

## ■ Creating a single voice for NFPs

The not-for-profit (NFP) sector would benefit from having a Federal Government minister, as well as a peak industry association, overseeing its interests.

These were the views of senior executives from a diverse group of NFP organisations who attended a recent forum in Sydney to review their common issues. The aim was to create “a single voice” when responding to the draft report expected to be released in early October by the Productivity Commission (PC) on its inquiry into the contribution of the NFP sector.

New figures released by the Australian Bureau of Statistics (ABS) last week show that the NFP sector contributed almost \$50 billion to the Australian economy in 2006/07. Yet, according to Paul Gallimore MAICD, a director of CTC Consulting Group, this sector remains fragmented and thinks of itself in silos.

“At present, there is no Federal government minister to oversee the sector. It is monitored by an Upper House member, Ursula Stephens,” says Gallimore, whose company convened the forum. “We are not saying that there has to be an exclusive government minister portfolio for the sector. It could be one among other roles, but if you want change, you need someone to listen to you.

“The minister would also need access to sufficient, detailed and quality data to make decisions and progress the sector. The forum agreed that there was a need to set up a working party to review how data is collected and how the process can be improved. Ultimately, this would require an industry authority or peak association to do the job.”

Forum attendee Richard Jones, general manager of the Westpac Rescue Helicopter Service, says: “Given the size and contribution of the NFP sector, I believe that with more current data and someone to oversee it, we could get better results for the communities we all serve. There also needs to be some rationalisation in the sector and having someone overseeing it, or who we could talk to directly, could assist in that process.”

Rob Oerlemans, executive officer of Lions Australia, says while his organisation will make a direct submission to the PC, he attended the forum because he was interested in working with other NFPs to get a greater recognition of volunteering and the contribution of volunteering around the country.

The ABS released its 2006/07 *Australian National Accounts: Non-Profit Institutions Satellite Account* on Friday, but Gallimore

says these figures are released on an ad-hoc basis and there is no government commitment yet to continue compiling them.

Nonetheless, the ABS figures show that the NFP sector contributed 4.1 per cent to Australia’s total gross domestic product in 2006/07. During that year, NFPs received income of \$76.6 billion and held \$138 billion worth of assets. They also employed 889,900 people and used over 4.6 million volunteers.

### Contribute feedback



## ■ In defence of the conglomerate

Wesfarmers' success was because of its diversification and not in spite of it, Wesfarmers managing director and CEO Richard Goyder FAICD argued at an AICD lunch in Sydney yesterday.

He noted that over the past 10 years, Wesfarmers had produced a total return, on average, of 13 per cent per year compared to the All Ordinaries Accumulation Index's return of nine per cent.

Goyder attributed Wesfarmers' solid performance to three factors: good people, very clear strategic objectives around shareholder returns and a strong emphasis on reputation.

He said Wesfarmers had a portfolio of quality businesses and each was positioned for growth. "That could be because they are in a fast growth industry or that there are unexploited competitive opportunities. We also think that we have a value creating business model that gives us the ability to recognise and acquire undervalued businesses, the skills to turn around those assets and from time-to-time to exit those assets if we think that value has been maximised... Our financial objective allows us to be absolutely dispassionate about what we invest in and what we divest from."

Goyder noted that Wesfarmers' diversification had given it strong cash flows over the past 12 months "at a time when every corporate has needed strong cash flows". It had also given it the capacity to understand many different sectors of business.

"We do challenge Wesfarmers' diversified model. Every year when we do our corporate planning, we look at the sum of the parts versus the sum of the whole," he said.

"In around 2004/05, the board told [former CEO] Michael Chaney and myself: 'We want you to go look and talk to other companies like BlueScope, Origin and OneSteel to see why they have generated such strong shareholder returns after being spun out.' We did that and what most people told us was that they were now able to focus on running their business and that they now had incentives aligned to the running of that business. We think that we do both. A divisional managing director at Wesfarmers is able to spend 90 to 95 per cent of his or her time running the business and short-term incentives are aligned to the performance of the business."

Goyder added: "Heading a diversified company creates some challenges and some analysts say they have difficulty understanding it. But that's because they find us too complex to understand. Sometimes I think that's because they overcomplicate things themselves... Investment funds diversify and yet at Wesfarmers, we have a massive advantage over investment funds and that is because we control the assets we run so we have our hands on our wheels."

## ■ A warning for directors and their advisers

A recent court case reinforces the role and responsibilities of directors in insolvency situations and sounds some warnings to advisers about facilitating illegal activities.

The New South Wales Supreme Court recently found that eight directors of unrelated companies acted in breach of the *Corporations Act* by engaging in what the Australian Securities and Investments Commission (ASIC) regards as illegal “phoenix” activity.

It also found that their legal adviser, Timothy Donald Somerville, contravened the *Corporations Act* by being involved in the directors’ breaches. Indeed, this was the first time ASIC had successfully taken action against an adviser for involvement in facilitating illegal phoenix activity.

Each of the directors had sought advice from Somerville in circumstances where their companies were insolvent or nearing insolvency. The transactions entered into by the directors as a result of that advice were found by the court to have the effect of taking assets out of their companies and out of the reach of creditors, and that by causing the companies to enter the transactions, the directors failed in their duty to act both in the interest of the company and its creditors.

The findings made by the court against Somerville mark out the line across which legal and other professional advisers should not step. It was found that the transactions would not have taken place but for Somerville’s involvement. By his advice and conduct, Somerville had facilitated his clients breaching their directors’ duties and as a consequence he was found to have aided and abetted their breaches.

In this case, Acting Justice Windeyer was satisfied that Somerville had devised a series of transactions, with the appearance of legitimacy, to bring about asset stripping and disadvantage to creditors.

“Not only does this case reinforce the role and responsibilities of directors in insolvency situations, but it brings home to advisers the need to ensure that they do not get themselves in a position where their involvement amounts to advice, as in this case, to carry out an improper activity. Advisers who go beyond the normal giving of advice which cause their clients to breach the director duties provisions of the *Corporations Act* run the risk of themselves breaching those provisions by being involved in their clients’ contraventions,” observes ASIC Commissioner Michael Dwyer.

Declarations of breaches of their duties, under sections 181(1), 181(2) and 181(3) of the *Corporations Act* were made against each of the eight directors. Declarations for breaches of these provisions were also made against Somerville as it was found, pursuant to section 79 of the Act, that he aided and abetted the directors in their breaches.

Orders restraining each of the defendants from engaging in similar conduct in the future were also made. ASIC is also seeking an order disqualifying the directors and Somerville from managing a company.

## ■ Employers in limbo on pay and share schemes

Employers remain in limbo, unable to finalise executive remuneration packages and employee securities schemes, until legislation and various inquiries into these areas are finalised, says Martin Morrow, partner, Equity Based Compensation and Executive Remuneration, at KPMG.

The Government issued a Policy Statement, setting out the final tax treatment of share and rights acquired under employee share schemes, on 1 July 2009 and then released an exposure draft of its proposed legislation on 14 August.

Parliament rose on 17 September and will only resume on 17 October. In the meantime, however, Treasury announced further industry consultations on technical aspects of the package (to which AICD has made a submission).

“Treasury is finalising the exposure draft and will prepare it as a Bill. We would expect a final Bill on the legislation to be introduced into Parliament in the Spring sessions in October,” says Morrow. “At the same time, last week, the Government released an exposure draft on the transitional rules as to how shares and options granted under the old scheme will be treated under the new legislation. Submissions for this closed yesterday. The main issue out of those transitional provisions is that employers will be required to report on the shares and options granted before 1 July 2009 that are taxed after 1 July 2009.”

Meanwhile, the Productivity Commission is expected to release the preliminary report on its inquiry into the regulatory framework around the remuneration of directors and executives of companies regulated under the *Corporations Act* towards the

end of September. “It will take submissions and hold hearings on this throughout October and will release its final report in December,” says Morrow.

“At the same, the legislation capping termination payments to executives is sitting in Parliament and hasn’t been passed by both houses as yet. And, the Australian Prudential Regulation Authority (APRA) has released a second consultation package on remuneration for authorised deposit-taking institutions and general and life insurance companies.”

APRA is seeking submissions on its revised draft standards and prudential practice guides by 5 October and expects its final prudential standards and associated prudential practice guides to be released in November and become effective from 1 April 2010.

In the meantime, the Senate Economics References Committee has also released its report on Employee Share Schemes, which recommends the Government delay the introduction of the employee share scheme tax legislation in order to take note of the other reviews in this area, including the Henry review, to maintain legislative integrity and coherence.

In addition, the Board of Taxation has been asked by the Federal Government to review elements of the taxation of employee share schemes, including the valuation methodology and potentially a different set of rules for speculative, start-up and R&D entities. The closing date for its submissions is 9 October.

## ■ Audit boards come under the microscope

Audit boards are being scrutinised by GovernanceMetrics International (GMI), which rates the corporate governance practices of companies in 45 countries.

Releasing new ratings for its entire universe of 4,207 companies today, GMI notes it has added a number of new metrics that enable it to more closely examine the level of independent members of audit boards as well as the involvement of executives and employees on this oversight body. GMI is also now tracking the levels of financial expertise and industry knowledge on audit boards to provide a broader perspective of how audit boards are made up.

Traditionally, audit boards have been the main oversight body on audit issues for companies in Japan with 93 per cent of companies covered by GMI having an audit board. They are also a feature of companies in some other markets, such as Brazil (71 per cent of companies covered by GMI), Czech Republic (20 per cent), Italy (90 per cent), Portugal (67 per cent), Russia (four per cent), South Korea (four per cent) and Turkey (13 per cent).

GMI notes: "Audit boards are usually appointed by shareholders, but many of them have serious independence concerns, especially in Japan. Although at first blush an audit board appointed by shareholders is attractive, GMI's research has shown that in Japan, 39 per cent of audit board members are executives or company employees. This compares badly with audit boards in other markets (3 per cent) and audit committees with less than one per cent. The adequacy of oversight with such

levels of conflicts of interest is seriously concerning. Japanese audit boards also have lower levels of independence (53 per cent) than audit boards in other markets (68 per cent) and audit committees (89 per cent)."

When it comes to audit boards, GMI considers the following practices as positive or progressive:

- The audit board is wholly composed of non-executive/employee members.
- At least one non-executive/employee member of the audit board has expertise in accounting or financial management.
- Non-executive/employee members of the audit board with expertise in accounting or financial management form a majority of the board.
- The chair of the audit board is a non-executive/employee and has expertise in accounting or financial management.
- At least one non-executive/employee member of the audit board has substantial industry knowledge.
- Non-executive/employee members of the audit board with substantial industry knowledge form a majority of the board.
- The chair of the audit board is non-executive and has substantial industry knowledge.