PHILANTHROPY
Australia

Australian Philanthropy

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Governance and regulation in philanthropy

What do you need to know?

- David Ward on governance essentials
- Alice Macdougall's checklists for trustees
- Myles McGregor-Lowndes on improving compliance

***Australian Philanthropy* is the journal of Philanthropy Australia Inc.**

Philanthropy Australia is the national peak body for philanthropy and is a not-for-profit membership organisation. Our Members are trusts and foundations, families and individuals who want to make a difference through their own philanthropy and encourage others to become philanthropists.

Our vision
A giving and caring nation.

Our mission
To represent, grow and inspire an effective and robust philanthropic sector for the community.

Philanthropy
The planned and structured giving of money, time, information, goods and services, voice and influence to improve the wellbeing of humanity and the community.

Philanthropic sector
Trusts, foundations, organisations, families and individuals who engage in philanthropy.

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Front Cover
Our front cover photograph shows David Ward, author of the *Trustee Handbook: Roles and Duties of Trustees of Charitable Trusts and Foundations in Australia*, presenting a seminar entitled 'Understanding the Governance of Charitable Foundations' as part of Philanthropy Australia's professional development services. Photograph by Andrew Ashton Photography.

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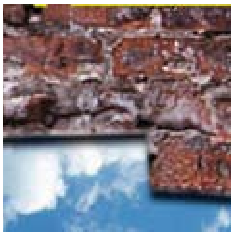

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From the CEO

Until Warren Buffet announced his extraordinary gift to the Bill and Melinda Gates Foundation in mid 2006, the word ‘philanthropy’ was not well understood in Australia and many considered it very old fashioned. Fast forward to today and the word ‘philanthropy’ now seems to encompass all types of giving. However it is defined, there is no doubt that the profile of philanthropy is increasing. Prominence and visibility bring greater recognition but also greater scrutiny.

The issue emerging from our Members is that of finding the right balance on governance and regulation. In this edition of *Australian Philanthropy* this issue of balance is raised in a number of different ways. Do we have the right mix of trustee time and resources spent on the three core governance obligations: administration, investment and grantmaking? In some foundations the prime focus of trustees has been scrutinising grantmaking strategies and activities, while outsourcing investment. On the other hand, the legal framework has focused on regulating investment, but largely ignored grantmaking.

In response, Philanthropy Australia will be developing our professional development program to provide specific seminars on investment strategies, as well as publishing a PPF/PAF Trustee Handbook. However the over-riding goal must be to ensure that the philanthropic sector remains vibrant, flexible and attractive to donors, which is not just in the best interests of the philanthropic sector but also those of charitable organisations and the entire community which they serve. ■

Gina Anderson, CEO, Philanthropy Australia

From the Assistant Treasurer

In tough economic times, philanthropy remains a beacon of hope and pragmatism, inspiring others to generosity. The Rudd Government places a strong policy premium on charitable giving and on recognising all philanthropists in our community.

I am aware the not-for-profit (NFP) sector and philanthropy are going through a dynamic phase of change. Traditionally in Australia, much of our giving has been anonymous. Today, many philanthropists are taking a lead in championing the role of philanthropy publicly.

Until the abolition of death duties, most trusts and foundations were established by bequests. Since then, the majority of private foundations have been set up during the life of the benefactors. In addition, the large growth in wealth before the global recession, together with the anticipated inter-generational transfer of wealth, is prompting an increase in overall giving.

With this higher profile in the media and on the internet, there are increasing calls for both transparency and accountability in philanthropy and across the NFP sector.

Recently, the Rudd Government held an inquiry into ‘Improving the Integrity of Prescribed Private Funds’ and through wide consultation has refined and updated the relevant legislation and guidelines. One immediate result is Prescribed Private Funds (PPF) will now be known as Private Ancillary Funds (PAFs). Philanthropy Australia, and the whole philanthropic sector, has worked closely with the government on clarifying and revising the rules under which PAFs operate.

The legislation that was introduced into parliament in June 2009 establishes for the first time a comprehensive legal framework for PAFs that will boost the integrity of our tax system and ensure such funds deliver strong philanthropic outcomes.

PAFs are an important feature of charitable giving in our country and the Rudd Government strongly supports their use. They continue to be a significant catalyst in building a culture of philanthropy in Australia and developing a socially cohesive community. Those setting up PAFs effectively encourage their families, friends and peers to engage with Australian civil society.

Following the PPF Inquiry and with the new PAF framework, there now is an opportunity to build on the understanding between the Rudd Government and the philanthropic sector. I'm pleased to introduce this ‘Governance and Regulation’ issue of *Australian Philanthropy* to you. ■

Senator Nick Sherry, Assistant Treasurer

From the President

Australia is in a phase of rapid regulatory changes that will have a profound effect on the philanthropic sector and the not-for-profit sector. No one involved in the philanthropic sector (or the not-for-profit sector) should underestimate the significance of these changes.

The primary catalyst for change is a reformist Rudd Government, which as part of its agenda also wishes to engage much more with the not-for-profit sector.

As a result, at representations on regulatory reforms and government inquiries have moved to centre stage in terms of the services that Philanthropy Australia provides to Members.

In representing the sector, Philanthropy Australia's approach is to promote the sector and its contributions while also contributing to good public policy and building relationships with governments, other sectors, the media and academics.

In recent times, representations by Philanthropy Australia have focused on two vital areas: first, the regulation of Prescribed Private Funds (PPFs) and, second, accounting standards and a standard chart of accounts for the not-for-profit sector.

The Guidelines that have been issued recently by Treasury in respect of Prescribed Private Funds, which will now be known as Private Ancillary Funds, will simplify and improve their operation. The changes are very welcome and the Rudd Government should be congratulated for cementing the role of PPFs, which were first established by the Howard Government in 2001.

Now, with strong bipartisan support, these changes will deepen and broaden Australia's philanthropic tradition, which has already resulted in some 800 PPFs being established, $1.3 billion being contributed to PPFs and more than $300 million being distributed. New philanthropists will be encouraged and new family traditions in philanthropy will be built.

Second, through representations to a number of government inquiries in the past few years, including the Senate Economics Committee Inquiry into the Non Profit Sector and the Stronger Community Organisations Project in Victoria, Philanthropy Australia has argued that the sector's transparency and performance would be enhanced through specialised accounting standards and a standard chart of accounts. These reforms are now receiving growing acceptance and, when introduced, will assist Members in their assessments of organisations' financial capacity and performance.
Looking ahead there are two current government inquiries that could fundamentally change the regulations affecting philanthropy and the not-for-profit sector – the Henry Tax Review and the Productivity Commission Review into the Contribution of the Not-for-Profit Sector.

The Tax Review notes in its Consultation paper: The tax concessions for the not-for-profit (NFP) sector are complex and applied unevenly.

Gifts are an important source of funding for NFP organisations. The current gift deductibility arrangements impose compliance costs on individuals and provide high income earners with greater taxation benefit the lower income donors.

The Review then poses two questions:

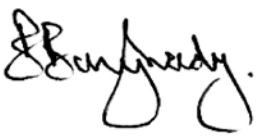
What is the appropriate tax treatment for NFP organisations, including compliance obligations?

Given the impact of the tax concessions for NFP organisations on competition, compliance costs and equity, would alternative arrangements (such as provision of direct funding) be a more efficient way of assisting these organisations to further their philanthropic and community-based activities?

These observations and questions suggest that the Henry Review will recommend some significant changes to the current taxation arrangements for the not-for-profit sector which are likely to have a profound effect on its activities, including the philanthropic sector.

The Productivity Commission Review into the Contribution of the Not-for-Profit Sector has been given very wide terms of reference, including how the sector's contribution could be improved, impediments to the sector's effectiveness and enhancing its relationships with other sectors.

In anticipation, Philanthropy Australia has made submissions to the Henry Tax Review and the Productivity Commission. Now, Philanthropy Australia is working with other leading organisations in the not-for-profit sector to strengthen the sector's leadership, so that it will have a stronger voice on the regulatory and policy issues that will profoundly affect the sector in the years ahead. ■



Bruce Bonyhady, President

Guidelines for Private Ancillary Funds, formerly PPFs

With the recent release of the Guidelines for Private Ancillary Funds (formerly known as PPFs), the PPF structure has now been refined and updated. The Rudd Government, in accepting the recommendation of Philanthropy Australia, its members and the wider philanthropic sector to set a minimum distribution rate of 5 per cent for Private Ancillary Funds (PAFs), has signalled its commitment to backing a successful social innovation for the long term, enabling PAFs to make a significant and profound contribution to Australian society.

The major provisions in the guidelines below are designed to simplify and streamline the establishment and operation of PAFs while refining their governance and regulation:

- Minimum distribution rate of 5 per cent of market value of assets at the end of previous financial year. Funds must distribute at least $11,000 if the 5 per cent is less than $11,000 and the expenses for that year are paid from the Fund's assets or income.
- For currently existing PPFs, there are transitional rules which include the stipulation that if an existing PPF's governing rules prevent compliance with the new guidelines they have until 1 October 2012 to comply (by seeking to have the governing rules amended). There are also transitional distribution rules for existing PPFs.
- No stated requirement that PAFs make their contact details or other information available to the general public.
- No stated requirement for PAFs to have a single corporate trustee.
- Assets other than land must be valued annually; land must be valued every three years.
- Trustees must also prepare and maintain an investment strategy for the fund.
- There is no maximum limit set on donors, but there is a requirement that PAFs do not solicit donations from the public, and that in any given financial year they do not accept donations totalling more than 10 per cent of assets from entities other than the founder or associates or employees of the founder.
- A PPF can be converted into a PAF with the agreement of the Commissioner.

Further information can be found on the website www.philanthropy.org.au/

Farewell

Philanthropy Australia is saddened by the loss of two noted philanthropists, Richard Pratt and Victor Smorgon AC.

Richard Pratt died at his home on April 28 2009. Well-known both for founding the Pratt Foundation and for making personal contributions, particularly for the arts but across a wide variety of other causes, Mr Pratt was also a vocal and enthusiastic advocate for philanthropy. A State Memorial Service was held on Sunday 21 June, at the Arts Centre's Hamer Hall.

Victor Smorgon passed away on July 3 2009, aged 96. After emigrating to Australia from Ukraine as a child, Victor Smorgon moved his family business from the butcher's shop started by his father into other areas such as meat exporting, fruit canning, and production of plastic and steel, making it Australia's largest private company. Together with his wife Loti, Mr Smorgon was a generous donor to a variety of organisations and causes; they made news last year with a $15 million donation to the National Gallery of Victoria. ■

Modernising Charity Law conference

The Australian Centre for Philanthropy and Nonprofit Studies hosted the Modernising Charity Law conference for 84 invited guests over three days in mid-April. Participants included over 20 leading charity law and regulation scholars and practitioners from common law jurisdictions including the New Zealand Charity Commissioner, Singapore Charity Commissioner and Revenue Canada nonprofit section head. State and federal public servants who are involved in nonprofit regulation or the numerous reform inquiries being currently undertaken also attended, together with peak sector organisations' representatives.

Senator Stephens who attended the conference said, "Not only was the conference notable for its lively discussion, but it's also very rare to have in one room so many third sector specialists and practitioners from across the country and around the world sharing the experiences of their own countries, comparing them with others, and reflecting on the success and lessons learned."

Experiences of the recent reform agenda from each jurisdiction were explored as well as the issue of defining and measuring public benefit, unrelated business income treatment, expansion of the heads of charity, religion as a charitable purpose, regulatory systems going beyond charity to all third sector organisations and an assessment of different philanthropic incentives and their possible application in Australia. In the last couple of years England, Wales, Scotland, Ireland, New Zealand and Singapore have all implemented significant charity law reforms which bear a striking resemblance in many instances to the unimplemented Australian Charities Definition Inquiry recommendations of 2001.

You can listen to a Podcast summary of the conference by Senator Stephens, Prof Dennis Young, Bob Wyatt and Laird Hunter QC at http://www.bus.qut.edu.au/research/cpns/podcast/. You can also download conference papers or streamed video or audio recordings of the presentations from the Centre's website at http://www.bus.qut.edu.au/research/cpns/seminarevent/pastseminar.jsp ■

QUT Queensland University of Technology
The Australian Centre for Philanthropy and Nonprofit Studies

Cath Webb

Cath Webb is a granddaughter of the founder of the John T Reid Charitable Trusts. Back for her second five year term as a Trustee, Cath spoke to Louise Arkles about what the role means to her.

Coming back into the sector after time away, what do you see as the main challenges to trustees?

The current worldwide financial situation affects trusts and foundations just as it affects many other sectors. We now have to look for the best opportunities to fund in areas of need, and to target our funding as effectively as possible.

The second challenge is that the landscape for trusts and foundations has changed in the five years I was not on the Trust, and it took a bit of running to catch up! There is now a much clearer need to understand the legal and financial responsibilities of being a trustee. When I left there was a much stronger reliance on goodwill, and now there is a stronger reliance on governance.

What caused that change?

It seems to be a cultural shift and was, I imagine, driven by a couple of key legal decisions in the 1980s as well. Required by law, there is now a legal as well as an ethical obligation to understand governance responsibilities. Back in my grandfather's day philanthropy was very personal and many dealings were completed with a handshake. While I appreciate how that must have been a satisfying way to do business, we can't rely on the handshake alone any more.

The evolution has been slow, moving from the handshake to the paper trails that we need now. I think partly it has been informed by not-for-profit organisations (NFPs) and foundations in the United States and Europe. Certainly in some overseas organisations there has been a great deal of emphasis on making sure that donated money has been spent on what it was raised for.

Many NFPs are now significantly more scrupulous about being accountable for their donations. It is also incumbent upon those of us in donor organisations to take the same approach.

What sources have you found most useful for governance information?

Other trustees and our vastly knowledgeable staff are a key source of information. We have a huge breadth and depth of knowledge around our boardroom table. Experienced board members provide information, leadership and continuity to the foundation – a generation of people who have a corporate memory. Documenting that corporate memory is really important – writing histories and having a manual of procedures is vital.

I have also recently done the Australian Institute for Company Directors' not-for-profit governance training, which was invaluable.

Personally, I read widely on philanthropy and the NPF sector too, however the work of each foundation doesn't necessarily happen with reference to other foundations. We do what we do and it's fairly self-contained, but there are opportunities to collaborate from time to time.

Your grandfather was the founder of the John T Reid Charitable Trusts – what significance does that hold for you?

While I am delighted to have that family continuity, the contemporary role of trusts and foundations requires that we have to take a professional view of what we do. As trustees, we are not just family members of the founder but have a legal responsibility to act in good faith and to understand the work of the Trust, and the legal and ethical framework in which it sits. We need to understand where the money has gone, to know that the project for which we were providing funds has happened and what the impact has been.

Do you enjoy the investment management component of the trustee role?

Personally this is an issue where I have to work quite hard, I find giving it away is a little easier. I need to put in the homework on the investment side of things, but there's plenty of information both within the Trust and external information to support me in this.

At the John T Reid Charitable Trusts we're very lucky that we can fund Australia wide and across a range of fields: our Trust deed is broad and that's a fine thing.

Are you optimistic about the future of philanthropy?

Australians are fairly generous, and are fantastic in a crisis but it would be great to see an increase in non-crisis giving. I would like to see individual people less reluctant to give and having more confidence in their ability to trust NFPs. I think it is clear that we need a greater understanding of the work, achievements and importance of the third sector to Australia.

One of the big drivers of change around mainstreaming philanthropy is that the more we talk about it the more it becomes an expectation in society.

This is my second five year stint as a trustee, and what I've found most rewarding, both last time and now, is the astonishing things that people are doing that need funding. Truly people out there are changing the world, and its really a privilege to be able to see those things and help those people get on with it. It's fabulous. ■

Cath Webb, Trustee of the John T Reid Charitable Trusts

Governance: the need to know

While governance has become a widely used word in the business context, it is as relevant to foundations as it is to the business community. Many would argue even more so, given the tax exempt status philanthropy enjoys. In this article **David Ward**, author of the *Trustee Handbook: Roles and Duties of Trustees of Charitable Trusts and Foundations in Australia*, explains what it is those in positions of responsibility need to know.

"We hold ourselves responsible to those who created us, to those with whom we currently interact, and to those who may look to us in the future."

- What do we mean when we use the term governance in the philanthropic context?
- Who is responsible?
- What does good foundation governance actually entail?
- Governance failure.

What is 'governance'?

There are many definitions of the term governance, starting with The Oxford Dictionary's 'to steer, guide, and control'. However, within the business setting the mostly widely used description in Australia is from Justice Owen and the Royal Commission into the collapse of HIH, who described corporate governance as:

"The framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations".[1]

In the philanthropic context, with the often used description of philanthropy being 'private money for public means', governance needs to blend the requirements for the stewardship of private assets with the concept of public service. So in addition to the business corporate governance principles as set out in the ASX's 'Corporate Governance Principles'[2] the concepts of public service, best described in the UKs The Seven Principles of Public Life from the Committee on Standards in Public Life[3], also apply. This blend places strong emphasise on the core concepts of integrity, honesty, selflessness, ethical and responsible decision making and managing risk. *The Preamble to Stewardship Principles and Practices for Independent Foundations*, published by the US Council on Foundations, sets this out well:

"As responsible stewards of philanthropic assets, independent foundations should work in ways that benefit the public and also reflect fundamental values that include honesty, integrity, openness, fairness and accountability."[4]

Who is responsible?

Governance of charitable foundations is the prime responsibility of the trustees. In this regard significant elements of trustees' responsibilities and duties are the same as those of directors of public companies. While state Attorneys General have supervisory responsibilities for all trusts, including charitable trusts, because there are no shareholders, Annual General Meetings or the equivalent of ASIC providing close scrutiny, the onus for getting 'things right' falls predominately on trustees themselves.

That being said, particularly for those foundations with the additional Deductible Gift Recipient (DGR) tax status – namely Public Ancillary Funds and Prescribed Private Funds (PPFs) – there is some additional compliance and monitoring by the ATO. The phrase I like that captures this essence of a governance framework for trustees is from the US Council on Foundations 2005 statement:

"We hold ourselves responsible to those who created us, to those with whom we currently interact, and to those who may look to us in the future."[5]

This captures the notion that good foundation governance underpins community and government confidence and support for the philanthropic sector. More directly good governance also protects trustees from the personal liability a breach of trust might entail. Trustees should not forget that the requirement under Trust law for a breach of trust is restitution by the trustees from their personal resources. Finally, while all trustees are accountable and responsible, those individuals and organisations that hold themselves out as having expertise in the field, such as Statutory Trustee Companies, have a higher duty of care.[6]

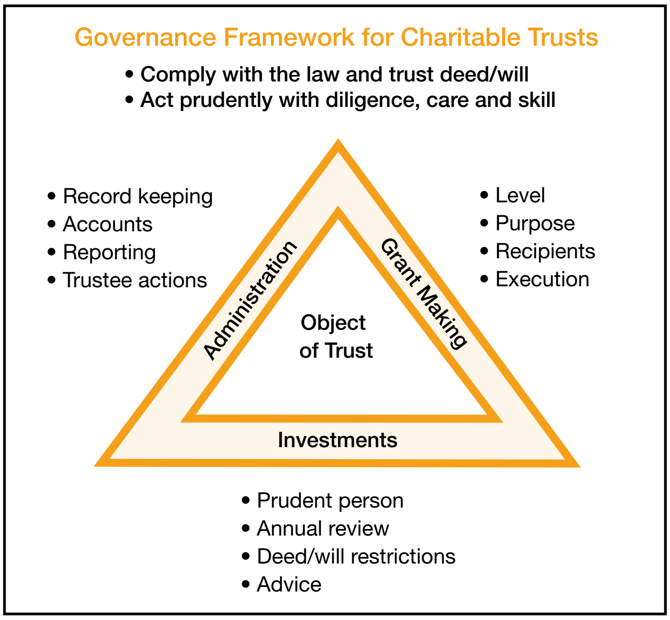
What does good governance entail?

Through the governance framework trustees are accountable for directing the affairs of each foundation to ensure it is well run, compliant with relevant federal, state and common law and the deed, and is supporting the charitable activity for which it was established. Moreover, trustees have a fiduciary responsibility to manage money on behalf of others and to exercise their powers with integrity and good faith and avoid any personal conflict of interest.[7]

Drilling down from the proper process and behavioural requirements there are specific practical components that comprise effective foundation governance, which can best be summarised using the following diagram around the three prime foundation activities: Administration, Investment and Grant Making[8].

The core minimum requirements are the following:

- **Administration**: to keep proper records and accounts including having them audited if required; to file required reports; to avoid actual or potential conflicts of interest; and to act solely in the best interests of the trust.
- **Investment**: to protect and manage the trust assets with the care, diligence and skill of a prudent person; to take appropriate consideration of the key investment parameters set out in the relevant State Trustee Act including diversification, risk, balancing income and growth, and tax; to formally review the investment portfolio at least annually; and to take advice.
- **Grantmaking**: to ensure the required level of granting is achieved within the purpose of the deed; to ensure only 'eligible recipients' are funded; and to ensure the proper execution of the grants made.



The *Trustee Handbook: Roles and Duties of Trustees of Charitable Trusts and Foundations in Australia,* published by Philanthropy Australia in 2008,[9] provides the full specific detail on each of these elements; this can be downloaded free from the PhilanthropyWiki at http://philanthropywiki.org.au/index.php/Trustee_Handbook

It needs to be recognised that there is significant variation between foundations on key aspects of activity. For instance, the nature of 'eligible recipients' in particular varies greatly between foundation structures as does audit and reporting requirements. There may also be restrictions or guidance in the deed itself on grantmaking and/or investment policy.

Therefore the starting point for trustees of any foundation in developing a governance process is to understand the legal structure of that specific foundation and become familiar with the trust deed. Just because one foundation can do something, for example award scholarships to individuals or grants to small charities, it does not mean that others can do likewise. PPFs, for instance, cannot award scholarships directly to individuals or support organisations without DGR, but some other foundations can. In this regard, while philanthropy tends to be a very collegial activity, it is important to be wary of informal advice from a trustee of one foundation to trustees of another, as the second foundation may have a different structure and/or objects.

The matter of foundation expenses can also pose governance questions. To start with, trustees cannot pay themselves more than is provided for in the deed, which may be a nominal amount or nothing at all. Only the Courts can authorise more. Other expenses must be reasonable. However, this does not mean foundations should be unduly spendthrift, particularly in the two key areas of investment, (especially if Trustees lack direct experience in the investment sphere) and grant research.

Proper research of social issues, due diligence of potential grantee organisations and post project evaluation are all necessary for effective philanthropy. Larger foundations in particular may require paid professional services from staff or contractors where the task is beyond trustees own time commitments or capabilities. As Professor of Philanthropy Joel Orosz, states "there can be both bad and good foundation overhead expenses," the bad should be eliminated, the good nurtured.[10]

"… expenses must be reasonable. However, this does not mean foundations should be unduly spendthrift, particularly in the two key areas of investment, and grant research."

Recognising governance failure

At its most basic, governance failure stems from either falling below the standards for process and/or behaviours, or not completing some of the specific tasks in accordance with the regulations or deed. Overall in Australia there seems to be a general understanding and adherence to the required behaviour of trustees to make decisions with care, diligence and prudence. However, that being said, it is also clear from the available data (and anecdotal evidence) that there have been breaches of granting regulations and conflicts of interest may not have been always as well managed as is required. While one hopes most of these are inadvertent, stemming from a lack of knowledge of the detail of the regulations, ignorance of the law is not a legal defence.

In thinking about governance it is important to clearly distinguish between governance failures on the one hand and outcomes not meeting expectations on the other. The two are not necessarily the same. Governance is about process and care and diligence in decision-making, not solely outcomes. Particularly in the current financial climate, most if not all foundation investment portfolios will have declined significantly in value over the last 18 months. Does this represent failure of good governance by trustees? Maybe, maybe not.

The governance test is whether in managing the portfolio the Trustees considered the various factors set out in the trustee legislation[11] including risk and diversification, whether regular annual reviews were being conducted and whether trustees had taken advice if their expertise was not in the investment sphere. These are the questions that need to be asked rather than simply whether the portfolio has fallen in value by more than the accepted benchmark.

Similarly, a well thought through and executed project that failed to deliver the expected outcome may not be, prima facie, a governance failure. Philanthropy is able to, and many would argue should, take risks in funding new ambitious approaches to tackle deep-seated problems in ways that may not appeal to governments or business. This will mean that from time to time projects will not achieve their desired outcomes. As Dennis Collins, the ex-CEO of the James Irving Foundation in the US, says "not failure, but low aim is the real sin"[12].

Raising the bar

The governance framework should not be limited to simply ensuring minimum legal requirements are met. There should also be a focus on being effective. Every foundation was established to achieve a social purpose and there is an expectation by the benefactor and the community of that money being spent to achieve maximum impact, which underpins the beneficial tax exempt environment in which foundations operate. Grant monitoring, for instance, should not be restricted to solely ensuring whether the money was spent, but also include an evaluation of whether the project achieved the intended outcome, whether that be of reducing social disadvantage or finding a new cure. To enhance transparency and community support many Trustees choose to publish Annual Reports, setting out financial information and details of a sample of projects funded during the year. This also provides an opportunity to showcase some of the community organisations the foundation has worked with.

In conclusion, involvement in a charitable foundation is an intrinsically rewarding role, but there are significant responsibilities. The prime governance objective of Trustees is to ensure the foundation pursues the objects of its trust deed within the law. In addition to their legal fiduciary responsibilities, Trustees have a moral responsibility to the community, as foundations operate in a government endorsed tax exempt environment, creating an expectation that there will be significant community benefit. Finally, trustees should also ensure their actions do not damage the reputation of the sector.

Good foundation governance requires specific actions to be completed, however it is wrong to think of governance as solely a 'to do' list. The essence of good governance of charitable foundations is the adoption of proper processes, appropriate behaviours and meeting trustees' fiduciary responsibilities. ■

David Ward is Treasurer of Philanthropy Australia, and a Director of ANZ Trustees and Share Gift Australia

1. Justice Owen in the HIH Royal Commission, *The Failure of HIH Insurance Volume 1: A Corporate Collapse and Its Lessons, Commonwealth of Australia*, April 2003 at page xxxiii.
2. ASX, Corporate Governance Principles and Recommendations, 2007.
3. Committee on Standards in Public Life (Nolan Committee), Standards in Public Life, 1996.
4. Council on Foundations, Stewardship Principles and Practices for Independent Foundations, 2005.
5. Council on Foundations, Stewardship Principles and Practices for Independent Foundations.
6. Investment Sections of state Trustee Acts and J Finn in Australian Securities Commission v As Nominees, Ample Funds Limited and others, 1995.
7. David Ward, Trustees Handbook: Role and Duties of Trustees of Charitable Trusts and Foundations in Australia, Philanthropy Australia, 2008. http://philanthropywiki.org.au/index.php/Trustee_Handbook
8. Philanthropy Australia Trustee Seminar material, 2008.
9. David Ward, Trustee Handbook: *Roles and Duties of Trustees of Charitable Trusts and Foundations in Australia*, Philanthropy Australia, 2008. http://philanthropywiki.org.au/index.php/Trustee_Handbook
10. Professor Joel Orosz, Centre for Philanthropy and Nonprofit Leadership, Grand rapids, Michigan, 'High Overhead, low overhead, no overhead' in *Philanthropy NZ News*, Spring 2008.
11. The various State Trustee Acts, i.e. Trustee Act 1958 Victoria.
12. Dennis Collins, 'The Art of Philanthropy', in *Just Money A Critique of American Philanthropy*, 2004.

Optimising value with your auditor

Good communication between auditors and those charged with governance lies at the heart of the auditing process. **David Gibbs** has a wealth of experience as an auditor to and trustee of community organisations, and explains that relationships are just as important to an auditor.

Many philanthropic organisations require the appointment of auditors but relatively few use the relationship to optimise value. From the auditor's perspective, the opportunity does not always arise to address the Board or senior management on matters that come to their attention or indeed as part of understanding the broader processes and governance of the organisation.

So what are the rules?

For Companies Limited by Guarantee, appointment of an auditor is mandatory. The company must produce General Purpose Financial Statements and the auditor must follow the Corporations Act in attesting to his report which necessarily includes abiding by a range of Auditing Standards. For other types of community organizations, the appointment of auditor is generally required by the relevant legislation or trust deed.

Some three years ago, Auditing Standards were made part of the Corporations Act for the first time. For the purposes of this article, two standards are particularly relevant:

- ASA 260 Communication of Audit Matters with those charged with Governance; and
- ASA 300 Planning an Audit of a Financial Report.

Communication with those charged with governance is at the hub of the issue. The onus is quite clearly on the auditor to make sure that this happens. However, I would assert that those charged with governance must take some responsibility for being available and open to communicate with auditors!

For the purpose of this Auditing Standard, 'governance' means the term used to describe the role of persons entrusted with the oversight, control and direction of the entity. Those charged with governance includes those persons accountable for ensuring that the entity achieves its objectives with regard to reliability of financial reporting, effectiveness and efficiency of operations, compliance with applicable laws, and reporting to interested parties.

Some of the audit matters of interest dealt with under the Standard include:

- the scope of the audit;
- the accounting policies;
- the potential effect of risks and exposures;
- material audit adjustments;
- material uncertainties;
- disagreements with management; and
- the independence of the auditor.

These audit matters need to be communicated on a timely basis and in an effective form which would generally be in writing.

The Standard in relation to planning encourages communication with management and those charged with governance regarding the expected type and timing of reports to be issued and other communications, both written and oral, including the auditor's report, management letters and communications to those charged with governance. The communication is expected at the start of the audit , throughout the audit and at the end.

In practice, I am of the view that the auditor should attend a meeting of those charged with governance to present the audit plan before the detailed audit work is performed. In this way, the auditor can assess the connectedness of the governance regime to the inherent control environment under audit and those charged with governance can have direct input into the audit process.

When the financial statements are ready for signing, those charged with governance should convene a meeting to sign their statement to the effect that the accounts are fairly stated and that the organisation can pay its way as and when accounts are due. The auditor should attend this meeting. In this way, not only do those charged with governance have direct access to the auditor but the auditor can observe and assess the diligence and competence of those so charged. At this meeting, the auditor should table, in writing, the matters that came to his attention during the audit. The auditor will need to be satisfied that the governance has been satisfactorily discharged.

Larger organisations may delegate the relationship with auditors to an Audit Committee. It is of importance that the Audit Committee is comprised of those charged with governance and that the relationship with auditors is not delegated to management.

Holding office as a trustee, director or senior executive requires you to have a relationship with your auditor. Relationships are created, maintained and enhanced by communication and in this case supported documentation.

David Gibbs practises as a Chartered Accountant at Mutual Trust Pty Ltd, specialising in family financial advice. For some 20 years he was as auditor to a wide range of community based organisations, including Philanthropy Australia. He is currently a Board member of Abbottsford Convent Foundation, Mittagundi Outdoor Education Centre and the Point Nepean Respite Centre Ltd. ■

Improving governance in the nonprofit sector

Sparse but compelling evidence shows there is considerable room for improvement in the governance of some charitable trusts. **Professor Myles McGregor-Lowndes** reports on compliance failures and an evaluation tool that CPNS is developing to address the problem.

Persons who are charitable trustees or directors of companies acting as trustees are lightly externally regulated, compared to other OECD jurisdictions.[1] Much falls upon the integrity and capacity of trustees to ensure the trust funds are properly and efficiently managed.

There is often no natural forum of accountability for such bodies as they may in essence have no members and no annual member or stakeholder meeting to be held to account usually through an annual report.

The State Attorney General with the assistance of the courts at common law has for centuries been theoretically the overseer of prudent governance by charity trustees. This has not been a proactive function in recent years. For better or worse, Australia has not developed an administrative structure such as a charity commission to require annual reporting to provide a forum for scrutiny and accountability.

The one set of foundation trustees who are more tightly regulated is the Prescribed Private Funds (PPF). They face annual scrutiny by the Australian Taxation Office through an annual information return. Their record is not encouraging, as in 2007-2008 the Australian Taxation Office reported that it completed 45 reviews of PPF endorsements, resulting in 21 cases receiving written advice to implement changes to ensure future compliance with tax obligations. Not all of these were mere technical breaches as the ATO was concerned with general adherence to the prescription of the fund, use of offshore investments to gain benefits, inappropriate access to fund property, excessive expenses and benefits by trustees or founders and distributions to non-eligible recipients.[2]

In 2007 it appears that up to $9.2 million, being about 8 per cent of all distributions, was distributed to ineligible organisations or persons, a very technical area, but still a significant leakage of distributions.

"The (ATO) reported that it completed 45 reviews of PPF endorsements, resulting in 21 cases receiving written advice to implement changes to ensure future compliance with tax obligations."

The recent Treasury paper on reform of PPFs claimed that:

"Breaches include: PPFs carrying on a business; PPFs making loans offshore and/or to associates of the founder or major donor (these loans are of particular concern when they are provided at a reduced or zero rate of interest or are not repaid); and PPF funds being used to purchase property for use by the founder or their associates (examples of property have included both residential and commercial real estate and motor vehicles)."[3]

For all concerned it is clearly beneficial for the governing body to be effective in its role rather than having external bodies expending significant resources to find and correct governance failures. Unfortunately the popular debate moves too quickly to external accountability mechanisms without first seeking to encourage those charged with the responsibility of governing the body to fulfil their role. This is not only the case for foundation trustees, but for directors or committees of other nonprofit bodies as well.

Attempting to ensure that a governing body is operating appropriately involves some type of evaluation. Evaluation of a board or trustees can take a number of forms from self reflection by individuals to an external evaluation by a governance professional. A number of US-based validated tools currently exist for the purposes of evaluating nonprofit boards and their relative effectiveness. For example:

- Herman and Renz (1997)[4] propose board effectiveness as a function of: stakeholder and CEO judgements of board effectiveness; board, staff, and funders' perceptions of organisational effectiveness; objective indicators such as stated organisational effectiveness criteria; other organisational variables such as total revenue, and retrenchment strategies.
- Another example is the Board Self-Assessment Questionnaire (Holland, 1998).[5] This assesses board performance in six areas that have been shown to be characteristic of effective boards (i.e., context; education; interpersonal, analytical, political, and strategic skills).

- Lastly, the Governance Self-Assessment Checklist (Gills, 2004)[6] assesses board effectiveness on 12 dimensions, e.g. relating to board culture, management, decision-making, monitoring, and development.

There is no publicly available recognised evaluation tool for nonprofit boards or trustees which has been properly validated for Australian law and cultural norms. The governance research team at The Australian Centre for Philanthropy and Nonprofit Studies identified this gap several years ago. They were generously funded by John T Reid Charitable Trusts and the ANZ Queensland Community Foundation – A N Carmichael Memorial Fund managed by ANZ Trustees to rectify the situation.

The project set itself the challenge that any board evaluation tool developed:

- should empower users to have ownership of their evaluation and planning processes and build 'reflexive' boards – that reflect on and learn from the evaluation process and are able to pass on such learning skills to their successors;
- should encourage open discussion and interaction in a board on possible governance changes that would improve governance with positive impacts upon organisational effectiveness;
- needs to be relevant to boards and their context: 'one size fits all' governance solutions are inappropriate in the nonprofit sector because of diversity of organisational cultures, size, activities and geography; and
- needs to be evidence based and responsive to different contexts: prescriptive 'how to do it' tools based on 'armchair' thoughts around ideal or heroic boards can lead to inappropriate guidance and may eventually prove de-motivating.

After an extensive review of the literature and consultation with a wide variety of nonprofit board members, the 'team function approach' to work groups which is an integrated and holistic approach was chosen as the theoretical basis. This approach was developed in relation to work teams by Wageman, Hackman, and Lehman and resulted in a Team Diagnostic Survey. While the team function aspect has not been studied formally in a board setting, it aligns with anecdotal and normative assessments of effective board functioning in nonprofit organisations. Principles of the Team Diagnostic Survey have been adapted and extended for use in a nonprofit governance context, with some aspects of the model excluded due to lack of relevance to boards.

Our pilot research so far indicates that board members and officers think about their governance in terms of five different areas. These areas are board involvement in:

- **Strategy** including setting direction, planning, ensuring alignment between actions and plans as well as monitoring organisational performance.
- **Risk and compliance** including overseeing risk management plans, understanding legislative risks, overseeing legislative and stakeholder requirements, along with understanding key risks.
- **Oversight of the governance system** including understanding and delineating the board's role, assessing the board's performance and developing skills and having frameworks for managing compliance and risk.
- **Oversight and management of the chief executive** including performance management (both assessment and remuneration), succession planning for senior management and the chief executive, and assisting, advising or mentoring the chief executive.
- **Providing access to resources** for the organisation including scanning the environment, making contacts available to the organisation, securing necessary resources and contributing new ideas.

During the last half of 2009 the research team will be seeking the cooperation of a large number of foundation and nonprofit boards to validate the diagnostic surveys that the initial pilot research produced. This will be through board members of participating bodies completing three online surveys (about 35 minutes in total) from which will be generated a governance effectiveness report for those boards and validation data to refine the board effectiveness tool.

Once the surveys have been fully developed, tested and are relatively stable, the tool will be freely available on the internet. It is envisaged that a data warehouse of de-identified survey results will be developed where boards will be able to upload their results into a secure online data warehouse. With a databank of results, it will eventually be possible for nonprofit boards:

- to benchmark their own performance against that of comparable boards (for example in terms of sector or size); and
- to assess their own performance over time.

Having a databank of results will also inform future evidence-based research on nonprofit boards and assist the further development of the evaluation tools.

More information about the project can be found at https://wiki.qut.edu.au/display/CPNS/DYB+Home and you can participate by contacting the project team:

Email: a.overell@qut.edu.au

Phone Anne Overell: (07) 3138 6780. ■

Myles McGregor-Lowndes, Director of the Australian Centre for Philanthropy and Nonprofit Studies (CPNS) at QUT http://www.bus.qut.edu.au/research/cpns/

QUT Queensland University of Technology
The Australian Centre for Philanthropy and Nonprofit Studies

1. We exclude from this article trustee companies which are subject to their own regulatory and accountability regime.
2. ATO Compliance Plans 2007-08 and 2008-09 http://www.ato.gov.au/corporate/content.asp?doc=/content/00155156.htm&page=66&H66.
3. Treasury, Improving the integrity of Prescribed Private Funds (PPFs), 2008, Para 27 available at http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1444.
4. Herman, R. D., and Renz, D. O. (1997) 'Multiple Constituencies and the Social Construction of Organizational Effectiveness.' *Nonprofit Management and Leadership*, vol. 26(2), 185–206.
5. Jackson, D. K., and Holland, T. P. (1998) 'Measuring the Effectiveness of Nonprofit Boards.' *Nonprofit and Voluntary Sector Quarterly*, vol. 27(2), 159–182.
6. Gill, M, Flynn, R J, Reissing, E (2005) 'The Governance Self-Assessment Checklist: An Instrument for Assessing Board Effectiveness' Nonprofit Management and Leadership, vol. 15(3), Spring 2005.
7. Ruth Wageman, J. Richard Hackman, Erin Lehman (2005) 'Team Diagnostic Survey: Development of an Instrument', *The Journal of Applied Behavioral Science*, Vol. 41 No. 4, 373-398.

Louise Gourlay

Louise Gourlay OAM, Chairman of The William Buckland Foundation, is one of a rare breed of women chairs of philanthropic trusts in Australia. She spoke with Louise Arkles, editor of *Australian Philanthropy*, about the role.

How did you first come to be involved in philanthropy?

I had spent most of my 'charitable life' at the Royal Children's Hospital (RCH) in Melbourne. I was on the Committee of Management for 12 years and am still the patron of the Auxilliaries so it has been part of my life, with many other causes, for a very long time. Trinity College at the University of Melbourne was my husband's great passion, together with the Stroke Foundation, and since his death I have remained very involved with these organisations.

After my retirement from the RCH Board, Ian Roach, who was the Chair of The William Buckland Foundation, approached me asking if I'd become a trustee. I had huge respect for Ian – he was a wonderful man and as they hadn't ever had a woman on the Board before I agreed to give it a go. It has been a very rewarding experience.

What is it that you bring to the Board?

My only tertiary qualifications are secretarial so time and experience are what I bring to my role at Buckland, and really my 'life skills'. I'm a mother of four and grandmother of eight. I also run a farm and the family charitable trust – at Trinity College the Gourlay Family have a perpetual fund for a professor of ethics in business. I've been fundraising for various causes all my life, from kindergartens and schools to the Childens' hospital and various charities. This breadth of experience has really stood me in good stead for my role as Chairman.

What does it mean to be the Chairman?

I think it is a very personal role. 'People' are my great interest, so my style is to talk to, listen to and learn from them. My co-trustees are all busy businessmen who have restricted time, so are happy for me to undertake that role.

It's important to meet the people behind the grant applications to know who is doing what, and I am often invited to events to hear and see what organisations have been doing. I function on gut feelings and by meeting people and hearing them speak about their work, I can make assessments in my own mind.

How long were you on the Board before you became Chairman?

I have been on the Board for approximately six years and chairman for nearly three. Initially I felt I couldn't take on this role, that I didn't know enough about it. Specifically I thought I didn't have the financial expertise that was essential to Buckland's success. I knew the value of Barry Capp's and Ian Roach's contributions, and the trustees that had gone before them, who took the responsibility of building the investments to a substantial capital base.

> **"Just communicating with people takes time, and listening and negotiating which are really just life skills, require commitment."**

Consequently, I agreed to take on the role of Chairman if I could be supported by a Finance Committee and a separate Chairman of that group. I am on this committee, and having been married to someone in the finance industry, and having the experience of running our family investment business with my children, I find I am capable of understanding the finances, but I have handed responsibility for it over to an expert.

I took on the 'people' side of the role, which is really my strength: attending functions, working with the researchers, meeting the people we're going to give money to, and saying 'thank you'.

What advice do you have for those considering taking on the Chairman role?

Having the time to give the role is very important; being available for whatever crops up. At Buckland we officially have four meetings a year, but that often varies. We do have four granting rounds a year, but we often need to meet and talk and work through issues between these meetings. Just communicating with people takes time, and listening and negotiating which are really just life skills, require commitment.

To be passionate about the cause is vital too, whatever it is. To see the outcome of a successful program we've funded gives me tremendous excitement and pleasure. A grant that will start the ball rolling and help all those wonderful people out there who are doing the work, (I have huge admiration for people at the coalface) and like 'giving' of any sort, time or money, the reward is always far greater than your contribution. ■

How to ensure your PPF Board is effective

Having established over 40 foundations and assisted with the implementation of their strategic giving programs, **Peter Winneke** gives us the essentials of PPF governance.

Unlike corporates who have shareholders or non-profits who have donors, PPF boards are typically accountable to no outside entity other than lodging an annual return with the Tax Office. This creates a challenging environment for PPF boards to operate in, where for all practical purposes the determination of whether a PPF is effective in achieving its goals rests primarily with the board.

Despite no obvious group holding the PPF board accountable, given the tax exempt status of the PPF a board should consider itself as the custodian of public funds, with the expectation from the community of significant social benefit as a result of the PPF. Governance Statements play an important role and should assist effective boards to focus on:

- assessment of the overall performance of the foundation and board;
- development of the foundation's strategy, including mission, and monitoring the execution of the strategy;
- assessment of social impact;
- investment strategy; and
- grantmaking strategy.

Assessing the PPF's social impact and setting of strategic planning should therefore be seen as integral to the board's effectiveness. If there is no board approved strategic plan, the construct which decisions are made and performance judged under is what should be considered. If the board is the custodian of public money to be used for the public benefit, an assessment of social impact should also be a key requirement of the governing body of a PPF.

A unique aspect of PPFs is the role of the 'responsible person'. Effectively an independent director, the responsible person of the PPF must be aware of his/her responsibilities, including ensuring the work of the PPF is performed in accordance with the Trust Deed, the PPF guidelines, the Governance Statement and with integrity.

A strong Governance Statement will build in requirements for the board to set and approve a strategic plan, and include criteria for performance assessments which extend beyond the usual indicators to include social impact as well. ■

Pete Winneke is Head of Philanthropic Services at The Myer Family Office
http://www.mfo.com.au/

Are archives another accountability?

The Helen Macpherson Smith Trust recently established an archive (HMS Archive) to ensure the documentary history of its benefactor Helen Macpherson Schutt (née Smith) and her Macpherson, Smith and Schutt families are secure, preserved and accessible for present and future researchers.

The Chairman of Trustees Darvell Hutchinson advocates that "vibrant living legacies of benefactors bring accountability to their trustees to professionally preserve the heritage of a philanthropic trust or foundation". Consequently, two years ago, I was employed as a consultant archivist.

Much of the material in the Archive was acquired during the extensive research for the publication *'Helen Macpherson Schutt: Philanthropist 1874-1951'* (Jane Sandilands, 2001) to mark the 50th Anniversary of Helen's death.

The research revealed the quite significant industriousness and entrepreneurial activities of Helen's pioneering Scottish forebears. The details of Helen's personal life, however, remain elusive. Her life in Australia and Europe, and her death in Cannes in 1951, were both 'mysterious' and research continues to unfold aspects of this to be added to the Archive.

Archives throughout Australia hold many iconic treasures, from the ephemeral to significant objects, memorabilia and special collections. However essential evidence of private and public lives can also be found in the ordinary day-to-day recordings of past generations: company ledgers, journals, annual reports, minutes and correspondence; family letters, diaries and newspaper clippings; birth, marriage and death certificates; wills and land titles; photographs, maps and drawings.

The policies and processes of establishing and building the Archive are documented in an article now available on the PhilanthropyWiki at http://philanthropywiki.org.au/index.php/Archiving_at_the_Helen_Macpherson_Smith_Trust

Small static displays are planned of selected material from the Archive. Copy material will be used to promote the activities of the Trust and to acknowledge the generosity of Helen Macpherson Schutt.

Go to the HMST website for more information http://www.hmstrust.org.au/about-the-trust/hms-archive. Enquiries are welcome. ■

Shirley Goldsworthy, Archivist, Helen Macpherson Smith Trust
http://www.hmstrust.org.au/

What should you know? Take the tests for good governance

What must trustees (or directors of an incorporated trustee) of grantmaking foundations know to ensure they fulfil both their legal duties and achieve good governance? Alice Macdougall, Special Counsel at Freehills, offers four checklists for new and experienced trustees.

Good governance

Good governance of grantmaking foundations (generally trusts, though these comments apply equally to any structure) requires the trustees (including in this paper, directors of incorporated trustees) to have some basic essential knowledge. This knowledge should be provided either before or on appointment of a new trustee as part of an induction process.

What should every trustee know?

On appointment, a trustee should be provided with the following, with some explanation from the chair or CEO:

- legal information relating to the structure and tax status;
- information relating to the financials and investments;
- information as to grantmaking processes and legal limitations; and
- information as to expectations of trustees.

It is useful to have an induction pack that goes to each new appointee regardless of their background or previous experience. It may also be useful to ensure it is reviewed each year by all trustees, both as a refresher of the relevant information but also to ensure it is kept up to date.

Of course, the circumstances of the particular foundation should be taken into account when considering the scope of information.

Checklists

Try these four checklists to see what you know and to check what you provide to new trustees. Use these as a starting point for developing an induction process that is appropriate to your foundation.

Grant making strategies

- ☑ **Eligible recipients**: The restrictions in the constituent documents as to eligible grant recipients should be explained. Explain what is meant if the trust can only give to DGRs in item 1 of the table in section 30-15 of the *Income Tax Assessment Act 1997*. (This will be a requirement if the foundation is a public ancillary fund or a PPF). If the foundation can give for charitable purposes, are new trustees given a short overview of the legal meaning of charitable purposes? What are the systems to ensure compliance?
- ☑ **Grantmaking policies**: Any current plans or policies adopted by the trustees as to grantmaking. Copies of the information available to applicants on grantmaking and grantmaking processes.
- ☑ **Evaluation**: Information as to any research or evaluation done on the grantmaking. Information as to the reporting requirements from grant recipients and how the reporting is provided back to the trustees or used to shape future grantmaking.

"Good governance of grantmaking foundations requires the trustees to have some basic essential knowledge. This knowledge should be provided either before or on appointment of a new trustee as part of an induction process."

Financial information

- **Accounts**: Copies of the last three financial accounts and any audits should be provided.
- **Funding**: Information regarding the funding of the foundation, i.e. whether there is an endowed amount or funding is received from other bodies or the public.
- **Administration expenses**: What are the administration expenses? Are there policies or public statements as to the level of expenses?
- **Investment strategy**: Details of the current investments and information on the investment strategy of the foundation. Are franking credits claimed? In whose name are investments made?
- **Income and capital**: Explain any accumulation strategy and any restrictions in the constituent documents or policies adopted regarding grantmaking from income or capital or the percentage of income to be distributed each year. If it is a PPF there are different requirements from other foundations.
- **Banking**: Details of bank accounts and bank signatories. Details of any financial delegations.
- **Budget**: The current budget and any strategic plan should also be provided.

Expectations

- **Role**: Philanthropy Australia's *Trustee Handbook*[1] should be provided to help ensure the trustee properly understands his or her role and duties. A trustee should be encouraged to ask questions and make suggestions.
- **Time**: A schedule of proposed meeting times, dates and venues and the expected time for delivery of board papers prior to these meetings plus any standard agenda items. The trustee should be clear on the time commitment that may be required in attending meetings, reading papers and related research.
- **Events**: If there are strategy days or evaluation days, it should be explained that the trustees are expected to attend, contribute to the agenda and participate in the sessions. It may be that trustees are expected to attend events and possibly site visits.
- **Review**: Are the contributions of the trustees regularly reviewed? Is there a maximum age or tenure? Is there a policy on composition, skills and succession planning?

1. *Trustee Handbook: Roles and Duties of Trustees of Charitable Trusts and Foundations in Australia*, by David Ward. 2008.

Structure and tax status

- **Trust deed/will/constitution:** each trustee must have a copy of the trust deed and any deeds of amendment (or preferably a consolidated version of the amended trust deed) or if the foundation is established by will or court order, a copy of the relevant documents. If the trustee is incorporated, a copy of the constitution must also be provided.
- **History**: A brief history of the foundation may be useful together with any brochures or other promotional materials, if relevant.
- **Trustees**: A list of other trustees, their skills, experience and background, period of appointment as well as contact details should be provided. Any composition policy and review processes.
- **Staff**: A list of staff and volunteers who assist in the foundation's activities, include an organisational chart, titles, areas of responsibility and contact information.
- **Fundraising**: If the foundation raises funds from the public, provide confirmation of fundraising registrations in all applicable states and territories.
- **Tax status**: Information regarding the tax status should be provided and explained. Is the foundation endorsed as a charitable fund (tax concession charity or TCC) or as an income tax exempt fund (ITEF)? Is it a deductible gift recipient (DGR) as a public ancillary fund, a prescribed private fund or another category, such as a necessitous circumstances fund or is it specifically named in the *Income Tax Assessment Act 1997*? An explanation of the restrictions or requirements of the tax status should be given.
- **GST**: Is the foundation registered for GST? Does it include GST in its grants?
- **Advisory committees**: If there are any advisory committees or sub-committees, the charters, roles and responsibilities should be provided together with the names, contact details, skills and experience of those on the committees.
- **Advisers**: Details of the financial advisers or managers, lawyers, accountants, auditors and other advisers should be provided.
- **Insurances and liabilities**: Information on any insurances maintained should be provided. Are risks adequately covered?

Governance of foundations

New trustees should be encouraged not to assume the foundation has a clean bill of health but to ensure that he or she is happy with the compliance and good governance within the foundation. ■

Alice Macdougall, Freehills

Darvell Hutchinson

Mr Darvell Hutchinson AM, Chairman of the Helen Macpherson Smith Trust, took early retirement from public practice to give more time to the community as a board member of charities and to take an active management role in the philanthropic sector. He is a trustee or director of several philanthropic trusts including the Helen Macpherson Smith Trust (HMST), The John Villiers Trust, and the Order of Australia Association Foundation. He spoke with Louise Arkles, editor of *Australian Philanthropy* about good governance.

Are there barriers to good governance in the philanthropic sector?

Often a more relaxed approach is taken to governance, but should not be. I hold a pragmatic view that running a philanthropic foundation or a service charity is a business no different from running a free enterprise operation, except of course that the former are tax exempt and are there to optimise their net profit for community benefit rather than shareholder reward. We are in a business to serve beneficiaries and therefore are answerable for sound governance. Charitable entities should be more cognisant of governance obligations because of the tax status they enjoy, coming of course from the public purse.

Some philanthropic foundations emphasise grantmaking as the sole purpose of their organisation. I don't support that: we are running a business and that entails first making the money, ensuring its proper reporting and compliance, and then giving it away through grants. For service charities it means giving to their breath of community services. So the obligation is upon trustees firstly to maximise the revenue stream, in order to then enhance the quantum and quality of grantmaking or services.

Is this because the distribution side is seen to be more rewarding?

Yes, however grantmaking is more onerous today. In this economic climate, most funders would be sending out many more letters of regret than letters of approval.

Over the long term, the rewarding aspect of philanthropy should be to look back and know that you've made a worthwhile contribution; by being an enquiring and effective trustee. Building the corpus of the HMST has been a major part of my role as trustee. In 1964 it was worth $4 million. Today it's worth $76 million, having given away $75 million of grants. Before the current economic meltdown, in November 2007, we peaked at $114 million, which commends Helen's benefaction of £275,000 in 1951.

That must surely be amongst the most satisfying achievements for you?

It is indeed, and it's been a privilege to be involved in Australian philanthropy. The movement has come a long way since its infancy of the 60s. The experience I've gained in the sector has been helpful also to a number of people who have asked to come and have a chat about their philanthropic intentions or problems. One of the joys has been acting as a mentor to those considering being a trustee, or forming a philanthropic trust. I look back and can see a few foundations that certainly came out of conversations I had, and their subsequent achievements give me much pleasure.

> **"There's no doubt in my mind that regulation is inevitable and only around the corner… it is now down to 'when', and 'in what form', rather than 'if'."**

How did you come to be involved in philanthropy?

I became involved in philanthropy in 1964 when a partner in chartered accounting firm Wilson, Bishop and Henderson, today PKF, and I became trustee in what was then called the Helen M Schutt Trust. We looked after Helen's accounting and investment needs, as we had for her family for generations. In 1970 I became Chairman and in 1988 took early retirement from my firm to devote more time to my directorships and community involvements. I joined the board of various charities including the Asthma Foundation of Victoria and the National Gallery of Victoria. I became President of The Australian Association of Philanthropy (as Philanthropy Australia was then called) in 1988, when the organisation was in its infancy, and remained on Council until 1993.

I think it is most helpful to those on the grantmaker side of the table to also have been involved on the other side of the table with grantseeking organisations. It gives one a better appreciation of the challenges faced by grantseekers, and makes for better trustees, having had a blend of both sides of the equation.

How can we move towards encouraging that transparency? How do you feel about further government regulation?

I'd like to see Philanthropy Australia take a lead role in shaping transparency for the lawmakers. Also, to devote more training sessions to accountability and transparency, as vital governance principles, for there's no doubt in my mind that regulation is inevitable and only around the corner. The Senate Standing Committee on Economics report can only strengthen one's view that it is now down to 'when', and 'in what form', rather than 'if'. I support national regulation provided it is not a one-size-fits-all system. I don't see our sector benefiting greatly in the eyes of government if there are views on regulation being put at total tangents and we can't portray the philanthropy movement as an informed cohesive voice.

Public transparency remains a sensitive issue for some trustees. There is a school of thought that if one is disclosing already to a regulator, as PPFs do, that is sufficient and one doesn't really need to do further public disclosure. That still seems unclear from the new draft PPF rules which states that a trust "is open, transparent and accountable to the public (through the Commissioner)."

We seem to have very few opportunities for benchmarking in philanthropy.

Benchmarking within our sector is almost a no-go, which is a shame. The whole sector – grantmakers and service providers – could benefit from financial benchmarking, such as investment performance and costs of operation. This is possible, whether or not foundations and charities outsource their investments to professional managers. HMST does its own investment management. We benchmark ourselves against the ASX 200 as the most comparable benchmark, but ironically can't benchmark ourselves against our peers.

Is that because they aren't undertaking benchmarking or aren't publicising where they're at?

A mixture of both. The annual reports of many philanthropic foundations are purely annual grant reports. They are exceedingly informative and illustrative, and to be highly commended, but they appear to place the accountability for reporting solely upon grantmaking as the premier role of foundations.

There remains quite a divergence of views about the extent of public transparency by philanthropic foundations. Two foundations to be commended for providing full financial disclosure in their annual reports are Colonial Foundation and the R E Ross Trust. HMST does not publish its full audited accounts but an abridged version, indicating revenue, expenses, net income, and net worth, plus investment performance.

"HMST does its own investment management. We benchmark ourselves against the ASX 200 as the most comparable benchmark, but ironically can't benchmark ourselves against our peers."

A comprehensive annual report is just one of the ingredients of transparency. An updated website is another vital part of a foundation's communication strategy. Websites should embrace wide coverage in addition to grantmaking strategy and guidelines – this has benefits all round, saving time for the grantmaker and providing easy access to information for the grantseeker – so making for smoother relationships with beneficiaries.

What other governance aspects, other than the fiduciary role of trustees, are important?

One would be to have a strong belief in the best vision for the charitable entity. Another would be to enshrine sound succession planning provisions, and lastly, honouring the heritage of the benefactor.

Knowing the vision and mission of an entity is paramount. Trustees and staff need to know their goal-posts before trying to kick goals. Enshrining terms of appointment of trustees recognises that trustees are mere stewards for a term and ultimately must pass the baton to others.

Last, but by no means least, we need to honour and promote the generosity of the founding benefaction which represents today's heritage to society, without which trustees and staff would have no role to play. ■

http://www.hmstrust.org.au/

Helen Macpherson Smith Trust

Governance of community foundations

Within philanthropy in Australia, community foundations are a young and emerging sector. With different structures and purposes from other types of foundations, they face particular governance challenges. To elicit understanding of these, *Australian Philanthropy* conducted a short survey of subscribers to the Community Foundations Listserv to get their perspective about governance issues.

The survey questions were:

- What are the challenges of trustee/staff relationships in community foundations?
- How easy has it been to source the information you need around governance for your work in a community foundation?
- What barriers are there to your understanding or implementation of good governance?

We opted to accept comments anonymously in order to solicit candid responses. The responses were strikingly similar, which allows us to make some useful generalisations.

As only CF staff members responded to the survey, the answers relating to staff/trustee relationships are understandably one-sided. Generally the responses lament the lack of board skills, and reluctance among trustees to broaden their knowledge – "they don't know what they don't know!"

"The barriers that limit the implementation of good governance are varied but unsurprising – primarily the shortage of resources, and conflicting ideas on the best use of limited time."

"The biggest challenge is for our board to understand the full scope of possibility afforded by the community foundation structure, especially in terms of multiple funds with multiple purposes... directors don't have access to other community foundations (i.e. they don't get involved in teleconferences, listservs, annual forums etc.) so they're not seeing first hand what's being done in other areas."

"We need (the board) to do a bit between meetings but without them becoming task-oriented/operational. Main emphasis is on trying to get directors working on opening their networks to the foundation and calling on a few favours, which people tend to be reluctant to do."

"No matter how much you talk about the responsibilities of directors and give them things to read, there are always some who don't read board papers, don't behave properly in board meetings and generally don't perform well. If they were employees you would sack them."

The barriers that limit the implementation of good governance are varied but unsurprising – primarily the shortage of resources, and conflicting ideas on the best use of limited time.

"People are time poor, so we keep our board meetings tight which runs the risk of cutting off discussions that are really important but maybe weren't on the agenda. When we've had a light agenda but allowed same timeframe we've usually had our most productive meetings as we've been able to let discussions go the full length especially when they've emerged spontaneously."

"My Chair is very intolerant of me spending time on governance – she just wants me doing business development."

There was a uniformly positive response to the ready availability of quality information around governance, and useful suggestions for knowledge sharing were made, but cost was cited as a prohibitive consideration:

"A number of Foundations have very good governance manuals that they are quite willing to share with new community foundations as they come along."

"We can't afford a lot of board training. I would love to send my directors to the PA workshops for trustees, or SVA courses, but we just don't have the money."

"The annual training from Alice (Macdougall of Freehills) at the CF forum has really stood me in good stead and I frequently refer to the papers she has produced over the years."

"Lots of information [is] available on websites and in publications but distilling this info into a manageable/easy to read form for busy people is difficult. Having people visit our board meetings has been useful, and I generally try to download podcasts from relevant radio segments (e.g. radio national) and burn these to disk for directors to listen to in the car." ■

Reviewing board effectiveness: the questionnaire

By Catherine Brown

Community foundations are complex beasts from a legal and tax perspective. This is largely because they do not easily fit within one of the existing Deductible Gift Recipient categories because they combine grantmaking with community building projects.

Community Foundations in Australia usually comprise a company, which often carries out charitable activities as well as acting as the trustee of one or more trusts. The governance of community foundations can be complex because boards of community foundations must meet both trust law and Corporations Act requirements. They also need a good understanding of the ATO endorsement(s) of each trust within the community foundation structure. This is critical for managing both fundraising and grantmaking correctly.

Board effectiveness can be enhanced if the board is able to develop strategies to ensure that all of its roles are carried out, and review its performance, preferably on an annual basis.

Catherine Brown developed the 'Board Effectiveness' questionnaire in 2004, specifically for community foundations. It is designed to provide boards of directors of community foundations with a framework for analysing their performance and then identifying areas of strength and new strategies to improve weaker areas.

The questionnaire assesses the board's effectiveness under six categories:

1. Compliance;
2. Strategy;
3. Policy making;
4. Monitoring performance;
5. Stakeholder management; and
6. Board relations and composition.

The review process allows the board to identify the key areas to focus on over the following year to improve board performance.

Each director may view matters a little differently but this can be the basis of worthwhile discussion, drawing on the skills and experience of each director. Most boards consider the responses to the self-assessment questionnaire as a group at a board meeting. Participants should treat this as a self-education process and part of good governance: no organisation is static and different skills and knowledge may be required at different stages of the community foundations evolution.

You can download the questionnaire from the PhilanthropyWiki. http://philanthropywiki.org.au/index.php/Board_Effectiveness:_a_process_for_regular_self-assessment

Catherine Brown is a Director of Catherine Brown & Associates Pty Ltd, a founding board member of Australian Community Philanthropy, and author of *The Community Foundations Kit: building stronger Australian communities.* www.catherinebrown.com.au

PricewaterhouseCoopers Transparency Awards

Offering more than just an annual prize, PricewaterhouseCoopers Transparency Awards are a catalyst for change in the regulatory environment. **Rick Millen**, Global and Australian Corporate Responsibility Partner at PricewaterhouseCoopers (PwC) Australia, explains.

In the current economic environment competition for funding in the increasingly crowded not-for-profit sector is fierce. Organisations must focus on how they present themselves to current and prospective stakeholders and transparent reporting plays a key role in this respect. In recognition of their excellence in this field, on 23 April 2009 Oxfam Australia was announced as the winner of the second annual PricewaterhouseCoopers Transparency Awards.

With no single regulatory regime for the not-for-profit sector in Australia, the Awards were established in 2008 by PricewaterhouseCoopers, the Institute of Chartered Accountants in Australia and the Centre for Social Impact. The Awards recognise the absence of adequate and consistent reporting requirements applicable for the sector. Disclosure requirements for charities and other not-for-profit organisations vary, depending on both the particular organisation's legal form of incorporation, and State-based reporting requirements specific to raising funds from the public. No wonder the quality of reporting is variable!

The aim of the Transparency Awards to draw attention to the issue and provide a benchmark against which not-for-profit organisations can measure the quality and transparency of their own reporting. They are designed to act as a catalyst for change in the regulatory environment to support fuller and more consistent, accessible and transparent reporting.

The process

Organisations that elect to enter the Awards make a submission which includes their annual report, website, donor magazines and stakeholder communications.

Submissions are reviewed in a three step process:

- review of all submissions by PricewaterhouseCoopers against the assessment framework;
- review of the top 10 submissions by a judging panel comprising senior subject matter experts; and
- review of the shortlist of 4 by an independent jury.

This year the jury comprised Senator Ursula Stephens, Parliamentary Secretary for the Voluntary Sector and Social Inclusion; Mr Mike Wilson, Chief Executive Officer of last year's winner Juvenile Diabetes Research Foundation; Mr Peter Hunt, Executive Chairman, Caliburn Partnership; and Ms Gina Anderson, CEO, Philanthropy Australia.

Following the Awards, summary feedback on the overall findings is made publicly available. Participants are also provided with individual feedback in relation to their own disclosure, advising them of the strengths and weaknesses of their reporting and highlighting areas for improvement. For the first time this year participants were provided with access to a free course run by the Centre for Social Impact entitled 'Financial Management of Social Enterprises'.

"For the first time this year participants were provided with access to a free course run by the Centre for Social Impact entitled 'Financial Management of Social Enterprises'."

The assessment framework is based on PricewaterhouseCoopers' Reporting Framework, the Institute's recent research and the Global Reporting Initiative's reporting guidelines. The criteria cover areas including the organisation's history, vision, strategy and mission, structure and performance.

PwC Australia has an established Corporate Reporting Group which analyses transparency and best practice in corporate reporting. Extending this model to the not-for-profit sector was an easy step, particularly given PwC firms in Europe have successfully run similar awards for a number of years.

Based on extensive research, the Institute of Chartered Accountants in Australia has produced three reports in the last three years proposing benchmarks for reporting in the sector. The most recent is titled *Enhancing Not-for-profit Annual and Financial Reporting* and was released in March 2009.[1]

Impact

There are encouraging signs that the Awards are being effective in shining a spotlight on the quality and transparency of reporting across the not-for-profit sector, as well as in the participating organisations.

It is clear that the issue is firmly on the Government's agenda. The Productivity Commission is undertaking an inquiry into the not-for-profit sector, and the terms of reference include an examination of the regulatory regime and reporting in the not-for-profit sector.

"Disclosure requirements for charities and other not-for-profit organisations vary, depending on both the particular organisation's legal form of incorporation, and State-based reporting requirements specific to raising funds from the public. No wonder the quality of reporting is variable!"

The Government has provided funding to the Australian Accounting Standards Board to consider the issue of accounting standards as they apply to the not-for-profit sector.

Not-for-profit regulation was also addressed in a recent Senate inquiry in the federal parliament.[2] The Committee's recommendations included:

- a single independent national regulator;
- a national fundraising Act;
- a tiered reporting system; and
- a standard chart of accounts.

With such changes afoot, the Transparency Awards will continue to promote transparency in the sector and help organisations to demonstrate the vital work they undertake across Australia. ■

Rick Millen, Global and Australian Corporate Responsibility Partner at PricewaterhouseCoopers Australia
http://www.pwc.com.au/

1. 'Enhancing not-for-profit annual and financial reporting' is available for download on the Institute of Chartered Accountant's website at http://www.charteredaccountants.com.au/files/documents/NFP_Report09_PDF.pdf
2. Senate Standing Committee on Economics Inquiry on disclosure regimes for charities and not-for-profit organisations. You can download Philanthropy Australia's submission from our website. http://pa-web/representation/submissions.html

Walking the talk on investments

Philanthropy Australia recently held a series of investment forums. Learnings from these events are summarised below.

Moving towards sustainable investment

The concept of responsible investment is Louise O'Halloran's speciality. The CEO of the Responsible Investment Association Australasia (RIAA) presented a step-by-step guide for charities and not-for-profits to develop a responsible investment strategy to a Philanthropy Australia member forum in June.

Responsible investment is an umbrella term used to describe an investment process which takes environmental, social, ethical or governance considerations into account. For values based organisations, it's about achieving congruence with practices (what we do) and mission (what we say we do).

For many charities, foundations or religious investors, responsible investment means screening out stocks which cause harm to the environment or society, and seeking out other more positive investments. But as the industry has grown, so too have the range of methods used by the investment sector to achieve sustainability outcomes.

As recently as just 20 years ago, companies were relatively easy to value, mainly because about 80 per cent of the company's assets were measurable and could be seen on the balance sheet or the P&L. Twenty years on and the reverse is true. 80 per cent of a company's value is tied up in intangibles, and most of those intangibles are associated with either environmental, social or governance issues. Because of this, developing a policy which assists you to take environmental, social and governance issues into account will also help you to make better investment decisions.

These simple steps can help organisations which would like to develop and implement a responsible investment strategy:

1. Develop a responsible investment policy.
2. Find out what are your managers doing about environment, social, ethical or governance considerations.
3. Include environment, social, eithical or governance considerations in your mandates.
4. Join collaborative investment initiatives such as the Investor Group on Climate Change or the UN Principles for Responsible Investment.
5. Vote your shares on ESG initiatives.
6. Engage directly with companies, approach the CEO or CIO with your questions.
7. Pursue positive investments in cleantech, microfinance or community investment products – e.g. affordable housing, sustainable agriculture etc.
8. Invest in Responsible Investment funds. Those listed on the RIAA website have been independently audited.
9. Become certified as a values based investor with the Responsible Investment Assocation, aligning your investments with your mission.
10. Look out for opportunities for training on responsible investment.

The RIAA website:
www.responsibleinvestment.org/

Investment under the cloud of the GFC

In May-June 2009 Philanthropy Australia hosted the Investment Forum: What does the global financial crisis mean for philanthropy? The general mood was one of pragmatism – but not pessimism. Held in both Sydney and Melbourne, the sessions involved commentary and analysis from a variety of perspectives.

The seminars began with a session on investment strategies and the expected effects of the current crisis. The consensus was that while Australia has escaped the worst of the global economic meltdown, the market will be rocky for some time, and the current volatility makes long term planning difficult; however, trustees of foundations and charities alike must be careful not to respond too hastily to short term moves in the market. Also, foundations must pay attention to their income as well as to the value of their corpus.

The second half of each seminar focused on philanthropy's role in a recession. All speakers agreed that this crisis point is also an opportunity, making change necessary now that we no longer have the luxury of prosperity. Of course, change is not new to philanthropy, but the volatility and capriciousness of society drives our work; our concerns are so strong because now that volatility has affected our financial capacity, something which previously was not an issue. At sessions in both Sydney and Melbourne, speakers were in firm agreement that some not-for-profit organisations would suffer to the point of extinction in the current crisis, but that the survivors will emerge leaner and more efficient.

There was also agreement that communication with grantees and the wider sector has become absolutely crucial at this time and that 'pass the project', never a sound practice, has become even less desirable. Foundations should now be looking after the needs of their not-for-profit partners – helping organisations build capacity and collaborate with one another, and making sure we don't cost the sector as much or more than we put into it.

The majority of speakers made points about the relevance of the global financial crisis to the broader questions of accountability and regulation. Noting the role that acceptance of bad advice played in the GFC, it was suggested that trustees should ensure that they understand want they are investing in, or "know what you're buying", and not invest in products they don't fully understand. The parallels with grantmaking were noted. ■

Reputation: who cares?

Dr Diana Leat is Visiting Professor at the Centre for Charity Effectiveness, Cass Business School, London, and a visiting academic at The Australian Centre for Philanthropy and Nonprofit Studies at QUT in Brisbane. Over many years she has worked as a consultant to various grantmaking foundations and as a researcher and writer on various aspects of philanthropy. This article first appeared in *Effect* magazine published by the European Foundation Centre in Spring 2009, and is reproduced here with the kind permission of the author and the EFC.

Should foundations care about how they are perceived by the public – and what can they do to improve their public image? Effect invited Diana Leat to share her reflections on the importance of reputation management – both for individual foundations and for the sector as a whole.

In a time when 'celebrities' are rewarded and famous for being famous – often for being famously badly behaved, does reputation matter? Should foundations care about their reputation? What is their collective and individual reputation? Does anyone really know?

In the past many foundations, all over the world, especially endowed foundations were 'above' reputation. They saw themselves and their activities as essentially private, and carefully guarded that privacy. Reputation was not an issue that troubled them, and some went to great lengths including anonymity to have no reputation – to be invisible. And, in an important sense, fully endowed foundations are the only institutions in most societies that can afford that luxury. Fully endowed foundations do not need the support and approval of customers, shareholders, constituents or the donating public in order to survive and thrive. Foundations do need the approval of regulators, but in most countries regulators' demands are far from onerous or constraining.

A changing climate

The current climate is a little different from the 'good old days'. First, accountability and transparency are in fashion – or perhaps more accurately the rhetoric of transparency and accountability. In most countries there is growing awareness of the indirect public subsidy foundations enjoy, as well as a dawning awareness of the existence of institutions that are not democratically elected but nevertheless enjoy considerable power, directly and indirectly, to influence policy for good or ill. Foundations are, of course, only one type of institution in this category. Once off the media and public radar, foundations are now gradually creeping onto it. This is one of the consequences of philanthropy's new found profile as a result, partly, of the magnificent gifts of the mega-philanthropists such as Gates and Buffet. Profile comes at a price and it is generally not possible to choose to be selectively famous, or famous only on Tuesdays but not on Fridays, or famous only in public but not in private.

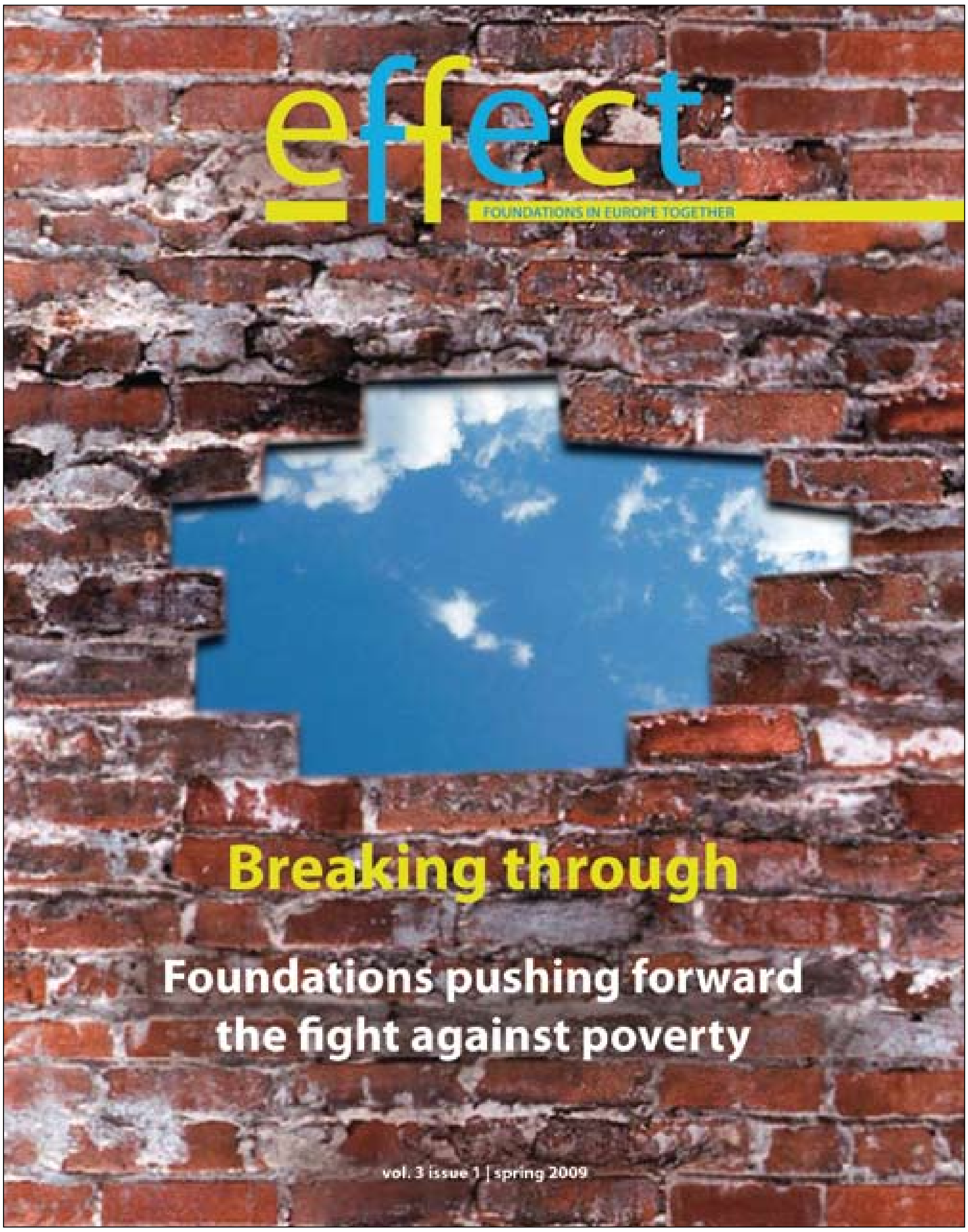
It is important not to overstate foundations' current position. Most people in Europe probably continue to have a hazy idea of the nature and existence of foundations, what they do and what they don't do. European media, and governments, have generally not woken up to the rich stories – good and bad – that might be found by paying greater attention to foundations. Foundations in Europe have generally not been subject to the sort of periodic, and often hostile, scrutiny by committees of inquiry and newspapers that have dogged their American counterparts.

"In a time when 'celebrities' are rewarded and famous for being famous – often for being famously badly behaved, does reputation matter? Should foundations care about their reputation? What is their collective and individual reputation? Does anyone really know?"

While many foundations could provide the media with some very good news stories, it is doubtful how many rotten apples there are in the foundation barrel. But one rotten apple would be sufficient to do the sector harm. So one conclusion might be that foundations need to consider carefully what they have to lose and to gain by embracing greater transparency. The 'disinfectant of sunshine' not only cleanses the odd germ but may also add to the health of the already healthy.

Foundations sometimes bemoan their lack of recognition, access and influence – but that is often the other side of the coin of invisibility and modesty. Reputation is not necessarily something that is forced on shy foundations. Some foundations actively seek to build a reputation for independent, wellgrounded knowledge in a particular field, creating a resource that is often more powerful than money.

There is another consideration. Can foundations afford to stay in the shadows – in a context in which those who receive direct or indirect public subsidy or have public influence are increasingly expected to demonstrate the value they add? While invisibility may be neither here nor there in the real added value of foundations, invisibility is difficult to square with demonstration. Acting as a rather expensive money laundering machine or cash point is not enough to convincingly demonstrate added value or justify running costs and privileges.



Accountability or transparency?

As government, business and non-profit organisations increasingly all speak the same language and are driven by similar strategies of seeking and maintaining popular approval, there is a strong argument that foundations – among the least democratic of all organisations – are paradoxically the strongest bulwark against the tabloid* homogenisation of public understanding and opinion. Foundations can create debate, experiment, take real risks and challenge the conventional wisdom – thereby enhancing democracy and contributing to a society's adaptive and problem-solving capacity.

Accountability – if it means being required to comply with government or corporate or publicly approved opinions regarding 'public benefit' - may not be the best way to ensure the vibrant debate necessary for democracy and the alternative views required for real innovation.

Transparency is different from accountability. It requires not that you toe the line of popular opinion, but that you are prepared to be open about your dealings and activities and are prepared to defend them in a reasoned way. Foundations may be of different political and value orientations; within the limits of the law that is acceptable in a democracy. But secrecy is not acceptable for those who enjoy public trust and benefits.

"While many foundations could provide the media with some very good news stories, it is doubtful how many rotten apples there are in the foundation barrel. But one rotten apple would be sufficient to do the sector harm."

Just as political parties are required to disclose their funders, so funders should be prepared to disclose to whom, for what and why they allocate financial support. Foundations are often fearful of increased regulation and scrutiny. In reality, these fears often turn out to be a fear of regulation and scrutiny which burdens foundations with process and fails to recognise the important role some foundations play in supporting innovation, creative conversation, debate and dissent. Foundations should welcome regulation and scrutiny as a seal of approval – but only in the context of an understanding of the crucial and paradoxical role foundations play in modern democracies. Regulation should follow role, and should be designed to enhance, rather than hinder, that role. ■

Dr Diana Leat

* *Tabloid* newspapers (also known as 'the popular press') are often considered to be superficial and simplistic, focusing on trivial topics and reflecting commonly-held prejudices and stereotypes. 'Tabloid' refers to the smaller format that was traditionally associated with 'mass market' newspapers – notably in the United Kingdom.

Tax update for the philanthropic sector

Cheryl Van Der Hor, pro bono tax consultant for Philanthropy Australia, explains recent tax changes to keep you up to date.

Tax consultations, reviews and changes in the not-for-profit sector seem to be in overwhelming supply this past year. Whilst there are many consultations afoot, this article seeks to provide an overview of changes that have occurred or are proposed to occur with effect since 1 July 2008.

Given the speed in which tax laws change, it is a matter of critical importance for all organisations to remain current on tax changes that may impact them directly, their donors or their funding recipients. As always with tax law, the devil is in the detail, and professional assistance should be sought when appropriate.

Federal budget 2009-10

Matters that may be of interest to philanthropic organisations arising from the 2009-10 Budget include:

- Intention to amend the fringe benefits tax law to allow exemption for salary sacrificed donations to DGRs.
- Statistics that show the steady increase in the number of PPFs prescribed over the past year.
- Extension of the general DGR category for Australian disaster relief funds to ensure DGR status for relief efforts for recent events such as the Victorian bushfires and Queensland floods.
- Announcement of the intention of the ATO to undertake triennial reviews of entities on DGR Registers (environmental organisations, cultural organisations, harm prevention charities and overseas aid gift deduction scheme entities).
- Statistics to show the steady increase to the number of DGRs endorsed by the ATO.
- Announcement of measures to help support people with severe disabilities through changes in taxation laws relating to Special Disability Trusts.

A full overview of the 2009-10 Budget Measures as well as the potential impact of the above changes to the philanthropy sector is available on the Philanthropy Australia website. http://www.philanthropy.org.au/members/policy/

Case law

The past few years have seen a wave of tax law cases as the Commissioner of Taxation continues to seek a framework for determining when an organisation is charitable at law (noting that this is different to the common understanding of the term). This has arisen in part due to the Australian Taxation Office's (ATO) interest in seeking clarity of entitlement to Tax Concession Charity (TCC) status through the courts given the inability to enact a statutory definition of charity.

As part of this process is litigation regarding access to FBT concessions, which inherently requires analysis of charitable status and the distinction between whether an organisation is a 'fund' (passive investment vehicle) or an 'institution' (actively operates charitable programs).

"Given the speed in which tax laws change, it is a matter of critical importance for all organisations to remain current on tax changes that may impact them directly, their donors or their funding recipients."

Philanthropic organisations may be impacted by these cases as they address some key issues, including:

- Whether an organisation is charitable in nature. Whilst, for example, PPFs are afforded DGR status, this does not necessarily imply charitable status which needs to be separately determined on application of the legal meaning of the term.
- Access to FBT concessions. Of note is that 'charitable funds' are not entitled to FBT concessions, where 'charitable institutions' are generally entitled to utilise the FBT rebate. This distinction will be particularly important to philanthropic organisations that employ staff and wish to access effective remuneration structures using FBT concessions.

Goods and services tax (GST)

As a relatively new tax, the interpretation of the GST Act continues to evolve. This has given rise to a number of significant court cases that affect a wide variety of transactions and organisations. These highlighted changes may impact on dealings of philanthropic organisations.

- **Gifts of property from discretionary trusts**: *GST Determination 2009/1* deals with GST aspects of in specie distributions of assets from discretionary trusts to beneficiaries. In some cases, distributions of assets from trusts for no consideration (including as a gift) can give rise to a GST liability of the Trustee on the disposal of the asset. Philanthropic organisations should be aware of this issue in the event that they are the beneficiaries of assets from discretionary trusts.
- **Claiming GST on portfolio management costs**: The ATO has released a fact sheet for self managed super funds in respect of claiming GST credits and reduced input tax credits for costs incurred. As the issues appear to have many similarities to those faced by philanthropic organisations (being treatment of costs incurred to manage financial investments), this may provide useful guidance. The Fact Sheet may be found at http://www.ato.gov.au/content/downloads/bus00144317n71512062008.pdf

ATO Compliance Program

- As we await the release of the 2009-10 Compliance Program (due August 2009), specific areas of interest to the Commissioner of Taxation relating to the non-profit sector are:
  - **Level of commercial activities**.
  - **Changes in activities after endorsement**.
  - **Maintaining taxation status** through regular reviews of your organisation, especially where there is a change in activities or governing documents.
  - **Misclassifying GST on grants**. This is an old issue, but still largely unresolved. Whist GST Ruling GSTR 2000/11 has been around for some time, it lacks sufficient guidance on GST treatment of grants, leading to ongoing errors.
  - **Prescribed private funds**. The Commissioner continues to have an interest in PPFs, with a focus on identifying non-compliance and gaining tax benefits for personal gain. (Noting that there are a number of other initiatives in this area being undertaken at the Federal level).
  - **Refunds of franking credits**. The Commissioner notes that all franking credit refund claims are verified for accuracy. As this is a key source of income for many philanthropic organisations, accuracy in completing refund forms should be a priority so as to avoid the ATO undertaking a more detailed review of your claim in the case that any errors are identified.

Final comments

Whilst the above aims to cover off on a number of relevant changes to the taxation laws landscape in the past year, the level of tax changes can only increase in the future once legislation is finalised under the Prescribed Private Funds Bill and its related guidelines are released, and the Productivity Commission Review and Henry Review are finalised.

This reiterates the need for philanthropic organisations to remain current with tax law changes to ensure that your organisation is compliant with the law and adequately flexible to cope with this fast-changing environment. ■

Resources

Australian Resources on Governance

Trustee Handbook: Roles and Duties of Trustees of Charitable Trusts and Foundations in Australia

Created by David Ward, the Trustee Handbook is a free download created in consultation with Philanthropy Australia's members. An ideal starting point for any wider exploration of governance and regulation, the Trustee Handbook is a highly valuable base for new trustees and foundation staff; useful to those providing advice on setting up foundations and trusts; and an excellent reference document and aide memoire to those already familiar with its subject.

http://philanthropywiki.org.au/index.php/Trustee_Handbook

PhilanthropyWiki

The PhilanthropyWiki has a selection of articles and tools relating to governance and regulation. Browse under 'Practices' – there are various categories of relevance: Governance, Investment, Trustees, Legislation and Taxation – and more.

www.philanthropywiki.org.au

Building Better Boards 4th National Conference 2008

This site offers copies of presentations made at the Building Better Boards conference, which span a variety of topics. The Better Boards website also offers Australia's largest online bookstore on governance and management resources for the non-profit and philanthropic sector.

http://www.betterboards.com.au/downloads/index.html

Our Community: Boards, Committees and Governance Centre

This resource was created to support the development of more efficient, responsive and responsible community boards. It includes free help sheets, an online Policy Bank, a quarterly newsletter, a Matching Service to help community boards get access to new members, a consultants' register and a Code of Governance for the Australian Community. A governance code sets out the values that the organisation considers central to its operations, describes the boundaries of acceptable behaviour for the organisation based on these values, and identifies the areas in which procedures are required to police these boundaries.

http://www.ourcommunity.com.au/boards

The Book of the Board: Effective Governance for Non-Profit Organisations, by David Fishel.

The Federation Press, 2008

This Australian handbook, recently revised and updated, provides clear explanations and quick-reference checklists on topics such as strategic planning, compliance, progress measurement, board recruitment and succession planning; a section on alliances and mergers in the non-profit field; visual overviews of key topics in chart and diagram form; and contributions from noted sectoral figures including Louise Walsh, Professor Myles McGregor-Lowndes and Elizabeth Jameson.

http://www.federationpress.com.au/bookstore/book.asp?isbn=9781862876897

International Resources on Governance

Good Governance Guide

This site, created by the New-York-based Governance Matters, sets out to encourage and support foundations in raising standards of board performance throughout the nonprofit sector. The Good Governance Guide is also noteworthy for the way in which it makes use of the publishing possibilities open to online texts. A streamlined graphics interface breaks the guide down into nine interconnected sections, allowing the user to follow the thread of what information is most appropriate for them from area to area; this nonlinear approach simplifies the often complex arguments involved in nonprofit and philanthropic governance.

http://www.governancematters.org/index.cfm?section_id=1086

Trustee Evaluation Toolkit

Published as a free download by FSG Social Impact Advisors, a US-based organisation, the Trustee Evaluation Toolkit is based on information gained from interviews with dozens of foundation trustees and CEOs, and collects insights and innovations from these discussions into a report which showcases the issues and potential improvements which can be employed by organisations. The 'Toolkit' aspect of the report takes the form of a self-assessment survey for trustees, dialogue frameworks, and a planning guide.

http://www.fsg-impact.org/ideas/item/trustee_evaluation_tools.html

Evaluation Kit for Trustees

Published by the US-based James Irvine Foundation, this kit consists of three short guides focused on providing tools for trustees to explore and make decisions on evaluation strategies.

Let's Consider Evaluation is a brief self-assessment survey for trustees to ascertain their points of view on evaluation purpose, method and cost.

http://www.irvine.org/images/stories/pdf/pubs/1_lets%20consider%20evaluation.pdf

Let's Discuss Evaluation provides a framework for a trustee dialogue on evaluation and also provides a facilitator's handbook:

http://www.irvine.org/images/stories/pdf/pubs/2_lets%20discuss%20evaluation.pdf and http://www.irvine.org/images/stories/pdf/pubs/2a_lets%20discuss%20evaluation.pdf

Let's Make Evaluation Work identifies four basic issues which tend to hamper evaluation for foundation trustees, and offers practical solutions for each one:

http://www.irvine.org/images/stories/pdf/pubs/3_lets%20make%20evaluation%20work.pdf

Governance as Leadership: Reframing the Work of Nonprofit Boards

The Harvard Business School interviews Professor Richard Chait, discusses how philanthropic board members should concentrate more on the 'generative thinking' mode of governance, which identifies and discerns challenges and opportunities, rather than the current regulation-centered focus of governance, which, Chait argues, does not allow for boards to draw on their natural aptitude for leadership.

http://hbswk.hbs.edu/archive/4735.html

Re-thinking nonprofit organisation governance: implications for management and leadership

This article, written by the academic John McClusky, focuses on the roles and responsibilities of boards and executives in the context of a foundation's size, life cycle, other staff, and environmental factors. McClusky suggests that regulation and governance need to be regularly and thoroughly re-examined and re-contextualised in order to allow boards to best perform their duties.

http://www.informaworld.com/smpp/content~db=all~content=a713645407

Principles Workbook: Steering Your Board Toward Good Governance and Ethical Practice

The Panel on the Nonprofit Sector, while US-based, is comprised of 24 nonprofit and philanthropic leaders from around the world. Their Principles Workbook is offered as a free download and is designed to help nonprofits, foundations, and corporate philanthropy programs examine and improve their governance practices; the Workbook's goal is that of allowing the sector as a whole to uphold "the highest standards of accountability in a cost-effective way".

http://www.nonprofitpanel.org/

It's Time to Share More Information About Worthy Charities By Sean Stannard-Stockton

This article focuses on one of the ways in which philanthropy's considerations differ from the considerations of the for-profit world: the relative value of disclosure and secrecy. Stannard-Stockton argues that information increases in value as it is shared widely in the philanthropic sector, and that this fact needs to underpin the way boards shape their organisations' communication policies.

http://tacticalphilanthropy.com/2009/03/sharing-information-to-drive-impact

The Conscious Governance Knowledge Center

This Knowledge Centre offers a library of downloadable mp3 podcasts designed to provide training and information to philanthropic boards, and a YouTube channel of videos on the same subject. They also distribute a regular free e-zine and have an online archive of past editions.

http://www.conscious-governance.com/knowledge-center.html

Mission-Driven Governance

This article from the *Stanford Social Innovation Review* proposes a new governance framework for not-for-profit organisations. The authors argue that the prevailing governance model is fundamentally adversarial, pitting board members against executives, and that while this model ensures that legal requirements of oversight and compliance are met, it can impede the advancement of the organisation's goals. They propose instead a model where the board's primary activity 'is not oversight, which often creates a climate of conservatism and risk aversion; it is group decision making that is robust and open to opportunities.'

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http://www.ssireview.org/articles/entry/mission_driven_governance/

Compiled Mary Borsellino, *Australian Philanthropy* Assistant Editor

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