LawSense – School Law

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Engaging and Managing External Sport Service Providers, Volunteers and Venues

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Introduction

1. Children today are offered a world of opportunity and choice in terms of their extra-curricular sporting activities. It is not uncommon for schools to offer their students up to 20 different sporting activities over the course of a typical school year.

2. As a consequence, it is often financially and logistically impossible for school to rely upon existing staff to coordinate, coach and administer these diverse extra-curricular activities.

3. Schools therefore turn to external service providers to assist them with the sports they offer their students.

4. Those external sport service providers may include:

    - Coaches;
    - Referees;
    - Officials;
    - Managers;
    - Professional service providers such as doctors, physiotherapists and lawyers.

5. Some of these external sports service providers may be professionals; others may be nothing more than enthusiastic amateurs. Some providers may be former students of the school; others may be parents of existing students or local retirees looking to give something back to their community.

6. Many of these external sports service providers may come onto school premises, interact with the children and have a degree of autonomy in terms of what they do and how they do it. Others may provide the venue offsite and the equipment to be used in the sports program.

7. Although the use of external sports service providers is widespread, the legal issues which pertain to the use of external use sport service providers remain a mystery to many people. Not surprisingly, there are a host of legal issues associated with the use of external sports service providers.

8. This paper will analyse these issues from the perspective of the terms of retainer of external providers, potential liability for the school and the external provider, the need for insurance and the contractual ramifications of entering into external sporting providers' venue contracts.

Hiring an external sports service provider – what are the options?

9. There are essentially three options for the recruitment of an external sports service provider, namely:

- Employee;
- Independent contractor;
- Volunteer.

10. The issue of volunteers will be dealt with in a separate section below.

Employees and independent contractors

11. In these competitive times, it is not uncommon for schools to occasionally decide to pursue a strong reputation for excellence in a particular field of sporting endeavour. It is also not uncommon for schools to resolve to offer a particular sport to students because it has never been offered before. In those circumstances, they may turn to external service providers for assistance.

12. For example, if a school resolves that it was going to offer students the hitherto unavailable sport of basketball, they may decide that none of the existing members of the school community have the requisite skills to provide coaching to students. A new head of basketball may need to be recruited.

13. If that school finds a coach (for example, someone who may have played at an elite level, represented their country and has qualifications in teaching or coaching), they may decide that person needs to be recruited. This may particularly be the case if the successful applicant is dynamic, inspirational and has the perceived ability to inspire students to participate, and encourage parents to support and donate time and money to the school project. If this person insists on being paid, the school will be left with two legal options in order to retain their services. They may either hire the person as an employee or retain them as an independent contractor. It is therefore important that schools understand the differences between these two important legal states. One is a contract of service and one is a contract for services.

Independent contractor v employee – general principles

14. Under the common law, a historical distinction developed (predominantly during the 19th century in England) between work performed on a "master/ servant" basis and other forms of work. In recognition of the fact that the workers were often at a disadvantage due to the lack of equality of bargaining power, the common law intervened and developed a special relationship of employer/ employee. Various obligations of fairness were implied into and imposed upon that relationship and they form the basis of modern employment law.

15. Today, the common law no longer speaks of the antiquated notion of a "master/ servant" relationship. However, the law recognises a critical distinction between employees and independent contractors.

16. Historically, the principal difference between the two contractual roles related to the issue of "control". The traditional view was that the more control which is exercised over the worker in relation to the

manner and performance of the work being done, the more likely it was that the relationship was one of employer and employee rather than principal and contractor[1].

17. With the passing of time, the control test became somewhat redundant, primarily in situations where the work involved specialist skills and knowledge, often not possessed by the employer. In those cases, it was more difficult to suggest that the employer controlled the employee notwithstanding the fact that both parties regarded themselves as being in an employment relationship.

18. This led to the development of a new test which is now applied in Australia to determine the difference between employees and independent contractors.

19. The new test has been described as a "totality of relationship" or "multi-faceted" test. This new test includes elements of the control test, but takes the situation further. The main focus of the new totality of relationship test is to determine whether or not the worker performing the work is doing so on their own account. In the case of *Hollis -v- Vabu Pty Ltd [2001] 207CLR 21*, the High Court stated that the ultimate question, after reviewing the totality of the evidence, was to determine whether the worker was in business on their own account as distinct from working for the business of their employer.

20. Under the new test, a Court will consider the following factors when determining whether a person is an employee or independent contractor:

    (a) Whether the person performing the work is paid on the basis of task completion rather than receiving wages or salary according to a period of time worked;

    (b) Whether the person who has requested the work be performed has the ability to control the person performing the work and further, the manner in which that control is exercised;

    (c) Whether the worker has the opportunity to make a profit from the work or carries the risk of financial loss or is paid according to the quality of work or financial benefit derived from it;

    (d) Whether the work requires the person performing it to have particular qualifications or skills or is only able to be performed by a person with specialised experience or knowledge;

    (e) Whether the worker has the ability to determine the clothing to be worn when the work is performed and is not required to comply with a dress code stipulated by the person requiring the work;

    (f) Whether the worker has the ability to subcontract the work to another party or delegate it without the approval of the principal;

    (g) Whether the worker is at liberty to perform similar work for other people at the time when the engagement is undertaken;

[1] A summary of the "control test" can be found in the case of *Stevens -v- Brodribb (1986) 160CLR 16* at 23-24 per Mason J

(h) Whether the worker supplies their own tools and equipment.

21. The more affirmative answers to the above questions, the more likely it is that the person performing the work is an independent contractor rather than employee.

22. The leading recent authority on the distinction between employees and independent contractors in Australia is the case of *Hollis -v- Vabu Pty Ltd [2001] 201CLR 21*. In that case, the High Court was asked to determine whether bicycle couriers were employees or independent contractors. The Court found the couriers were employees in reliance upon a number of considerations which included:

- the fact that the workers did not need to possess any special skills or qualifications;
- each time they performed the service they were not building up goodwill or their own business;
- the company retaining them imposed strict rules regarding attendance and assignment of work rosters;
- the couriers wore uniforms with the company logo and had personal dress standards imposed upon them;
- the workers were unable to refuse work or delegate their jobs; and
- there was a significant amount of control exercised over the couriers by the company retaining them.

23. A school considering retaining an external service sport provider must appreciate that simply labelling a person as an “employee” or “independent contractor” (even with the consent of both parties) does not necessarily mean that the worker will hold that status (from a legal perspective). The question of whether a coach, manager, trainer or other service provider is an employee or independent contractor will turn on the particular facts and circumstances of their retainer.

24. For example, if a school retains a person as basketball coach and expects them to provide nothing more than quality coaching, oversight of students, preparation of a coaching master plan and attendance at games and training sessions for several hours a week over a period of 3 to 6 months, but has no objection to the coach providing similar services to other schools at the same time and on the same basis, then it is highly likely the coach can be retained as in independent contractor and will ultimately hold that status.

25. However, if the degree of control exercised by the school over the coach is increased, then a person may be considered an employee. This may arise if it is expected that the coach will only provide coaching services to the school that has retained him or her, maintains confidentiality in terms of specific secret aspects to that coaching and refuses to permit the coach to delegate the services to

another person, it is more likely that the person will be considered an employee and the school should consider retaining them on that basis.

26. The greater the extent of bargaining power possessed by the worker and the greater their autonomy from the school retaining their services, the more likely it is that the external service provider is an independent contractor rather than employee.

Contractual essentials

27. Although attendees at this conference are predominantly not legal practitioners, it is assumed that all attendees will have a reasonable understanding of the principles which are essential for the formation of a valid and enforceable contract.

28. By way of very general overview, a binding employment contract must comprise the following critical elements:

    (a) An offer of employment;

    (b) An acceptance of that offer;

    (c) Valuable consideration passing between the parties. This usually comprises a promise to pay wages in exchange for a commensurate promise to provide services;

    (d) An intention to be legally bound to perform the promises (that is, an intention to create legal relations) and an understanding that there are legal consequences for failure to observe the terms of the contract;

    (e) The parties to the contract must have legal capacity to enter into a legally binding agreement. This is important if a school retains the services of a particularly young athlete to assist with coaching or training. If the athlete is underage, the contract may not be enforced against them. Similarly, a contract entered into with an unincorporated association (as oppose to an incorporated association) may be unenforceable or, in some circumstances only enforceable against individual members of a management committee. This may be relevant if a school retains the services of a local sporting club for assistance with the provision of external sports services and that club is not formally incorporated as a company limited by guarantee or an incorporated association.

29. It is not necessary (but it is definitely preferable) for contracts to be in writing. Determining the terms of an oral agreement can be difficult and subject to dispute.

30. Any employment contract designed for the hiring of an external sports service provider should include the following:

    (a) A clause governing the duration of the contract or a defined termination date;

(b) A remuneration clause which clearly sets out the payment to be made to the employee;

(c) A statement of the express duties to be performed by the employee and the manner in which they perform them;

(d) A statement of minimum entitlements such as annual leave, leave loading, long service leave and superannuation contributions;

(e) Obligations on the person providing the service to comply with any school codes of conduct or policies and procedures;

(f) Grounds upon which the contract may be terminated;

(g) Any preconditions to the contract (for example, the obligation to comply with any statutory requirements that the person satisfy any Police checks or hold any "working with children" blue cards etc;

31. The written document may not be the sum total of all provisions governing the terms of the external sports service provider's employment. Various contractual terms may be implied by common law and may include:

(a) An obligation to comply with reasonable and lawful directions provided to them by the school;

(b) The duty to exercise care and diligence in the performance of their employment;

(c) An obligation to protect the confidential interests of the employer;

(d) An obligation not to engage in misconduct; and

(e) A duty to not make any secret profits as a result of the work they perform for the school.

32. As mentioned above, some schools may wish to ensure that the external sports service provider is curtailed from offering the same service to other schools, particularly in competitions which are highly regarded and prestigious within the school community. A school board may take particular umbrage to a school rowing coach also being employed to provide coaching services to the rowing squad of another school within the same competition. If the coach is retained as an employee, it may be necessary to incorporate a restraint of trade which prevents the coach from providing the same or similar services to a competing school within the same geographical area for a defined period of time. This would certainly be the case during the term of the contract and in certain limited circumstances may also apply after the contract has come to an end.

33. If the external service provider is covered by an industrial award, the school must ensure that their employment contract provides the employee with benefits which are equivalent to (or if desired,

greater than) the minimum provisions set out in the relevant award. Under the *Fair Work Act*, modern awards have been reduced in terms of their scope but will cover the following:

(a) Minimum wages;

(b) Type of employment;

(c) Overtime and penalty rates;

(d) Leave arrangements, leave loadings and superannuation;

(e) Arrangements for dispute resolution, representation and consultation.

34. In the case of contracts with independent contractors, the number of matters which need to be included in the contract diminishes. For example, minimum statutory entitlements relating to leave, long service leave, leave loading and superannuation are clearly not going to be incorporated in an independent contractor's agreement. However, independent contractor's agreements will require the incorporation of certain specific and important terms which may include the following:

(a) A statement that the service provider performs the services as an independent contractor rather than as an employee;

(b) A statement that that service provider must maintain requisite policies of insurance;

(c) A statement that the service provider must have an ABN, render tax invoices which clearly denote GST payable and will be responsible for any GST occasion by the provision of the service.

Volunteers in school sport – key considerations

35. School sport, like club sport, would collapse without the support of tireless and essential volunteers. Many school sporting teams rely upon assistance provided by parents, former students of the school, altruistic members of the community and volunteer sports officials in order to ensure that children receive high quality and personally-enriching sporting experiences. The difficulty for schools retaining volunteer external sports providers is the need to simultaneously exercise control over the volunteers and limit liability for their conduct.

36. The principal difference between a volunteer service provider and an employee or contractor is that arrangements for voluntary or unpaid work will generally not be contractual in nature. This is largely because there is no intention to create legal relations between the parties when the agreement to provide volunteer services is finalised.

37. A volunteer who fails to perform the services they agree to provide, would not expect to be sued for breach of contract as a result of their failure to do so. This is because the nature of volunteer work is

that the party receiving the benefit is not able to legally compel the volunteer to provide the assistance which they have ultimately agreed to supply.

38. As a consequence, schools retaining volunteers depend upon the goodwill of the service provider in the absence of an enforceable obligation to perform the necessary assistance. It is possible for even a long term volunteer who has received some form of remuneration to be found to be not an employee simply because of the absence of any intention to create legal relations[2].

39. Accordingly, the principal difference between a volunteer and an employee is the absence of an employment contract and associated employment legislation.

40. However, the "grey areas" associated with the use of volunteers are not devoid of legal obligations, rights and consequences. For example:

(a) Volunteers may owe a duty of care to the school which retains them which is similar to the duty owed by employees to an employer;

(b) Volunteers may be obliged to keep confidential information which they receive in their capacity as a volunteer confidential;

(c) Schools which retain volunteers will be subject to a duty to take reasonable care to not injure the volunteers, both at common law and by virtue of occupational health and safety legislation;

(d) Anti-discrimination legislation such as the *Anti-Discrimination Act 1991* may render a school vicariously liable for discriminatory acts engaged in by its volunteers. For example, a volunteer who sexually harasses another person or engages in racial discrimination or vilification may expose the school to liability under state and federal anti-discrimination laws.

41. On occasion, volunteers may seek to have themselves deemed to be employees in order to avail themselves of the benefits set out in the usual indicia of employment. This does not always prove to be successful. For example, in the case of *South Australia -v- Day (2000) 78 SASR 270*, a teacher who had been injured was found to not be an employee at the time of an accident because she was not performing the work under her employment contract but was volunteering under a rehabilitation plan.

42. The most important issue for schools who are dependent upon the support and assistance of volunteer external sports service providers is the issue of vicarious liability.

43. Vicarious liability in an employment context means an employer is liable for the consequences of any negligent acts engaged in by their employees. In the case of volunteers, the same principles may apply. The duty of care owed by schools is a non-delegable duty. As a consequence, volunteers will

[2] *Redeemer Baptist School Limited -v- Glossop [2006] NSWSC 120*

be regarded as representing the school and the school may be vicariously liable for any negligent act done by those volunteers (as if they were actually employees).

44. Similarly, under the law of agency, a principal is liable for the acts or omissions of their agent. The acts of a volunteer external sports provider such as a coach, official or administrator or manager may be sheeted home to the school pursuant to the laws of agency in the same way as the principles of vicarious liability.

45. The volunteers themselves may be protected from liability for their negligent acts due to the operation of the *Civil Liability Act*. The *Civil Liability Act* expressly excludes personal civil liability for acts or omissions done by a volunteer in good faith when doing community work. This exclusion of liability does not apply where the volunteer engages in criminal conduct, is under the influence of a drug or alcohol and is acting outside the scope of their activities or contrary to instructions or where the law requires the activity to be the subject of insurance.

46. This can be a two-edged sword. A Court may be more inclined to find a school responsible for the conduct of a volunteer if the volunteer is able to avail themselves of the protections inherent in the legislation.

47. Given the absence of any employment contract, exercising "control" over volunteers can be difficult. An effective means of doing so can be through the use of codes of conduct which volunteers must sign and agree to abide by at the commencement of the provision of service. Another, less legal but more administrative function can be the conduct of appropriate briefings at the commencement of service delivery to ensure volunteers understand the nature of the role they are to perform and the expectations and responsibilities which they must discharge.

48. Schools must ensure that they impose upon themselves the same occupational health and safety standards which they would otherwise impose in respect of employees, when retaining volunteers. There is no difference at law in the occupational health and safety responsibilities (both statutory and common law) which a school must discharge in favour of volunteers.

49. Before retaining volunteers, a responsible school will conduct a risk assessment of the activities to be undertaken.

50. This will include:

- Identification of hazards;
- Evaluation of risk;
- Determining precautions to be taken;

- Allocation of responsibility for the above steps;
- Management of the process;
- Reviewing an assessment of steps taken and updating where required.

Venue contracts – the implications for schools

51. Schools are regularly required to enter into contracts with external service providers. One of the most common legal agreements which schools are required to sign relates to the hire of external venues. This may arise when a particular sport needs to be performed on a surface or in a facility that the school does not possess. For example, if a school wishes to provide students with the opportunity to play basketball but does not possess a basketball court, they will need to take the students elsewhere. This may result in the school being expected to sign a venue hire agreement.

52. Venue hire agreements for external sporting facilities are not significantly different to venue hire agreements outside the sports sector. They will typically include provisions relating to the payment of a deposit, the term of the arrangement, the days and times on which the venue will be made available to the school, the fee to be charged, the obligation to return the venue to the owner in a clean and usable condition and a statement as to who is liable for physical damage to the premises.

53. Before entering into a contract a school may wish to ensure that the venue hire agreement contains an exclusivity clause which limits the use of the facility to the school and its personnel at the time the sport is undertaken. It is sub-optimal for members of the public to be interacting with students and school sports providers at the same time. This increases the scope for injury and other legal considerations. If exclusive use of the venue cannot be arranged, the contract should include a statement as to a particular area within the venue which is solely to be used by the school during the time in which students are on the premises.

54. Owners of venues will have a non-delegable duty to provide a safe venue and if this is not expressed in the contract, it will either be imposed by statute or implied by common law.

55. A typical clause which a venue owner may seek to impose upon a school will comprise a statement of risk and indemnity. This may look something like the following:

> *"The Renter will be liable for any physical damages, legal actions and/ or loss of reputation or business opportunities that the Owner may incur as a consequence of the actions of the Renter or any of the Renter's guests, students, representatives or agents while the Renter is in control of the venue, and shall indemnify and hold harmless the Owner against any and all legal action which may arise from the Renter's use of the venue."*

56. In plain English, the effect of such a clause is to say that the school is liable for any legal consequences arising from the use of the facility and if anyone sues the owner of the facility, the school indemnifies the owner for any loss they sustained as a result.

57. It is trite to say that legal advice should be obtained before signing such contracts. Schools should also ensure that they maintain adequate insurance which covers activities undertaken by students on school-sanctioned excursions not just on school property but at external venues as well.

58. It may also be possible to limit the effect of such a clause by excluding liability arising as a result of the venue owner's breach of statute, negligence or misconduct.

59. As mentioned above, venue providers have a statutory duty to provide a safe workplace. However, if possible, an indemnity clause such as the one above, should be avoided or limited to the greatest extent possible.

Insurance

60. All schools must maintain adequate public liability insurance, comply with their statutory workcover obligations and should seek the assistance of a reputable insurance broker. Full disclosure must be made of the activities to be undertaken and if a particularly "risk inherent" activity is proposed, top-up insurance may be required.

61. Schools may also need to consider the need to take out "directors and officers" insurance and satisfy themselves that this insurance may cover volunteers as well as controlling minds behind the school community.

62. A typical insurance policy may extend to volunteers acting on behalf of the school but exclude coverage in circumstances of criminal misconduct, gross negligence, intoxication or performing services under the influence of drugs and so on. These issues need to be clearly stipulated to volunteers. When taking out insurance, schools must consider the various classes of external sport service providers (i.e. employees, independent contractors and volunteers) and require their insurer to provide coverage in respect of all three. Insurance should be regarded as an essential and basic requirement for all sport and it would be absurd for a school to consider any form of sport conducted either in-house or through the use of external service providers without requisite insurance.