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CHAPTER TWENTY NINE: UNDERTAKING CONSULTANCIES[1]

1. Introduction

This chapter looks at issues that can arise when collecting organisations offer their expertise as consultants. This is not unusual as, after all, the staff of a collecting organisation is an embodiment of extraordinary knowledge and expertise. This, when combined with access to the holdings and services of their institution, can make for a formidable resource – one that can be valuable to outside organisations.[2]

Collecting institutions vary in their capacity and attitude to consultancy work. Generally, such work is only available to the large establishments for it takes a certain heft to attract, administer, supervise and fulfil such contracts. It is hard enough for smaller organisations to deliver their core responsibilities without looking outside to undertake work. That said, there could be good reasons for the large organisations to undertake consultancies: the most obvious of these is the money that can earned (and applied to other costs within the institution); They may also be good for branding and reputation when the project involves prestigious partners or projects; they can be useful for staff morale and staff development; and they can be seen as one of the gateways by which corporations, government and the wider community can access the expertise of the institution.

2. Can you do it?

Before you undertake outside consultancies and research you must ask: "*Is the organisation legally entitled to undertake the work?*" This is answered by looking first at the document by which the institution was established – the constitution or statute (as the case may be).

2.1 *The statute or constitution*

Reading the organisation's constitution or statute must be undertaken strictly. The fact that the opportunity is ethically, professionally or financially attractive is irrelevant when determining whether the organisation is legally entitled to undertake the work.

Some institutions are established with clear statements of function and power. For example the statute establishing the Australian Museum clearly anticipates that professional consultancies are to be a part of the function of the organisation[3] and such work is an important part of its function and business plan, including through grants to complete specific research.[4]

1 First published 22 July 2013, updated by Shane Simpson and Ian McDonald in July 2018.

2 AusHeritage enables Australian collecting organisations and individuals to undertake consultancies overseas: http://www.ausheritage.org.au.

3 Section 8 of the *Australian Museum Trust Act 1975* (NSW) – and see in particular subsections (d) and (g).

4 See, generally, the Musuem's Annual Reports, available at https://australianmuseum.net.au/about-us-section.

On the other hand, let's say that the Australian War Memorial were asked to provide consultancy services to the government of Malaysia that wanted to establish a war memorial museum to honour Malaysian military history. On review of the **functions** and the **powers** of the War Memorial, set out in its enabling legislation, you would see that they are not wide enough to include this task.[5] They are really restricted to Australian wartime history.

In contrast, if the Australian National Maritime Museum received a request from Malaysia to consult on the establishment of a maritime museum, its functions and powers are sufficiently wide to permit it to undertake the work and earn a consultancy fee.[6]

2.2 *Board Decision*

Assuming that the organisation's key document permits the consultancy, it is prudent to obtain the authority of the governing body. The decision that the organisation is going to undertake outside consultancies is of strategic importance and one that should not be undertaken without formal authority. Usually, if the board decides that such work is appropriate, it will delegate to the director both the power to authorise particular projects and the responsibility for oversight of the work.

Customarily, this would be done through the strategic planning process, whereby consultancy work is included in the business plan; the plan is approved by the board, and then implemented by management. If a consultancy opportunity arises where such consultancies are not part of the business plan, the director should take it to the board for decision.

2.3 *Freelance work*

Given that this chapter is principally about consultancies and third-party research undertaken by the institution, it is perhaps an aside to include some thoughts on the separate and more contentious decision as to whether the staff of an institution should be allowed to do outside consulting work – work that is not, formally, a project of the institution. Some institutions permit this; most do not. It is a policy decision, not a legal one. Nevertheless, it is extremely important that the institution have a clearly articulated, written policy on this. The board of the organisation must make a policy decision as to whether or not such freelance work will be permitted at all – and if it is, under what conditions. That policy will be articulated in the organisation's code of conduct and, in turn, reflected in the conditions of employment.

The reason for this intervention is that, notwithstanding the employee's personal reputation for excellence, part of the attraction for the client is the reputation of their employer: they are inextricably attached.

For each organisation there are principally three issues:

- Will the contracted services involve the use of the organisation's resources?
- Will the freelance work affect the employee's ability to do the work for which they are employed?
- How will risk be handled?

If the consultant expects to use the organisation's resources or if the project might the employee's day-to-day responsibilities, then the project should probably be formally undertaken by the institution rather than as a piece of freelance work. As to risk, the danger for the employer is that if there is controversy over the results of the consultancy, the organisation will inevitably be drawn into the conflict even though it has had no part in the work and has received no remuneration from it.

If such consultancies are to be allowed it is prudent to, at least, require that the employee disclose all requests for such work to the chief executive and have each consultancy approved. Moreover, it should be required that the consultancy agreement is clear that the consultancy is undertaken in a private capacity and not as an employee of the institution.

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5 See sections 5 and 6 of the *Australian War Memorial Act 1980* (Cth).

6 See sections 6(f) and 7(t) of the *Australian National Maritime Museum Act 1990* (Cth) which provide that that museum's functions include "*to develop sponsorship, marketing and other commercial activities relating to the Museum's functions"*, and its powers include the right "*to raise money for the purposes of the Museum by appropriate means, having regard to the proper performance of the functions of the Museum*".

3. Should You Do It?

Assuming the organisation is empowered to undertake the consultancy or research, the question remains: "should you?".

This is really a risk-management issue rather than a legal one. Assuming that the work is compatible with the existing, primary priorities of the organisation and is consistent with its branding, reputation and values, the question comes down to competence. And this is where potentially expensive legal liabilities arise.

It is well established by decided cases that where you hold yourself out as having expertise, you must not be negligent in your performance of the task. You have a duty of care to your client. You must do the work with skill, care and diligence. If you don't, a client who suffers loss as a result of reliance on your advice is entitled to sue. This will inevitably involve the institution in an enormous expenditure of time and money and is a threat to personal and institutional reputation. (As well, it comes at extraordinary personal emotional cost.)

Many jurisdictions have legislation aimed at limiting liability for professional negligence.[7] These statutes are similarly worded. For example section 50 of the *Civil Liability Act 2002* (NSW) states:

> *(1) A person practising a profession ("a professional") does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.*
>
> *(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.*
>
> *(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.*
>
> *(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.*

While this may seem like good news, it is not the "get out of jail" card that it may first appear to be. The provision is only a defence. The plaintiff has to establish that the professional was negligent and, if negligence is established, the defendant can raise the statutory defence that the professional's actions accorded with "*peer professional opinion as competent advice"*. It is the defendant who has the burden of proof. The effect of this is that, even if the defence is eventually established, both the person who gave the advice and their employer have to go through the horrors of a full trial – something that leaves few reputations (or bank accounts) intact.[8]

Accordingly, it is in the interests of a collecting institution that permits (or encourages) its staff to undertake outside consultancies, to manage the risk.

3.1 *Setting up the consultancy*

No one should undertake expert consultancy work without two basic tools: standard contractual terms and insurance.

(a) Standard terms

Most professional consultants have a standard contract[9] that clearly sets out the terms by which they undertake the work. A lawyer expert in such things should draft these terms. It is a specialised area and certainly not the sort of thing that an amateur should attempt to put together by cutting and pasting documents retrieved from the Internet. The area is full of liability issues and it requires particular care and knowledge to navigate and minimise the dangers.

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7 NSW: *Civil Liability Act 2002*, section 50; Qld: *Civil Liability Act 2003*, section 22; SA: *Civil Liability Act 1936, section 41; Tas: Civil Liability Act 2002*, section 22; Vic: *Wrongs Act 1958*, section 59. In WA the *Civil Liability Act 2002*, section 5PB is restricted to health professionals; the ACT and NT have no such provisions.

8 Generally, the organisation will be vicariously liable for the negligence of its employees.

9 By that, we mean a contract that they have specifically drafted for all their consultancy work – not a contract that is standard for all consultants.

When the draft of this document is ready, it should also be shown to the insurer. This is important so that the insurer can add its experience and expertise to the mix and so that it cannot later say that the contract invalidated the cover in some way.

That said, when the party commissioning the consultancy is a company or government, it will usually be the commissioner that draws up the contract and lays down the rules. These must be read carefully and negotiated. Sometimes, the terms presented by a commissioner over-reach. Sometimes, the terms have just been lifted from an earlier consultancy and their author has not given any real thought to the differences between the jobs. Too often, they are just signed with a wistful shrug. The terms must be clear, unambiguous, fair and achievable.

(b) Insurance

Most prudent commissioners will insist that the consultant maintains an adequate level of insurance for professional negligence. In any event, it is essential to the management of risk. Yes, it costs money – but think of it like salary or rent – it is a basic overhead expense.

If you can't afford the insurance, you can't afford to do the work!

4. Doing the work

When it comes to actually undertaking a consultancy, the case of *Reiffel v ACN 075 839 226 Ltd*[10] provides independent experts with some insights into the limits of risk and some safeguards that would be prudent to consider.

The case suggests that, to minimise exposure to risk, an expert consultant should:

- be careful to clarify the terms of its brief;
- qualify any opinion where necessary; and
- review all opinions given in the context of the advice sought as a whole, keeping in mind what type of impression is likely to be created in the mind of a reasonable person who is likely to read and rely on the document.

To show that reasonable care and diligence has been taken, it is essential that the expert keeps full, well-organized files to show the path of the enquiry and the research undertaken.

The decision also left no doubt that courts will give no or little effect to any carefully crafted qualifications or formulations in the consultant's report[11] such as, "*On the basis of our review and subject to the comments in this report, nothing has come to our attention…*". If the reader of the report is misled as to the true state of play, such weasel words are not likely to provide protection.[12]

The court also held that independent experts impliedly promise that they will exercise a reasonable degree of professional care and diligence. They do not, generally speaking, warrant the correctness of their opinion.

In other words, they must not be negligent in the way that they come to their conclusions and there must be a reasonable basis for any statement made, but they don't have to get it right. This may come as a surprise to the person commissioning the advice, who pays good money for it – but infallibility costs more![13]

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10 (2003) 45 ACSR 67.

11 Often referred to as "*negative assurance wording"*.

12 For those wanting to know more about the various levels of assurance, see: '*Effectively communicating moderate levels of assurance'*, Hasan, Roebuck. Simnett (2002), available as a downloadable pdf document at: *http://digitalarchive.maastrichtuniversity.nl/fedora/get/guid:995c8f36-88ea-46e4-9805-8b72cbef1c52/ASSET1*.

13 For a court case involving a claim about whether a person acting as agent and in an advisory capacity in relation to the sale of several paintings was negligent, see *McBride v Christie's Australia Pty Limited* [2014] NSWSC 1729 (4 December 2014). The court dismissed the claim based on professional negligence, but did find for the plaintiff in relation to an undisclosed commission that the agent was to be paid on sale of the painting at the centre of the action.