



## **Review of not-for-profit governance arrangements**

### **Response to Treasury Consultation Paper**

#### **Background to the Lord Mayor's Charitable Foundation**

The Lord Mayor's Charitable Foundation was established in 1923 and incorporated by an Act of Parliament in 1930. Its original name was the Lord Mayor's Fund for Metropolitan Hospitals and Charities. The first donor was the then Lord Mayor, Sir John Swanson. The Foundation is Melbourne's largest community foundation with nearly \$100 million in corpus and 193 charitable fund accounts within the Foundation. The Foundation is a Public Ancillary Fund with charitable status. The Board of Management is a charitable institution, which acts as the trustee of the Public Ancillary Fund, amongst other charitable activities.

The Foundation makes grants in the areas of family, youth, health, ageing, homelessness, the arts education and the environment. These include funds for both direct relief and social change grants. Current priority areas are Homelessness, Youth and Ageing. The Foundation provides Signature Grants for priority initiatives, Major Grants and General Grants. It has also recently introduced a proactive granting program. The Foundation funds more than 400 charitable organisations with Deductible Gift Recipient and Tax Concession Charity status each year.

In addition to grantmaking, the Foundation engages in public policy research and in community education through Forums, the commissioning of DVDs on particular charitable issues and through the media.

#### **Scope of Submission**

This submission responds only to the consultation questions that are of particular concern or relevance to the Foundation.

#### **Responsible Individual's Duties**

Overall the Foundation supports a principles based approach to ensuring good governance within the not-for-profit sector. Because of the different forms of incorporation and establishment of not-for-profits, it is important that any requirements of the Australian Charities and Not-for-profit Commission (ACNC) encourage good governance and accountability but do not increase the administrative burden on the sector.

Not-for-profits should be able to report to the ACNC against high level governance principles, which will usually be reflected in the requirements of the relevant legislation ie the Corporations Act, CATSI, or the relevant Associations Incorporation Act, the relevant Trustee Act and so on. As a

general approach, there is merit in linking the high level governance principles with the overriding duties as company directors under the Corporations Act for several reasons:

1. The duty to act with care and diligence, the duty to act in good faith in the best interests of the entity and the duty not to misuse position or information and to the duty to disclose material personal interests, are relevant to the governance of all not-for-profit entities with some level of accountability to the public.
2. These duties are clearly laid out in the Corporations Act and are well understood by many Board Members who hold both for profit and not-for-profit governance roles. This reduces complexity during Board induction.
3. A great deal of governance training, especially that provided by AICD, is focused on these duties and the relevant roles of a Board. Creating another framework would be confusing to those seeking to enhance their governance skills.
4. Where the entity is a trustee of one or more trusts, the additional duties of a trustee could of course also apply.

The standard of care and diligence required by a Board Member should reflect the size, tax status and level of risk of the entity's activities. The standard of care required of a Board Member should also take into account the particular Board Members experience and professional qualifications, as under the Corporations Act.

A majority of the Board of a larger not-for-profit that enjoys Deductible Gift Recipient status should be Responsible Persons as defined by the ATO. This already works well for the trustee of a Public Ancillary Fund and the Management Committee of an organisation on the Register of Environmental Organisations. Smaller DGRs should be required to have perhaps at least two Responsible Persons on their Board.

### **Disclosure Requirements**

The tiered/proportional reporting requirements that are being proposed as part of ACNC requirements make sense. The amendments to the Corporations Act that created three tiers of company limited by guarantee with different reporting and audit requirements are a good example of this approach.

The project to develop a standard chart of accounts that links with the proposed ACNC reporting framework is critical so that additional administration is not an outcome of the reforms. The reforms are meant to improve efficiency while increasing public accountability.

Reporting in relation to fundraising expenses, government grants, memberships of related entities are all appropriate provided that there is a context to the reporting. For example, different types of fundraising activities will require different expense models and the public will need to become better informed about financial and information management systems required to run a robust and trusted donor development program. Some fundraising activities also have community education outcomes such as awareness raising events.

Reporting on Board and Employee Benefits can be problematic in the not-for-profit sector as there is a wide range of Board fees and staff salaries. Detailed reporting could have a demotivating effect as

people may not want others to know how little or how much they earn. People work in the not-for-profit sector because they are motivated by things they value in addition to Board fees or salary. In addition, the not-for-profit sector requires professionally qualified accountants, lawyers, policy makers and managers and meeting salary needs can be a struggle. Detailed reporting could inadvertently push salary and Board fee expectations up.

### **Managing Conflict of Interest**

Managing actual and perceived conflicts of interest is an ongoing challenge in the not-for-profit sector. It extends beyond material personal gain into more subtle issues of avoiding the appearance of inappropriate influence or favour, for example in grantmaking to related organisations or the employment of relatives. This can have an adverse impact on an organisation's reputation but is managed well by most not-for-profit organisations.

Many not-for-profit organisations follow procedures to disclose actual or potential conflicts of interest at the start of a Board and Board Committee meetings. The procedures for managing conflict of interest under the Corporations Act and the Association Incorporation Acts are well understood and have been successfully applied by many not-for-profits that are companies limited by guarantee.

It is also important that good procurement practices are undertaken (for example, that a number of quotes are obtained for significant contracts) so that any perceptions of conflict of interest are avoided.

The sample policy in the Consultation paper (item 126) is a good outline of a sensible approach in this area.

### **Risk Management**

Risk management is integral to managing any organisation well. The risk management process adopted by a not-for-profit should match its level of risk and its organisational capacity and resources. It is better to operate an actively managed but simple risk management framework rather than develop a Rolls Royce complex version that lies in the bottom draw. All not-for-profits should have a Risk Management Framework that fits their organisation's activities and sector and a Risk Register that is considered by the Board every six months.

### **Governing Rules**

Governing Rules (or Constitutions or Trust Deeds) are particularly critical in the not-for-profit sector because there is a wide scope for differing approaches to:

- The process of Board appointment (election, appointment by the Board, appointment by member organisations, combinations of these and so on);
- The membership structure (which may include different voting and other rights);
- The term of appointment of Board Members;
- The qualifications of Board Members (for example, the Responsible Person requirement);
- The appointment of the Chair of the Board;
- The term of appointment of the Chair of the Board;

- Purposes (which are part of determining tax status);
- Powers
- Winding up provisions (again, relevant to tax status).

It would be useful if the ACNC provided a range of pro forma Constitutions and Trust Deeds available to adapt.

## **Other Governance Requirements**

In addition to the areas covered in the Consultation Paper it is important that not-for-profits have processes in place to ensure they are active in the other areas of Board responsibility listed below. (More information about these and related areas is contained in my book, *Great Foundation a 360 degree guide to building resilient and effective not-for-profit organisations* (ACER Press, 2010)):

### *1. Legal and Financial Compliance*

At a minimum a not-for-profit Board should be assured by management that compliance requirements are being met. This can be reported by management in a Compliance Table. New and emerging compliance requirements must be reported to the Board by management, especially as Board Members often work in different sectors and may otherwise not be up to date with changes. Some of the tax issues raised under Risk Management in the Consultation Paper can be dealt with by a formal annual review of the tax status and ATO requirements.

### *2. Strategic Planning*

One of the Board's key roles is to set strategic direction, in consultation with management. Ensuring that there is a Strategic Plan in place that is reviewed at least every three to five years to reflect the changing external and internal environment is critical. This should be a governance requirement.

### *3. Board Effectiveness Reviews*

A Board should review its own performance each year through a process that leads to improved governance. There are many processes available, from simple self-education questionnaires to complex, externally facilitated processes. This should also be a requirement, perhaps at least bi-annually, which should build not-for-profit's organisational capacity.

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