability would be unable to satisfy the requirements of section 180.
79. Section 181 of the *Corporations Act* mandates a director to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose. Inherent in this is an expectation of capacity to exercise powers and discharge duties in the required ways, including the ability to evaluate what is in the best commercial and other interest of a corporation.
80. Section 181 is a “civil penalty” provision, meaning that when a court is satisfied the section’s obligations are contravened the court can make a declaration to such an effect and the regulator, ASIC, can seek a penalty order.<sup>69</sup>
81. Section 182 of the Act requires a director to abstain from improperly using their position to gain an advantage for themselves or someone else or cause detriment to the corporation.
82. This provision may not be relevant to a director with an intellectual disability but some risk remains in relation to improper discharge of functions which results, for instance, in an adverse outcome for a corporation by reason of uncomprehending or otherwise problematic conduct or decision-making by the director.
83. Section 183 is a companion provision to section 182 – it proscribes improper use of information acquired as a director to gain an advantage for themselves or someone else or cause detriment to the corporation. It is unlikely (although not inconceivable) that this situation would arise for a director with an intellectual disability.
84. Section 184 criminalises conduct by a director that is reckless and dishonest when there is an exercise of powers and discharge of duties or for an improper purpose. It is unlikely that this situation would arise for a director with an intellectual disability, save that it is possible that a person could attempt to manipulate a director with intellectual

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<sup>69</sup> *Corporations Act 2001* (Cth), s 1317E.

disability who may not have the cognitive ability to appreciate adequately the dynamics of what is taking place in interactions with them.

85. Section 588G of the *Corporations Act* imposes a duty upon directors of a company at a time when a company incurs a debt and the company is insolvent, or becomes insolvent by incurring the debt or that debt and others, and there are reasonable grounds for suspecting that the company is insolvent or would become insolvent. The provision operates by creating civil penalty (as against criminal) offences.
86. This section provides that a person commits an offence if they are aware that there are grounds for the suspicions referred to above (in s588G) or, importantly, “a reasonable person in a like position in a company in the company’s circumstances would be so aware”.
87. In addition, the provision creates an offence (under s588G(3)) if a company incurs a debt at a particular time and at that time a person is a director of the company and the company is insolvent at that time, or becomes insolvent by incurring the debt or debts, including the particular debt, and the director suspected at the time of incurring the debt that the company was insolvent or would become insolvent as a result of incurring those debts, and the director’s failure to prevent the company incurring the debt was dishonest.
88. Section 588G(3) is a complex provision, made the more difficult as a combination of absolute and strict liability applies to parts of it, although not to the dishonesty component. What is apparent is that the obligation that is imposed upon directors is to be alert to the circumstances of a company that incurs debts when insolvent or at risk of becoming so, a risk that is backed up by the imposition of civil penalty provisions. Evaluation of the financial status of a company at all times is at the core of the obligation, manifestly requiring ability to understand and probe a company’s ongoing liquidity, and not just to accept claims and explanations made from within the company. It is a demanding obligation, going beyond financial literacy. A person with an intellectual disability would have difficulty complying with it.
89. In relation to an earlier version of the corporations legislation, s556 of the Companies Code, Justice Tadjell observed that:

it may be said in a general way that the law requires a director only to act reasonably and to attain to standards of no more than ordinary competence and to behave with only average prudence, but it is in my opinion unwarrantable and unhelpful to limit the interpretation of s 556(1) by these concepts alone. What constitutes the proper performance of the duties of a director of a particular company will be dictated by a host of circumstances, including no doubt the type of company, the size and nature of its enterprise, the provisions of its articles of association, the composition of its board and the distribution of work between the board and other officers: *Byrne v Baker* [1964] VicRp 57; [1964] VR 443 at 450. To speak of a director of ordinary, reasonable or average competence or prudence, or indeed of an ordinary reasonable or average director, is to give no very useful description, whereas *a person seeking properly to perform the duties of a director of a particular company can be identified*

*by reference to more specific criteria of which ordinariness, reasonableness and averageness are, or may be, merely ingredients.* [emphasis added].<sup>70</sup>

90. It is an objective standard of care that is applicable to directors (both executive and non-executive). Significantly, for present purposes, in *Gamble v Hoffman*<sup>71</sup> Justice Carr in the Federal Court of Australia heard that a director had left school at the age of 14, had no tertiary qualifications and had spent his life essentially as a fruit and vegetable market gardener. Justice Carr held that while the ambit of the director's duty and the standard of care depend on the particular circumstances,

*the test is essentially objective i.e. did the officer exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances?* I doubt whether the factors which Mr Bates advanced would justify a lower standard of care. They might exclude any suggestion of special skills other than those acquired by extensive experience in the fruit and vegetable markets. [emphasis added]<sup>72</sup>

91. Justice Carr's enunciation of the legal principles highlights that the test that is applied is not flexible in respect of financial skills or comprehension that a particular director has.

## **9. DUTIES OF OFFICERS HOLDERS OF INCORPORATED ASSOCIATIONS**

92. An "office holder", of an incorporated association, is defined as:

(a) a member of the committee;

(b) the secretary;

(c) a person, including an employee of the association, who makes, or participates in making, decisions that affect the whole, or a substantial part, of the operations of the association;

(d) a person who has the capacity to significantly affect the association's financial standing;

(e) a person in accordance with whose instructions or wishes the committee of the association are accustomed to act (but excluding a person who gives advice to the association in the proper performance of functions attaching to the person's professional capacity or to the person's business relationship with members of the committee or with the association).<sup>73</sup>

93. An office holder of an incorporated association has obligations similar to those of a board member under the Corporations Act. In this section the Victorian legislation is referred to for convenience.

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<sup>70</sup> *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 at 125.

<sup>71</sup> [1997] FCA 677; (1997) 15 ACLC 1314; (1997) 24 ACSR 369.

<sup>72</sup> (1997) 24 ACSR 369 at 373.

<sup>73</sup> *Associations Incorporation Reform Act 2012* (Vic), s82.

94. For instance, they must exercise his or her powers and discharge his or her duties—
- (a) in good faith in the best interests of the association; and
  - (b) for a proper purpose.<sup>74</sup>
95. Office holders must not make improper use of information acquired by virtue of holding their office or gain an advantage for themselves or anyone else or to cause detriment to the association.<sup>75</sup>
96. An office holder must exercise his or her powers and discharge their duties with the degree of care and diligence that a reasonable person would if that person were an office holder of the association in the circumstances applying at the time of the exercise of the power or the discharge of the duty; and occupied the office held by, and had the same responsibilities within the association as, the office holder.<sup>76</sup>
97. An office holder will only discharge their duty of due care and diligence if they make a “business judgment” and in doing so:
- (a) makes the judgment in good faith for a proper purpose; and
  - (b) does not have a material personal interest in the subject matter of the judgment; and
  - (c) informs himself or herself about the subject matter of the judgment to the extent that he or she reasonably believes to be appropriate; and
  - (d) rationally believes that the judgment is in the best interests of the association.<sup>77</sup>
98. A "business judgment" is defined broadly to mean any decision to take or not take action in respect of a matter relevant to the operations of the incorporated association.<sup>78</sup>
99. An office holder's belief that a business judgment is in the best interests of the incorporated association is deemed to be a rational belief unless the belief is one that no reasonable person in the position of the office holder would hold.<sup>79</sup>
100. There is a specific provision that applies if the reasonableness of an office holder's reliance on information or advice given to the office holder arises in a proceeding brought to determine whether the office holder has performed a duty under the *Associations Incorporation Reform Act* or an equivalent common law duty.<sup>80</sup> It provides that:

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<sup>74</sup> *Associations Incorporation Reform Act 2012* (Vic), s85.

<sup>75</sup> *Associations Incorporation Reform Act 2012* (Vic), s83.

<sup>76</sup> *Associations Incorporation Reform Act 2012* (Vic), s84(1).

<sup>77</sup> *Associations Incorporation Reform Act 2012* (Vic), s84(2).

<sup>78</sup> *Associations Incorporation Reform Act 2012* (Vic), s84(3)(a).

<sup>79</sup> *Associations Incorporation Reform Act 2012* (Vic), s84(3)(b).

<sup>80</sup> *Associations Incorporation Reform Act 2012* (Vic), s86(1).

Unless the contrary is proved, the office holder's reliance on the information or advice is taken to be reasonable if—

(a) the information or advice was given or prepared by—

(i) an employee of the incorporated association whom the office holder reasonably believed to be reliable and competent in relation to the matters concerned; or

(ii) a professional advisor or expert in relation to the matters that the office holder reasonably believed to be within that person's professional or expert competence; or

(iii) another office holder in relation to matters within the other office holder's authority; or

(iv) a sub-committee of the incorporated association of which the office holder was not a member in relation to matters within the sub-committee's authority; and

(b) the reliance was made—

(i) in good faith; and

(ii) after making an independent assessment of the information and advice, having regard to the office holder's knowledge of the incorporated association and the complexity and structure of the incorporated association.

## 10. RESPONSIBLE PERSONS UNDER THE ACNC ACT

101. Under the *Australian Charities and Not-for-Profits Commission Act 2012 (Cth)* (**ACNC Act**) the term “responsible entity” refers, amongst other things, to a person who is responsible for governing a charity, namely its board or committee members or trustees (including insolvency trustees or administrators).

102. The following table outlines categories of persons likely to function as a responsible entity of a registered charity:

Charity structure	Responsible Persons
Incorporated association (usually incorporated under state or territory law)	Each of the members of the association’s committee of management
Company limited by guarantee or other company under <i>Corporations Act 2001(Cth)</i>	Each of the company’s directors
Indigenous corporations under <i>the Corporations (Aboriginal and Torres Strait Islander) Act 2006(Cth)</i>	Each of the corporation’s directors

<b>Charity structure</b>	<b>Responsible Persons</b>
Trust	Each of the trustees. If there is a corporate trustee, the directors of that corporate trustee are the Responsible People.
Co-operative	Directors of the co-operative
An organisation or body that is incorporated in some other way (such as through an Act of Parliament)	The title used will differ depending on the legislation or charter (may be trustee, director or council member)
Unincorporated associations – this can include small groups such as church groups or parishes or Parents and Citizens associations (P&Cs)	<p>Sometimes it may not be as clear who the appropriate Responsible Persons are. This may be because the charity is unincorporated without a well-defined governing body, or is a religious organisation with a central governing body and branches or parishes in many locations.</p> <p>But in these organisations, the Responsible Persons may be the members of the governing body – those directing or guiding the strategic direction of the charity. These people will be responsible for ensuring that it is solvent and well run, and delivering the charitable outcomes.</p> <p>Sometimes there may be a large number of Responsible Persons, for example a collective where each member is equally responsible to manage the charity.</p>
If a charity is the subject of insolvency arrangements	The trustee in bankruptcy, receiver, administrator or a liquidator may also be a Responsible Person.

103. As stated above, registered charities must meet the standards of the ACNC, although they are excepted from some of the directors’ duties of the Corporations Act.
104. To comply with Governance Standard 4<sup>81</sup> charities must ensure that their responsible persons are “suitable for the responsibility they hold to a charity and to the people it works with.” The Standard seeks to ensure that registered charities are not controlled by people who may pose a risk to the charity’s financial position or the pursuit of its charitable work.
105. To comply with Governance Standard 5<sup>82</sup> charities must take reasonable steps to ensure that the following duties apply to responsible persons and that they follow them:
- To act with reasonable care and diligence

<sup>81</sup> <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/4-suitability-responsible>.

<sup>82</sup> <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/5-duties-responsible-people>.

- to act honestly and fairly in the best interests of the charity and for its charitable purposes
- not to misuse their position or information they gain as a Responsible Person
- to disclose conflicts of interest
- to ensure that the financial affairs of the charity are managed responsibly, and
- not to allow the charity to operate while it is insolvent.<sup>83</sup>

## 11. WORK HEALTH AND SAFETY DUTIES

106. As previously noted, in addition to duties imposed under the governing legislation, additional liability attaches to being an officer of an “applicable entity” in some jurisdictions.
107. For instance, in Victoria, an officer of a body corporate, unincorporated body or association in the *Occupational Health and Safety Act 2004* (Vic) has the same meaning as in section 9AD of the *Corporations Act*, which includes a director or secretary, as well as a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or who has the capacity to affect the corporation's financial standing significantly.
108. Section 39G of the *Occupational Health and Safety Act* creates an offence for an officer (who is not a volunteer) of an applicable entity (defined to include a body corporate or unincorporated body or association)<sup>84</sup> to engage in conduct that is negligent, constitutes a breach of an applicable duty that the entity owes to another person<sup>85</sup> and causes the death of that person. It is punishable by imprisonment for 25 years. This provision was introduced in 2019 and came into operation on 1 July 2020.
109. So far there have been only a small number of prosecutions under section 39G of the *Occupational Health and Safety Act*. In these cases, it is ordinarily a sole director or two managing directors with practical control over the relevant company who are prosecuted and convicted under this provision.<sup>86</sup> I have not identified extension thus far of the liability to a larger board or committee not otherwise involved in day-to-day management. However, this is an issue yet to be finally resolved and there is a real possibility that directors will be regarded as liable in some situations.

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<sup>83</sup> In addition, the United Kingdom Supreme Court in *Lehtimäki v Cooper* [2020] UKSC 33, reported as *Children’s Investment Fund Foundation (UK) v Attorney General* [2022] AC 155 has held that members of a charitable company limited by guarantee owe fiduciary duties, although this may not be applicable in Australia; see also RT Langford, “Charities and the Fiduciary Paradigm” (2022) 16 *Journal of Equity* 146, [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0004/4698220/11-July-SSRN-Langford-Fiduciary-Paradigm.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0004/4698220/11-July-SSRN-Langford-Fiduciary-Paradigm.pdf), J Nel de Koker, “Regulating Volunteer Directors’ Duties in Companies Registered with the Australian Charities and Not-for-Profits Commission” (2022) 45(2) *UNSW Law Journal* 764, <https://www.unsw.edu.au/content/dam/pdfs/law/unsw-law-journal/2020-2029/2022/Issue-452-09-Nel-de-Koker.pdf>.

<sup>84</sup> *Occupational Health and Safety Act 2004* (Vic), s39G(3).

<sup>85</sup> *Occupational Health and Safety Act 2004* (Vic), s39F.

<sup>86</sup> See *R v LH Holding & Hanna* [2024] VSC 90 and *DPP v Nordic Elevators* [2025] VSC 379.

110. Under what is known as “the model work health and safety legislation”, which applies throughout Australia, other than in Victoria, failure to comply with safe work practices can result in liability. Under the model legislation deemed officers, such as board directors and executive managers,<sup>87</sup> are obliged to exercise “due diligence” to ensure that the business complies with its duties or obligations.<sup>88</sup>

111. "Due diligence" is stipulated to include taking reasonable steps:

- (a) to acquire and keep up-to-date knowledge of work health and safety matters, and
- (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations, and
- (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking, and
- (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and
- (e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act, and
- (f) to verify the provision and use of the resources and processes referred to in paragraphs (c)-(e).

112. It is apparent, therefore, that in most parts of Australia, Victoria probably excepted,<sup>89</sup> directors could be liable under this provision if they are found to have failed to apply due diligence to ensure that a provider of disability services complies with its duties or obligations.<sup>90</sup>

## 12. CAPACITY

113. To construe the parameters of capacity, and relevant principles, it is useful to have regard to legislation dealing with issues aside from corporations and incorporated associations.

114. In *PBU & NJE v Mental Health Tribunal*, Justice Bell said: “The equal birthright of all persons under the common law is the recognition of their legal personality, which embodies the right to have and exercise legal capacity”.<sup>91</sup> This “birthright” is reflected

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<sup>87</sup> See eg *Work Health and Safety Act 2011* (NSW), s4.

<sup>88</sup> See eg *Work Health and Safety Act 2011* (NSW), s27.

<sup>89</sup> See A Hough, C Bigby and D Marsh, “Australian Work Health and Safety Enforcement Regarding Service Provision to People with Disabilities: Lessons for Service Providers” (2023) *Research and Practice in Intellectual and Developmental Disabilities*, <https://doi.org/10.1080/23297018.2023.2210580>.

<sup>90</sup> See D Marsh, A Hough and C Bigby, “Enforcement of Work Health and Safety Laws in Services for People with Disabilities: Issues for Policymakers and Regulators” (2024) *Research and Practice in Intellectual and Developmental Disabilities*, <https://doi.org/10.1080/23297018.2024.2308287>

<sup>91</sup> [2018] VSC 564 at [143].

in Article 12 (2) and (3) of the United Nations Convention on the Rights of Persons with Disabilities, which states:

[2] States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

[3] States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

115. A person’s capacity to make particular decisions will be dependent on the context and specific issues involved.<sup>92</sup> In a leading authority on the issue of legal capacity, the High Court of Australia has explained that:

The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be *capable of understanding the general nature* of what he is doing by his participation.

...

Ordinarily the nature of the transaction means in this connection the broad operation, the ‘general purport’ of the instrument.<sup>93</sup>

116. In a cognate context (guardianship and administration), the term “decision-making capacity” has been defined legislatively as the person’s ability:

(a) to *understand* the information relevant to the decision and the effect of the decision; and

(b) to *retain* that information to the extent necessary to make the decision; and

(c) to *use or weigh* that information as part of the process of making the decision; and

(d) to *communicate* the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means. [emphasis added]<sup>94</sup>

117. There is a presumption in favour of a person having decision-making capacity.<sup>95</sup>

118. In her systemic review of the literature on decision-making since the Convention on the Rights of Persons with Disabilities, social work academic, Shirli Werner, explained:

One of the barriers is severity of ID, with difficulties in verbal and memory deficits, difficulties with problem-solving, a tendency towards acquiescence and suggestibility, problems with abstract thinking, and an overly concrete thought process. Although many individuals with ID have enough cognitive capacity in at least some components of the decision-making process, individuals with severe ID may not be aware of their role in the decision-making process and the options available to them.

Additionally, for people with ID, it is especially difficult to make decisions that are based on information from two sources, such as magnitude (e.g., sum of money) and delay (e.g., immediate versus delayed reward). This relates to problems in executive functioning, rather than IQ, which may underlie reasoning abilities in people with ID. Executive functioning refers to the complex set of cognitive processes that regulate

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<sup>92</sup> *Meshram v Bing Lee Electrics Pty Ltd* [2025] FCA 769 at [10] per Stellios J.

<sup>93</sup> *Gibbons v Wright* (1954) 91 CLR 423 at 437-8.

<sup>94</sup> *Guardianship and Administration Act 2019* (Vic) s 5(1).

<sup>95</sup> *Guardianship and Administration Act 2019* (Vic), s 5(2).

an individual's ability to organize thoughts and activities, prioritize tasks, manage time efficiently, and make decisions. It includes goal-setting and planning, organization of behavior over time, response initiation, response inhibition, attention, working memory, set shifting and fluency.

Communication difficulties pose an additional barrier to decision-making among individuals with ID by making it difficult for individuals to express their own needs. The vocabulary which adults provide for children may be too restricted and insufficiently individualized for individuals with communication difficulties. [Footnotes omitted]<sup>96</sup>

119. Further guidance on the nature of capacity in the context of ability to manage personal matters was summarised in *M v P (No 3)*:

(a) there is no fixed standard of the mental capacity required at law for a person to be deemed "capable" of managing their own affairs;

(b) the standard will fluctuate according to the legal character, complexity and significance of the matter in question;

(c) proof of complete incapacity or proof that the party should be subjected to involuntary medical treatment under mental health legislation is not required;

(d) a person can lack the mental capacity to participate in legal proceedings yet still be capable of performing the usual activities of daily life;

(e) the Court must consider whether the person has sufficient mental capacity to understand the case and the legal issues involved, to make decisions in relation to the case and (if instructing a solicitor) to give instructions; and

(f) where the litigant is self-represented, the standard has been described as being greater than the level of mental capacity required to instruct a solicitor, because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.<sup>97</sup>

120. A further and important consideration in this context is that, as explained by Justice Bell in *PBU & NJE*, a person's capacity may fluctuate depending on a range of factors and circumstances, such as their current health and appropriate support with the help of others.<sup>98</sup> However, while it is important to support individuals to exercise their decision-making capacity, in the context of corporate governance, it is equally as important to remember that directors are personally liable for their conduct. Of course, too, there is not the same episodic variation in capacity for persons with intellectual disability.

121. The *Guardianship and Administration Act 2019* (Vic) provides the following useful steps that can (and must in its context) be taken in determining a person's decision-making capacity:

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<sup>96</sup> S Werner, "Individuals with Intellectual Disabilities: A Review of the Literature on Decision-Making Since the Convention on the Rights of Persons with Disabilities (CRPD) (2012) 34(2) *Public Health Reviews* 1 at 18.

<sup>97</sup> *M v P (No 3)* [2024] WASC 123 at [21] per Lundberg J; see too *Meshram v Bing Lee Electrics Pty Ltd* [2025] FCA 769.

<sup>98</sup> *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 at [149]-[151].

- (a) a person may have decision-making capacity in relation to some matters and not others;
- (b) if a person does not have decision-making capacity in relation to a matter, it may be temporary;
- (c) it should not be assumed that a person does not have decision-making capacity in relation to a matter on the basis of the person's appearance;
- (d) it should not be assumed that a person does not have decision-making capacity in relation to a matter merely because the person makes a decision that, in the opinion of others, is unwise;
- (e) a person has decision-making capacity in relation to a matter if it is possible for the person to make the decision with practicable and appropriate support.<sup>99</sup>

122. In recognising and seeking to adopt the principles within the United Nations Convention on the Rights of Persons with Disabilities, adults should be supported to exercise their capacity. However, the recognition of such fundamental rights must also be balanced against the burdensome obligations placed on board and committee members, which have the potential for significant legal consequences as discussed throughout this advice.
123. I note that Dr Jackie Bettington, mentioned above, has developed a “director financial literacy test and questionnaire”, which is designed to assess “baseline financial capability in reading and using financial statements for board work”.<sup>100</sup> However, this test does not assess all of what of the aspects of capacity that are required for discharge of the responsibilities of board members.

### 13. ANTI-DISCRIMINATION LAW

124. Discrimination on the ground of a person’s disability, albeit only within certain spheres, is unlawful under the *Disability Discrimination Act 1992* (Cth) and applicable state and territory anti-discrimination legislation. For comparison in this advice, the anti-discrimination legislation referred to, out of convenience, will be the *Equal Opportunity Act 2010* (Vic).
125. The *Disability Discrimination Act* prohibits discrimination against a person on the ground of a disability that person may possess.<sup>101</sup> Discrimination occurs when the person is, or is proposed to be, treated “less favourably” than another person, without the disability, would be in similar circumstances.<sup>102</sup> This form of discrimination is often referred to as “**direct discrimination**”.<sup>103</sup>
126. The other form of discrimination is “**indirect discrimination**” and may initially be less obvious to identify. Indirect discrimination occurs when there is a need to comply with requirements or conditions that a person cannot comply with, because of their

<sup>99</sup> *Guardianship and Administration Act 2019* (Vic), s 5(4).

<sup>100</sup> The test, and more information about it, can be found here: [https://qsurvey.qut.edu.au/jfe/form/SV\\_8e9DiB0A7AmTcsC?\\_gl=1\\*8r33sl\\*\\_ga\\*MTMzNzk5MzQ4Mi4xNzU5NzE5OTc3\\*\\_ga\\_S1B55LT1H8\\*czE3NTk3MTk5NzYkbzEkZzAkdDE3NTk3MTk5NzYkajYwJGwwJGgw](https://qsurvey.qut.edu.au/jfe/form/SV_8e9DiB0A7AmTcsC?_gl=1*8r33sl*_ga*MTMzNzk5MzQ4Mi4xNzU5NzE5OTc3*_ga_S1B55LT1H8*czE3NTk3MTk5NzYkbzEkZzAkdDE3NTk3MTk5NzYkajYwJGwwJGgw)

<sup>101</sup> *Disability Discrimination Act 1992* (Cth), s 5(1). *Equal Opportunity Act 2010* (Vic), s 7.

<sup>102</sup> *Disability Discrimination Act 1992* (Cth), s 5(1).

<sup>103</sup> *Disability Discrimination Act 1992* (Cth), s 5; *Equal Opportunity Act 2010* (Vic), s 8(1).

disability, and the requirement or condition has, or is likely to have, a disadvantaging effect on people with the disability.<sup>104</sup>

127. A common feature of disability discrimination law is the involvement of “reasonable adjustments” that are required to be made for the person with disability to comply with the requirement or term or otherwise be considered equal to others in similar circumstances.<sup>105</sup>
128. Generally, “disability” is broadly defined by characteristics, rather than a medical diagnosis and is defined to mean:

- (a) total or partial loss of the person’s bodily or mental functions; or
  - (b) total or partial loss of a part of the body; or
  - (c) the presence in the body of organisms causing disease or illness; or
  - (d) the presence in the body of organisms capable of causing disease or illness; or
  - (e) the malfunction, malformation or disfigurement of a part of the person’s body; or
  - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
  - (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
  - (i) previously existed but no longer exists; or
  - (j) may exist in the future (including because of a genetic predisposition to that disability); or
  - (k) is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.<sup>106</sup>

129. It is likely that people living with intellectual disability would satisfy the definition above in (f), namely “a disorder or malformation that results in the person learning differently from a person without the disorder or malfunction.”
130. As indicated above, anti-discrimination law does not apply to all aspects of private and public life. Rather, anti-discrimination legislation regulates discriminatory behaviour within certain prescribed activities. Typically, these are:

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<sup>104</sup> *Disability Discrimination Act 1992* (Cth), s 6(1); *Equal Opportunity Act 2010* (Vic), s 9(1).

<sup>105</sup> *Disability Discrimination Act 1992* (Cth), ss 5(2) and 6(2).

<sup>106</sup> *Disability Discrimination Act 1992* (Cth), s 4(1); *Equal Opportunity Act 2010* (Vic), s 4(1).

- employment;<sup>107</sup>
- education;<sup>108</sup>
- accessing premises;<sup>109</sup>
- the provision of goods, services and facilities;<sup>110</sup>
- the provision of accommodation;<sup>111</sup>
- engagement with clubs and incorporated associations;<sup>112</sup>
- participating in sport.<sup>113</sup>

131. The word “employment” is broadly defined in this context to include:

- (a) part-time and temporary employment; and
- (b) work under a contract for services; and
- (c) work as a Commonwealth employee; and
- (d) work as an employee of a State or an instrumentality of a State.<sup>114</sup>

132. The prohibition against unlawful discrimination in the employment sphere concerns:<sup>115</sup>

- arrangements made for the purpose of determining who should be offered employment;
- determinations of who should be offered employment; and
- terms or conditions in which employment may be offered.

133. In *Commissioner of Police v Estate of Russell*,<sup>116</sup> the New South Wales Court of Appeal considered a dispute related to the extension of liability as an employer or principal. The aspect of this judgment that is relevant for the present context is the following analysis by Chief Justice Spigelman:

Nothing in the scope and purpose of [the *Anti-Discrimination Act 1977* (NSW)] suggests that it should be limited to persons subject to contracts of employment, even with the specific statutory extension to include work under a contract for services. In so far as persons do “work” in a context closely analogous to “employment”, the

<sup>107</sup> *Disability Discrimination Act 1992* (Cth), pt. 2, div. 1; *Equal Opportunity Act 2010* (Vic), pt. 4, div. 1.

<sup>108</sup> *Disability Discrimination Act 1992* (Cth), s 22; *Equal Opportunity Act 2010* (Vic), pt. 4, div. 3.

<sup>109</sup> *Disability Discrimination Act 1992* (Cth), s 23.

<sup>110</sup> *Disability Discrimination Act 1992* (Cth), s 24; *Equal Opportunity Act 2010* (Vic), pt. 4, div. 4.

<sup>111</sup> *Disability Discrimination Act 1992* (Cth), s 25; *Equal Opportunity Act 2010* (Vic), pt. 4, div. 5.

<sup>112</sup> *Disability Discrimination Act 1992* (Cth), s 27; *Equal Opportunity Act 2010* (Vic), pt. 4, div. 6. Note, this prohibits unlawful discrimination the conduct in how the club or incorporated association accepts or otherwise restricts membership, not in their operations as a whole.

<sup>113</sup> *Disability Discrimination Act 1992* (Cth), s 28; *Equal Opportunity Act 2010* (Vic), pt. 4, div. 7.

<sup>114</sup> *Disability Discrimination Act 1992* (Cth), s 4(1).

<sup>115</sup> *Disability Discrimination Act 1992* (Cth), s 15(1).

<sup>116</sup> (2002) 194 ALR 319.

purpose of the legislation would be better served by extending the protection of the Act to such a relationship. There must be some element of regularity and permanence in the relationship, and also an element of direction and control of work, for it to fall within the extended sense of the word “employment”. But where such contexts exist, the court should be slow to hold that the Act has no application.<sup>117</sup>

134. Depending on the entity’s structure, it may be that the executive director is a full-time employee taking on the daily management responsibilities on delegation from the board of directors. However, the general position for board and committee members is that, while they may be performing a service or function for the entity, they do not do so under a “contract for services”. Rather, generally such a role is for remuneration fixed by the governing document. It is ordinarily the employees (if any) who sit under the board or committee. For example, the Fair Work Commission has stated:

[53] A dispute about whether a contract of employment exists is resolved by reference to the true character of the relationship between the alleged parties. This requires examination of the various facets and circumstances of the relationship. Each case turns on its own facts, as established by the evidence adduced.

[54] In order to find that the Directors were employees of [the company], I would need to be satisfied that a contract of employment existed between them. [Witness] gave evidence that he is involved in high level strategic, marketing and technology matters and is responsible for hiring and firing employees for [the company], but is not involved in its day to day dealings. Neither [the witness] nor [a director] have an employment agreement nor any specific roles or duties. [The witness] derives income from [the company] through dividends as a shareholder in Odin Marketing and has no entitlement to wages or superannuation. [The witness] is not covered by [the company’s] workers compensation policy...<sup>118</sup>

135. Based on these observations, it is unlikely a board or committee member of a corporation or incorporated association would be considered to be in an employment relationship. In particular, the nature of the relationship and functions performed in the role would not be considered “work” and an employee and employer relationship.
136. Despite this, there may be some parallels between the appointment to a board or committee and appointment in a form of employment. Consequently, it may be considered “best practice” for organisations for people with disability to adopt an approach to their functions that is consistent with anti-discrimination law due to one of the objectives of the *Disability Discrimination Act*, namely “to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community”.<sup>119</sup>
137. As such, it is important that an exception to unlawful discrimination in an employment context is that the discrimination relates to certain work that, due to the person’s disability, the person is unable to carry out because of the “inherent requirements” of that work in circumstances where reasonable adjustments are made.<sup>120</sup>

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<sup>117</sup> *Commissioner of Police v Estate of Russell* (2002) 194 ALR 319 at [88].

<sup>118</sup> *Taylor, Jeremy v Auto Loans Group Pty Ltd T/A AutoCarLoans.com.au* [2018] FWC 1950.

<sup>119</sup> *Disability Discrimination Act 1992* (Cth), s 3(b).

<sup>120</sup> *Disability Discrimination Act 1992* (Cth), s 21A(1).

138. In *Watts v Australian Postal Corporation*,<sup>121</sup> Justice Mortimer (as her Honour then was) held:

Although the word “work” is chosen so that it is capable of covering all the situations with which Div 1 deals, the use of the adjective “particular” suggests Parliament intended a further level of precision to be applied to identifying the “work” said to carry inherent requirements. In my opinion, s 21A [the provision related to the exception for an inherent requirement] *requires a focus on the position, task, services or conduct the aggrieved person performs, or seeks to perform, in the workplace*. For example, in s 18(3), which deals with partnerships, the relevant prohibition at paragraph (b) (not excluded by s 21A(4)) relates to expulsion from the partnership. In order to assess the application of s 21A(1), *it will be necessary to identify what “particular work” the disabled partner was performing, was asked to perform, or sought to perform*. For example, was it to manage the human resources area of a partnership, or marketing, or client relations? That is the “particular work” whose inherent requirements must be identified.<sup>122</sup>

139. A further and consistent exemption to unlawful discrimination across relevant legislation is that a failure to discriminate against the person with disability would impose “unjustifiable hardship” on the relevant person or entity. This is defined in section 11 of the *Disability Discrimination Act* to mean:

(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the first person) would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:

(a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;

(b) the effect of the disability of any person concerned;

(c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;

(d) the availability of financial and other assistance to the first person;

(e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

(2) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.

140. Taking into account the burdensome duties for board and committee members, it is likely that the position, task, and services to be performed will not be possible for persons with an intellectual disability. In these circumstances, it is very likely that a valid excuse would apply in the context of a decision not to appoint a person to a board or committee on the basis that they have an intellectual disability. Further, while

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<sup>121</sup> [2014] FCA 370.

<sup>122</sup> *Ibid* at [45].

adjustments may be made to support people with intellectual disability engaging in corporate governance, such as by making documentation accessible or by providing other supports, this will fall short of what is required for them to be able to discharge their duties to the necessary level of skill and diligence.

141. Insofar as the prohibition relates to clubs and associations, the *Disability Discrimination Act* provides that:

(1) It is unlawful for a club or incorporated association, the committee of management of a club or a member of the committee of management of a club or incorporated association to discriminate against a person who is not a member of the club or association on the ground of the person's disability:

(a) by refusing or failing to accept the person's application for membership; or

(b) in the terms or conditions on which the club or association is prepared to admit the person to membership.

(2) It is unlawful for a club or incorporated association, the committee of management of a club or a member of the committee of management of a club or incorporated association to discriminate against a person who is a member of the club or association on the ground of the member's disability:

(a) in the terms or conditions of membership that are afforded to the member; or

(b) by refusing or failing to accept the member's application for a particular class or type of membership; or

(c) by denying the member access, or limiting the member's access to any benefit provided by the club or association; or

(d) by depriving the member of membership or varying the terms of membership; or

(e) by subjecting the member to any other detriment.

(4) Neither subsection (1) nor (2) renders it unlawful to discriminate against a person on the ground of the person's disability if membership (however described) of the club or incorporated association is restricted only to persons who have a particular disability and the first - mentioned person does not have that disability.<sup>123</sup>

142. Depending on the organisation's structure and governing rules, it is unlikely that this prohibition would apply to the appointment to a committee, as it is concerned with a person's ability to join its general membership and the benefits a person can access from the club or association once a member. However, if this were to apply in the context of appointment to a committee, the excuse of "unjustifiable hardship", as discussed above, would be likely to constitute an appropriate defence to the conduct.

## 14. ALTERNATIVES TO BOARD AND COMMITTEE APPOINTMENTS

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<sup>123</sup> *Disability Discrimination Act 1992* (Cth), s27.

143. As discussed above, people living with disability can bring valuable insights and skills to corporate governance and the strategic priorities of organisations. In principle, their inclusion at all levels supports full and effective participation in society.
144. Specifically, for organisations that represent or provide services to people living with intellectual disability, the inclusion of members from this group has the potential to help organisations understand better their clients, their needs, and barriers they may experience.
145. However, as set out above, there are many reasons why it is inappropriate to appoint a person with an intellectual disability to a committee or board of directors due to the significant burden corporate governance and engaging with financial issues places on office holders.
146. In its policy paper “What Does ‘Inclusive Governance’ Mean? Clarifying Theory and Practice”, the OECD explained:

Inclusive governance as a concept has strong intrinsic value. This is because, in principle, inclusive decision-making processes give voice and basic freedoms to people to pursue the goals and aspirations they value and to seek redress when an injustice is perceived.

...

Inclusive governance is intended to enhance citizen empowerment and agency and to secure stronger rights and protections for marginalised groups.<sup>124</sup>

147. There may be other options available to the organisation in enhancing representation and input. Amongst other options, this may come in the form:
- working or advisory committees that work with the executive members;
  - a lived-experience panel that may be called upon by the board or committee for input on matters;
  - reserved positions for parents of people with intellectual disability (assuming they too have capacity to fulfil the role);
  - involving people living with intellectual disability as part of recruitment interview panels.<sup>125</sup>

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<sup>124</sup> [https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/03/what-does-inclusive-governance-mean\\_8b38bb2b/960f5a97-en.pdf](https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/03/what-does-inclusive-governance-mean_8b38bb2b/960f5a97-en.pdf) pp 16-7.

<sup>125</sup> Board observership status is unlikely to be appropriate in this context because such a role is of its essence intended to be preparatory and training for persons who aspire to be board members: see The Observership Program, “Our Vision”, <https://www.observership.com.au> : “The Observership Program facilitates the involvement of young, talented and energetic individuals in a structured experience on non-profit and government appointed Boards. Each Observer is paired with an organisation for a 12-month period. During that time, Observers attend all board and/or committee meetings as non-voting members and learn about fundamental principles and functions of not-for-profit boards, the roles of board members, fiscal processes and other governance priorities. The Program provides Observers with first-hand exposure to the role of the board, its decision-making and operations as well as targeted training and mentorship designed to give Observers important skills to bring to the boardroom.” See also Australian Institute of Company Directors, “The Observership Program: A New Boardroom Pathway” (1 February 2020),

148. Any time and input from people with disability should be considered equally as valuable as that from people without disability and, if appropriate, equal remuneration should be offered for their time.

## 15. CONCLUSION

149. Persons who are directors of corporations or office holders of incorporated associations have a significant number of duties under corporations, incorporated associations, NDIS and work health and safety legislation, as well as under the law of equity.

150. Breach of such duties has the potential to result in the imposition of civil penalties and significant periods of imprisonment under the criminal law.

151. Integral to the discharge of duties by directors of corporations or office holders of incorporated associations is a significant level of capacity for understanding of legislative provisions, financial transactions, structures, strategies, decisions and governance and management arrangements.

152. A person with an intellectual disability, as defined throughout Australia, will not have sufficient capacity in respect of these duties.

153. If they functioned as a director or office holder, a person with intellectual disability would be unable to satisfy the legislative requirements and would run a real risk of contravening them and themselves becoming liable. Their presence on a board or committee may also reduce the number of effective members, thereby detracting from the capacity of the board or committee to discharge its functions effectively.

154. Regarding people with intellectual disability as ineligible for such roles is not a prohibited form of discrimination under the *Disability Discrimination Act*. While it would depend on the circumstances, it is highly unlikely the Act would apply to the appointment to these roles.

155. Therefore, unless there is a fundamental legislative amendment to directors' and office holders' duties, which in the short term is unlikely, they should not be appointed to such roles.

156. However, this is not to say that persons with intellectual disabilities cannot add significantly to the work of boards and committees of disability service provider organisations.

157. There are a number of creative options for securing such lived experience and advocacy input.

158. Firstly, they could be invited to attend and participate as "lived experience experts" during portions of board or committee meetings but not as voting directors or office holders. They could also provide valuable assistance on committees or working groups of such bodies.

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<https://www.aicd.com.au/leadership/qualities-of-a-good-leader/development/observership-program-a-new-boardroom-pathway.html>.

159. Secondly, some aspects of lived experience and advocacy on their behalf could also be provided by parents and carers (provided they do not have an intellectual disability) of persons with intellectual disabilities.
160. Finally, people living with intellectual disability could be involved in other aspects of the organisation's running and management, such as being involved in recruitment processes and panels.
161. If I can assist further in relation to these issues, I would be pleased to do so.

AND I SO ADVISE

Dr Ian Freckelton AO KC  
Barrister, Castan Chambers  
Professor, Law Faculty, University of Melbourne  
<https://ianfreckelton.com.au>

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