

2.1 INTRODUCTION

There are several aspects to the successful management of a non-profit organisation. One is ensuring that everyone involved has a clear idea of their expectations, roles and responsibilities in relation to the objectives and running of the organisation and the management of its finances.

Another is recognising and addressing the problems that can occur in organisations that depend heavily on the commitment and enthusiasm of a few individuals. The relationship between the individual members of the board will also be a relevant factor, and understanding how to successfully manage boards, to make the most of the skills and talents of the people on the board, is also an important aspect of running an organisation.

Attention should also be paid to the relationship between the board, the staff and volunteers of the organisation to ensure that there are proper lines of communication, accountability and responsibility established and maintained.

This section outlines the responsibilities of people in authority and then looks at other aspects of the successful management of a non-profit organisation, including how to manage difficult board members.

2.2 PURPOSE OF THE BOARD

The board has a multiplicity of purposes, the foremost of which is a management role in relation to the organisation and its staff. The main responsibilities of the board are to:

- establish and review the structure of the organisation;
- define and review the policies and practices of the organisation. These include policies concerning the cultural objectives of the organisation but also policies relating to the employment of staff, the relationship of the organisation to other institutions and to the public, the raising of funds, and the financial management of the organisation;
- devise and review the strategies for implementation of the organisation's objectives
- establish clearly defined lines of communication , delegation, and responsibility;
- help raise money for the organisation;
- provide the organisation with a network of contacts; and
- lend their credibility and reputation to the organisation.

2.3 SELECTING THE BOARD

The board provides a bank of skills to assist the implementation of these policies, and should provide the organisation with the contacts that are so useful and the credibility that is so essential. Selecting

the people to be on the board involves a consideration of the governance role of the board and the needs of the organisation.

The board needs to be comprised of people who have the managerial, financial and appropriate cultural experience and expertise to oversee the organisation. When putting a board together, the steering committee should avoid inviting friends and 'yes people'.

The long-term strength of the organisation will flow from the strength of the board. For example, it can be invaluable to have an accountant in the group to assist in budgeting, advising on fund raising strategies, reviewing expenditure and preparing financial reports. Similarly, as most organisations these days have to raise money of their own it is almost always important to have a well-connected business person on the committee. Such a person will not only give sensible practical advice on finance and administration but will also be able to make personal contact with potential sponsors. (If the group has a local base, a local influential business person should be asked. If it is a national organisation, board members with a national reputation and chain of contacts are essential.)

At least at the beginning, it will be useful to have a lawyer on the committee, be it to assist with the design of the organisation's legal structure or to advise on the many legal requirements, rights and responsibilities that will affect the organisation. Moreover, as one of the most important functions of any board is to determine policy, it is vital to have a strong representation of persons with relevant experience in the area. Knowledge and practical experience is more important than fine intentions.

As mentioned above, one of the important contributions that board members must be expected to make is to lend actively their personal reputation to the organisation. This is often overlooked. If you are establishing an organisation of national focus, the board must contain members of national reputation and networks. If it is a local community organisation, persons with influence within the local community are more appropriate. It is horses for courses. Not only must they have the reputation, they must be prepared to use it for the benefit of the organisation. Their name alone may help, but they must also be prepared to write that letter or make that phone call; in other words, actively to use their contacts for the benefit of the organisation.

A balanced board includes members who represent a range of constituent interests. The board is an invaluable source of knowledge, wisdom, contacts, vision and experience. (For example in an art museum, those interests include curators, museum managers, collectors, artists, gallerists, financiers, suitably experienced lawyers, and donors.) The American approach whereby board members are expected to be major donors, is not relevant in Australia or New Zealand. In the local environment, one should beware the donor that demands or expects a place on the board. The ability and preparedness to write a cheque is no guarantee of governance skills. There are almost always better ways of attracting and retaining donors than also expecting them to work as a director. Look first to the skills required on the board. If the organisation has the right balance of skills, the money will follow. The reverse does not apply.

In summary, when forming the board one must keep in mind a few basic rules:

1. Having regard to the objects of the organisation, work out the talents that are needed on the board.
2. Review all appropriate names.
3. Ask only the best. Nobody minds being invited onto a board. It is usually flattering. If the first choice is unable or not prepared to join, ask them for names of persons that they think might be suitable. Do this in person.
4. Professional advice is expensive. So, unless the organisation is so rich or successful as to be able to afford professional fees, or so small-scale as not to need professional skills, the group should invite the necessary expertise onto its board.
5. Don't invite figureheads. Board members are workers. Famous names who won't come to meetings, won't become actively involved, won't write that letter or make that important phone call, have no part on the board. Figureheads make good patrons and terrible board members.
6. Don't invite someone just because they are rich. Look for people with true networks of influence: They are often more valuable and usually require less maintenance.

2.4 DUTIES OF THE BOARD

Every person in a position of responsibility has duties imposed by law. For example, some music organisations are a part of a government department and their employees are departmental employees bound by various laws such as the Public Service Act, Audit Act, Finance Directions and so on.

Other institutions may be statutory bodies, established and funded by government but operating under their own statute. Those established by Local Government will operate under different rules again, including the Local Government Act.

Then there are companies established under the Corporation Law, incorporated associations established under the Incorporated Associations Act and trusts which are governed by the Trustee Act and associated legislation.

As if this were not enough, employees of all tiers of governmental institutions may be hired as government employees or under contract, while employees of companies, trusts, and associations are all employed under a common law contract of employment. These will all impose particular responsibilities in addition to those set out in the legislation.

The following can only provide a guide to your rights and responsibilities and does not try to discuss the complexities of the numerous individual circumstances.

Statutory Bodies

(I) THE STATUTORY DUTIES

The statute that establishes an institution also sets out the basic duties of those responsible for its governance. Necessarily, each such institution is different and all employees and board members should be familiar with the terms of their statute.

(II) THE DUTY TO OBSERVE NATURAL JUSTICE

Besides the provisions of the statute that establishes an institution, those invested with power have an obligation to observe the rules of natural justice. These include the duty to act fairly, to take into account all relevant matters and to omit all extraneous considerations.

Each board member's duty is to the institution. Even if he or she is on the council as a representative or nominee of a particular interest group, or has a particularly burning political, ethical or other position, the over-riding duty must be to the institution and the purposes for which it is established. A board member must not be compromised by promoting interests that are extraneous to those of the institution.

Duties Of Committee Members Of Unincorporated Associations

Because an unincorporated association cannot hold assets in its own right, any member that looks after property or money belonging to the association does so as a trustee on behalf of the association. A trustee must not place his or her own interests above the purposes of the trust because the trustee has a fiduciary duty to the objects of the trust. A trustee's obligations are the most onerous of all. (Refer to the section "Duties of Trustees" below.)

Duties Of Management Committee Members Of Incorporated Associations

The responsibilities of the Management Committee of an incorporated association will be set down in the relevant state legislation.

The Management Committee will be responsible for holding regular meetings, as well as an Annual General Meeting and the Public Officer of the association will be responsible for filing the association's annual statement with the appropriate government department.

It is also important to remember that while the formation of an incorporated association does provide protection to member of the committee and the association from liability for debts incurred by the association, this is not unlimited. Individual committee members could be held personally liable for debts if they authorise expenditure without having reasonable grounds to expect that the debt can be paid.

The legislation governing incorporated associations also provides for the imposition of fines and other penalties if the committee members actions amount to fraud. This responsibility will not be imposed on members of the Committee who did not authorise or consent to the expenditure being incurred. However, if a Committee member ought to have been aware of the debt, for example if they are responsible for overseeing a particular area of the association's operations and they fail to keep informed about that area, they could be held responsible for a debt, even if they did not know about it.

The duties of members of a management committee of an incorporated association under the common law are the same as those of the members of a Board of a company limited by guarantee (considered below). In several States the legislation has clarified the nature of these duties. It is essential that all members of a Management Committee are aware of their responsibilities under the relevant legislation, acquaint themselves with the rules governing the association and keep themselves informed of the activities of the association and its members.

Duties Of Directors Of Companies Limited By Guarantee

The responsibilities of a company director are the same, regardless of whether the company is profit making or a non-profit organisation. This point was made clear by the National Safety Council Case (*Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115), a case that struck fear into the heart of every person sitting on the Board of an arts organisation. There, the elderly, respected Chairman lost his savings, his reputation and his health as a result of the actions of the chief executive when he was found liable as a director for an extraordinary amount of debts incurred without his knowledge.

THE DUTIES OF A DIRECTOR OF A NON-PROFIT COMPANY

- To act honestly, and in the best interests of the company;
- To not make improper use of information;
- To not make improper use of their position,;
- To avoid conflicts of interest;
- To act in good faith, and for a proper purpose;
- To demonstrate reasonable skill in the performance of their duties;
- To exercise reasonable care and diligence when making decisions; and

- To ensure that the company does not continue to operate after it has become insolvent.

In recent years the courts have become much stricter in imposing liability on 'passive' directors, directors that through ignorance or inactivity fail to carry out their duties properly. You can no longer say you "didn't know". You should have known! If you take on the responsibility of Board membership, you must take an active interest and care in the operation of the company. You cannot just let others look after business. If you do, you are inviting personal liability.

Directors of companies that fail to carry out their duties may lose the protection of limited liability and become personally liable for debts incurred by the company. A member of a Board has a duty to keep informed about the operations of the company and must have adequate skills to cope with the demands of the company management. It is no longer sufficient to simply do one's best and hope for the best.

Duties Of Directors, Board Members, And Management

It is generally true that directors and employees enjoy very limited liability for losses incurred by their company. However, the Corporations Law does lay down a number of situations in which the corporate veil may be lifted to expose the individual not only to prosecution and penalty but also to a personal civil liability. In considering the following paragraphs it is important to note that the legislation defines "officer" to include the directors, secretary or executive officer of the corporation and anyone from whom those people customarily take direction. It is also important to note that a breach of any of the next four duties can result not only in a court order prohibiting you from managing a corporation, it can also expose you to civil penalties up to \$200,000.

- (i) **The duty of honesty:** An officer of a corporation must act honestly in the exercise of his or her powers and duties.
- (ii) **The duty to take reasonable care and be diligent:** People are often invited to join a board merely for their famous name. Those people run grave risks if they do not actually read the board's documents, attend its meetings and diligently oversee the operation of the company. It is no answer to say that "I was too busy to get to meetings", or "I don't understand figures". Board membership is not appropriate for anyone wishing to lend their name to a cause but not intending to be involved personally. Those people make good "patrons" but their membership of boards does not assist control of the company and exposes them to potentially enormous liability.
- (iii) **The duty not to make improper use of information acquired as a result of your position with the corporation.** A board member or an employee owes primary loyalty to the well being of the organisation. Thus, information learned as a result of one's position in the company must be applied to benefit the company and personal interests must take second

place.

(iv) **The duty not to make improper use of your position.** No director or employee is allowed to make improper use of their position to gain personal advantage, or to advantage anyone else, or to disadvantage the corporation.

(v) **The duty of a director to disclose conflict in contracts.** It is important to emphasise that it is both common and permissible for directors to have conflicts of interest. However, the Corporations Law demands that a director, who is in any way interested in a contract or proposed contract, must declare that interest. This must be done in a meeting of the board as soon as is practicable after the relevant facts are known.

This does not prevent that person from speaking to the subject of the contract or even voting on it. It merely provides the other directors with the context from which the person speaks. The directors can give those comments the weight that they deem appropriate in the declared circumstances.

Often, of course, when a potential conflict of interest arises it is most appropriate for that director to offer to leave the room until the issue is decided. The other directors may then accept that suggestion or invite the interested person to remain. That, however, is a matter of etiquette not law. All that one need do is declare the interest.

“Interest” is interpreted very broadly. It may arise through board membership, employment, consultancies, family connections, investment, and so on. To lessen the repetitious intrusion of such declarations into the business of the board, a director may give a general notice of interest to the effect that he or she is an officer, director or member of a specified corporation or firm and is therefore to be regarded as interested in any contract which may be made with that corporation or firm.

For this reason, it makes good sense for all board members to disclose, at the first board meeting after each Annual General Meeting, all current employment, directorships or memberships. It is interesting for the other board members, it saves the tedious interruption of board business by directors making repetitive declarations of interest, and it lessens the risk of receiving a \$1,000 fine or three months imprisonment. If it is discovered that a director has not disclosed a conflict of interest, the contract may be voidable by the company.

(I) LIABILITY OF DIRECTORS AND EMPLOYEES TO PAY COMPANY DEBTS

As a general rule, incorporation protects the individuals from personal liability. If the company goes to the wall, its directors and employees may walk away with their reputations in tatters but their bank accounts intact.

However, if a person fails to act honestly or act with reasonable care and diligence, or makes improper use of either information or position, the corporation can sue that person and recover any

profit that any person made, and any sum that the corporation has lost as a result of the failure.

Moreover, section 592 (1) states that if -

- “(a) a company incurs a debt, whether within or outside the State; and
- (b) immediately before the time when the debt is incurred there are reasonable grounds to expect that either -
 - (i) the company will not be able to pay all its debts as and when they become due; or
 - (ii) if the company incurs the debt, it will not be able to pay all its debts as and when they become due; then any person who was a director of the company, or who took part in the management of the company, at the time when the debt was incurred is guilty of an offence and the company and that person or, if there are 2 or more such people, those people are jointly and severally liable for the payment of the debt.”

The legislation goes on to provide a defence for defendants who can prove that such debts were incurred without their implied authority or that they could not have had reasonable cause to suspect that the company would not be able to pay its debts when they came due.

The Corporations Law provides both civil and criminal sanctions for the breach of this section. If criminal proceedings are commenced the defendant is liable to a \$5,000 fine or one year in prison, or both. If civil proceedings are started, the directors and senior employees and any other persons involved with the management of the company may be held personally liable for the company's debts.

The duties imposed on directors and other officers can have serious implications for all cultural organisations, for nearly all live according to the hazardous and uncertain principles of government funding. Quite simply, most public cultural organisations in Australia lose money and depend for their continued existence upon subsidy. The danger is that one year's funding does not guarantee a grant the next. Nor can the organisation assume that the level of grant will remain as high, let alone increase with inflation or in line with an expansion of program needs.

For years, the directors and management of such organisations have accepted this position and blithely entered on-going commitments on the assumption that there would always be public money available at (at least) the same level as the previous year. Now, with this imposition of personal liability and the increasingly restricted budgets available to funding bodies, such assumptions are dangerous.

For example, no publicly funded organisation should employ staff for a fixed term of more than a year without ensuring that the contract is conditional upon continued and adequate funding. Otherwise, if funding is cut off, there is a real (if remote) possibility that the board members may find themselves personally liable for paying staff salaries. Leases on premises raise similar problems.

Part of the difficulty lies with policies of funding bodies. They all warn client groups that on-going

funding is not guaranteed and some have warned of the onerous liability under the Corporations Act. Aware of this potential danger, funding bodies will generally put an organisation on notice or review before cutting off funding.

If your company is put on notice by the Australia Council that it may not have funding reviewed next year, you should not enter any agreements for next year unless you are sure that the company can fund them even if the Australia Council does withdraw funding.

You cannot assume that the funding review will be successful and that the company will get the money just because it did last year! All such contracts entered during the review period should be subject to the company receiving continuing and adequate funding. Thus a company "on review" cannot commit to forward programming unless it is assured that the necessary funds are presently held or unconditionally promised. If it does, and the funding does not eventuate, the directors are likely to be personally liable for consequent losses.

Cultural organisations, large or small, can only exist because of the generosity of thousands of people who donate their time, expertise and efforts as board members. In order to protect these people from personal liability should that funding be suddenly cut or sharply decreased, funding bodies should set out in their funding guide-lines that organisations who receive administrative or core funding may expect that (whilst funding can never be guaranteed) such organisations may expect phasing of reductions in funding over, say, three years. Of course, the funding body would have to retain the right to "terminate with sudden and extreme prejudice" but such a guide-line would protect those thousands of volunteers who now have good cause to worry about their personal liability in the event that funding is suddenly discontinued.

Section 592 of the Corporations Act also has the important effect of making the decision-makers in the group more aware of the need for reasonable, attainable, well-budgeted and tightly administered programs. If an incorporated body takes on a huge project and hocks itself up to the hilt in the unreasonable belief that things will work out - and things don't - the creditors will be looking for their money. If the company can't meet the debts, one can be sure that the creditors will look to the people who were in control when the company incurred the debt. Culture has become a multi-million dollar industry and as with other industries, programs must be financed, debts must be paid, loan repayments must be met and losses must be recovered. It cannot be reasonably assumed that public money will be available to bale one out. The days are long over when ailing art organisations were allowed to suffer a long and quiet death. Now, the end is quick, the noise is often excruciating and the legal consequences for directors and senior management can be dire.

(II) PEOPLE FORBIDDEN TO BE INVOLVED WITH COMPANY MANAGEMENT

These may be summarised (only slightly inaccurately) as the poor, the criminal and the insane.

- (i) **Insolvency:** Persons who are bankrupt or whose affairs are under the control of an administrator, cannot in any way be involved with the management of a corporation without the leave of the court. This includes being a director, promoter or manager of a

company.

- (ii) **Prior Conviction:** There are considerable limitations upon people who have been convicted of a serious offence in connection with the promotion, formation or management of a corporation; or any offence involving serious fraud; or any number of specified offences under the Corporations Law or similar legislation.

These people may not, without leave of the court, be involved in the management of a corporation for five years from the date of conviction or release from prison (whichever is the later). If they wish to take part in management during this period, they must obtain the leave of the court.

Duties of Trustees

The duties of a trustee are none the less perhaps the most onerous of all duties imposed on people of responsibility in relation to organisations. They include the following duties:

- **To know and understand the terms of the trust.**
- **To obey the terms of the trust.** One can only depart from the terms of the trust if directed to do so by all beneficiaries, or the court.
- **To adhere to and carry out the terms of the trust.** Only if a statute or the court allows non-adherence, can one avoid this obligation. If it is necessary to not carry out the strict terms of the trust, the trustees should approach the court for a declaration, for otherwise, non-adherence to the terms of the trust will be at the peril of the trustees.
- **To act impartially between the beneficiaries.** One cannot favour one beneficiary over another, unless the trust document provides such a power. Sometimes an act will turn out to benefit one beneficiary more than another. This is not a problem for the law does not expect the trustees to be psychic. Their duty is considered in the circumstances which prevailed at the time when the act was done by the trustee.
- **To act gratuitously.** Trustees are not entitled to be paid for their labours. If the trust deed provides for such payments, they are permissible but there are very few exceptions to the general rule and trustees should take legal advice before assuming that they fall within an exception.
- **To not profit by the trust.** The trustees may not use the trust property for their own benefit. Trusteeship is benevolent not mercenary.
- **To pay the trust property to the right persons.** It is this obligation that strikes fear into many trustees. It is really only an extension of the duty to comply with the terms of the trust. The trustees will be personally liable for such errors unless they can show that they acted honestly and reasonably and that in the circumstances they should be excused.
- **To properly invest trust funds.** Trustee Acts specify the places in which trust moneys may be invested. These are usually secure investments such as the major banks. Not all building societies qualify, and investment in institutions such as property trusts, shares, in other speculative ways of maintaining the fund are restricted.

- **To keep and render proper accounts.** If the treasurer of the trust is not an accountant (or someone with those skills) the trustees would be well advised to either retain one professionally, or to invite one onto the Board. Even if the trust uses an accountant, the trustees are not absolved from all responsibilities. One cannot escape one's responsibilities by simply putting them onto someone else's shoulders.
- **To exercise reasonable care.** Trustees must act with the same care and diligence as would an ordinary prudent business person. It is an objective test. Otherwise a normally careless or lazy person would be excused when a normally careful and skilful person would not. This is a high onus, for the courts have long held that ordinary prudent business persons take a very great care when investing or using other people's money and would not take the same sorts of risks with the money of others as they might with their own.

The court has the power under the Trustee Acts to relieve a trustee from liability so long as the trustee has acted in good faith, honestly, reasonably and, in the discretion of the court, it is fair that the trustee be excused.

2.5 MAKING THE BOARD WORK FOR THE ORGANISATION

The health and success of an organisation reflects the effectiveness of the Board. There just aren't any cot case companies with terrific Boards. This section discusses some of the ways that an organisation can get the most out of their Board and ensure that their Board works as well as it should. Given that non-profit organisations are run by Boards of volunteers it is important to put in place, from the outset, mechanisms that will assist them to maximise their skills and generous preparedness to contribute to the organisation and the sector

The care and feeding of board members

Board members give their time generously and without much return. Nobody accepts appointment to a Board for the money! They are making a voluntary contribution to a community activity that they really care about. They are almost certainly very busy and it is important that they are made to feel welcome and involved. If they are to contribute to their maximum ability to the benefit of the organisation, there are some basic steps that every organisation should put in place.

Introduction procedures for new board members

Every organisation must ensure that there are clear handover procedures for the induction of new members onto the Board. A good handover 'package' would include: (i) a personal brief as to what is expected of them; (ii) copies of the management plan, the financial reports and papers and minutes of the last few meetings; the policies of the institution including Ethical Conduct Policy; guidelines as to discipline and lines of communication, a list of key personnel, and any other papers of which the new

Board member should be aware.

The new Board member should be introduced to the staff and, if there are premises, shown around the offices. Every new Board member should have a feeling of belonging.

Then, every three or four months, the Chair should contact each member individually and have a brief chat as to how they think the organisation is going, whether there are any issues that need addressing and, most importantly, how they feel they are contributing to the organisation. This gives the Chair the opportunity to hear more private views that may need to be expressed and acknowledged and also permits the Chair the opportunity to deal with any problems or issues, such as lack of performance, that may be embarrassing to discuss at the Board meeting. Board members need to feel part of the organisation but they are also subject to performance review (albeit in a subtle way!)

How responsibilities are assigned

Perhaps the most important internal function of any Board is the definition and assignment of individual responsibilities to directors. In all cases, because a Board can only function by delegating certain tasks to individuals or subcommittees, it is important for Boards to consider the most how to go about delegating tasks in the most effective manner. This also involves an understanding of the appropriate limits that should be placed on individual Board members actions and responsibilities.

When assigning responsibilities you must make sure that:

- The best use is being made of their expertise and contacts;
- Individual Board members are being realistic about the level of responsibility they can take on. (The Chair must be careful not to overload any particular Board members. They are volunteers. That generosity must not be abused or they will soon lose the fire in their belly. Jobs need to be spread around between Board members. If they can't be, it may well indicate that you need to review the make-up of the Board.)
- The responsibility should be clearly articulated so that there can be no mistake as to the commitment being undertaken.
- There should be a reporting line and a time line put against each task;
- The task should be fully minuted so that the responsibility is recorded and both the individual and the Board itself knows that there will be a report on the activity at the next meeting.

Decision making, defining policy and setting strategy

When looking at the policies and strategies of an organisation Board members must ask themselves:

- Does our organisation have a written Statement of Objectives that is clearly articulated, understood and accepted? Without it, the organisation has no basis for determining its actions and its priorities. Without it, the senior management of the organisation has no tiller with which to

guide its day to day decisions;

- How long is it since the organisation's policies and priorities were reviewed? Unless these are regularly reviewed, the organisation may become stagnant or the victim of conflicting and incompatible priorities for resources.
- How are policy reviews undertaken? Is the Board involving all the people who have a contribution to make in the policy development process? Is it using the best available techniques? All too often, Boards make policy without sufficient involvement of their members, their staff, their funding bodies and other groups who may have real contributions to make to the process. The involvement of select outsiders may assist the Board to gain a wider perspective of their own organisation. Few Boards have the internal skills to carry out thorough policy reviews using only their own internal resources and the Board could consider seeking the assistance of a professional facilitator to assist in the process.
- How are strategies determined? While the responsibility for determining strategy lies with the Board, in most cases it is the staff, volunteers and members who will carry out the strategies and in many cases it is the staff that actually designs the strategies. It is one of the areas in which there is great potential for conflict with staff but it is important that the Board oversees the development and implementation of the organisation's strategies. It is the Board that must call for them, query them and, when satisfied, approve them. Later, it must evaluate and amend them. This remains an on-going process.

Setting limits and creating communication channels

Many Board members need to understand better the nature of and limits to their relationship with employees or volunteers of the organisation, with members of the organisation and with the public. Each of these relationships is potentially complex and may give rise to difficulty, whether an organisation is large and has numerous employees and a senior management, or whether it is a small organisation that is not much larger than the Board itself.

There should be clear guidelines as to what a Board member may or may not do in relation to management, staff, members and volunteers. For example, in terms of dealing with staff- it should provide written guidelines articulating the staff selection, instruction, reporting and review procedures. It is the **Board** that has responsibility for staff and it is the responsibility of each director to ensure that the **Board** fulfils its duties in relation to staff. It is not each director's **individual** duty to get the staff to do what he or she individually thinks is best. If you are a director and if you cannot persuade the Board as to what needs to be done in relation to staff, do not take it upon yourself to interfere.

Linked with this, where an organisation has a substantial staff, Boards should consider holding annual or semi-annual confidential interviews with senior management so the Board can learn more about the needs and expectations of those controlling key sections of the operation.

Delegation

The delegation of power and authority is another form of setting limits – whether it be on sub-committees or on individual directors who are delegated responsibilities.

If Boards have one problem that is greater than almost any other it is in the delegating of power and authority. Because a corporate body can only act by a series of delegations it is necessarily and fundamentally dependent upon the quality of those delegations. Three common problems arise with delegations: invalidity, vagueness or, quite simply, they are forgotten.

- Invalidity usually arises because the delegation is outside of the powers of the Board, or outside of the objects of the organisation, as set out in the constitution;
- Vagueness arises because the terms of the delegation have been insufficiently articulated.
- Oversight usually occurs because the delegation has not been formally or clearly recorded in a special delegations book (and not just in the Minutes Book).

When establishing a delegation of power the Board needs to ensure that the constitution allows for that the authority to be delegated. Once that has been established, when setting out the extent of the delegation it is important that the parameters are clearly defined and that everyone knows what is expected. The Board needs to decide or ensure:

- whether the sub-committee has the power to make a decision or whether it merely makes a recommendation to the Board which in turn makes the decision;
- that the nature and burden of work involved is appropriate. Indiscriminate assignment of work to others is not delegating. It is dumping, and giving orders is not the same as delegating.
- that it is selecting a capable person;
- that it provides a specific time frame through each of the project's phases.
- that it establishes specific review dates throughout the entire time frame
- that it records the fact of the delegation and its ambit. Verbal instructions should usually be followed up in writing so that the memo can be referred to later;

Remember that while the ultimate responsibility stays with the delegator, true delegation implies that the individual, subcommittee, or subordinate is given the authority to do the job: that they can make independent decisions and have the responsibility for seeing the job done well. When a Board delegates a task it should avoid unnecessary interference. If you have selected the right person and given clear instructions, let them get on with it.

2.6 DEALING WITH PROBLEM BOARD MEMBERS

The successful management of a Board is a learned skill. There are many publications that deal with

the proper conduct of meetings and a Chair of a Board should find one that suits the organisation and use it as a resource for setting up and conducting effective meetings. However, there will also be occasions when a Chair or organisation has to deal with 'problem' Board members and it is a good idea to consider how an organisation can set itself up so as to avoid difficult members becoming entrenched on an organisation's Board. The 'types' described below do not form a closed list, rather they are meant to provide some 'warning signals' to members of organisations and Chairs to assist in recognising that the needs of the organisation will not be met by allowing Boards to become hijacked by members who are not fully committed to the needs of the organisation.

Ghosts

Ghosts are those who don't turn up to meetings or functions at which Board members should be expected to attend. A poor attendance record often indicates either that a Board member is not committed to the organisation, is too over-committed to contribute as a Board member, or has a problem with something within the Board - but is unable to express it. It is the job of the Chair to keep an eye out for this pattern, make contact with the member and find out what is happening. This must be non-confrontational but direct. Handled properly, this will have the effect of either facilitating the Board member's return to the flock as a positive, contributing member or will facilitate an early resignation. Either result is good.

If this does not work, rather than moving to expel an individual Board member, it may be less contentious to move an amendment to the Constitution tightening up the attendance requirements. Then, failure to attend a prescribed number of meetings without leave of the Board and the member is automatically deemed to have resigned.

Sometimes, for intra-Board political reasons, certain members will stay away from meetings thus causing paralysis of the affairs of the organisation by denying the Board a quorum. If this can not be dealt with through negotiation, the Chair (or the requisite number of directors/members) should call a general meeting of members. Failure to act, refusal to act, deadlock, repeated failure of quorum, are all matters that the membership have a right to consider and in which they have a right to intervene. Although the general meeting of members cannot overrule or interfere with an exercise of conferred powers by the directors, it can interfere to exercise power where the directors are unable or unwilling to do so. Accordingly, if the membership is dissatisfied with the attendance of its Board members it can call a general meeting and vote upon the removal of that director.

Back-slappers

These are people whose sole contribution to the proceedings of the Board is to move motions of thanks or congratulations. They never ask the tough questions. They need to be loved and that is not a need that contributes to an energetic exchange of ideas, their contribution to the organisation will remain limited.

Celebrities and socialites

Board members must be workers. Famous names and social members will often not be able to put in the time the organisation needs. Whether they are male or female, socialites can open doors to power and money but contrary to popular myth, socialites are not necessarily very good fundraisers. The socialites worth having on the Board are those who are there for the organisation rather than merely to be admired.

Sleepers

How many Board members do you know who attend every meeting and yet contribute to nothing substantial to the discussion. Sometimes the sleeper is really only timid or overly cautious about expressing their opinion, or they may just feel that they are too new to the Board. A good Chair must direct specific questions to a sleeper to help them and thus assist the Board to have the benefit of the member's talents. If that doesn't work, the Chair should consider discussing their role on the Board with them, and encourage them to reconsider the nature of their commitment to the Board.

Bullies

Bullies need to get their own way. Bullies are not good listeners. Bullies are good tellers. If you have a bully on the Board you will need a very strong and judicious Chair. The Chair must control the time allowed to bullies yet make them feel that they have been heard. Reflective, summarising techniques are often useful to achieve this. Above all, the Chair must ensure that the other members of the Board are not intimidated and have a proper chance to express their own views - even if they are contrary to those of the bully. The Chair must make the other Board members safe.

If the bully is the Chair, the Board, and thus the organisation, is in real trouble. Many of the Board's most talented people will eventually resign and the Chair will attract either friends or martyrs to the Board. After a while, nobody of outstanding talent will be bothered to offer themselves for election to the Board and the organisation is well on the way to being, at best, a private club.

Lifers

Lifers are members who have been on the Board too long. Every Board member has a "use by" date. Board membership is about determined, devoted, energetic commitment to the organisation and its goals. You maximise the effort by having people commit themselves to a finite term of effort. At the end of their period they should leave with regret; tired but still committed. It is time for new persons, with new skills, new ideas, new energies.

Although they can never admit it (because they will never recognise it), Lifers are on the Board for their own purposes, to satisfy their own needs. The organisation is a mere instrument. The Constitution should always provide for rotation of membership. Because a 'lifer' is so apparently selfless in their contribution to the organisation, the least offensive way of dealing with them is to

ensure that the Constitution provides for a maximum number of consecutive terms of appointment.

Some organisations have rotation of Board membership but then allow departing members to immediately stand again for reappointment. This is a sham. You must build a wall, not merely a revolving door. The Constitution should provide for a maximum term (three or five years is often a good guideline), and must provide that the member has a compulsory rest period of one or two years before being again eligible for re-election.

Martyrs

Martyrs are professional sufferers. They are a source of discontent within a Board because they never feel that they have been heard, that the Board doesn't follow their suggestions, that their efforts on behalf of the organisation are unrecognised. They are negative in a passive way. They complain outside the walls of the boardroom and in this way, can be very destructive.

Secret Agents

These are people with hidden agenda. They can make life difficult for even the most experienced Chair and can be very destructive on any Board. You might pick that there is a hidden agenda through their comportment, through the person's choice of language or tone of voice. You might not pick it at all. You deal with secret agents by either ignoring what you perceive to be their hidden agenda or bringing it out into the open. Two secret agents make a conspiracy. This can only be tackled by confrontation.

A wise Chair will often take the secret agent aside and have an informal chat about things and determine whether there is something of significance for the organisation going on. If the Chair is the secret agent, it is going to take a very forthright Board member to raise it - but raise it you must. No hidden agenda is threatening when it is revealed and can be openly discussed by the whole Board.

Talkers

Talkers are infuriating. They often have a very good point to make, but chatter on and on and on and on. Detail, circumstances, exceptions, lead up, let down. They are often intelligent and well meaning but just have no idea when to close their mouth. You don't want to hurt their feelings but after a few meetings you are prepared to kill them. If you feel that way, it is likely that most of the other Board members do too. Any good Chair will be able to cope with talkers. They must be given a fair opportunity to express their views, but their time must be firmly limited.

The Diary Afflicted

There are some Board members who simply don't have the time to come to meetings – or if they do, continually have to leave early to fulfil other commitments. Their good will is overcoming their good judgment. They want to help and be supportive but they view their other commitments as more pressing.

It is the Chair's task to have a quiet word with such people. They are doing neither themselves nor the organisation justice. They need to rationalise their priorities so that they can contribute their skills with the profundity that they deserve and the organisation requires. Something is going to have to go. It might be the board member.

CHECKLIST FOR BOARDS AND MANAGERS OF NON-PROFIT ARTS ORGANISATIONS IN AUSTRALIA

(Issued by and available from the Australia Council. The Checklist is reproduced here with kind permission.)

1. SETTING OBJECTIVES

- 1.1 Do the board and senior management review and set company objectives once a year?
- 1.2 Are these objectives adequately documented to ensure that staff and other people with an interest in the company can find out what they are?
- 1.3 Does the board ensure that the company measures its performance against these objectives?
- 1.4 What steps are taken to ensure that adequate long-term planning is carried out?
- 1.5 Are the results of all performance reviews adequately documented and included in the company's annual report?
- 1.6 Are these results communicated to all funding bodies?
- 1.7 Does the board actively promote excellence in reporting by entering its annual report in yearly competitions - for example, that run by the Australian Institute of Management?

2. CORPORATIONS LAW

- 2.1 Have all board members and all managers received a copy of the booklet *The Corporations Law and the Arts* published by the Australia Council?
- 2.2 Has the board identified which managers should be classified as "officers" under the Corporations Law?
- 2.3 Has the company's chairperson made sure that all board members and all managers participating in the administration of the company's affairs are aware of their responsibilities under the Corporations Law and accept them?

- 2.4 Have duty statements been issued to individual members and to senior staff?
- 2.5 Has the board considered the adoption of specific skills criteria for board membership?
- 2.6 Have all members of the board and all senior managers read the company's Memorandum and Articles of Association?
- 2.7 Does the board invite relevant managers to attend board meetings for items dealing with their area of responsibility?
- 2.8 Does the board maintain records of attendance by board meetings for items dealing with their area of responsibility?
- 2.9 Does the board actively encourage open membership of the company?

3. ORGANISATION AND MANAGEMENT

- 3.1 Has the board reviewed, within the last twelve months, the company's structure, especially the duties and responsibilities of all senior staff?
- 3.2 Within the last six months have board members reviewed their duties and responsibilities to ensure sufficient checks and balances exist to guard against misuse of company funds or manipulation of information going to the board or funding authorities?
- 3.3 Do the board and senior management take an active interest in the company's industrial relations?
- 3.4 Do both a member of the board and a member of senior management have skills in this area?
- 3.5 Is the company observing all awards relating to both full-time and part-time employees?
- 3.6 Do the chairperson and/or a board nominee meet regularly with the staff?
- 3.7 Do the artistic director and the administrator have regular meetings with the staff?
- 3.8 Is independent legal advice sought before any significant or controversial decisions are taken?
- 3.9 Does the board ensure that stocks held by the company are regularly checked?

4. FINANCIAL MANAGEMENT

- 4.1 Does the board member with qualifications and experience in finance advise the board on financial matters and, in particular, the monitoring of financial reports?
- 4.2 Does that person attend all board meetings?
- 4.3 Does the person responsible for preparing the financial statements for the board attend that

- part of a board meeting at which finance is discussed?
- 4.4 Does the administrator personally check all financial reports before they are distributed to the board?
- 4.5 Is the person who prepares the financial statements free to discuss with the board any matters relating to the accounts?
- 4.6 Is a standard format used for all financial reports?
- 4.7 Does the board receive:
- (a) monthly financial statements prepared on an accrual basis of accounting?
 - (b) monthly cash flow statements?
 - (c) all reports on a timely basis?
- 4.8 Does the board receive a standard written report from the administrator highlighting any items of exception in the financial statements?
- 4.9 Is a regular comparison made of budgeted income and expenditure with actual income and expenditure?
- 4.10 Does the board take appropriate action if actual results differ significantly from budget?
- 4.11 Does the board ensure that revised estimates are prepared for the balance of the year (to reflect actual income and expenditure to date) for each board meeting?
- 4.12 Are detailed budgets prepared for all activities?
- 4.13 Does the board insist that:
- (a) feasibility studies are carried out and tabled with the board showing how all capital will be paid before any final decisions are taken?
 - (b) at least three quotes are obtained from potential suppliers before considering any major capital expenditure?
- 4.14 Does the board ensure that actual capital expenditure is compared with budgeted capital expenditure on a regular basis?
- 4.15 Are detailed work papers prepared and kept by staff to support figures in all financial statements prepared for the board?
- 4.16 Are all questions asked at a board meeting properly answered or, if not, carried through to the next meeting?
- 4.17 Does the board ensure that the investment of company funds at call or otherwise with an institution is in line with company policy?
- 4.18 Does the board ensure that the company has an adequate system of internal control over all financial transactions and the control of company's assets?

- 4.19 Does the chairperson meet at least twice a year with the company's external auditor?
- 4.20 Does the board review all management letters from the external auditor?
- 4.21 Is the board satisfied with the quality of financial information provided for board meetings?
- 4.22 Has electronic data processing been considered/introduced by the company?

5. LIAISON WITH FUNDING BODIES

- 5.1 Have all members of the board and management read the most recent conditions of grant from funding authorities?
- 5.2 Are all board members and senior staff aware of what the funding bodies expect from the organisation?
- 5.3 Do the full board and senior management meet representatives of funding authorities once a year to discuss mutual plans and problems?
- 5.4 Does the company's chairperson make contact at least twice a year with a nominated person in all funding authorities?
- 5.5 Is the tenor of those discussions reported to the board?
- 5.6 Has the board considered periodically inviting representatives from funding bodies to a routine board meeting for discussion?
- 5.7 Have the company's chairperson and the board member responsible for monitoring the company's financial affairs:
 - (a) read the accounting questionnaire presented by the Australia Council?
 - (b) taken appropriate action to ensure that its completion will not adversely affect the company's ability to receive further funding?
 - (c) ensured that any specific conditions relating to finance in the conditions of grant will be complied with?

6. MARKETING AND PUBLIC RELATIONS

- 6.1 Does the board ensure that the company maintains a high public profile in order to attract audiences and private support?
- 6.2 Do individual board members:
 - (a) attend all first nights, openings and other important functions and take an active interest in the company's operations, especially the less prominent activities such as workshops, theatre-in-education programs, training schools, play readings, etc?

- (b) make sure that they are known to senior and middle management?
 - (c) familiarise themselves with the location and state of repair of all premises used by the company?
- 6.3 Do the individual board members take an active interest in helping to promote the arts by:
- (a) inviting parliamentarians, local council members and potential corporate sponsors to performances, exhibitions, or other events?
 - (b) personally seeking private support from individuals and others?
 - (c) taking stock of how much other board members have raised for the company through their personal endeavours?
- 6.4 Does the board have a member skilled in marketing?
- 6.5 Does the board monitor marketing growth rates and similar measures?
- 6.6 Has the board considered using unsold seats to promote the company's interests or social objectives, such as increasing access for the unemployed?

FURTHER READING

Legal Issues For Non-Profit Associations, ed. McGregor-Lowndes, Fletcher & Sievers, LBC, 1996