



**Association of School Business Administrators
Conference 2015**

Governance in your School

by

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Introduction

I am greatly honoured to have been invited to address this national conference of the Association of School Business Administrators. I would particularly like to welcome delegates who have travelled long distances in order to attend this conference, perhaps from within our vast State, but also from other States and Territories and New Zealand.

Traditional Owners

I would like to acknowledge the traditional owners of the lands on which we meet, the *Whadjuk* people who form part of the great *Noongar* clan of south-western Australia, and pay my respects to their Elders past and present, and acknowledge their continuing stewardship of these lands.

Visitors to Perth may not be aware that we meet on a place of particular significance to the *Whadjuk* people, as we meet on land reclaimed from the bed of the river which we know as the Swan River, but which is known to the *Whadjuk* as *Derbarl Yerrigan*. According to *Whadjuk* lore, this river and various other sources of fresh water situated on the coastal plain between the scarp to the east and the sea to the west were carved out by the *Waugal*, which is a serpentine creature of great significance to the culture and traditions of the *Whadjuk* people.¹

I assume delegates will also have noticed the prominent hill which overlooks this Convention Centre. That hill is now known as

¹ Information from Christopher Pease, available at Kaartdijin Noongar - Noongar Knowledge website, www.noongarculture.org.au/spirituality (accessed 18 September 2015).

Mt Eliza, named after the wife of Governor Darling, then Governor of New South Wales, and forms part of a large area of natural bush known as King's Park. The hill is known to the Whadjuk as *Ga-ra-katta*, and is a place of great cultural significance.² A natural spring at the base of the hill, on the banks of the *Derbarl Yerrigan*, was a significant meeting place for the Indigenous inhabitants of this area. There is a certain cultural appropriateness in this meeting place having been constructed nearby the ancient meeting place of the *Waugal*.

I also hope that you have been enjoying as much of the beautiful weather we often have at this time of the year, as best you can given your conference commitments. Of course, the colonial settlers brought with them from a different place and a different climate the notion of four seasons in each annual cycle. The *Noongar* people, who have been observing changes in the seasons for tens of thousands years longer than the colonists, identify six different seasons each year. The season which has just started is known to the *Noongar* as *Kambarang*, which loosely translates to the wildflower season, or the season of birth. It has been described as a time when:

Many things are undergoing transformation with the warm change in the weather. Longer dry periods accompany a definite warming trend.³

It is a perfect time to view the extraordinary array of wildflowers which emerge at this time of year, given that the south-west of our State is internationally recognised as a "hotspot" for floristic diversity.

² Note 1.

³ Bureau of Meteorology, 'Nyoongar Calendar', available at: www.bom.gov.au/iwk/nyoongar/ (accessed 18 September 2015).

If you do not have time to go further afield, King's Park is a very good place nearby in which you might view the flowers and natural trees.

The Importance of School Administration

It has often been said that Australia's greatest assets do not lie under the ground but walk across its surface. It is also trite to observe that our children are our future. If our children are to realise their full potential in an increasingly competitive global environment, it is essential that they be provided with a world class education.

In any world class educational system, pedagogical principles and standards will be set by education professionals, who will also take responsibility for the delivery of programmes and classes designed in accordance with those principles. But education professionals can no more provide a world class education system on their own, than officers in an army could fight a war without the support of engineers, logistics personnel and enlisted recruits, or doctors provide a health system without the support of nurses, orderlies, pharmacists and hospital administrators.

Contemporary schools are complex institutions. Their success depends upon the application of a diverse range of skills and expertise in the fields of finance, management, human resources, information technology, sport and recreation and many more fields that I am sure will be known to delegates to this conference. School administrators are responsible for co-ordinating and resourcing all of these fields of expertise so that they work efficiently and harmoniously together.

The structures and processes through which that is achieved are what I loosely describe as "governance".

The Growing Role of Non-Government Schools

Given that this organisation draws its members from school administrators in non-government schools, it is worth noting the increasing role played by non-government schools in the education of Australian children.⁴

According to the Australian Bureau of Statistics, in 1970 there were over 2,000,000 students attending government schools in Australia. At that time, over 600,000 students attended non-government schools.⁵ By 2014, the ABS reported that there were more than 3,500,000 children attending school in Australia, of whom almost 2,500,000 were attending government schools, and more than 1.2 million were attending non-government schools.⁶ So, over the last 40 years or so, enrolments at non-government schools have increased at a much faster rate than enrolments at government schools.

Diversity

These figures also show that many of the delegates at this conference represent a sector which is responsible for the education of about one-third of Australia's children. That is a very significant

⁴ Without, of course, seeking to diminish in any way the continuing significance of government schools.

⁵ Australia Schools, 1970 (Reference No 13.5, August 1971) 7, Table 1 'Schools, Teachers, and Pupils : Australia, 1970 – Summary'.

⁶ 4221.0 Schools, Australia 2014 (19 March 2015) Table 90a 'Key information by States and Territories, 2009-2014'.

responsibility, magnified by the multi-faceted diversity of the people and organisations within the non-government education sector. To quote from your own organisation:

The students, staff and the school community encompass the whole spectrum of cultural and economic background that is the melting pot of today's modern society. Within the education sector itself, there is great diversity: kindergartens, primary schools, high schools, K-12 colleges, independent and Catholic systemic, secular and non-secular, boys, girls and co-ed, old and new.⁷

Of course, one of the great advantages of the non-government education sector is that schools within that sector have an autonomy which promotes innovation and flexibility, both of which are highly desirable attributes in an education system which must cater for an increasingly diverse society. The achievement of that innovation and flexibility depends critically upon good governance, the topic to which I will now turn.

Good Governance

I have been called upon to perform roles relating to the governance of a wide variety of organisations, including commercial organisations like law firms and barristers' chambers, not for profit and charitable organisations, professional organisations, and a variety of government organisations including, for the last nine years or so, the courts of Western Australia as a member of the Heads of Jurisdiction Board. I have also served as chair of the council of a non-government school, which has probably got more than a little to do with the reason why I have been asked to address you this morning.

⁷ Association of School Business Administrators, 'Embracing Diversity - Conference Preview' (8 June 2015) 3.

The HIH Royal Commission

Although the governance arrangements in these various organisations have had their strengths and weaknesses, and the organisations themselves have had their ups and downs, fortunately none of them experienced the catastrophic failure in governance which led to the collapse of the HIH Group of Insurance Companies, which was Australia's second-largest general insurer at the time. The collapse of those companies in 2001 was generally thought to have been the largest collapse, measured in dollar terms, in Australia at the time, and had many significant ramifications in various sectors of the community. A royal commission was appointed to inquire into the reasons for the collapse, and I served as counsel assisting that royal commission. The public examination of the failure of those companies revealed a lot about governance structures that had failed spectacularly, and from which, one would hope, we might learn about governance structures that are more likely to succeed.

The shock waves generated by the collapse were magnified by the fact that the companies had all the apparent trappings of success and good governance. They had large and opulent corporate offices in every State, a fabulous programme of entertainment for clients and associates, including generous gifts, charitable donations and corporate sponsorship. Its managing director was feted as one of Australia's most successful self-made men. The board of directors was composed of highly regarded, senior and experienced representatives of the business, legal and accounting communities. It

was audited by a highly respected accounting firm - one of the then big five, although the demise of that firm has now left us with the big four. It received advice from actuaries with respect to the provisions which should be made for future claims liabilities, and operated in an industry which was subject to the most intensive form of prudential regulation available in Australia by a recently created and apparently well credentialed regulator - namely, the Australian Prudential Regulation Authority. So how could it all go so wrong?

How could it happen?

Royal Commissioner Neville Owen has produced several thousand pages presented in three volumes in answer to that question, and it would be presumptuous of me to attempt to summarise all the reasons for the failure of the group in the few minutes available to me this morning. But if I could try to sum it up in one pithy phrase, I would draw upon the well-known analogy that "a fish rots from the head". Although HIH had all the traditional governance structures including a well-credentialed board, an audit committee, independent highly regarded auditors and actuaries, the best legal advisers a lot of money could buy and so on, all of those superficial structures failed because of an underlying moral and cultural deficit which started at the very top of the governance structures within the organisation, and ultimately seeped down to all levels of the corporate group, infecting officers at relatively junior levels. The fundamental problem was that at all levels in the organisation the question which they were asking themselves was "Can we do this?", or even "Can we get away with

this?" when, of course, the question they should have been asking is "Is this the right and proper thing to do?"

A Fish Rots from the Head

Let me try to give you some indication of the dimensions of the problem within HIH with some admittedly superficial examples. The profligate expenditure of the managing director, unchecked by the board, set an appalling example of irresponsible leadership. He spent \$380,000 of the company's money buying gold watches. He provided an unsecured and interest free loan from the company to a friend in an amount of \$500,000. He gave \$1600 worth of cigars to that man, purchased by the company, at the time the loan was outstanding and no interest was being paid on it. In the last year before the company collapsed, he organised a company Christmas party in Sydney that cost \$800,000. He was regularly giving away about \$5,000,000 per annum of the company's money to charities of his choice, most of whom reflected his generosity with other people's money by bestowing honours and accolades upon him personally. I digress to observe that these expenditures were incurred in the late 90s, at a time when, of course, the value of the dollar was much more than it is today.

Now you might think that I am being a bit petty by criticising these personal extravagances, when obviously they were not of an order of magnitude which could have caused Australia's largest commercial collapse, leaving a deficit of many billions of dollars. And of course that is right. Nor were the extravagances to which I refer illegal. But

the lack of respect for proper systems of governance, and the lack of a proper sense of stewardship of the shareholders' funds, came to characterise the major business decisions made at the most senior levels of the company, and also spread like an internet virus through all levels of the company.

The Rot Spreads

At the senior levels, a number of utterly disastrous decisions were taken without proper due diligence and evaluation. They included undertaking major reinsurance business in the UK, which lost hundreds of millions of dollars, embarking on a disastrous insurance venture into the United States and another into China, and the acquisition of FAI Insurance, which was a financial disaster. At lower levels in the company, this distortion of business ethics resulted in writing what was described as film insurance, but which was in fact a form of underwriting the profitability of film ventures in circumstances in which the underwriters had no idea what the film was, or as to its likely profitability. That ill-fated venture cost the company over \$100,000,000. At even lower levels still, it extended to providing insurance against a particular outcome in the European Football Cup which is, of course, nothing more than gambling. Other ventures included the provision of personal injury insurance to the Taiwanese military forces at a time of great tension between Taiwan and China, and the provision of reinsurance to Israeli motor vehicle insurers at a time when terrorism in that country was having a significant impact on motor vehicle damage.

The Smartest Guys in the Room

You will gather from this description of commercial dysfunction that although this fish started rotting at the head, the rot spread through the major organs and riddled the flesh. This putrescence was concealed from shareholders and investors by the adoption of accounting techniques, most but not all of which were legal, but which were unethical and immoral, and concealed the true financial state of affairs. Although those accounting techniques differed in detail from those adopted in the United States by Enron, which collapsed at around the same time, the common theme between both collapses was that the accounting techniques were designed and implemented by people who had a lack of commitment to disclosure of the truth. They might have been the smartest guys in the room, but they did not have a moral compass.

So what has all this got to do with administering a school I hear you say. The answer to that question is that it seems to me that there are a number of lessons of general application which we can draw from this example. The first is that the leaders of any organisation must set the right culture and ethical framework for the operations of that organisation. The moral ethos adopted at the top of any organisation will quickly permeate to all levels. That is why the school board, the principal and senior administrators must work together to enunciate and exemplify in their conduct the ethical framework which will govern all activities within the school, whether major or minor.

Ethics and Morality

Another lesson learnt from the failure of HIH and other similar organisations, is that prescription and regulation simply does not work unless it supports and encourages the development of ethics and morality as core principles within the organisation. Codes of conduct, strategic plans and business plans are all highly desirable managerial administrative tools, but they are worse than useless if they are not capable of ready application in day to day activities. If they are cast at a level of generality, or if they are replete with motherhood statements and clichés, they will be of little or no assistance. Indeed, they can do more harm than good, by inducing a false sense of confidence that all within the organisation comprehend and act according to the codes of conduct or ethical framework without there being any systematic audit or assessment of the extent of compliance.

Tick a Box Mentality

At the other end of the spectrum, there can be dangers in over-detailed prescription and regulation of daily activities within an organisation. Within the collapse of HIH we saw the real danger of a "tick a box" mentality relating to corporate regulation and governance. So, the board of directors was able to go through the standard checklist of governance questions and assert, "Yes, we have a competent, well qualified board; yes, we have an audit committee comprising members with appropriate expertise; yes, we have independent auditors; yes, we have actuaries advising us; yes, we have independent legal advisers" and so on. So, HIH would have scored positively on all those indicia of good governance, at a time when it was rotten to the core.

This proposition was better put by Dr Fred Robins in a paper dealing with corporate governance in the light of the increased regulation following the passage of the Sarbanes-Oxley legislation in the United States.⁸ He observed:

At some point we are obliged to recognise that it is ultimately impossible to regulate for ethics and common sense of the sort that might have saved us from HIH, or for that matter, from Enron. Prescriptive rules can provide important benchmarks for good corporate governance, but cannot by themselves do much to raise levels of actual performance. No rules would automatically prevent misleading or deceptive conduct any more than they will prevent outright fraud. Nor will the best rules in the world compensate for negligence, ignorance, apathy or stupidity. So the governance debate has to move beyond the checklist template.

A Governance Framework for Moral Behaviour

The third proposition I would draw from the HIH experience is related to the first two and it is essentially that the ethical framework and moral culture of any organisation is much more important than superficial compliance with traditional governance mechanisms or prescriptive standards of conduct. That framework and culture must encourage every person within the organisation to test every action which they are contemplating by asking whether it is the right and proper thing to do, is it something that **should** be done - not whether it is something that **could** be done, or worse still, whether it is something that they could get away with.

⁸ Fred Robins, 'Corporate Governance after Sarbanes-Oxley: an Australian perspective', *Corporate Governance: The international journal of business in society* (2006) (6:1) 34-48.

Governance and the Duty of Care

The expression "duty of care" has acquired a broader meaning in general usage than the legal meaning which it bears in the context of the law of tort, where it originated. Today I use the expression to connote the broader meaning given to the expression in common parlance - that is, the general obligation to take care of others.

Whether that obligation is assessed by a reference to legal principles or community standards and expectations, the extent of the obligation will depend upon all the facts and circumstances, including most particularly the nature of the relationship between the parties and the vulnerability of the person to whom the obligation is said to be owed. So, if a vulnerable person is placed under the care and responsibility of a person who has the capacity to protect that person from harm, the ambit of the obligation of care will be at its highest. As these are characteristics of virtually all schools, it follows that schools will properly be regarded by both the courts and the community as having a very substantial obligation to take proper care of the children entrusted to them, and will be expected to take all reasonable steps to minimise the risk that children will suffer harm while entrusted to their care.

The governance arrangements relating to schools must therefore be structured so as to ensure the effective discharge of this vital responsibility. In this respect at least, schools are rather different to the commercial organisations scrutinised in the HIIH royal commission.

The Royal Commission into Institutional Responses to Child Sexual Abuse

Appropriate guidance with respect to the effective discharge of the obligations which arise when a child is entrusted to the care of an institution can be found in the work of another royal commission - the current Royal Commission into Institutional Responses to Child Sexual Abuse. I am sure that many here will be aware of its work over the period of more than two years it has been in operation. As at July this year, in addition to the publicly conducted case studies the commission had completed 3,766 private hearing sessions relating to the sexual abuse of a child in an institutional environment.⁹ The royal commissioner, the Hon Justice Peter McClellan AM is well qualified to provide great insight into the magnitude of this behavioural scourge, and as to the ways in which the risk of future transgression can be minimised. In a recent address, he noted:

From the work we have done we know that there have been failures to protect children in residential facilities, schools, including boarding schools, Christian churches of every character, Jewish organisations, kindergartens, after school care, sporting organisations, dance classes, music organisations, scouts, hospitals and other institutions. There is no difference in the nature of the allegations nor in the mechanism for institutional failure between institutions conducted by the government and those in the private sector.¹⁰

In the same address he observed:

It is now apparent that when our task is complete we will have documented a period in Australian society when institutions failed the children in their care. I do not mean to condemn every institution. It is clear that many were managed and sustained by the efforts of both

⁹ Hon Justice Peter McClellan AM, 'Address to the Triennial Assembly of the Uniting Church in Australia' (15 July 2015) 2.

¹⁰ Note 9, 3.

volunteers and paid workers who understood how to manage an institution that provides for the welfare of children. But even then we can recognise that many well-intentioned people did not understand and did not respond to failures which should have been obvious in the institutions of which they were part. Although some institutions operated as single entities most have some integrated or overarching management arrangement or doctrinal regime. Failures may have been evident in the actions of one or a number of people but that does not excuse those in responsible positions who failed to provide appropriate policies to guide the institution and practices to inhibit the actions of offenders.¹¹

Societal Norms

Commissioner McClellan considers that the magnitude of these problems may have been exacerbated at a time in the history of Australian society when "prevailing social attitudes to children and an unquestioning respect for authority of institutions by adults coalesced to create the high risk environment in which thousands of children were abused."¹² In his view, the behavioural norm embodied in the adage "children should be seen but not heard", accompanied by an unquestioning belief in the integrity of those entrusted by reputable institutions with the care of children created "a volatile mix".¹³

It follows that the risk of recurrence of these tragic events will be reduced if the governance structures in any institution responsible for the care of children, including schools, fulfil at least two vital objectives:

- (a) mechanisms must be provided whereby children are given the opportunity, and are encouraged to inform adults other than those responsible for their immediate care of anything which is

¹¹ Note 9, 3.

¹² Note 9, 3.

¹³ Note 9, 3.

having an adverse effect upon them and are provided with a protected and completely safe environment in which to make such disclosures; and

- (b) supervision and management practices must be vigilant to the risk of child abuse, and cannot safely proceed upon an assumption of integrity: those systems must ensure diligent and effective investigation of any circumstance which might give rise to a suggestion of child abuse.

It must be conceded that until relatively recently, the legal system was not meeting either of these objectives. Until the last couple of decades, mechanisms for the encouragement of disclosure of sexual abuse and the protection of victims of that abuse were quite inadequate. Presumptions relating to the need for independent corroboration and prompt complaint together with highly adversarial cross examination, amongst other things, resulted in charges not being brought and in improbably high rates of acquittal when charges were brought. Although you are entitled to discount my next statement as being self-serving, I genuinely believe that our legal system has become much more responsive to and accountable for its treatment of the diversity which is characteristic of our community, including diversity of culture, language, Aboriginality, sexuality and gender diversity, physical and mental disability and those who are vulnerable, including children.

Like Commissioner Owen, Commissioner McClellan places great importance upon the culture of an institution. Both royal

commissioners have investigated too many institutions in which there was a prevailing culture of concealing failure and dysfunction, rather than a culture of diligent scrutiny and investigation.

Cultural Change

For that reason, Commissioner McClellan has spoken of ways in which cultural change might be achieved within institutions responsible for the care of children. He considers working with children checks to be a tool which helps to ensure that the right people are selected to work with children,¹⁴ and no reasonable person would quarrel with that proposition. He has also referred to a proposal in New South Wales that the same screening checks should apply to those who perform leadership roles in organisations that deal with children as those which apply to frontline staff, even though those in leadership roles may have no direct contact with children.¹⁵

It will be obvious from what I have said of my experience in the HIH Royal Commission that I regard the cultural approach taken by the leaders in any organisation to be a matter of vital importance. Anything which can be done to reinforce the importance of child safety to those in leadership roles within institutions responsible for child care has to be a good thing. However, there are two cautions which I would advance in relation to screening techniques like "working with children" checks. First, such techniques provide no protection against first time offenders, or at least offenders who have

¹⁴ Note 9, 9.

¹⁵ Note 9, 10. The Royal Commission into Institutional Responses to Child Sexual Abuse did not recommend such an extension of the checks in its *Working with Children Checks Report* (2015).

not previously been reported, and, by definition, every offender must offend and be reported a first time. Second, consistently with the views I have expressed about the possible dangers of a "tick a box" mentality, there is some danger that organisations might regard this relatively superficial screening as a substitute for proper due diligence both before and after hiring staff.

Commissioner McClellan has also given consideration to the extent to which the law might encourage cultural change within institutions. Of course, the criminal law imposes very significant penalties upon those who abuse children, but there is no significant history of civil or criminal sanctions being imposed upon institutions.

Institutional Civil Liability

The law of tort has long had behavioural change as one of its objectives. One of the purposes of imposing civil liability upon employers, or producers of consumer goods, or those responsible for the condition of land or buildings, is to encourage the adoption of appropriate standards of care for the protection of those who might be injured while at work, or consuming products, or while on land under the control of another.

Vicarious Liability

Achievement of this objective is enhanced through the principles known to lawyers as vicarious liability. Under those principles, an employer is generally liable for the actions of an employee undertaken in the course of their employment. However, the conventional view in

Australia has been that these principles have little or no application in relation to child sexual abuse, because it could not ordinarily be said that such abuse was undertaken in the course of employment. Accordingly, employers would only be liable to compensate those who suffered by reason of such abuse if they were negligent by failing to adequately investigate the employee prior to appointment, or to adequately supervise the employee, or to take appropriate action when the employee was under suspicion. As Commissioner McClellan has pointed out, in this respect, the current law of Australia can be contrasted to developments which have taken place in the law in the United Kingdom and Canada, in which, in some circumstances, an institution can be civilly liable for the criminal act of an employee even when the institution itself has acted without negligence.¹⁶ He has queried whether the law should be developed in a similar way in Australia.

It should, however, be noted that these principles may turn upon the position occupied by the relevant employee. So, a few weeks ago, Justice Rush of the Supreme Court of Victoria held that a school was liable for sexual misconduct committed by its principal because her seniority within the organisational structure of the school was such that her acts were, in effect, the acts of the school, and because the school had failed to adequately supervise the principal.¹⁷ The potential for institutional liability revealed by this case reinforces the

¹⁶ Note 9, 5.

¹⁷ *Erllich v Leifer and Adass Israel School Inc* [2015] VSC 499.

need to ensure the absolute integrity and moral commitment of those charged with leadership responsibilities in schools.

Institutional Criminal Liability

The Royal Commission into Institutional Responses to Child Sexual Abuse has also given consideration to the possibility of encouraging cultural change within institutions by creating a criminal offence applicable to institutions in which child abuse takes place. As Commissioner McClellan observes, while criminalising institutional behaviour might seem a significant step, it is not without precedent. As he observes, organisational criminal liability has been deployed to encourage behavioural and cultural change within organisations in a number of areas of the law including most notably workplace safety law and environmental law.¹⁸ An interesting paper which deals with that issue, amongst others, has been published by the commission.¹⁹ I am confident that the final report of the commission will greatly facilitate community and political consideration of these important issues.

Conclusion

I commenced my remarks with observations relating to the importance of education in general, and the non-government school sector in particular, including the blindingly obvious observation to the effect that effective governance structures are vital to the success of any institution, including educational institutions. In the paper I have

¹⁸ Note 9, 8.

¹⁹ Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (July 2015).

endeavoured to identify some of the factors which lead to effective governance structures in the context of institutional failures so catastrophic that they have led to the appointment of royal commissions of inquiry. That medium has, I hope, added dramatic emphasis to the points I wish to make. I hope that emphasis has not come at the cost of an erroneous impression that all or even a significant number of the schools in the non-government sector are prone to the risk of catastrophic failure of the kind investigated by those royal commissions. The school administrators represented by the association conducting this conference are entitled to take great pride in the contribution which their schools are making to maximising the potential of Australia's most valuable asset, our children, and are, I believe, very well equipped to advise upon and implement governance structures conducive to the achievement of that vital objective.