



**The Exchange Project**

# **Review of Not-For-Profit Governance Arrangements**

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Consultation Paper December 2011

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# REVIEW OF NOT-FOR-PROFIT GOVERNANCE ARRANGEMENTS

The Exchange Project is pleased to submit our response to the Review of not-for-profit governance arrangements Consultation Paper.

## Who we are

The Exchange Project is a newly established nonprofit organisation that specialises in helping small to medium non-government organisations shape their own futures and achieve long term sustainability. Our purpose is to provide ideas, insights and management expertise to help build the strategic and organisational capacity of nonprofit organisations.

Central to The Exchange Project is a virtual clearing house to collect, store and disseminate information and resources useful to nonprofits. The clearing house will eventually act as an intermediary that connects nonprofits seeking solutions to problems with a community of ‘problem solvers’ all of whom have specialised knowledge and skills spanning the full range of management disciplines. In addition, nonprofits will be able to link with volunteer and pro bono support through a facilitated search process.

## 1. Our experience with boards

- The directors of the Exchange Project have accumulated many decades of experience in working with and on boards of not-for-profit organisations. This has led us to the view that governance in the sector, particularly in the smaller to medium sized organisations, leaves a lot to be desired. Most of the boards we have dealt with over the years, or heard about from discussions with NFP managers, whilst having good intentions do not understand the difference between management of the organisation and governing the organisation.
- Without a keen understanding of the specialised role of governance many boards fill the knowledge vacuum by managing the manager – in other words concerning itself with the business of everyday operational matters of the organisation.

## 2. Our view on the cause of poor governance

- A board that does not know what work it needs to do, let alone how to do it, will inevitably be inclined towards the easier option of acting as second tier (albeit, a less informed one) of management. This can be very frustrating for a competent manager. Conversely, it can be a convenient excuse to an incompetent manager who excuses poor organisational performance on the grounds of an interfering, incompetent board.
- The issue of what is properly the work of a board and what is the work of management, is an old chestnut that has yet to be satisfactorily resolved in the sector, and in our opinion is the root cause of much of the sector’s poor track record in governance. It is not surprising that many NFP boards (and many managers for that matter) have difficulty in knowing when the work of one ends and the other begins since much of the literature about governance is also confused on this matter.

### 3. Our view of board members

- Boards that don't know how to do their own work exhibit many different forms of behaviour ranging from merely 'rubber stamping' management reports through to meddling in the organisation's every day details. Too often board members are recruited for their perceived influence or professional skill with little consideration given to their knowledge of governance or the time they have available to fulfil their governing obligations.
- A further factor affecting the performance of NFT boards lies in the fact that board members are voluntary, quite often holding down busy full time employment, and for the most part are not expecting, or indeed willing, to devote to their role the same level of commitment or intellectual energy as do, for example, directors of for-profit boards.

### 4. What we support

- We commend the Government's decision to establish the Australian Charities and Not-for-profits Commission (ACNC) as an independent one-stop shop regulator for the sector.
- We support the notion of having a well-defined set of governance principles for the sector as outlined in the Consultation Paper. In relation to the specific coverage and content of these principles, we believe that the following governance principles are excellent models upon which the Australian not-for-profit governance principles could be based.
  - The ASX Corporate Governance Council corporate governance Principles and Recommendations 2010. These would need to be tweaked to apply to non-for-profit organisations;
  - Charity Commission UK – a code of governance for the voluntary and community sector.

### 5. What we don't support

- We don't think that enshrining governance principles in legislation is desirable or feasible. In our view legislating the principles would hinder their subjection to ongoing scrutiny and review. Any set of principles or codes of behaviour need to be reviewed from time to time to ensure their continued relevance and compatibility with new knowledge.
- Legislating the principles implies the need to regulate compliance which in turn demands some form of response or punishment to noncompliance. The sheer number of NFPs, and the length of time and difficulty involved in proving compliance/noncompliance, would not only be extremely difficult to enforce, but also very expensive.

## 6. Regulating 'high level' duties

- Notwithstanding the above, we do agree wholeheartedly with the need to integrate the 'high level' duties of responsible individuals enacted in legislation in all Australian states and territories under the one ACNC legislation. The higher duties to which we refer include:
  - a duty of care and diligence
  - a duty to act in good faith in the best interests of the entity;
  - a duty to not misuse their position;
  - a duty not to misuse information; and
  - a duty to disclose material personal interests.
- We also support the idea of the ACNC regulating the compliance of NFPs with these higher level duties. This would pick up on the best parts of state and territory legislation and combine them into the one point of reference for the sector. In turn this would facilitate the adoption of a consistent nationwide approach to maintaining regulatory compliance.
- The high level duties of individuals are well understood in the sector since they are the general legal responsibilities of members of NFP boards. They are also common sense applications of what people should normally do if they are charged with looking after someone else's interests. In this sense these duties are quite separate from, and should not be integrated with, the principles of good governance.

## 7. What we suggest

If the intention of the Government is to improve the overall performance of governance in the sector, then we believe a regime needs to be implemented where:

- the ACNC regulates NFP compliance with the general legal responsibilities enshrined in the legislation; and
- the principles of governance (as previously discussed) be developed in a way that allows for auditing. Whilst we are not suggesting that adopting these principles or standards of governance is compulsory, we are recommending that incentives (including resources) are put in place to encourage their uptake.