

EMERGING LEGAL THEMES – CORPORATE GOVERNANCE OF CHARITIES

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Once upon a time...

Key Emerging Themes:

- (i) Accountability
- (ii) Conflicts of Interest
- (iii) Related concepts of duties of the board and fiscal responsibility



NFP Governance Myths

- (i) NFPs operate according to different rules than commercial sector
- (ii) Financial considerations are not central to NFPs



The Reality

- ⊙ Greater compliance and regulation for NFP over past decade
- ⊙ Charities Act 2005
- ⊙ Income Tax Act 2007
- ⊙ Regulatory controls by Department of Internal Affairs

Pragmatic Assessment of Governance in NFP Sector

- © Governance amongst NFPs today is intrinsically concerned with financial practice management and diligent utilisation of human resources, enveloped by principles of business efficacy

A Snapshot

- ◎ Over 114,000 registered charities in NZ
- ◎ Approx 27,000 charities manage assets worth \$40 billion
- ◎ Annual income for asset rich charities is approx. \$15.1 billion
- ◎ NFP Sector alone is worth \$60 billion as at March 2017

⦿ Interests

⦿ Risks

⦿ Outcomes

- ◎ WHAT is governed?
- ◎ HOW it is governed?
- ◎ BY WHOM?

- ◎ Board is “the Brain”
- ◎ Responsible for
 - disclosing conflicts of interest
 - financial oversight
 - oversight of internal controls and legal compliance

Accountability

© The process of holding actors responsible for their actions, individually and corporately

- ⊙ Essentially a relational concept
- ⊙ Varies according to relationships between parties
- ⊙ Varies across different types of organisations – i.e. membership, service, advocacy

- ◎ NFPs are expected to be accountable to multiple parties:
 - To funders/patrons
 - To service clients & other stakeholders
 - Internally to themselves
 - To their missions

A Lesson in Accountability

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Conflicts of Interest

Any situation in which an individual's personal interests or loyalties could, or may be perceived to, prevent that individual from making a decision in the best interests of the organisation

Handling Conflicts of Interest

- (i) Identify *actual* conflicts or *potential* conflicts
- (ii) Act decisively to prevent the conflict from affecting any important decision
- (iii) Record the actual conflict, or the possibility for conflict occurring
- (iv) Report and/or declare the actual conflict – confess to possibility of conflict arising

Avoiding/Minimising Conflicts of Interest

- (i) Internal training on loyalty to the organisation, on promoting the “mission” of the organisation diligently and without compromise
- (ii) Educating management and board on what constitutes “conflict” and avoiding private pecuniary gain
- (iii) Comprehensive internal systems and procedures in place to question how decisions are made and the motivation of decision-makers

(iv) Procedures and policies to raise issues relating to manner in which decisions are made and reporting decision-making processes

(v) Read and follow the organisation's body of rules/constitution

(vi) Holding regular internal review meetings in larger organisations, say, within teams

(vii) Managers and board members who are “interested” in particular activities to immediately withdraw from all related meetings and not be involved in any decision-making concerning the interest

(viii) Knowledge is important – so other decision-makers should be cautioned about disclosing or discussing matters pertaining to the subject matter with the conflicted board member or manager

Dealing with an actual conflict that is authorised

- (i) The conflicted person to not be involved in the activity or influence it in any way
- (ii) The benefit must be properly authorised and recorded (resolutions, waivers, annual reports, etc)
- (iii) It is important that the benefit is exchanged at a value/ in a manner which will not disadvantage the organisation in any way

(iv) decision-makers must carefully follow conditions attached to the authority which enables the conflict to be addressed and the benefit to pass – such authority can clarify how the conflict will be managed effectively without harm to the organisation

Further cautionary tales