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# **Trustee Corporations Association of Australia**

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

**Submission to Treasury**

**January 2012**

## Introduction

The TCA is the peak representative body for the trustee corporations industry in Australia.

It represents 16 organisations, comprising all 8 regional Public Trustees and the great majority of the 11 private 'licensed trustee company' groups (see Attachment).

Our members provide a wide range of financial services to individual, family and corporate clients, involving the management / administration of about \$500b in assets.

Member services include:

- traditional activities, such as estate planning, wills, powers of attorney, deceased estate administration, and management of various types of personal trusts.
- superannuation fund trustees / administrators.
- responsible entities for managed investment schemes.
- other corporate activities such as debenture trusteeships, securitisation facilities and custodial services.

Within the trusts sector of their businesses, TCA members manage over 2,100 charitable trusts or foundations with assets of around \$3.2b.

In 2009/10, members distributed about \$175m to charitable causes from those trusts or directly from deceased estates they administered.

We are very pleased to have the opportunity to comment on the consultation paper *Review of not-for-profit governance arrangements*.

Our focus is mainly on the governance arrangements in respect of charitable trusts.

## Comments

### Responsible individuals' duties

1. Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties?

We believe that the legislation should make as clear as possible what are the duties of RIs and to whom they owe those duties.

2. Who do the responsible individuals of NFPs need to consider when exercising their duties? Donors? Beneficiaries? The public? The entity, or mission and purpose of the entity?

We agree that, as a general principle, RIs of NFPs should consider a range of stakeholders, including donors, beneficiaries, volunteers and the public when exercising their duties.

However, in the case of charitable trusts, it needs to be noted that the obligation of the trustees (RIs) under trust law is narrower, ie: to exercise their powers in accordance with the purpose for which it was conferred in the trust instrument.

This essentially means that the trustee must ensure that trust property is maintained, preserved and applied for those persons having a beneficial interest in the property.

3. What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation?

The core duties of RIs, to be outlined in the legislation, should be to:

- act with care and diligence.
- act in good faith in the best interests of the entity and its mission.
- not misuse their position and information.
- disclose significant personal interests and avoid conflicts of interest.

Additional duties, conferred by statute or by the trust instrument, apply to trustees of charitable trusts, ie:

- to acquaint themselves with the terms of the trust.
- to administer the trust according to its terms and the general law.
- to protect and preserve the trust property.
- to exercise discretionary powers or discretions in good faith, upon a real and genuine consideration and according to the purpose for which the power was conferred.
- not to delegate except as permitted by the trust instrument.
- to invest as permitted under the trust deed and in accordance with statutory “prudent person” principles.

4. What should be the minimum standard of care required to comply with any duties? Should the standard of care be higher for paid employees than volunteers? For professionals than lay persons?

We agree that RIs should be required to exercise at least the same degree of care, diligence and skill that a reasonable person would exercise in managing the affairs of others.

We do not believe that a higher standard of care should apply to paid employees versus volunteers, nor to large entities versus smaller entities.

However, a higher standard should be expected of professional RIs versus lay persons.

5. Should responsible individuals be required to hold particular qualifications or have particular experience or skills (tiered depending on size of the NFP entity or amount of funding it administers)?

Some broad principles could be laid down regarding eligible RIs, eg: must be at least 18 years of age, not bankrupt, no indictable tax offences etc.

However, specifying particular qualifications or experience for RIs of all NFPs would introduce unnecessary complexity into the new regime.

ACNC could assess the adequacy of RIs' qualifications and experience (particularly in respect of financial literacy) when considering applications for registration and when reviewing the Annual Information Statements.

It might be noted that licensed trustee companies are required to hold an AFSL to provide 'traditional trustee company services', which include acting as trustee for charitable trusts. They must also provide ASIC, the national regulator, with details of 'responsible managers' (RMs), ie: those persons directly responsible for significant day-to-day decisions about the ongoing provision of financial services - ASIC expects RMs to have the appropriate knowledge and skills for their roles.

6. Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?

ACNC should assess the qualifications of an NFP's RIs as a group.

7. Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?

The basic high-level duties of RIs should be consistent across all entities.

8. Are there any other responsible individuals' obligations or considerations or other issues (for example, should there be requirements on volunteers?) that need to be covered which are specific to NFPs?

No.

9. Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?

See our answers to Qs 4 and 5.

10. Is there a preference for the core duties to be based on the Corporations Act, CATSI Act, the office holder requirements applying to incorporated associations, the requirements applying to trustees of charitable trusts, or another model?

Core duties should be consistent across all entities irrespective of the model on which they are based.

#### Disclosure and conflicts of interest

11. What information should registered entities be required to disclose to ensure good governance procedures are in place?

NFPs receiving public funds should be required to publish statistics showing:

- the aggregate amount of donations received during the year (ie: not details of individual donors)
- expenses incurred
- a breakdown of distributions classified by type of recipient
- the value of assets at the end of the financial year.

However, in the case of Private Ancillary Funds and other charitable trusts which do not receive donations from the general public, only aggregate information should be made available to the general public by ACNC.

12. Should the remuneration (if any) of responsible individuals be required to be disclosed?

As a general rule, no.

It might be noted that a licensed trustee company is required to publish the scale of fees that it generally charges for its services.

For the management of charitable trusts, different arrangements apply to services provided to new charitable trusts (ie: services provided after the new national regulatory regime commenced in May 2010) and existing charitable trusts (ie: services that were being provided when the new regime commenced).

For new charitable trusts, the trustee company may charge either:

- a capital commission not exceeding 5.5% (Including GST) of the gross value of the trust assets and an income commission (not exceeding 6.6% of the income received on trust assets), or
- an annual management fee not exceeding 1.056 per cent (GST inclusive) of the gross value of the trust assets.

For existing charitable trusts, the trustee company must not charge fees in excess of fees that it could have charged in relation to the trust immediately before the commencement of the new regime.

This arrangement, which is to be reviewed by the Government after May 2012, does not affect the ability of a charitable trust and a trustee company to negotiate a different fee structure.

13. Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?

Yes.

14. Are specific conflict of interest requirements required for entities where the beneficiaries and responsible individuals may be related (for example, a NFP entity set up by a native title group)?

No.

15. Should ACNC governance obligations stipulate the types of conflict of interest that responsible individuals in NFPs should disclose and manage? Or should it be based on the Corporations Act understanding of 'material personal interest'?

We believe that the conflict of interest requirements should be based on the Corporations Act understanding of 'material personal interest'.

## Risk management

16. Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?

NFPs should be required to have a risk management strategy appropriate to the size and nature of its activities.

17. Should particular requirements (for example, an investment strategy) be mandated, or broad requirements for NFPs to ensure they have adequate procedures in place?

An appropriate documented strategy for managing an NFP's assets should be required of medium and large NFPs (based on the proposed ACNC reporting framework thresholds).

18. Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances?

We believe that NFPs should be required to have appropriate insurance covering base on their particular circumstances.

19. Should responsible individuals generally be required to have indemnity insurance?

See answer to Q18.

## Reviews

20. What internal review procedures should be mandated?

All NFPs should require 2 individuals to authorise financial transactions.

Small and medium entities should be required to have their annual accounts reviewed by an independent party, while the accounts of large entities should be audited.

## Governing rules

21. What are the core minimum requirements that registered entities should be required to include in their governing rules?

An NFP's governing rules should, at a minimum, clearly set out the entity's mission, how it intends to pursue its mission, the structure of the organisation and procedures for removing members, altering rules and wind-up.

For charitable trusts, the governing rules are established by the trust deed.

22. Should the ACNC have a role in mandating requirements of the governing rules, to protect the mission of the entity and the interests of the public?

Rather than mandate requirements of the governing rules, the ACNC should assess whether an entity's rules are appropriate as part of the registration process.

23. Who should be able to enforce the rules?

While ACNC generally should enforce the rules, the removal of trustees should remain a matter for the Courts.

24. Should the ACNC have a role in the enforcement and alteration of governing rules, such as on wind-up or deregistration?

Yes.

25. Should model rules be used?

Model rules would provide a useful guide. These could be varied as appropriate for particular entities.

Relationships with members

We have no comments on this section.

Other matters

No comment.

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**Attachment**

**TCA Members**

- ANZ Trustees Ltd
- Australian Executor Trustees Ltd
- Equity Trustees Ltd
- National Australia Trustees Ltd
- New South Wales Trustee and Guardian
- Perpetual Ltd
- Public Trustee for the ACT
- Public Trustee for the Northern Territory
- The Public Trustee of Queensland
- Public Trustee South Australia
- The Public Trustee Tasmania
- Public Trustee Western Australia
- Sandhurst Trustees Ltd
- State Trustees Ltd
- Tasmanian Perpetual Trustees Ltd
- The Trust Company Ltd